Herald Trustees Ltd v D; C; E; F; G (on her own behalf and as guardian of A); H and I; J; K and Advocate B. J. Lincoln representing the unborn and unascertained beneficiaries and R

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Cornu, Olsen
Judgment Date:	28 May 2014
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Text

[2014] JRC 119

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE Q TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between

Herald Trustees Limited
Representor
and
D
C
E
F
G (on her own behalf and as guardian of A)
H
First Respondents

and

I
J
K
Second Respondents

and

Advocate B. J. Lincoln representing the unborn and unascertained beneficiaries
Third Respondent

and

R
Fourth Respondent

Advocate D. R. Wilson **for the Representor.**

Advocate B. J. Lincoln **for the First Respondents.**

I appeared in person.

Authorities

Trusts (Jersey) Law 1984.

Re S Settlement 2001/154 .

Public Trustee v Cooper [2001] WTLR 901 .

Trust — reasons for approving decision made by Herald and directions given accordingly.

THE COMMISSIONER:

1 On the 8th May, 2014, the Court blessed a momentous decision the representor ("Herald") had reached in relation to the Q Trust and we now set out our reasons.

The family

2 The settlor was an Italian national who lived in Spain from about 1963. He died on the 17 th September, 2005. By his first wife, who died in 1958, he had three children, one of whom is now deceased. There are four grandchildren and one (minor) great-grandchild, who is represented by his mother. They are the first respondents and we will refer to them as "the L beneficiaries" (which expression may include some of them). By his second wife, whom he married in 1962, the settlor had three children and they are the second respondents, who we will refer to as "the M beneficiaries". One of the M beneficiaries, namely I attended the hearing ("I").

The background

3 The Q Trust has a history of illiquidity and litigation in both Jersey and Spain, and there have been a number of trustees. Our description of the background has been taken in the main from the affidavits of Mr Bruce James Ferguson, a director of Herald, but we acknowledge that much of the background is contentious as between the beneficiaries.

4 It would appear that shortly after leaving his second wife in or around 1981, the settlor transferred his assets to a Jersey trust known as the S Settlement dated 5 th November, 1981, of which Barclaytrust International Limited was trustee. In or around May 1990, his second wife instituted proceedings in Jersey challenging the validity of that settlement and those proceedings were compromised in 1994 on the parties' divorce on the basis of an equal division of the assets. The settlor's share, comprising ultimately a large farm in Spain in which he lived and minority interests in a Spanish marina and adjacent land, was settled into a Jersey discretionary trust known as the Q Trust and the second wife's share, ultimately comprising a majority interest in the Spanish marina and adjacent land, was settled by her into a Jersey discretionary trust known as the T Trust. The two trusts had the same trustee. It would seem that following the divorce, the parties reconciled, with the second wife returning to the farm to live with the settlor, although they never re-married.

5 The L beneficiaries were the beneficiaries of the Q Settlement. On advice, the settlor was not (initially) a beneficiary, but it was a condition of his settling the assets that he would be able to continue living at and managing the farm. This very soon became a source of friction between him and the L beneficiaries, who questioned his competence as he got older to manage the farm.

6 The M beneficiaries were the beneficiaries of the T Trust, together, we assume, with the second wife. We will describe the current corporate structure underlying the two trusts

shortly.

7 In the view of Herald, both the M beneficiaries and the L beneficiaries have put successive trustees under pressure and/or sought to procure their dismissal from office in order to advance their respective interests.

8 The original trustee of both the Q Trust and the T Trust was Mourant & Co which resigned in favour of Sinel Trust Limited (which changed its name to SGI Trust (Jersey) Limited (we will refer to it as "SGI")) on the 11 th June, 1997. In August 1997, the L beneficiaries commenced proceedings in Jersey against SGI and Mourant & Co challenging the resignation of Mourant & Co and the appointment of SGI as a fraud on a power and alleging that SGI had acted in breach of its duties by giving effect to the settlor's wishes by appointing him a beneficiary of the Q Trust and making him the sole administrator of the farm. In October 1997, those proceedings were recommenced by way of Order of Justice, seeking the resignation or removal of both Mourant & Co and SGI and the appointment of a new trustee.

9 In May 1998, SGI applied for directions in relation to these proceedings and in January 1999 was authorised by the Court to do so at the cost of the trust fund. In July 2000, SGI applied to strike out the Order of Justice brought by the L beneficiaries and it is believed that the proceedings were compromised by agreement.

10 In or around July 2005, SGI Trust was placed in liquidation (for reasons unconnected with these trusts) and on 26 th July, 2005, Equinox Trustees Limited ("Equinox") was appointed trustee of both the Q Trust and the T Trust.

11 In October/November 2005, the M beneficiaries issued two representations seeking the removal of Equinox as trustee of the Q Trust and the T Trust and the appointment of Whitmill Trust Company Limited in its place. The reason provided for the removal of Equinox was that it was not independent of Advocate Philip Sinel, in whom the M children had apparently lost faith and confidence. In December 2005, Equinox sought the directions of the Court in relation to these representations. The Court ordered the removal of Equinox as trustee of the T Trust, finding that the hostility which existed between the M beneficiaries and Equinox was likely to affect its proper administration and Centurion Trust Company Limited ("Centurion") was appointed in its place. In August 2006, the Court ordered that Equinox remain as trustee of the Q Trust as no grounds could be found justifying its summary removal from office as trustee.

12 In December 2007, Equinox retired in favour of Centurion with the result that the Q Trust and the T Trust had the same trustee once again. On 30 th March, 2010, the Court ordered the winding up of Centurion (for reasons unconnected with the trusts), appointing Y as liquidator. The Court subsequently sanctioned the appointment of Herald as trustee of the Q Trust and Trustcorp (Jersey) Limited ("Trustcorp") as trustee of the T Trust.

13 In his letter of wishes of 10 th November, 1998, the settlor explained that his original intention was for his six legitimate children to benefit equally from his assets with the M beneficiaries benefiting from the assets in the T Trust and the L beneficiaries benefiting from the assets in the Q Trust. By 1998, the circumstances had altered in that the assets of the T Trust had deteriorated in value and he therefore wished the M beneficiaries to be added as beneficiaries of the Q Trust, to ensure that his legitimate children could benefit equally. The resolution adding the M beneficiaries as beneficiaries of the Q Trust was passed on 23 rd September, 1999. As a consequence, both the M beneficiaries and the L beneficiaries are beneficiaries of the Q Trust and the M beneficiaries alone are the beneficiaries of the T Trust.

Current trust structures

14 The assets of the Q Trust are owned through a wholly owned Jersey company, R ("R"). R in turn owns:–

(i) 99.55% of U ("U"), a Spanish company which owns the farm. The remaining 0.5% of U is owned by the estate of the settlor, which we understand has yet to be finalised as the result of ongoing hostility between the respondents.

(ii) 26.02% of V ("V") which used to own the marina complex called W which was seized in 1998 by Banco de Bilbao due to non-payment of the interest on a bank loan. It now owns land and property through shares in two other subsidiary companies.

(iii) 29.958% in a Spanish company called X ("X"), which company owns various parcels of land adjacent to the marina.

15 The assets of the T Trust are owned through a wholly owned Irish company, EE ("EE"). EE owns:–

(i) 66.14% of V, and

(ii) 69.9% of X.

16 In August 2006, the Spanish representative of R, acting as administrator of U, a Z, authorised a share capital increase of AU in favour of a Swiss company, AA., the ownership of which appears to be unknown. The purpose of this, said the L beneficiaries, was to inject much needed liquidity into U which had been making annual losses. They asserted that Equinox as trustee was aware of the proposal, the result of which would have been to put R into the position of a minority shareholder in U. Equinox responded by removing Z as the Spanish representative and replacing him by K ("K"), an appointment much criticised by the L beneficiaries. The resolution increasing the share capital was

annulled but U was unable to repay the funds that had been subscribed. That had been spent within days discharging liabilities, with some going towards the outstanding fees of Equinox. Accordingly Equinox as trustee of the T Trust procured that X lend £1.7M to U to enable it to do so, secured in favour of Equinox over the shares in R and conditional upon K being the Spanish representative of R acting as administrator of U for so long as the loan remained outstanding.

Letter of wishes

17 Herald is now in possession of nine letters of wishes dating from 25 th August, 1995, to 1 st June, 2005. It believes the letter of wishes dated 10 th November, 1998, referred to above is informative as to the settlor's intention when creating the Q Trust.

18 However, not long after the creation of the Q Trust, relations between the settlor and two of the GL beneficiaries apparently deteriorated and he subsequently expressed the wish that they should both be excluded as beneficiaries of the Q Trust for a period of five years (letters dated 18 th July, 1997, and 23 rd July, 1997). A later letter of wishes requested that this exclusion be permanent (letter dated 24 th August, 1997). However, a year later, he requested once again that both the L beneficiaries and the M beneficiaries should benefit equally from his assets (letter dated 10 th November, 1998, referred to above).

19 The settlor prepared a written statement for the Court in or around May 1998 for the purposes of the application for directions brought by SGI. Quoting selectively from that statement:–

> *"3. The above settlement [the BB Settlement] was established by myself on the 5th of November, 1981, to enable me to put all my personal assets therein to avoid any future inheritance tax in Spain. The beneficiaries that I nominated were my wife, CC and my six children. ….*
>
> *4. In 1995 the assets in the BB Settlement were taken out and divided between me and CC. CC had started divorce proceedings against me in Spain and had also started proceedings in Jersey to attack the BB Settlement ….*
>
> *5. CC and I agreed that the assets in the BB Settlement should be split in half and that I should give half of them to her. The assets basically consisted of two companies: R ("R") and V ("V"). I agreed that I would transfer 70% of the shares of V to CC.* At the time we all believed that the value of those shares represented about half of the value of all the assets. ….
>
> *9 because it was my intention at this time that the ultimate benefit of the assets which I retained should be preserved for [the L beneficiaries].* This was firstly because my three children by CC ("the M children") were going to benefit from the assets which I had transferred to her.

34……By this time [1996] the W was in a very bad financial position. It looked as if it was going to go bankrupt as the assets had been seized by Banco Exterior to repay the outstanding money that I had borrowed from them to finance the purchase of the Marina some years before. Because of this it looked as if the M children would not receive any benefit from the assets which I transferred to CC in 1995.

35. I had always wanted my children to benefit equally from my assets and that is what I had intended in 1995 when the Settlement was established. Because the circumstances had changed I wanted the M children added as beneficiaries of the Settlement so that all my children would benefit equally."

20 In that statement the settlor describes the proceedings brought by the three L children over the control of the farm and said this:–

"67. It will be seen from this letter that it is now my wish that all my children benefit equally from the Settlement. I think that one of the main reasons that B is continuing this action is because he and his sisters are afraid that they will not benefit at all from the Settlement as a result of what they have done. Certainly when I was reacting to what they had done I did want this to happen. But that is not helpful and it is no longer my wish.

68. I do not know how B and his sisters will react to my latest wishes if they become aware of them."

21 In his letter of wishes of 11 th December, 2003, the settlor stated that he would like his assets to be divided equally between his children in respect of their needs, circumstances or conduct, but he specifically requested that the trustee should not take into account any assets not belonging to the Q Trust.

22 From 2004 until the time of the settlor's death, his wish appeared to be that all of the L beneficiaries should be excluded from the Q Trust (letters dated 17 th November, 2004, 18 th January, 2005, and 1 st June, 2005).

23 The L beneficiaries have raised the following concerns regarding these later letters of wishes:–

(i) The authenticity of these letters of wishes.

(ii) Whether these letters of wishes, even if authentic, had ever been sent to the trustee so as to be effective as letters of wishes.

(iii) The settlor's capacity at the time the alleged letters of wishes were completed.

(iv) The extent and propriety of the influence exerted by the settlor's second wife over

him in the period covered by the alleged letters of wishes.

(v) If the settlor was the author of the alleged letters of wishes and if they had been sent, and if he was of capacity and not subject to improper pressure, the extent to which he was properly informed and held an accurate understanding of the true factual position at the time.

24 Herald is mindful that in order to investigate these concerns it would be required to carry out a fact finding exercise and attempt to arrive at a conclusion in the absence of evidence from both the settlor and his second wife (who is also deceased). Furthermore, even if the Q Trust had liquidity with which to fund such investigations, Herald believes there would be no guarantee that such an investigation would produce a reliable resolution to the concerns raised.

Consultation process

25 It is the view of Herald, and had been the view of Centurion before it and of all of the beneficiaries, that the current trust structure of the Q Trust is not feasible. Its assets needed to be distributed and the trust terminated. Centurion commenced a process of consultation in 2009. It prepared a draft representation and draft supporting affidavit seeking permission to distribute the trust fund in accordance with what was believed to have been the settlor's last wishes, namely that the L beneficiaries be excluded and that the trust fund be made available to the M beneficiaries. In the alternative, Centurion proposed to ask the Court to provide directions as to the true construction of the letters of wishes and what the trustee should properly perceive to have been the wishes of the settlor. Soon after that consultation process had commenced, Centurion was the subject of a just and equitable winding up and Herald was appointed as trustee in its place. Having visited Spain and met with both sets of beneficiaries, Herald wrote to them on 22 nd November, 2010, notifying them that it intended to resume the consultation process and it would not form a view of the proceedings drafted by Centurion until such time as it was in receipt of both sets of beneficiaries' responses to the consultation document.

26 In broad terms, the L beneficiaries believed that the draft proposals were manifestly unfair and unreasonable. They stated that Centurion had “failed to grapple properly with the relevant underlying factual position, which is plainly controversial as between the L's and the M's.” Furthermore, they felt the draft proposals were indicative of Centurion's improper partiality to the interests of the M beneficiaries over those of the L beneficiaries. In broad terms, and perhaps not surprisingly, the M beneficiaries agreed with the draft proposals.

27 In the interests of impartiality, Herald wanted the next step in the consultation process to involve an exchange of the beneficiaries' responses. The L beneficiaries agreed to the exchange but the M beneficiaries did not. There followed direct discussions between the beneficiaries and a failed attempt at mediation. In February 2012, the beneficiaries provided Herald with details of their financial means and in May and June 2012, there were

further meetings between Herald and the legal representative of the L beneficiaries and with I, representing the M beneficiaries. Those discussions were set against a backdrop of illiquidity at trust level and U having significant liabilities as well as being in default of the repayments of the loan due to W.

28 In order to release some liquidity into the trust structure, Herald procured the sale by U of a 100 hectare plot called DD which could be undertaken without affecting the farm unity. It obtained a valuation from Savills in Madrid which valued the land at £6,500 per hectare. The M beneficiaries approved of the sale, provided the sale proceeds were applied in the manner they suggested. The L beneficiaries were against the sale, as they believed it would provide only a temporary cash-flow respite, without resolving current underlying financial problems faced by the Q Trust. The sale proceeded but the written instructions given by Herald through R to K in relation to the disposal of the proceeds of £798,000 were disobeyed by him and used by him in their entirety towards the part repayment of the loan due to W. Herald had no funds with which to challenge the actions of K and as a consequence of his actions Herald lost confidence in him as the administrator of U.

29 As one of the options open to the trust was the further sale of the whole or part of the farm, a priority for Herald then became the repayment of the balance of the W loan, the cancellation of the security interest over the R shares and the removal of K as the Spanish representative, whose role had always been a source of conflict between the beneficiaries.

In principle decision

30 Having taken the consultation process as far as it could, and it being clear that the beneficiaries were not able to reach an agreement between them, Herald made an “in principle” decision in February 2013 that the assets of the Q Trust should be distributed between the L beneficiaries and the M beneficiaries based on a notion of equality, taking into account the assets and liabilities of the Q Trust and, where it was possible to ascertain them, those of the T Trust. It took the view that the weight it would normally give to the historic wishes of a settlor of the trust assets should, in this case, be mitigated by uncertainty as to whether the more recent letters of wishes truly expressed the intention of the settlor on which it could rely as the basis for a decision as to the distribution of the fund. It believed any further attempt to gain a more reliable picture of the wishes of the settlor was likely to lead to vigorous dispute and significant additional costs and may still result in an inherently unreliable answer.

31 Herald was aware that the Q Trust had a long and hostile history with court proceedings in both Jersey and Spain. Proceedings in Jersey had been commenced throughout the trust's life by both the L beneficiaries and the M beneficiaries in relation to the retirement and appointment of trustees. Both civil and criminal Spanish proceedings had resulted from the allegedly fraudulent capital share increase in 2006. Various other Spanish proceedings had been commenced against the underlying Spanish companies and against I as the Spanish representative of V.

32 Herald considered that it would not be productive from a cost and time perspective point of view to become embroiled in a lengthy consideration of the behaviour of the beneficiaries over the years. Nor did it believe it would be possible or productive to conduct a detailed investigation into the financial circumstances of the beneficiaries in order to be able to take into account their needs. Not only were the trust's resources severely restricted, limiting any investigation that might take place, but also Herald was mindful that under the proposed distribution the sums that would be received by the beneficiaries would be sufficient to ensure a reasonable standard of living for both sides of the family.

33 Herald had regard to the settlor's wishes to the extent that it has taken into account the evidence as to his original intention, namely that the L and M beneficiaries should be treated equally as regards the property ultimately derived from him.

34 The beneficiaries were informed of the decision by letter dated 25 th February, 2013. Herald also wrote to Trustcorp, the trustee of the T Trust, asking for it to disclose financial information with regard to the assets and liabilities of the T Trust. Trustcorp's response was that it would take three to six months before it would be able to consider the matter properly and comment on whether it would provide any information. Advocate James, on behalf of the M beneficiaries, described the in principle decision as *"a volte face"* compared to that of Centurion and it seems that Trustcorp only provided limited information thereafter, we presume at the request of the M beneficiaries, although it did provide Herald with the accounts of the T Trust for the year ending 31 st December, 2012, and the audited accounts of EE for the same period.

irections

35 Herald applied by its representation dated 22 nd August, 2013, for the Court to sanction and approve its *"in principle"* decision regarding a division of the assets of the Q Trust and its termination. The first hearing for directions took place on 27 th September, 2013. At that stage, some £365,820.40p was needed to pay outstanding fees to both Herald and its legal advisers going back over the three year period of its appointment and a further working fund of £50,000 was required to see the application through. The M beneficiaries could not afford, they said, to make any contribution towards these costs and indeed indicated that they would not be able to instruct Advocate James to appear for them beyond that hearing. The L beneficiaries, represented by Advocate Lincoln, were concerned about a sale of the farm as a whole, partly because of the state of the market in Spain and partly because of the fiscal consequences that would flow. They were not able to provide further funding to ease the cash-flow issues faced by Herald, but did put forward an offer to lend sufficient funds to enable the W loan to be repaid and the removal of K as the Spanish representative of R.

36 The M beneficiaries wanted substantial funding to be made available in order to properly

and fully investigate the history of the Q Trust which they felt, if so investigated, would affect the exercise of Herald's discretion as to how the trust fund should be divided between the two families. Issues that would need to be investigated, they said, included:–

> (i) Civil and criminal proceedings that have commenced at the behest of both sets of beneficiaries in Spain and in particular an alleged fraudulent attempt at a capital increase in U.
>
> (ii) Further Spanish proceedings in relation to land summarised at paragraph 69 of the first affidavit of Mr Ferguson.
>
> (iii) Issues as to the various letters of wishes signed by the settlor, which include issues of capacity and undue influence.
>
> (iv) Issues as to the payments made to the M beneficiaries for the administration of W and U.
>
> (v) Issues as to various sums which are claimed as being owed to the M beneficiaries as summarised in paragraph 174 of Mr Ferguson's first affidavit.
>
> (vi) Issues as to inter-company loans as described in paragraphs 128 et seq of Mr Ferguson's first affidavit.

37 In a judgment issued on the 27 th September, 2013, and circulated to the parties only, Clyde-Smith, Commissioner, said this:–

> ***"6. For the reasons set out in Mr Ferguson's affidavit, Herald have taken the view that nothing is to be gained by looking further into these matters. It is not for me, in giving directions, to comment on the merits of the stance taken by Herald, as that is something which Herald will seek to have the Court bless in due course, but I can say that before committing the trust fund to material expenditure of the kind the M beneficiaries are suggesting, it would be necessary for there to be put forward a properly thought out proposal by which it would be possible to have a reasonably clear view as to how long this exercise would take, what it would be likely to cost and the benefit to the trust estate (financial or otherwise) to be gained from it. I can see serious difficulties in the M beneficiaries being able to provide the kind of clarity that any responsible trustee would need before embarking on such a course. Until they do so, I do not regard it as reasonable to expect Herald, bearing in mind the current financial circumstances of the trust, to pursue that proposal any further.***
>
> ***7. What Herald might do is explore with such providers whether they would be in a position to fund Herald's application. I appreciate that there may be difficulties in offering any security as U has apparently already borrowed approximately £1M on the security of the land it owns and it would not be in a position to service any further borrowings.***

8. Mr Wilson, for Herald, pointed out that there were four ways in which finance could be provided - firstly by the beneficiaries, secondly by third party funding, thirdly by the sale of part of the land and fourthly by the sale of all of the land. I commented on the first two above, but as to the third and fourth possibilities, any sale of land could take a year and because of this Herald was more inclined to sell all of the land; however, Mr Wilson will discuss this further with Advocate James (if he is still instructed) and Advocate Lincoln."

38 The Court directed the parties to fix two dates; one day to deal with the funding issue and one day for the final hearing to consider the blessing of Herald's in principle decision.

39 Herald subsequently produced a detailed review of the costs and funding options available to the Q Trust which was circulated to the beneficiaries. On 23 rd October, 2013, Mr Ferguson travelled to Spain in order to discuss with the beneficiaries those options and also to meet with Mr Antonio Caracuel Garcia ("Mr Caracuel") of the Spanish law firm in Marbella known as Caracuel Abogados, to ascertain whether he was a suitable replacement for K as the Spanish representative of R.

40 According to the second affidavit of Mr Ferguson dated 11 th November, 2013, when he attended to meet with the M beneficiaries, he was greeted by an officer of the local court with a notice of a lawsuit against him personally, which purported to prevent a sale or other transfer of any part of the farm. A notice of those proceedings had apparently been placed on the Spanish Land Registry. According to Mr Ferguson, at that meeting I acknowledged the critical financial position of U and hinted that he had encouraged some of the creditors in Spain to take action against it. He apparently threatened action for monies owed to the M family should K be removed as the Spanish representative of R.

41 Having visited the offices of Caracuel Abogados, Mr Ferguson was satisfied that it was a small but long established firm in Marbella with a good reputation. Both Mr Caracuel and his associate were able to speak English fluently and soon managed, he said, to understand the many difficulties that Herald was facing. Although Mr Caracuel knew of Mr Medina Bocos, the financial adviser to the L beneficiaries, there did not appear to be any other relationship between the two parties.

42 On 7 th November, 2013, R removed K as its Spanish representative and appointed Mr Caracuel with immediate effect, providing him with a new Power of Attorney. This would seem to have been done on the basis that the W loan would be repaid with funds provided by the L beneficiaries as we describe below.

43 In the meantime Herald had received a proposal from the L beneficiaries which it brought to the Court on the 14 th November, 2013, on an urgent basis and when only two hours was

available for its consideration. The position at that hearing is best summarised by quoting from the judgment of Clyde-Smith, Commissioner, issued on the 29 th November, 2013, which was circulated to the parties only:–

> ***6. With a total lack of any liquidity within the Trust, and the commencement of Spanish proceedings by the M family restricting additional finance being obtained, Herald faced an impossible predicament in that it had no funds with which to i) defend the Spanish proceedings, ii)fund the on-going Jersey proceedings or iii) fund the administration of the Trust. It was into that situation that Advocate Lincoln, acting for the L beneficiaries, wrote on 30th October, 2013, setting out a proposal which can be summarised as follows:–***
>
> > ***(i) Herald would distribute to the T Trust the two minority shareholdings it has in companies within that Trust structure (in which the L beneficiaries have no interest).***
> >
> > ***(ii) The shares in R would be distributed to the L beneficiaries who would take on the responsibility for dealing with the problems associated with U and as a result of the Spanish proceedings, thus terminating the Trust.***
> >
> > ***(iii) The L beneficiaries would pay Herald £150,000 towards its fees and expenses and grant a security interest over the shares in R in respect of the balance due (currently some £424,000 is owing to Herald, its advisers and one of the previous trustees).***
>
> ***7. For the reasons set out in Mr Ferguson's second affidavit, Herald decided to accept that proposal (we will refer to this as "the new decision") and applied urgently to the Court for the new decision to be blessed by it. That application came before the Court on 14th November, 2013, but because of pressure on the Court diary only two hours could be devoted to it.***
>
> ***8. Notice of the new decision was given to the M beneficiaries on 11th November, 2013, some three days only before the application and K wrote to the Court on 13th November, 2013, looking for an adjournment in order to give the M beneficiaries time to consider the application.***
>
> ***9. In that letter, K downplays the significance of the Spanish proceedings:–***
>
> ***'Much is made of the preservation order that we have obtained in the Spanish courts.*** This is not a hostile act, merely an attempt to secure the status-quo and prevent the trustee, who is clearly in a difficult cash position itself, from taking a decision that is based on its needs rather than to act on behalf of the Trust's beneficiaries'.
>
> ***10. It is the case that the new decision involves the distribution of assets to***

the T Trust, which would appear to be entirely for the benefit of the M beneficiaries. It would seem from the figures, which Mr Ferguson makes it clear may not be accurate, that the two companies within the T Trust in which the Trust has a minority interest have net assets of some £4.79M, and ignoring any discount for a minority shareholding, that equates to a distribution to the T Trust of some £1.05M. The farm owned by U on the other hand would appear to have a net value of £9.3M. The accounts for the T Trust for the period ending 31st December, 2012, confirm that its trustee values its majority interest in the two companies at some £3.2M but we note the reference to liquidity problems and the trustee having to rely on funding from the beneficiaries to pay fees and expenses. Even so, it is reasonable to assume that if the in principle decision of Herald of February of this year were implemented, the M beneficiaries would expect to receive substantially more than they would under the new decision.

11. The L beneficiaries say that they need to have all of the shares in R in order to provide collateral for the costs they will incur in dealing with the Spanish proceedings and defending the assets of R in Spain.

12. Both sets of beneficiaries would like to see an end of the Trust and one can see the attraction for Herald in the L proposals in that its long outstanding fees and expenses are paid in part and secured for the balance with the Trust being brought to an end. It would not, of course, be an end to litigation in Spain. With all the shares in R (essentially the farm), the L beneficiaries would have every incentive to defend the Spanish proceedings and the M beneficiaries every incentive to continue with them.

13. Mr Ferguson addresses the issue of potential conflict arising out the proposals in respect of the fees and expenses of Herald and the Spanish proceedings brought against him personally, but Herald's view was that it was still able to fairly and reasonably make the new decision for the following reasons, (quoting from paragraph 82 of his affidavit): –

> ***'82.1 The trustee had already reached an 'in principle' decision which it felt able to do at that time.*** The only material change since that decision is that the New Spanish Proceedings have been served upon me in my personal capacity. The decision reached by the trustee does not impact in any way on the New Spanish Proceedings.
>
> ***82.2 The outstanding fees have always been an issue in these proceedings.*** Payment of professional fees would always form part of the trustee's final appointment whether it be by way of settlement or by way of security taken over the R shares.'

We were not comfortable with this however. English counsel to Herald, in his opinion of 25th February, 2013, makes the point at paragraph 15 that:–

> ***'Pressure to act due to the force of circumstances should not override the Trustee's discretion … the Trustee's underlying duty is to act for the benefit of the Trust and the beneficiaries.'***

14. We were concerned that the change in the way Herald proposes to exercise its discretion over the assets of the Trust may have been influenced by the financial pressures upon it and the Spanish proceedings against Mr Ferguson personally and that it might be argued that Herald has taken the new decision as a consequence more of its own needs than those of the needs of the beneficiaries.

15. In addition to these concerns was the fact that the M beneficiaries had only received some three days' notice of the new decision and that fairness dictated that they should be given an opportunity to address Herald's position in detail. We were conscious that in blessing a decision of a trustee, the Court gives that trustee protection against future claims in breach of trust that might be brought by beneficiaries. The position is summarised in Lewin on Trusts 18th Edition at paragraph 29–299:–

> ***'29–299 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 ass 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 (through 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."

16. Herald has not surrendered its discretion to the Court and our position,

in the regrettably short time allotted for the hearing, is that we were left in some doubt as to the propriety of the new decision and we were not therefore prepared to bless it.

17. We accept that the position of Herald is extremely difficult. Faced with an illiquid trust and warring sets of beneficiaries, it has done its best to resolve their competing interests by reaching the in principle decision of February 2013 and bringing that to the Court, involving the respondents in the whole of that process. The M beneficiaries' stated position at the directions hearing on 18th September, 2013, was that they could not afford to continue with Jersey representation, (and indeed instructions to their Jersey lawyer Advocate James appear to have been withdrawn) but that is belied by (a) their subsequently instructing Spanish lawyers to commence what has the appearance to us as being hostile proceedings in Spain, presumably knowing that Herald has no means to defend such proceedings and (b) the existence of assets within the T Trust, of which they are beneficiaries. It is not unreasonable to observe that they appear to have taken the strategic decision of not cooperating with this Court (which has exclusive jurisdiction over Herald) electing to take their chance before the Spanish courts, but faced with the new decision of Herald now want an opportunity to participate again in the Jersey proceedings. The involvement of Mr Ferguson as a sole personal defendant when it is Herald that is the Trustee is deeply regrettable.

18. We have to bear in mind, however, that on looking back at the history of the Trust, the conduct of the L beneficiaries is equally open to criticism. It might be thought that they too are taking advantage of the dire predicament of Herald in order to acquire legal ownership of the farm which is the principal asset of the Trust.

19. Mr Wilson said that Herald had no option but to accept the L proposal. We are not convinced that this is the case. Where trust assets are under attack and the trustee has no funds to defend them (it being trite law that a trustee cannot be expected to use its personal funds in the discharge of its duties as trustee) then the beneficiaries (or some of them) would have to do so if they wish to preserve their interests through the trust in those assets. The L beneficiaries can fund the defence of the Spanish proceedings, although any costs so incurred would no doubt be taken into account by Herald in any final distribution. Once that litigation is concluded, the trustee can then decide how to appoint out whatever assets may be remaining within the Trust.

20. Unfortunately, time did not permit a proper discussion of this or any other possible options that may be available to Herald. We did not reject the application outright, leaving it open to Herald to relist the matter if it so wished."

44 In subsequent correspondence with Herald, Advocate Lincoln re-iterated the position of the L beneficiaries at the hearing, namely that having agreed to fund the repayment of the W loan, they could not also fund the defence of the Spanish proceedings without the R shares, which would in turn enable them to raise funds for that purpose.

45 A key issue at the hearing on 14 th November, 2013, was the reliability of the accounts of the Spanish companies for the purpose of valuing the underlying assets, leading to a concern that the offer put forward by the L beneficiaries might involve a greater share of the trust assets being appointed to them than to the M beneficiaries.

46 Herald concluded that in order to satisfactorily progress matters and determine whether the proposed distribution of assets was fair as between the beneficiaries of the Q Trust, it would need to obtain a detailed independent valuation of the underlying assets of both trusts and it would need to press the beneficiaries to cover the cost of such an exercise.

47 With funds borrowed from a Spanish company Renta 12 (which Herald was aware was connected to Mr Medina Bocos, a financial adviser to the L beneficiaries) U repaid W £571,866.68 on 3 rd December, 2013. It transpires that this represented an over payment of the amounts due to W under the loan by £94,339.32.

48 Mr Caracuel recommended a firm called Reding Consulting Auditores & Consultores ("Reding Consulting") to carry out the proposed new valuation. Herald contacted Reding Consulting direct and determined that it was appropriately qualified to carry out that task. The cost of valuation would be £16,000 and Reding Consulting required 50% of that fee to be paid at the time of instruction and the remainder upon completion. Having no funds with which to pay for that valuation, Herald wrote to the beneficiaries on 3 rd January, 2014, asking for a contribution of 50% of the cost. The L beneficiaries confirmed that they were prepared to pay for the valuation provided that they were refunded 50% of the cost in the event that the M beneficiaries paid half of the requisite sum and that such an advance would be taken into account in the final distribution.

49 The M beneficiaries questioned the purpose of the valuations and said it was *"a physical impossibility"* to obtain a true valuation of the Spanish companies, given the extent of litigation surrounding them. Concerns were raised as to whether Reding Consulting would be influenced whilst making the valuations by Mr Caracuel, who they believed to be influenced by Mr Medina Bocos, who was associated with the L beneficiaries. Furthermore, they said that Reding Consulting was not an official appraisal society and was not recognised by the Bank of Spain as being able to issue *"official certificates of appraisal"*. In any event, they confirmed that they had insufficient funds to pay for the proposed valuation.

50 Herald considered the M beneficiaries' views. Spanish advice obtained confirmed that an official appraisal society recognised by the Spanish banks was only required in the event that the valuation was required for the purpose of granting a mortgage loan, which was not

the desired purpose of the valuation. Herald was satisfied that Reding Consulting could provide a suitable and independent valuation of the underlying Spanish companies.

51 That valuation was provided with a translated version of the valuation report on 3rd March, 2014. The exhibits to the valuation report consist of the following:–

The exhibits run to approximately 480 pages.

(i) Annual accounts of the Spanish companies.

(ii) Balance sheets.

(iii) Informative notes from the Registry of Commerce for the Spanish companies.

(iv) Report of the architect David Renones Moran.

(v) Minutes of the AGMs of W,

(vi) Protocol 1048 of the notary of Mr Jevier Manrique Plaza.

(vii) Valuation carried out by Savills in 2012.

(viii) Burofax sent to the administrators of W and V.

52 The report notes that on 17th February, 2014, a request was made to the administrators of V and W for financial information to be provided, but no response was received. Reding Consulting had been instructed that in the absence of the co-operation of the administrators of the Spanish companies, it was to make reasonably optimistic assumptions as to the values of each company based on what is known of the company and its assets.

53 The headline valuations were as follows:–

U	£10,607,503.52
V	£645,321.07
W	£19,308,470.57
TOTAL	£30,561,295.16

54 Working on the basis of the value obtained on the sale of the San Antonio land, namely £7,000 per hectare, Herald had estimated that the U land would be valued at £12,000,000. Once the liabilities of £2,684,315, according to the 2012 accounts, had been deducted that would give a net asset value of approximately £9.3M to U. A 2007 report had valued the U

land (which then consisted of 1,695 hectares) at approximately £17,000 per hectare. This was at a time immediately before the Spanish real estate market crashed. In 2009, that valuation had been revised to £12,600 per hectare and in 2012, Savills had valued the San Antonio land at £6,500 per hectare. The Savills valuation report makes reference to values of £14,000 per hectare being achieved in that area *"in the peak of the real estate bubble"*. Herald therefore felt that the valuation produced by Reding Consultants of £6,900 per hectare was credible.

55 The value of the assets of W were substantially more than the accounts which had previously been relied on indicated. The Reding Consulting report lists the commercial residential properties owned by W and values them collectively at £8,941,345.40. In addition, there is a plot of land known as P7 which had been transferred to a company called Campo Marina 2000 S.L. for construction work under an agreement by which W will receive 25% of the finished project. Reding Consulting placed a valuation of £8,183,000 on that asset.

56 Having considered the valuation report, Herald felt that it now had sufficient information to enable its *"in principle"* decision of February 2013 to be put into effect. In other words, it could rely on the figures to determine how the shares should be appointed in order to achieve equality between the M and L beneficiaries taking into account the assets of the Q Trust and the T Trust.

57 On 25 th March, 2014, Baker & Partners wrote to the M and L beneficiaries in the following terms:–

> *"The trustee is mindful of the desirability of reducing the areas of conflict between the M and the L beneficiaries.* You will recall that consideration has previously been given to a proposed distribution that would see the shares in V and W being appointed to the M beneficiaries and once these shares had been appointed out, the shares in R (holding shares in U) being appointed to the L beneficiaries. The proposal was for the M shares to be transferred to EE unless told otherwise. This method of distribution would achieve what the trustee saw as a clean break between the beneficiaries (insofar as the circumstances allow).
>
> *The trustee has reconsidered its position in light of the valuations received and maintains that the 'in principle' decision is indeed the correct decision, subject to the following paragraphs.*
>
> *You will note that the figures contained in the Reding Consulting valuation do not support the notion of a clean break without some adjustment.* If the trustee proceeds with the decision to transfer V and W to EE (on behalf of the M beneficiaries) the M beneficiaries will receive a more generous portion of the trust fund.
>
> *In order to achieve both equality and a clean break, the trustee proposes that there be a cash adjustment from the M beneficiaries.* The cash adjustment

would also take account of the trustee's creditors, including for its own fees and expenses.

The trustee is still in the process of obtaining some clarification in relation to certain figures as well as requesting updated financial statements for the T Trust and EE. The final figures will be distributed shortly but the cash adjustment required is likely to be in the region of approximately £4.5M to approximately £5.7M.

In the event that the M beneficiaries/EE are not able/willing to make the cash adjustment referred to above then the trustee has decided in principle to distribute to the M beneficiaries fewer shares in V and W and to distribute some of its shares in those companies to the L beneficiaries. This option would not be the trustee's first choice however the trustee would have no proper alternative.

Accordingly, we require the following confirmations from the M beneficiaries:

1. Will the M beneficiaries co-operate and procure the co-operation of EE/Trustcorp (Jersey) Limited in this process?

2 If the M beneficiaries do not wish their respective shares to be transferred to EE then do the M beneficiaries wish the shares to be transferred?

3 Will the M beneficiaries provide or procure the provision of a cash adjustment in the amount suggested above?"

58 At the same time, Baker & Partners wrote to Trustcorp enclosing a copy of the letter to the beneficiaries, and asking it to confirm that it would co-operate in the proposed distribution of shares in V and W to EE and to make a cash injection to facilitate a clean break as contemplated. Trustcorp were also asked to produce updated financial statements for the T Trust and EE for the year ending 31st December, 2013, for the benefit of the Court (Herald being in possession of accounts for both entities to 31 st December, 2012).

59 Trustcorp responded by e-mail on 10 th April, 2014, saying that the value of the shares has been disputed in Spain and it was not therefore in a position to accept a transfer of shares until matters had been resolved in Spain to the satisfaction of both families. It was also unable to confirm that a cash injection would be provided at this time. No response was received from the M beneficiaries.

60 The final distribution schedule produced by Herald starts on the basis that the L beneficiaries will have the value of the assets of the Q Trust, (£15,880,929 which includes the value of the U land and the minority shareholdings in W and V) and the M beneficiaries the value of the assets in the T Trust (£13,940,027).

61 From the assets of the Q Trust need to be deducted the trustee liabilities as follows:–

Loan payable to T Trust	£16,475
Credtiors — Herald Trust Company	£352,350
Creditors — Baker & Partners (including counsel's fees)	£491,175
Creditors — Baker & Partners (incurred during Centurion trusteeship)	£36,867
Creditors — Equinox Trustees	£54,575
Creditors — Y (Liquidator of Centurion)	£2,586
Creditors — Caracuel Abogados re BJF	£2,811
Total trustee Liabilities	**£884,839**

62 After deduction of these liabilities, which the L beneficiaries will have to discharge, the value of the Q Trust assets in their hands is reduced to £14,996.090 and there is therefore required a transfer of £528,031 to create equalisation with the value of the assets in the hands of the M beneficiaries (£13,940,027). In the absence of a cash adjustment from either the M beneficiaries or the T Trust, Herald felt it has no option other than to proceed on the basis of a transfer of all 585,400 shares owned by R in V to EE at £0.286835 per share, which equates to £167,913, and the transfer of 661 shares out of 10,613 shares owned by R in W to EE at £545.0367 per share, which equates to £360,118 (a total of £528,031).

63 In the event that the M beneficiaries or EE decline to co-operate in the transfer of these shares, then the order proposed by Herald is that R should hold those shares on bare trust for the M beneficiaries and execute standard declarations of trust to that effect.

Current financial position of the Q Trust

64 The liabilities at trust level as shown above total £884,839 and there is absolutely no liquidity in the trust structure to meet the same and with the Spanish proceedings no prospect of liquidity in the foreseeable future. Herald has not been paid its fees since its appointment as trustee over three years ago. This has caused it serious cash flow difficulties. We were informed that its business had been acquired by the Jersey Trust Company in December of last year. Baker & Partners have not been paid from the time of the previous trustee Centurion. Advocate Wilson informed us that Baker & Partners have had to pay the court stamp for the final hearing out of its own funds.

65 The beneficiaries only seem prepared to contribute to the liabilities at trust level on their terms. Advocate Wilson, not unreasonably, made it clear that Herald and his firm cannot go on personally financing the administration of the Q Trust in this way and we sympathise with that standpoint. It is trite law that trustees cannot be expected to use their personal funds in the discharge of their duties.

66 The position in relation to U is, in the words of Mr Caracuel, very worrying. On 23 rd December, 2013, he advised that:–

> (i) The difference between the income and current expenses presented an actual deficit of £284,807.
>
> (ii) The cash flow forecast for the next six months was negative, with a shortfall of £339,885 by the end of June 2014. If any claim recently commenced by the company's former legal advisers were taken into account the deficit could rise to £417,803.
>
> (iii) The debts that U has with its banks, suppliers and creditors amount to approximately £2M, without taking into consideration the possible claims from the M beneficiaries or their solicitors.
>
> (iv) TEPRO, who are contracted to administer the farm, considered it was necessary to dismiss workers at the farm in order to reduce outgoings.
>
> (v) The funds required to fund the redundancy packages in order to reduce the personnel expenses on the farm were £114,005.
>
> (vi) U was only viable with a minimum cash injection of £600,000, failing which it could enter into bankruptcy.
>
> (vii) In the meantime, Mr Caracuel, acting as R's Spansh Representative had kept U afloat by arranging a short term loan of £250,000, co-ordinating negotiations with creditors and receipt of small injections further to the sale of cattle, disposal of farm workers and the new hunting contract.

67 Herald have a *lien* over the assets of the Q Trust for the payment of their fees and the discharge of other liabilities at trust level. Quite properly, it is only prepared to distribute the shares in R and thus to terminate the trust if those liabilities are discharged. The L beneficiaries will be receiving assets to the full value of those liabilities and have accordingly agreed to undertake to meet them.

Position of the beneficiaries

68 The L beneficiaries support Herald's decision to terminate the Q Trust on the basis of equality between the M and L beneficiaries, taking into account the assets and liabilities of

both trusts and based now on the valuation from Reding Consulting. The M beneficiaries do not support the decision. Their position is that the assets of the Q Trust should be divided equally between the two branches of the family. Thus, they would retain the benefit of all of the assets within the T Trust (of which they are, of course, the only beneficiaries) and receive 50% of the benefit of all of the assets in the Q Trust.

69 Mr I attended the hearing with his wife who acted as his interpreter. Shortly prior to the hearing, he produced a lengthy draft affidavit amounting to some 341 paragraphs with numerous exhibits which go into the history of both trusts in detail. On the day of the hearing, he produced a valuation of the assets of the two trusts dated 21st April, 2014, by Francisco Martin Recuerda Garcia, Member No. 1 of Illustrious College of Economists of Granada, an economist-auditor. That reached very different conclusions from the Reding Consulting valuation as follows:–

U	£30,087,815.02
V	£2,194,524.89
W	£1,586,973.93
Subsidiaries of V	£2,563,532.10
TOTAL VALUE COMPANIES	£36,432,845.94

70 Mr I had prepared written submissions for the Court which his wife had translated in which, amongst other things, he accuses Herald of manufacturing the Reding Consulting valuation to suit its purposes, and alleges that Herald, together with Mr Medina Bocos, the L family financial adviser, and the husband of one of the L beneficiaries, were attempting a simple basic fraud on the Q Trust.

71 The M beneficiaries sought the following:–

(i) Immediate action so that U be returned to the control of their family and taken out of the hands of third parties. They undertake to ensure that these assets are protected and wherever possible enhanced.

(ii) More time for I to complete the development of his affidavit.

(iii) A hearing of three to four days for him to present his affidavit and explain the exhibits.

(iv) An investigation into the conduct of Herald and the fees they seek to charge.

(v) The costs of I attending the hearing on an indemnity basis.

Spanish proceedings

72 Mr I informed the Court that a hearing of the Spanish court had been scheduled for 24 th June, 2014. He also asked for an order that Herald co-operate fully with the Spanish court and to adhere to the orders of both the Royal Court and the Spanish court. It would seem that there may be precedent in Spanish law that trustees holding assets in Spain upon common law trusts can only exercise their discretion in strict adherence to the forced heirship rules in Spain. He informed us that a hearing on 28 th November, 2013, the Spanish court warned both Herald and Mr Ferguson that they could find themselves in contempt of court and liable to criminal prosecution if they failed to co-operate.

73 Mr Ferguson had produced a copy of what appears to be the application of the L beneficiaries in the proceedings against Mr Ferguson. The Spanish Court order of 23 rd October, 2013, again names him as the sole defendant, and in its operative part imposes the following precautionary measure (in translation):–

> ***"Prohibiting the defendant, per se or through third, to proceeding with any act of disposal of assets of the Q Trust under their control, and more specifically, of estates whose ownership corresponds with the Spanish society U over which the defendant exercises absolute control through the society R, majority shareholder and Sole Administrator of the same, and alternatively, agreeing to put in force cautionary notice of this application on the registered estates that make up the current assets of the said mercantile U ("U").***

74 Caracuel Abogados advise Herald that the Spanish proceedings are aimed solely and exclusively against Mr Ferguson, and specifically have not been brought against him as a representative of R or as an administrator of U. A reply has been filed, stating that he has no capacity to dispose of the property of the Q Trust or of R or U, and so no measures may be taken against him. The precautionary measures not to dispose of the property imposed by the court "lack sense and practical content as the property is not under his control or power to dispose of it." The property registers in Spain have refused to enter the precautionary measures as the identity of the defendant, Mr Ferguson, does not correspond with that of the owner of the properties concerned, namely U. They conclude as follows:–

> *"From all the above, we may conclude that, in the first instance, the action is not directed at the administrators of U but solely against Brian Ferguson, and, secondly, that the R shares are not subject to Spanish legislation with regard to their disposability.* To the best of our knowledge and understanding and apart from opinions to the contrary, we consider that Herald Trust may freely dispose of the R shares as the said Herald Trust has administrators other than Mr Ferguson.
>
> *In our opinion, the best defence for Mr Ferguson and the property of Q is to*

disassociate Mr Ferguson from any action taken in the near future and to distribute the assets (shares) of the company R, not of the company "U.", before the proceedings against Mr Ferguson are held.

Once the said shares have been distributed and awarded, the new owners of the said property or shares, in their capacity as beneficiaries and heirs of N, will be those who best defend their interests and bear the copious costs of this claim and others which may arise.

Our understanding is that the sole purpose of the M family's actions is to frighten Mr Ferguson and block any action by him in the company, when Mr Ferguson is neither an administrator nor director of the Spanish company "U." [U] nor of the company R. From what has been claimed and explained above, we consider that the claim against Mr Ferguson cannot prosper but may be long and costly if no suitable measures are taken to disassociate the Q Trust from the plaintiffs, the M family."

75 It is appropriate for this Court, out of comity, to respect the jurisdiction of the Spanish courts and we would be concerned at blessing any decision that purported to encroach upon that jurisdiction. However, it seems to us that there is a clear jurisdictional divide between the two courts. The Q Trust is a Jersey proper law trust, with a Jersey resident trustee. The trust assets comprise shares in a Jersey incorporated company. There can be no question that this Court has jurisdiction to give directions in relation to that trustee in respect of its shares in that Jersey company.

76 Equally, the Spanish courts have jurisdiction over the Spanish companies and their underlying assets. No steps are being taken or contemplated by Herald that would in any way alter or effect the current structure of the Spanish companies and their respective assets. If Herald's decision is put into effect, then the L beneficiaries will simply become the shareholders of R and as Caracuel Abogados advise, will through that company have the burden of defending any proceedings in Spain.

77 Mr Ferguson, who was also personally advised by Caracuel Abogados, has not suggested that the implementation of Herald's decision will place him in personal jeopardy in Spain. In any event the decision will be implemented by Herald and not by Mr Ferguson.

Options available to Herald

78 In deciding to implement its *"in principle"* decision, Herald has given consideration to other options available to it as follows:–

(i) Third party funding for the cost of this application. Not surprisingly, given the financial position of the Q Trust and the Spanish proceedings, this has come to nothing.

(ii) The appointment of a receiver. This has been ruled out as a viable option. It has no support from any of the beneficiaries and would require the engagement of an international firm of accountants with a presence in Spain, and the further incurring of very substantial fees with no prospects in the foreseeable future for liquidity to meet the same. Any sale of the land would take place at a time when the Spanish economy was in a poor state and could also result in adverse Spanish fiscal implications. Receivership would, in the view of Herald, tie up the trust assets for many more years.

(iii) An equal division of the assets of the Q Trust (not taking into account the assets of the T Trust). This has been ruled out by Herald, as it would be contrary to its decision in principle for there to be an equal division taking into account the assets and liabilities of both trusts. Furthermore, from a practical perspective, the hostility that exists between the two families would simply continue at shareholder level within R. A shareholders' agreement would be essential to regulate their ownership of R and the prospects of the terms of such an agreement being agreed between the parties is remote.

(iv) A transfer of the R shares to the M beneficiaries and the shares in W and V to the L beneficiaries. This again is a non-starter in that the L beneficiaries are not beneficiaries of the T Trust and therefore cannot benefit from any part of its holding in those companies.

79 The conduct of all of the respondents in the past can be criticised but Herald submits it is trying to resolve the situation by looking through the “fog of war” to the original intention of the settlor and is firm in its opinion that it is appropriate to take into account the assets of the T Trust when calculating the distribution to both sets of beneficiaries. It has accepted the valuations provided by Reding Consulting and has satisfied itself as to the independence of that firm for the purpose of carrying out the valuations. That valuation did not support the notion of a clean break and the method of achieving equality between the beneficiaries was for there to be a cash adjustment from the M beneficiaries. It being clear from Trustcorp that such an adjustment would not be feasible, then equality can only be achieved through the distribution of shares in the manner set out above.

Legal principles to be applied

80 As previously stated, the Q Trust is a Jersey trust with a Jersey resident trustee and accordingly, the Court has jurisdiction pursuant to Article 5 of the Trusts (Jersey) Law 1984. The approach of the Court in applications such as this is well established, following *Re S Settlement* 2001/154 which in turn referred to the English authority of *Public Trustee v Cooper* [2001] WTLR 901. This application comes within the second category set out in *Re S Settlement* where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how 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.

81 In *Re S Settlement* establishes that there are three matters which the Court is required to take into consideration when determining an application that falls within the second category:–

> ***"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?"***

82 Guidance is provided in *Public Trustee v Cooper* with regard to the existence of a conflict of interest. The case makes it clear that the existence of a conflict does not necessarily mean that the trustee is disabled from making its own decision as to how to proceed. Hart J said this:–

> ***"i 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 trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.
>
> ***ii. Secondly the nature of the conflict may be so persuasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.***
>
> ***iii. 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 trustee 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."

83 Herald acknowledges that its decision involves the discharge of the fees due to itself together with an advance from the L beneficiaries of (now) £200,000 which would be used to discharge a portion of the outstanding professional fees. The L beneficiaries have also undertaken to discharge all outstanding creditors within twelve months of the date of the final order. Herald points out, however, that its *"in principle"* decision was made over fourteen months ago, at a time when:–

(i) It had no knowledge that the M beneficiaries would be unable or unwilling to assist with the discharge of outstanding trust liabilities.

(ii) It had no knowledge that the L beneficiaries would be willing to provide £200,000 towards outstanding professional fees or would be willing to undertake to discharge all outstanding creditors within twelve months.

84 In any event, Herald submits that its decision has not been influenced by self-interest, but rather by the desire to bring an end to the warring between the beneficiaries all of whom want the trust terminated. Any distribution from a trust would only ever take place once the creditors have been repaid. The L beneficiaries are receiving funds to a value which would enable them to repay the creditors and Herald is merely one of many other creditors to be paid. Herald has decided upon what it sees as the only workable solution.

Decision

85 The Court's function, where, as here, there is no surrender by Herald of its discretion as trustee, is a limited one and is described in the extract from *Lewin* set out in paragraph 43 above. It is worth stressing for the benefit of the beneficiaries that the settlor settled these assets upon discretionary trusts under which the trustee, now Herald, has the discretion (Clause A6 of the Trust Instrument) as to who within the class of beneficiaries will benefit. That discretion has not been surrendered to the Court and we have no right to intervene unless a breach of Herald's duties as trustee is proved. We could see no grounds here for the Court to intervene.

86 The financial position of U is serious and the financial position at trust level dire. It is manifestly unreasonable for Herald and its advisers to be left unpaid for such a period of time when it would seem from both valuations that there are substantial assets within the trusts. It is equally unreasonable for them to be expected to continue when there is no prospect of liquidity arising in the foreseeable future.

87 The position of the M beneficiaries is that not only should Herald and its advisers continue unpaid, but there should now be an investigation into Herald's conduct and the fees it has

charged. It is not clear who they propose would carry out that investigation, and would pay for it. Furthermore, the M beneficiaries now wish a hearing to take place over some three to four days (itself a modest estimate) so that the Court can consider I's very detailed affidavit in full. Clearly the M beneficiaries hope that such an exercise would lead the Court at best to ordering Herald to implement the settlor's later wishes by excluding the L beneficiaries resulting in the M beneficiaries receiving all of the assets ultimately derived from the settlor, or at the least ordering Herald to divide the Q Trust equally between the families, leaving the M beneficiaries the sole benefit of the assets of the T Trust.

88 What the M beneficiaries may not appreciate is that such a course would require the Court, as a matter of natural justice, to enable the L beneficiaries to respond to I's draft affidavit and it is clear that there is much in what he asserts that is contentious in their view.

89 At this stage, whilst the Court has considered the draft affidavit of I, it must bear in mind that this represents the views of one side of the family; we have not heard the views of the L beneficiaries in response.

90 There are clearly deeply held grievances on both sides of the family and we can understand why family members may want past perceived injustices to be investigated and if possible remedied. It would, however, be a very time consuming exercise and give rise to very considerable further cost. Even if the Q Trust had liquid assets available to fund such an exercise, we question whether it would be a prudent use of trust monies, as there would be no guarantee that it would lead to a helpful outcome. The fact of the matter is that there is no liquidity and we endorse the decision of Herald not to investigate the past conduct of the beneficiaries.

91 We also endorse Herald's decision to have regard to what we agree appears to have been the settlor's original intention, namely that his six legitimate children should benefit equally from all of the assets which derived from him; thus the original structure whereby the M beneficiaries were the beneficiaries of the T Trust and the L beneficiaries were the beneficiaries of the Q Trust. It seems clear that it was the perceived deterioration in the value of the assets in the T Trust that caused the settlor to request that the M beneficiaries be added as beneficiaries to the Q Trust.

92 Relations between the settlor and certain members of the L family became strained and in later years, he would appear to have sought the exclusion of some, and ultimately all of them, which, if implemented, would have cut the L side of the family out from any benefit at all from any of the assets derived from the settlor.

93 At the hearing, Mr I also produced an affidavit from Mr Johann Wijsmuller, dated 30 th April, 2014. He was a trust and company administrator and director of SGI from April 1999 to March 2005. The overall purpose of his affidavit was to confirm his view that the settlor did indeed, in his later letters of wishes, wish to exclude the L beneficiaries. He candidly admits

in his affidavit that he was known to be friendly to the M side of the family.

94 The L beneficiaries have not seen this affidavit and been given an opportunity to respond to it. They have, however, raised serious issues as to the reliability of those later letters of wishes and again an investigation into this would be both time consuming and expensive. There are simply no funds to conduct that exercise and even if there were, there would again be a question mark as to whether it would be a prudent use of trust money. We think the decision of Herald not to investigate the issue of these later letters of wishes and to have regard to the original intentions of the settlor is reasonable. Letters of wishes are not binding on a trustee and it is in itself inherently reasonable that the two sides of the family should benefit equally from the assets derived from the settlor.

95 The proposal which Herald brought to the Court on the 14 th November, 2013, entailed a division between the families on the basis of the value of the assets as shown in the accounts of the trusts and there was a concern as to whether this was prejudicial to the M beneficiaries. Herald has sensibly now sought to procure an independent valuation of the assets of both trusts which does show a marked increase in the value of the assets of W and V (in which the Q Trust has substantial minority interests). That exercise has been conducted in a transparent manner, but it would appear that the M beneficiaries and Trustcorp have made a decision not to co-operate in the process.

96 Instead, Mr I has produced his family's own valuation. Even though this valuation was dated 21 st April, 2014, a full eleven days before the hearing, he only saw fit to produce it to the Court and to the other parties at the hearing itself; no explanation was given for this. In the short time available to the other parties to consider this valuation, they point out:–

> (i) There seems to be no assessment by an expert of the market value of the underlying properties in any of the companies.
>
> (ii) The remarkably high valuation of the U farm land seems to have been arrived at by taking the valuation of that land in 2007 at the height of the property boom (£32,902,663.70) and applying what appears to be a very modest annual discount based on statistics taken from government surveys. The Savills and Reding Consulting's valuations, on the other hand, rely on actual sales of equivalent land in recent times.
>
> (iii) The much lower valuation of the real property assets of W and V appear to be based on historic valuations again adjusted by the application of statistics.

97 Reference is made in this valuation to the effect of litigation in relation to Plot P7 owned by W (reducing its value to zero), but no adjustment to the valuation of U had been made to take into account the effect of the litigation and other problems besetting that company. Advocate Lincoln drew a distinction between this approach and the approach of Reding Consulting who he submitted had sought to approach their valuations of both companies

on the same even handed basis.

98 These observations in relation to the valuation of Mr Garcia may or may not be justified, but that is likely to happen when valuations are presented both to the Court and the parties without any notice. What is Herald, and indeed the Court, to make of such a last minute and markedly different valuation which would seem to show the L beneficiaries scooping the lion's share of the assets if the decision of Herald is blessed? The only way of taking the matter forward, if there were funds to do so, would be for there to be another hearing at which the advice of the experts can be tested by way of cross-examination, with the possibility of a third valuation being commissioned.

99 Herald took time out at the hearing to consider this valuation which had just been presented to it, but it maintained its decision to proceed on the basis of the Reding Consulting's valuation and in the circumstances of this trust we consider its decision to do so to be reasonable. In contrast we consider the conduct of the M beneficiaries in not co-operating with the valuation commissioned by Herald and producing their own valuation on the day of the final hearing to be unreasonable. Nor do we think it reasonable for Herald to be expected to proceed in the manner proposed by the EM beneficiaries.

100 At the hearing on the 14 th November, 2013, when the Court had insufficient time to consider the proposal then being put forward fully, it did voice concern as to whether the financial pressure on Herald might be influencing its decision to accept the proposal put forward by the L beneficiaries.

101 We have considered the issue of conflict carefully. In essence, we accept Herald's position that its decision has not been vitiated by its own interest in its fees being paid. Every professional trustee is entitled to be concerned as to the payment of its fees. Professional trustees conduct businesses with overheads to pay and no professional trustee can be expected to distribute out the entirety of a trust fund without requiring that it and other creditors of the trust are paid. We are satisfied that its decision in principle reached in February 2013 was a reasonable decision which, with its independent valuation, it is now in a position to implement. That decision necessarily requires its fees and those of the other creditors to be discharged.

102 In conclusion, and addressing the questions set out in *Re S Settlement*:–

(i) We were satisfied that Herald has in fact reached its decision in good faith and that the circumstances of the case render it desirable and proper for it to implement that decision. We specifically reject the suggestion that Herald has manufactured the Reding Consulting valuation to suit its purpose or is party to some kind of fraud on the Q Trust.

(ii) We were satisfied that the decision which Herald has formed is one which a

reasonable trustee properly instructed could have arrived at.

(iii) We were satisfied that the decision that Herald has arrived at has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision.

Share certificates of R

103 Following the repayment of the loan to W, Baker & Partners have written on numerous occasions to Trustcorp requesting the return of the share certificates of R, which were held by way of security pursuant to a Guarantee and Security Interest Agreement entered into with its predecessor trustee, Equinox, on 17 th November, 2006. On 10 th April, 2014, Trustcorp e-mailed Baker & Partners saying this:–

> *"Our client, in his capacity as administrator of W, is not willing to release the original certificates until such time as the loan has been paid and expenses settled."*

104 Baker & Partners responded on 11 th April, 2014, pointing out that the loan was repaid on 3 rd December, 2013, the only outstanding argument remaining being a potential overpayment. In any event it is Trustcorp as trustee of the T Trust that is the secured party and it is not open to Mr I as administrator of W to withhold the certificates. Confirmation was sought in respect of the alleged expenses owed and specifically where this was set out in the contractual documents.

105 On 15 th April, 2014, in a telephone conversation with Trustcorp which was followed up by an e-mail by Trustcorp, it said it was unable to transfer the shares in relation to R in view of the ongoing court proceedings between W and U and an alleged outstanding balance of £416. It also explained that W was claiming legal costs under the agreement of £22,000.

106 Baker & Partners responded pointing out that the original share certificates are held by Trustcorp pursuant to the Guarantee and Security Interest Agreement, which is governed by Jersey law, and that Clause 26 contains a provision noting that the Courts of Jersey have jurisdiction over any disputes which arise out of or in connection with it. Baker & Partners were not aware of any order of the Royal Court that would prevent Trustcorp as the secured party from fulfilling its obligation to return the share certificates and that any advice received by Trustcorp regarding Spanish proceedings was irrelevant. Furthermore, there had been a large over-payment of the amounts due and Trustcorp were now obliged to return the original share certificates.

107 Advocate Wilson sought an order from the Court cancelling those share certificates, so that new share certificates could be issued.

108 A copy of the bank transfer by Banco Popular dated the 3rd December, 2013, was exhibited to Mr Ferguson's affidavit as was Baker & Partners email to Trustcorp of the 18th December, 2013, confirming that the loan from W had now been repaid in sums which exceed the amount due and asking for the return of the certificates and a certificate of discharge. Trustcorp responded on the same day saying it was checking the position with Mr I. It would seem that it was not until after the M beneficiaries had been told of Herald's decision over the distribution of the trust fund that any objections to the return of the certificates was raised.

109 It appeared to the Court from the evidence before it that Trustcorp was withholding these certificates at the behest of the M beneficiaries and that there were no good grounds for it its doing so. Until April 2014, there was no hint from W (as far as the Court is aware) that its loan had not been repaid in full. It would be intolerable for Herald to now be prevented from implementing this decision by the wrongful withholding of these certificates at the behest of the M beneficiaries. Even so, the Court had not heard from Trustcorp and was only prepared to make an order cancelling those share certificates on the basis that Trustcorp was given seven days in which to apply to the Court to show cause why it should not return the certificates. Such an application would be at its own risk as to costs.

110 In conclusion the Court blessed the decision of Herald and gave directions accordingly.