G Trustees Ltd v Mr A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Ronge
Judgment Date:	09 November 2017
Neutral Citation:	[2017] JRC 189
Reported In:	[2017] JRC 189
Court:	Royal Court
Date:	09 November 2017

Text

[2017] JRC 189

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner and Jurats Nicolle and Ronge.

In the Matter of the Representation of G Trustees Limited and in the Matter of the H and J Trusts

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984, as Amendeds

Between
G Trustees Limited
Representor
and
Mr A

First Respondent

and

Mrs C
Second Respondent

and

Mr D
Third Respondent

and

Mr E
Fourth Respondent

Advocate M. P. Renouf **for the Representor**.

Advocate J. W. Angus **for the First Respondent**.

Authorities

Representation of G Trustees Limited [2017] JRC 162A .

Trusts (Jersey) Law 1984.

Public Trustee v Cooper [2001] WTLR 903 .

In re S Settlement [2001] JLR Note 37 .

Re the Thyssen-Bornemisza Continuity Trust [2002] 5 ITELR 340 .

Lewin on Trusts 18th edition.

In the matter of A Settlement [1994] JLR 139 .

Trust — reasons relating to the decision of the representor that the country house be sold.

THE COMMISSIONER:

1 On 10 th July, 2017, the Court blessed the decision of the Representor, in its capacity as trustee of the J Trust, to market the substantial property it indirectly owns in Europe, for the reasons set out in the Court's judgment of 5 th October, 2017, (*Representation of G Trustees Limited* [2017] JRC 162A). For consistency with that judgment, we will refer to the property as ‘the country house”.

2 On 31 st October, 2017, the Court blessed a further decision of the Representor that the country house should be sold and we now set out our reasons. For ease of reading, we are going to repeat the background as set out in the Court's judgment of 5 th October, 2017.

The Trusts

3 The Representor, which is incorporated in and carries on a trust and company business from Jersey, has invoked the supervisory jurisdiction of the Court in relation to two family trusts:-

(i) The H Trust, which was created by the fourth respondent ("the settlor") on the 18 th February, 1988, with a Bermudan-based trustee. The Representor was appointed trustee on 4 th April, 2013. The trust fund was originally held on discretionary trusts for a class of beneficiaries composed of the settlor's elder son, the first respondent, whom we will refer to as "the elder son", his daughter, the second respondent, whom we will refer to as "the daughter" and his younger son, the third respondent, whom we will refer to as "the younger son" and any other children and remoter issue of the settlor and their spouses. The settlor and his wife are expressly excluded from benefit. Pursuant to a deed of appointment executed in 2001, the income of the whole of the assets subject to the H Trust are now held on trust to be paid to the younger son during his lifetime.

(ii) The J Trust, which was declared by a Bermudan-based trustee on 1 st April, 1999. The Representor was appointed trustee on 4 th April, 2013. The trust fund is held on discretionary trusts to appoint in favour of any of the class of beneficiaries composed of the elder son and the daughter (defined in the trust deed as "Principal Beneficiaries"), all of the children of the settlor, and their spouses, widows, widowers, children and remoter issue. Subject to the exercise of such power of appointment, the trust fund is divided into half, with the income of half being paid to the elder son during his lifetime and thereafter held as to capital and income for such of his children as have reached 25, and likewise for the daughter as to the other half. The settlor and his wife are again excluded from benefit.

4 The H Trust is governed by Bermudan law. Clause 2 of the trust deed is in these terms:-

"Proper Law

This Settlement is established under the laws of Bermuda and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law of this Settlement and to any change in the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the Proper Law of this Settlement shall be the law of Bermuda which shall be the forum for the administration thereof."

5 The J Trust is also governed by Bermudan law. Clause 19 of the trust deed simply provides:-

> *"19 The law of Bermuda shall be the proper law of this Settlement."*

6 There are two other family trusts of which the Representor is not the trustee.

Background

7 The application is concerned principally with the J Trust, which, through BVI incorporated companies, owns the country house and other assets.

8 The country house was purchased by the settlor many years ago, and he devoted a great deal of time and expense to restoring it, before settling it into the trust structure he had created. It is currently let to the settlor at an annual rental of €100,000, in respect of which there are arrears of rental as at 5 th April, 2017, of €501,559.2. The running expenses of the country house are significant – to the order of £500,000 a year. The Representor has allowed this to continue because of the family's attachment to the country house and to their strong desire to keep it in the family. It is a very valuable asset, but the only significant income it generates is the rent due from the settlor. In addition to the rental arrears, the settlor has considerable indebtedness to all four family trusts and to his bank.

9 A note produced by the Representor following a family meeting in July 2016 sets out the financial position of all four family trusts, showing substantial assets on a consolidated basis but borrowings of one third of their value. As the note says:-

> *"Viewed on a consolidated basis, the financial position of the trusts can be regarded in two different ways.* There are substantial assets and there are borrowings of approximately one third of the value of the assets which suggests a healthy financial position. The alternative view is that this initial view masks the true position because the trusts are unable to service the borrowings out of income and the greater part of the assets are not suitable for low cost bank lending purposes, which means the trust borrowings are expensive, and the borrowings increase quickly as the interest rolls up."

10 The J Trust has inter-trust debt, but there are also substantial charges over the country house in favour of third party lenders.

11 Following numerous unsuccessful efforts to find alternative long-term financing, and many suggestions from the settlor and the elder son as to potential sources of alternative finance, from which nothing concrete has ever emerged, it was concluded, following discussions, that the country house would have to be sold. This was acknowledged in a letter from the settlor of 3 rd October, 2016, in which he confirmed that if re-financing arrangements were

not completed by Easter 2017, then the country house would have to be sold to a third party.

12 No such re-financing was achieved. The only remotely credible alternative put forward by the settlor and the elder son was the sale of the other assets held within the four trusts, but that would leave the trusts with no income producing assets whatsoever, only the country house, and no way to service the running costs of that property. It would also be insufficient to deal with the whole of the third party debt, which would require servicing.

13 Once it became clear that the Representor wished to proceed with the marketing and sale of the country house on a controlled basis, the settlor and the elder son wrote to the Representor saying that they had lost trust and confidence in it, and wished to bring about the appointment of a new trustee. A new trustee had been identified by them which was prepared to pursue their alternative plan, a plan which the Representor regarded as financially suicidal for the family. This has created divisions within the family in that the daughter opposed a change of trustee and supported the proposal that the country house be sold, as did the younger son.

14 Marketing of the country house began on 12 th June, 2017, but it became clear to the Representor that the resident staff had instructions from the settlor and/or the elder son to frustrate any attempt to market the property. It appeared that they had been told that the Representor had already been removed as trustee. A substantial property of this kind requires time to market, and the Representor was understandably concerned to avoid a distressed sale at an impaired value. There was urgency as the first of the debts secured on the country house in the sum of £11.5 million fell due for repayment on 21 st December, 2017.

15 At paragraphs 14 and 15 of the Court's judgment of 5 th October, 2017, it reached this conclusion.

> ***"14 It is not necessary for this judgment to go further into the issue, as it was clear to the Court that the Representor required the protection of the Court.*** The Representor sought the Court's approval of its decision to market ***the property, on the basis that it would return for approval of any decision to sell.*** The Court was satisfied, applying the test in the case of *In the Matter of the S Settlement* [2001] JLR Note 37 , ***that the Representor had the power to procure the sale of the country house, that its decision to market the country house had been formed in good faith and was a reasonable one which had not been vitiated by any actual or potential conflict of interest***.
>
> ***15 Accordingly, the Court approved the decision of the Representor to market the country house.*** The Court also directed the Representor to remain as trustee of the trusts until further order of the Court, and ordered the Settlor and all of the Respondents to take all reasonable steps within their power to

facilitate the marketing of the country house, and to take all reasonable steps within their power to allow access to the country house, when reasonably required by the Representor or the appointed agents for that purpose."

Jurisdiction

16 Advocate Evans, who then represented the settlor and the elder son, whilst accepting that under Article 5 of the Trusts (Jersey) Law 1984 ("the Trusts Law") the Court had jurisdiction where ***"a trustee of a foreign trust is resident in Jersey"***, challenged the jurisdiction of the Court to give directions to the Representor under Article 51 of the Trusts Law, a challenge which was rejected for the reasons set out at paragraphs 25 – 34 of the judgment of 5 th October, 2017.

Forum non conveniens

17 Advocate Evans also applied, on behalf of the settlor and the elder son, for a stay of the Jersey proceedings on the grounds that Bermuda, where proceedings had also been initiated, was the most convenient forum, an application rejected by the Court for the reasons set out at paragraphs 38 and 39 of the judgment of 5 th October, 2017.

18 An application by the elder son for leave to appeal the judgment was refused by Commissioner Clyde-Smith on the 13 th October, 2017, and no application for leave to appeal has been made to a single Justice of the Court of Appeal.

Events subsequent to the 10th July hearing

19 Notwithstanding the Court's order to facilitate the marketing of the country house, on 12 th and 13 th July, 2017, the elder son issued a summons and subsequent motion in the Court of the country in which the country house is situated ("the M Court"), seeking interim injunctions preventing the marketing and sale of the country house. On 20 th July, the Representor filed a counter motion disputing the jurisdiction of the M Court.

20 On 26 th July, 2017, the proceedings in the M Court were stayed by consent until 3 rd October, 2017, to enable mediation between the parties to take place in the UK. The order of the M Court provided, *inter alia*, that during the period of the stay, the Representor was able to continue marketing the country house, and to fix a date for a hearing before this Court to approve a proposed contract for the sale of the country house.

21 Mediation did not resolve the dispute, and the matter was returned to the M Court on 3 rd October, 2017, when the elder son's application for injunctions and the representor's

challenge to the jurisdiction were adjourned to 16 th November, 2017, on the basis that this Court would first hear the Representor's application for it to bless the sale of the country house, at which any refinancing proposal could be put forward by the elder son.

22 Turning to Bermuda, on 12 th July, 2017, the settlor and the elder son issued a Generally Endorsed Writ of Summons seeking the removal of the Representor as trustee, the setting aside of the decision to market the country house, an injunction restraining the representor from marketing and/or selling the country house, and damages for alleged breach of trust.

23 On 9 th October, 2017, the representor filed a summons in the Bermudan proceedings disputing jurisdiction and on 19 th October, 2017, a consent order was made giving directions in those proceeding, with the representor's challenge to jurisdiction due to be heard on a date to be fixed after the representor's application to this Court for it to bless the sale of the country house.

24 The application of the Representor before this Court was supported by a further affidavit by Mr K, a director of the Representor, dated 25 th October, 2017, in which he deposed that no further re-financing proposals were put forward by the settlor or the elder son after the 10 th July, 2017, which were considered tenable. He exhibited two term sheets which had been presented at the mediation, which he analysed in some detail and which he concluded were not credible. Even if capable of implementation, he said they would represent an irresponsible use of the trust assets. His analysis was not challenged by Advocate Angus, representing the elder son. Mr K pointed out that the Representor had previously approached some forty potential lenders for refinancing without success, prior to the issue of the representation. The fundamental issue, he said, was that new responsible lending rules severely limited the ability to finance non-income producing assets.

25 The marketing of the country house had proceeded, with interest shown, but the concern of the Representor was:-

(i) Its ability to deal with the offers received within a reasonable timescale, bearing in mind the difficulty of getting access to court time in Jersey and the extant proceedings in Europe and Bermuda; and

(ii) The need to demonstrate to the lenders that there was a viable plan to reduce the indebtedness, bearing in mind that the loan in the sum of £11.5 million was due to be repaid on 21 st December, 2017; as Advocate Renouf for the representor pointed out at the hearing, a mere 51 days away.

26 With the morning of 31 st October, 2017, reserved before this Court (no other dates apparently being available until the New Year), the representor passed a resolution on 25 th October, 2017, resolving that the country house should be sold at a price of not less than €17 million. As we are being asked to bless that decision, it is necessary to set out the

preamble to that resolution, as contained within the minute:-

> *"(A) the Company is the sole trustee of the J Trust, an asset of which is the entire shareholding in … a BVI company, which in turn is the sole proprietor of the [the country house] Republic of Europe*.
>
> *(B) By clause 4 of the Schedule of Administrative Powers annexed to the Trust Deed the Company has power 'to exchange property for other property of a like or different nature and for such consideration and on such conditions as they in their absolute discretion think fit.'*
>
> *(C) The [country house] costs approximately £500,000 a year to run but generates little or no income relative to its capital value*.
>
> *(D) As trustee of the J Trust, the Company is substantially indebted to third party lenders and to other family trusts.* A full schedule of the current position was put before the meeting and is attached to these minutes. It was noted that the Company is also trustee of the H Trust, another …. family trust.
>
> *(E) A substantial part of the indebtedness is charged upon the [the country house] and the sum of £11,500,000 so charged becomes due for repayment on 21 December 2017.* Further indebtedness is expected to fall due shortly thereafter.
>
> *(F) Ownership of [the country house] is important to one of the two beneficiaries presently entitled to income of the J Trust and to the Settlor.* The other income beneficiary and a member of the class of discretionary beneficiaries of the trust both consider that it should be sold, the indebtedness of the trust addressed, and the balance of the proceeds invested in other assets.
>
> *(G) The class of discretionary beneficiaries also includes minors and unborn potential beneficiaries*.
>
> *(H) The Trustee over a period of several years investigated possibilities for re-financing the indebtedness and, despite over 40 lenders being approached, has not identified any that it considers tenable or in the best interest of the trust and its beneficiaries as a whole*.
>
> *(I) The Trustee currently has a date for hearing of its Representation before the Royal Court of Jersey for, among other matters, approval of the sale of [the country house], on 31st October 2017*.
>
> *(J) The Trustee has been marketing [the country house] for some months.* Some interest has been received and current advice from the valuers and estate agents was tabled and this suggests that a sale at a sum in excess of €17,000,000 would be acceptable.
>
> *(K) The draft sales contract was tabled and is attached to these minutes.* It was noted that this would be issued once an offer had been accepted."

27 The resolution itself was in these terms:-

> *"The directors agreed that they were well aware of the issues referred to above and agreed that decisive action was required to ensure that they are able to demonstrate a viable plan to pay the amounts due to the lenders (and that those amounts would be paid in accordance with that plan) and to reduce indebtedness to a prudent level.* After further discussion IT WAS RESOLVED that subject to the blessing of the Royal court of Jersey:
>
> *1. [The country house] should be sold at a price not less than €17,000,000.*
>
> *2. The Trustee will exercise its powers as sole shareholder of [the BVI company] to procure that the said company should enter into an agreement to sell [the country house] for the best price the directors of the Company consider obtainable in excess of €17,000,000, upon an offer satisfying that condition being received."*

28 We were satisfied that the advice received from the two agents instructed, as exhibited to Mr K's affidavit, supported the *"floor price"* of €17 million. We noted that the valuation of the latter indicated a huge reduction in value to €9.5 million if the country house was subjected to a forced sale within 90 days. The understandable concern of the Representor was the possibility that if the loan of £11.5 million was not repaid on 21 st December, 2017, the lender could enforce its security, taking the sale of the country house entirely out of the Representor's hands.

29 Following the passing of the resolution, and the day before the hearing, a credible purchaser (whose identity had been disclosed confidentially to the members of the Court) had emerged with an offer in the sum of €19.5 million, enforcing the need for the Representor to be able to move quickly should terms be agreed. As a consequence of this, the Representor passed a further resolution on the day of the hearing, increasing the floor price to €19 million.

Role of the Court

30 The Court was being asked to bless the decision of the Representor of 25 th October, 2017, as being a momentous decision within the second category of cases enunciated by Walker J in *Public Trustee v Cooper* [2001] WTLR 903 as follows:-

> ***"(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."

31 No doubt has been cast upon the power of the Representor under the provisions of the J Trust and through its wholly owned BVI company, to procure the sale of the country house, and there is equally no doubt that the decision to sell the country house is momentous, both financially and, on the part of the settlor and the elder son, emotionally.

32 It was held in the case of *In re S Settlement* [2001] JLR Note 37 that the Court should ask itself three questions, when asked to give directions in so-called ***"momentous decision"*** cases:-

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

33 There is no allegation that the Representor was acting in bad faith or that its decision was vitiated by any actual or potential conflict of interest, and so we were concerned essentially with the second question, namely whether the decision was one at which a reasonable trustee, properly instructed, could have arrived.

34 The J Trust is, of course, governed by Bermudan law, but it is clear from the decision of the Bermudan Supreme Court in *Re the Thyssen-Bornemisza Continuity Trust* [2002] 5 ITELR 340 that both jurisdictions follow the principles laid down in *Public Trustee v Cooper* and therefore have the same approach to applications of this kind.

35 There was no surrender of discretion, and we bore in mind the guidance on the role of the Court (guidance relevant, we suggest, to the courts in Jersey and Bermuda) given in Lewin on Trusts 18th edition at paragraph 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 as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

36 The decision of the Representor that the country house should be sold was supported by the daughter and by the younger son. The decision was opposed by the elder son. Although the settlor is excluded from benefit, we were aware of his opposition to the sale of the country house and took that into account.

Submissions of the elder son

37 We take each of the contentions of Advocate Angus as to why the Court should not bless the Representor's decision and our response thereto in turn.

Timing and filing of bundles

38 The representor had filed its three bundles two days prior to the hearing in accordance with practice direction RC 13/1, but the Court had requested the profession that in more complex cases where the relevant material comprises between three and six bundles, they should be provided at least one working week before the hearing takes place. As a consequence, Advocate Angus said that the elder son had not had a proper opportunity to consider the application, his position, and perhaps engage in fuller dialogue with the Representor.

39 Advocate Renouf pointed out that of the three bundles filed, two related to the previous hearing on the 10 th July, 2017, provided to the Court by way of background, and so were well known to the elder son. There was only one bundle filed in relation to this hearing.

40 Furthermore, the elder son had known since at least the hearing before the M Court on 3 rd October, 2017, that the Representor would be applying to this Court on 31 st October, 2017, for it to bless the sale of the country house, and had plenty of time therefore to marshal any arguments he may have to oppose such a course. Indeed, it was inherent in the Court's

blessing the decision to market the country house on 10 th July, 2017, that a sale would be likely to follow.

41 We declined to grant an adjournment on this account.

Representation of beneficiaries

42 Advocate Angus pointed out that only the adult beneficiaries had been convened to the Representor's application. The class of beneficiaries of the J Trust included all the children of the settlor, and their spouses, widows, widowers, children and remoter issue. We were told that the daughter is married, with three minor children, and that neither the elder son nor the younger son was married or had children.

43 As this is a momentous decision, which the Representor seeks to have blessed, Advocate Angus submitted that the daughter's husband should have been convened and a lawyer appointed to represent her minor children and the unborn and unascertained beneficiaries.

44 It is not always the practice of the Court to convene all of the beneficiaries to an application for directions. As Sir Philip Bailhache, then Deputy Bailiff, said in the case of *In the matter of A Settlement* [1994] JLR 139:-

> ***"The court agrees that it has a discretion to permit the joinder of one or more beneficiaries as parties to applications for directions made by trustees under art. 47 of the Law and proposes to exercise its jurisdiction in favour of the beneficiaries in this case.*** The court is not, however, prepared to go so far as to decree that as a matter of practice the beneficiaries should always be joined as parties to such applications. Much will depend upon the circumstances the proposed application. It is true that the beneficiaries will usually be interested in the outcome of an application for directions; and the court would be surprised if the trustees did not generally take it upon ***themselves to consult with, or at least to apprise, the principal beneficiaries of an intended application to the court under art. 47 of the Law.*** If trustees were aware of any dissenting views amongst the beneficiaries they would, of course, have a duty to draw such views to the attention of the court. … It would seem desirable, therefore, that a trustee should take steps to join any beneficiary who had expressed dissenting views or indeed who might be adversely affected by the proposed order."

45 The question of representation had not been raised by the elder son at the application on 10 th July, 2017. Advocate Renouf had asked the Court to convene the adult beneficiaries only, because he said the Court would have before it both the views of the Representor, the daughter and the younger son, all of whom supported the orders being sought and the views of the elder son and the settlor, who opposed the orders.

46 In our view, it was not in the interests of the trust estate for further parties to be convened for the following reasons:-

(i) It would inevitably entail an adjournment and the time constraints militated against any further delay.

(ii) The Court had before it the views of the elder son, who was opposed to the application, and it was unlikely that anyone else could have added to the arguments strenuously put forward on his behalf.

(iii) The trusts are illiquid and there are no funds available to meet the costs of any lawyer appointed to represent the minor, unborn and unascertained beneficiaries. Furthermore, because of the polarisation within the family, it might not be possible for one lawyer to represent all of them.

Improper exercise of discretion

47 Advocate Angus argued that the decision to make what he described as a theoretical sale at a future date was fundamentally flawed, and to bless such a decision was not a proper exercise of the Court's discretion under Article 51 of the Trusts Law. The existence of what he described as the anonymous offer, some €2 million greater than the floor price, rendered it all the more improper, given how much greater a price was apparently, although not conclusively, achievable. Bearing in mind that the need for the Court to be cautious in its approach, he said there must always be a concrete proposal put forward by the trustee to be blessed, with the background to and rationale of the proposal fully presented for scrutiny. Where the application falls short of that standard, the trustee should be refused relief, on the basis that the Court will necessarily be left in doubt as to the propriety of the underlying proposal.

48 Furthermore, he argued that the decision was flawed for the following reasons:-

(i) Timing – it was impossible to say when the sale would be concluded.

(ii) Price is only one element of a sale. There will be other terms which the floor price takes no account of, and for which the representor seeks immunity.

(iii) The fact that there has been an offer of €19 million cast doubt on the propriety of the one ascertainable element of the decision, namely the floor price.

(iv) In essence, the Court will be doing no more than blessing the continuation of the status quo. The intention to sell is inherent in the marketing of the country house, and in reality, the Court is being asked to bless a price, and not a momentous decision.

An application involving such imponderables amounts, he said, to an abuse of the Court's jurisdiction under Article 51 of the Trusts Law.

49 In our view, it was necessary to take into account the commercial realities faced by the Representor:-

(i) This was a substantial asset, the market for which was necessarily limited, and ordinarily it would take time to sell at the optimum price.

(ii) There were substantial liabilities, with £11.5 million becoming due on 21 st December, 2017, a looming deadline. The possibility of foreclosure and a forced sale would be calamitous for the beneficiaries. Even if there was no immediate foreclosure, the inability of the Representor to pay the lender the sums due on 21 st December, 2017, could render the J Trust insolvent on the cash-flow basis, with all of the implications that would flow from that.

(iii) It was important that if an offer was received, the Representor should be in a position to react to it quickly and consolidate a sale. There were real practical difficulties in making any negotiated sale subject to the approval of the Court, in terms of getting before the Court within a short timescale (leaving aside the issue of appeals), difficulties compounded in this case by the existence of proceedings in Bermuda and the M Court. Such hurdles could well deter any prospective buyers.

(iv) A decision that the country house should be sold, blessed by the Court, would enable the Representor to show the lenders that it had a viable plan to reduce the indebtedness and that it was taking decisive action.

50 Advocate Angus argued that the decision was effectively a decision to sell at €17 million (now €19 million) and the Representor would be relieved of its duty to obtain the best price obtainable above that figure, but the resolution makes it clear that the Representor would procure the directors of the BVI company to enter into an agreement to sell “for the best price the directors of the company consider obtainable in excess of €17 million” (now €19 million) and so the Representor is not relieved of its duty to do so. No doubt the Representor and the directors of the underlying company will be guided by the advice of the agents as to the best price obtainable in the current market.

51 There was nothing theoretical, in our view, about the decision of the Representor. Faced with this looming deadline of the 21 st December, 2017, the key decision was whether these extensive liabilities should be discharged by a refinancing or by way of the sale of the country house. The Representor, for sound commercial reasons, decided to address the issue of its liabilities as trustee by a sale at the best price above the floor price.

52 It was an important decision, firstly because it showed how the Representor intended to deal with this indebtedness and secondly, because it demonstrated to the lenders that the Representor had a viable plan to reduce that indebtedness.

53 The blessing of that decision did not give the Representor carte blanche to sell on any

terms provided the consideration exceeded the floor price of €19 million. It remained under a duty to obtain the best price over €19 million and furthermore it remained accountable to the beneficiaries for all of the other terms it agreed with any purchaser and generally for its conduct of the sale in their best interests.

54 In the view of the Court, the Representor was acting responsibly in very difficult circumstances. Its decision that the country house should be sold was both rational and honest and one which any reasonable trustee properly instructed could have arrived at. It was a decision that merited the support of the Court.

Fettering of trustee's discretion

55 Advocate Angus submitted that the Court could not bless a decision by a trustee where that is a decision to fetter its own discretion. He referred to this passage from Lewin 19th edition at paragraph 29–227:-

> ***"When the power is fiduciary, the donee must exercise his judgment according to the circumstances as they exist at the time: he cannot anticipate the arrival of the proper time by affecting to release or not to exercise it or by pledging himself beforehand as to the mode in which the power shall be exercised in the future.*** Any form of undertaking as to the way in which the power will be exercised in future is ineffective."

56 In his view, the Representor was seeking a blessing of a fettering of its discretion. The Representor wished now to bind itself to the floor price and by so doing was effectively "pledging itself beforehand as to the mode in which [a] power will be exercised in the future." Seeking a blessing to sell at a particular sale price now, he said, fetters any discretion (and indeed duty) to consider what may be different price parameters for a sale in, say, six months' time.

57 We did not agree that the Representor, by making this decision, was fettering the way in which it would exercise its powers in the future.

58 The Representor did not bind itself to sell the country house. The resolution was not expressed as being irrevocable in any way. The Representor retained the ability to pass further resolutions, for example not to sell at all if viable re-financing became available, or to sell at a price below €17 million (now €19 million) if the market deteriorated. The Representor's powers remained wholly unfettered.

Re-financing proposal

59 Advocate Angus tabled at the hearing a letter from the elder son dated 30 th October, 2017,

containing a Formal Term Sheet from L Management, which had been approved by the L Investment Committee. It is a complex proposal, which will need considerable elaboration, but our initial understanding (which may well be incorrect), is that:-

(i) A new special purpose vehicle (defined as “the Lender”) will be formed, which will act as lender of up to £40 million sterling to all four family trusts to replace all of the existing indebtedness, on a term of three to five years at three months LIBOR plus 2.5% (an improvement on the rates of interest currently paid).

(ii) The Lender will hold the consolidated assets of all four trusts (estimated by the elder son to be valued at £130 million against the Representor's estimate of £85 million) which will be pooled with some US$175 million provided by a cell of L Mutual PCC (defined as “the Provider”). It would seem that all of these pooled assets will then be invested/traded to provide a return.

(iii) The Provider and the four trusts will subscribe for shares in the Lender which can be redeemed.

60 There were conditions attached to the proposal as follows:-

(i) The Representor will confirm an exclusive right for the Lender to acquire the country house for €20 million, formal contracts to be drawn up immediately.

(ii) Upon settlement of the arrangements, the Representor will immediately retire as trustee, to be replaced by a trustee agreed by the Lender and the Provider.

(iii) From the date of the Formal Term Sheet (namely 30 th October, 2017,) no professional fees will be paid without the agreement of the Lender.

(iv) From the date of the Formal Term Sheet, no trust assets will be sold without the consent of the Provider and the Lender.

61 In the short time available, the directors of the Representor had not had time to consider this proposal, but undertook to do so by the end of that week. We reminded ourselves that the only application before us was that of the Representor to bless its decision that the country house should be sold; there was no application before us in relation to this refinancing proposal. It had been tabled for consideration by the Representor and as a reason for the Court not blessing the decision to sell. We agreed with Advocate Renouf that its tabling did not constitute a reason not to bless the decision to sell. A sale could proceed in favour of the Lender for €20 million, if it was in the interests of the beneficiaries to do so.

62 Bearing in mind the orders made on the 10 th July, 2017, (see paragraph 15 above), it would not be possible for the Representor to comply with the condition that it should resign as trustee without a further order of the Court.

63 The proposal could only be sent to the daughter and younger son on the day of the

hearing. In his covering e-mail, Mr K described it as *"another odd/flaky re-financing proposal"* from the elder son, which we think is regrettable, but in any event they need time to consider the proposal carefully. It is a proposal which, if implemented, could have profound implications for the assets held within the four family trusts and on which they may wish to seek legal advice.

64 In conclusion, and for all these reasons, we blessed the decision of the Representor that the country house should be sold.