

# The Representation of Apex Financial Services (Trustees) Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Deputy Bailiff
<b>Judgment Date:</b>	08 November 2022
<b>Neutral Citation:</b>	[2022] JRC 243
<b>Court:</b>	Royal Court

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## Text

In the Matter of the Representation of Apex Financial Services (Trustees) Limited  
And in the Matter of the Elephant Trust  
And in the Matter of the Trusts (Jersey) Law 1984 (As Amended)

[2022] JRC 243

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Averty and Cornish

ROYAL COURT

(Samedi)

Trust — reasons for the orders made.

## Authorities

Trusts (Jersey) Law 1984.

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*Kan v HSBC International Trustee Limited* [\[2015\] JCA 109](#).

**Advocate A. Kistler for the Trustee.**

**Advocate C. J. Scholefield for the adult children.**

Deputy Bailiff

**THE**

- 1 On 10 October 2022, we made various orders in this matter. We now give reasons for making those orders.
- 2 Apex Financial Services (Trustees) Limited (“the Trustee”) is Trustee of the Elephant Trust (the name of the trust has been changed for publication).
- 3 The Trust was established on 4 April 2008 by the settlor for the benefit of his then (now former) wife, their issue and remoter legitimate issue. They have four children all of whom are now adults. Three of the four children have young children of their own, all of whom are minors. The minors are all beneficiaries, save one child born out of wedlock.
- 4 The Trust is governed by Jersey law, administered in Jersey and the Trustee is a Jersey company resident in Jersey.
- 5 The settlor is an extremely successful businessman and the assets settled on trust derive from his business activities. Shares in a company founded by the settlor were settled on the Trust in order to take advantage of a low effective rate of UK capital gains tax by crystallising a capital gain prior to 5 April 2008.
- 6 The settlor and his wife separated in 2014 and are now divorced. In 2014, tax advice was given to the effect that it was appropriate for a new, separate, discretionary trust to be established for the benefit of the wife and her children. In reliance upon that advice, the Trustee settled a new discretionary trust for the wife for the benefit for the wife and her children in June 2014 in respect of certain segments of a bond which held the shares which were (and are) the principal assets of the Trust. The Trust has acquired assets as a result of borrowing secured on the bond and the Trustee has permitted sums to be withdrawn from the bond.
- 7 The advice which led to the 2014 appointment was incorrect and in 2018 the Royal Court made declarations to the effect that the 2014 appointment and subsequent and consequential transactions were void and of no effect, and that the decision taken at the time to exclude the wife from benefit under the Trust was voidable and no effect under

Article 47G of the Trusts (Jersey) Law 1984 ("the Law"). The consequence of these orders was to restore the Trust to its status prior to the creation of the new Trust in favour of the wife and the 2014 appointment and consequential transactions.

- 8 It was subsequently decided in 2018 that there would be advantages for a substantial distribution to be made from the Trust to the wife, who was no longer a UK tax resident. The settlor and the wife provided a letter of request to the Trustees in October 2018 setting out their proposals in detail and providing certain important information about the financial needs and resources of their four children. At that time the estimated net total value of the Trust was \$223 million based on the market price of the shares in the company held in the bond. Just over half the assets of the Trust were to be appointed to the wife, totalling approximately \$118 million — \$115 million and a property in which she lives. After payment of various loans secured on the Trust assets, the unencumbered value of the remaining segments of the bond, after the 2018 appointment, held for the beneficiaries of the Trust including the settlor and his wife, was approximately \$110 million.
- 9 The Trustee was satisfied that the children would be substantially catered for by gifts from parents and the assets remaining in the Trust. Furthermore, in any event, the children had already received and have continued to receive significant assets in their own right. The Trustee regarded the decision to make the 2018 appointment of the wife as momentous and received the Royal Court's approval to make the same in November 2018.
- 10 Earlier this year, the settlor informed the Trustee that he considered that the Trust was no longer fit for its original purpose and expressed the wish the Trustee give consideration to terminating the Trust and distributing all remaining assets to him.
- 11 The total value of the Trust assets are as at (June 2022) \$166 million contained in the bond segments. In December 2020, a Guernsey company beneficially owned by the wife made available to the Trustee a loan facility in the sum of approximately \$53 million. The purpose of the loan was to make funds available for the Trustee to repay a loan previously made to the Trustees. The loan is secured against certain bond segments and any withdrawals from the bond require the consent of the Guernsey company (in effect the wife) as lender. Accordingly, the net value of the Trust property is approximately \$113 million on the basis of the assets of \$166 million and liabilities of \$53 million.
- 12 The settlor has sworn an affidavit in which he exhibits the letter he wrote to the Trustee in August 2022 and expands upon the reasons for inviting the Trustee to terminate the Trust. In summary, when the settlor set up the Trust in 2008 he was a UK resident and the Trust was an effective vehicle to provide for the future needs of his family in a tax efficient manner. However, both the circumstances of himself and his family have changed significantly since then and his personal wealth has significantly increased.
- 13 The Trust is no longer an appropriate vehicle to hold the family assets. Firstly, the settlor

takes the view that he could obtain better investment returns outside the Trust, noting that the investment returns generated from the assets held within the bond are lower than he has achieved personally. Secondly, the costs of administering and maintaining the Trust have increased significantly, partly owing to the need for the Trustee to keep abreast of the increasingly complex legal and taxation landscape. The settlor wishes the Trustee to distribute the assets to him as he takes the view (which is not challenged) that his former wife has been adequately catered for, that the four children are the sole heirs of his estate and that of his former wife and accordingly can be expected to inherit substantial sums in due course. Of course, he may change his mind and the children's financial security will be less certain once these assets leave the Trust and are owned by the settlor personally. Nonetheless, the four children have been convened to this Representation and none object to the proposal.

- 14 Thirdly, the settlor is no longer a UK tax resident and has an opportunity now to unwind the Trust without crystallising a significant liability to UK tax. Both the Trustee and the settlor have received tax advice which advises that now the settlor is a UK non-resident there is an opportunity to dissolve the bond and the Trust without a charge to UK tax. There are various mechanisms by which the Trust assets can be transferred to the settlor without UK tax consequences. The settlor has expressed a preference that the Trustee surrenders the bond segments in return for the underlying investments and the Trustee distributes them to him in specie. His children, who are UK tax residents, would be liable to significant UK taxes on receipt of a distribution from the Trust which would or may not be the case on receipt of gifts during the settlor's lifetime or on his death.
- 15 Fourthly, the four children are all now financially independent and have no immediate need for additional funding. All have or are to receive in excess of \$10 million from their parents and we have seen summaries of their extent of their assets which it is not necessary to set out.
- 16 Finally, as regards the wife, she received distributions and appointments worth approximately \$115 million in 2018 she subsequently loaned \$53 million to the Trust and will receive repayment of this sum before termination of the Trust.
- 17 It is not necessary to set out the precise steps terms by which the distribution will be achieved. The loan to the Guernsey company will be repaid. Subsequently the Trustee will surrender the segments of the bond in return for the underlying assets represented by those segments and thereafter a distribution of those assets will be made to the settlor. This is all in accordance with tax advice from Deloitte.
- 18 We are satisfied that this is a momentous decision for the Trustee to take and this application was accordingly warranted. We read the letters from the children in which they explain that they understand the Trustee's in principle decision and the implications for them in that (*inter alia*) they will never receive distributions from the Trust or have the right that they currently enjoy to information regarding the assets held in the Trust They have had

explained to them their father's reasons for wishing to have the assets placed in Trust returned to him and they say that in their view “ *he is not acting capriciously*”.

- 19 They say that “ *like almost all fathers we believe that he has our well being as his children close to his heart and this will remain the case whatever the future may hold*. Future lifetime gifts from him to us may be made but equally we understand there is no guarantee this will happen.” They go on to say that if their father chooses to make gifts to persons and causes other than themselves they would not object owing to his previous generosity to them, and refer in particular to their father's track record of making generous gifts to educational bodies.
- 20 The four children were appointed to represent their respective issue and unborn issue and do not object on behalf of those persons to the application. In respect of those persons the children say they have been appointed to represent their issue and the unborn in response to previous Court applications and observe that, in the same way that they believe their father has their well being as their children close to his heart, the Court should accept that he has the well being of their respective issue close to his heart as do they; that their issue may in due course benefit from both their grandfather and grandmother (i.e. the children's parents) and that the gifts they have received to date may in the natural order of things likely benefit their issue too. The wife has also written a letter in support of the application made by the Trustee.
- 21 The Trustee requests that the settlor provide it with contractual indemnities in relation to any claims or liabilities that may arise in respect of the appointment for which the Trustee would have been entitled to be indemnified had it continued as Trustee pursuant to Article 43A of the Law. The Trustee, quite properly in our view, considers that contractual indemnities in respect of any potential claims or liabilities that have been properly incurred would constitute reasonable security in the circumstances of this matter.
- 22 In *Kan v HSBC International Trustee Limited* [\[2015\] JCA 109](#), the Court of Appeal set out the well established legal test to be applied when the Court is being asked to approve a momentous decision by trustees:

**“14. Where a trustee has made a momentous decision, that is a decision of real importance for the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction. As explained in *Re S Settlement* [2001] JLR N 37, the court must satisfy itself (i) first, that the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England:- see *Public Trustee v Cooper* [\[2001\] WTLR 901](#).”**

23 As to the procedure to be followed, the Court of Appeal said:

***“18. When the court is to give approval for a momentous decision the court needs to be satisfied as to the rationality of the decision; the lengths to which the court must go in examining the process by which the trustee arrived at the decision must depend upon the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine judgment in the face of competing considerations; in others the decision may be obvious. In the former cases the quality of the decision-making process will be more important than the latter. For that reason, we do not consider that the additional requirement for which Madam Kan contends should be introduced to the law of this jurisdiction, even if it were to be adopted in England .***

***19. That is not to suggest that the court should take a lax approach, or that it should approve any trustee's applications without due consideration. There is a threshold that must be crossed: the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. As was pointed out in Re Y Trust [\[2011\] JLR 464](#) (citing with approval Lewin on Trusts (18th ed.), at paragraph 29–299) (a similar approach is taken in Guernsey: see Re The Trusts (Guernsey) Law 2007 and [AAA] Children's Trust, Royal Court, 8th January 2014 [2015] WTLR 683) the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed. Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the test itself. Furthermore, each case will need to be decided on its own facts, and the degree of detail that is required from a trustee cannot be uniform in all circumstances. In some cases, a trustee's decision may come out of the blue, and if so it may require both the beneficiaries and the court to be given the background and the context in considerable detail: in other cases, such as this, a trustee's decision may emerge from a situation that is well known to the interested parties, and that is likely to have an impact on the degree of detail required from the trustee by the court.”***

## Our decision

24 We have already held that this is a momentous decision. Secondly, the Trustee has the

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necessary power pursuant to Clause 5 of the Trust to make the proposed appointment.

- 25 Thirdly, we are satisfied that the Trustee has carefully considered the relevant factors in this case. These are the settlor's requests and his reasons for that request; the tax advice received; the circumstances, needs and wishes of the beneficiaries. Following consideration of these matters, the Trustee has formed an opinion in good faith that it is desirable and proper for it to give effect to the proposed appointment.
- 26 Fourthly, the decision is one which a reasonable trustee properly instructed could have made having regard to the circumstances and wishes of the settlor, his wife, the four children and the children on behalf of those they were appointed to represent. We have set out the detail of the immediate background to the proposed appointment and do not repeat it.
- 27 Finally, the in principle decision of the Trustee to make the proposed appointment is not vitiated by actual or potential conflicts of interest which may have otherwise affected the proposed decision.
- 28 Accordingly we made the Order and granted the prayer to the Representation, thereby approving the exercise by the Trustee of its powers to repay the loan to the Guernsey company and to make the proposed appointment to the Settlor