V Trustees Ltd (formerly G Trustees Ltd) v Mr A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE., Jurats Christensen, Dulake
Judgment Date:	21 October 2020
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Text

In the Matter of the Representation of V Trustees Limited (Formerly G Trustees Limited)

and

In the Matter of the K and N Trusts

and

In the Matter of Article 51 of the Trusts (Jersey) Law 1985 (As Amended)

Between
V Trustees Limited (formerly G Trustees Limited)
Representor
and
Mr A
First Respondent
Mrs C
Second Respondent
Mr D
Third Respondent
Mr E
Fourth Respondent

[2020] JRC 220

Before:

J. A. Clyde-Smith OBE., Commissioner, and Jurats Christensen and Dulake

ROYAL COURT

(Samedi)

Trust — connected trusts.

Authorities

Representation of V Trustees Limited (formerly G Trustees) re K and N Trusts [2019] JRC 249

H & J Trusts [2017] (2) JLR 187

In the matter of the H & J Trusts [2017] JRC 189

In the matter of the K & N Trusts [2019] JRC 249.

Trusts (Jersey) Law 1984

In the matter of the E Trust [2017] 257 (In the Supreme Court of Bermuda)

In re the T Settlement [2002] JRC 33

Lewin on Trusts 20th Edition

Public Trustee v Cooper 20th December 1999 (unreported).

Re the Thyssen-Bornemisza Continuity Trust; Thybo-Trustees Ltd and another v Baron Thyssen-Bornemisza-de Kaszon and others 5 ITELR 340.

Re S Settlement [2001] JLR Note 37

In re B Settlement [2010] JLR 653

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

Mr A **appeared personally**.

Advocate S. C. Thomas **for the Second Respondent**.

Advocate R. S. Christie **for the Third Respondent**.

THE COMMISSIONER:

1 The Representor ("V Trustees Limited") comes to Court as trustee of two trusts, namely The K and the N Trusts, seeking to surrender its discretion in relation to proposed transactions between the two trusts in which it is conflicted.

2 There have been a number of previous applications by V Trustees Limited to the Court concerned in the main with the sale of a substantial property in Europe owned through a wholly owned BVI company as an asset of the N Trust (we will refer to it as the "Country House") and certain artwork; that sale has now taken place and the issue arises as to how the sale proceeds should be dealt with as between the two trusts. The previous relevant judgments are In the matter of the *H & J Trusts* [2017] (2) JLR 187, In the matter of the *H & J Trusts* [2017] JRC 189 and *In the matter of the K & N Trusts* [2019] JRC 249.

3 Although both trusts are governed by Bermudan law, V Trustees Limited is resident in Jersey and in the first of the above judgments, the Court held that it had jurisdiction over V Trustees Limited in its capacity as trustee of these two trusts, pursuant to Article 5 of the Trusts (Jersey) Law 1984 ("the Trusts Law") and jurisdiction to give V Trustees Limited directions pursuant to Article 51 of the Trusts Law. The assumption by this Court of jurisdiction over V Trustees Limited in its capacity as trustee of these two trusts was recognised by the Supreme Court of Bermuda in its decision of 30th November 2017 (*In the matter of the E Trust* [2017] 257).

The Trusts

4 The K Trust was established by the fourth Respondent, ("Mr A"), on 18 th February, 1988 and funds he settled were used to acquire a stake in his business Company A. It was a fully discretionary trust in favour of his three children, the first Respondent ("Mr A"), the second Respondent ("Mrs C") and the third Respondent ("Mr D") and any other children of Mr E born during the trust period (none have been born).

5 On the 8 th October, 1996, the trust fund was appointed by predecessor trustees upon Accumulation and Maintenance trusts for the three children under which each of them had a presumptive equal share of the fund at 25, but prior to them reaching the age of 25, that interest was defeasible by subsequent overriding appointments, which could be revocable. There was no interest in possession and the income could only be used for maintenance.

6 On 10 th October, 1996, the K Trust's stake in Company A was sold for £48.3 million, the sale consideration comprising a mixture of cash and loan notes.

7 New rules for the taxation of capital gains realised by non-UK resident trustees where the

Mr E remained UK resident were announced in the UK budget of March 1998 and were brought into effect on 5 th April, 1999, which rules would have generated a liability for the Mr E arising out of that sale of some £7.2 million.

8 Prior to the introduction of these new rules, a sequence of appointments under Bermudan law were made by the predecessor trustees, the effect of which has been carefully analysed by English counsel, Mr Marcus Flavin. Bermudan law tends to follow English law and although not qualified under Bermudan Law, each of his opinions has been confirmed as correct as a matter of Bermudan law by Mr Michael Mello, QC, who was called to the Bermudan Bar in 1973. Mr Flavin's analysis has not been challenged by any of the parties, save in one respect, to which we will refer later.

9 We are not going to track each stage of the re-structuring that took place, which was complex and entirely tax driven, as we are concerned with the end result. In essence, the intention was for the trust fund of the K Trust to be split into two parts, the first part comprising one third of the assets by value to be retained in the K Trust essentially for the benefit of the Mr D and the second part comprising two-thirds of the assets by value being appointed to the N Trust established by the Mr E on 1 st April, 1999, essentially for the benefit of the Mrs C and Mr A. The assets were divided in specie.

10 The current position in respect of the K Trust is that the trust fund is held on trust as to income to the Mr D for his life and although he has no right to demand capital, he is presumptively entitled to the whole fund. He is effectively the sole beneficiary. Mr A and Mrs C have been irrevocably excluded.

11 When first established the N Trust had as its principal beneficiaries Mrs C and Mr A and members of the appointed class (as defined) included all of the children of the Mr E (so including Mr D) and their wives, husbands, widows, widowers, children and remoter issue. There are no other beneficiaries and there is no power to add them. Currently each of Mrs C and Mr A have a defeasible interest in possession of one half of the trust fund, with powers of advancement and subject thereto, the capital and income are held for their children at 25. Their interests are subject to an overriding power of appointment in conventional wide terms.

12 Mr E and his wife are excluded from benefitting from both trusts. V Trustees Limited was appointed trustee of both trusts on 4 th April, 2013.

13 As at 30 th April, 1999, the K Trust and the N Trust had a combined value of £53.6 million, being £18.7 million for the K Trust and £34.3 million for the N Trust respectively and broadly reflecting the one third/two third split.

14 Mr Q, an officer of V Trustees Limited, explains in his 6 th affidavit that the predecessor

trustees were active in acquiring real estate in the UK and overseas, fine art and private equity investments, in the main from Mr E. Mr E had acquired the Country House in 1990 through his UK service company and this was sold to the N Trust in September 1999. Another acquisition by the N Trust was the [Redacted] Estate in the UK comprising 3,000 acres.

15 These investments by the N Trust were financed by a combination of trust capital and bank debt with the investments generally being illiquid and non income producing. Successive re-financing saw increasing borrowing to meet running costs and in particular, the expenditure relating to the Country House, so that by 2010, the predecessor trustees of the N Trust had borrowed £25.6 million.

Sale of Country House and artworks

16 The history of the attempts by V Trustees Limited to sell the Country House from 2017 is set out in the earlier judgments, but to summarise:

(i) In addition to servicing the substantial third-party debts secured over the [Redacted] Estate and the Country House, the running expenses of the Country House were significant – to the order of £500,000 a year. It had been let to Mr E at an annual rental of €100,000 (its only income) in respect of which arrears of some €500,000 had been built up as at 5 th April 2017.

(ii) At a family meeting in July 2016, Mr Q set out the financial position in relation to the family trusts, pointing out that although there were substantial assets, the true position was that the trusts were unable to service the borrowings out of income, and the greater part of the assets were not suitable for low cost bank lending arrangements, which meant that trust borrowings were expensive.

(iii) Following numerous unsuccessful efforts to find alternative long-term financing and many suggestions from Mr E and Mr A as to the potential sources of alternative finance from which nothing concrete ever emerged, it was concluded, following discussions, that the Country House would have to be sold and this was acknowledged by Mr E by letter dated 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.

(iv) No such re-financing was achieved by that time, but once it became clear that V Trustees Limited intended to proceed with the marketing and sale of the Country House on a controlled basis, Mr E and Mr A wrote to it, 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 they asserted was prepared to pursue their alternative plan, a plan which V Trustees Limited regarded as financially suicidal for the family. This created divisions within the family in that Mrs C and Mr D opposed any change of trustee and supported the proposal that the Country House should be

sold.

(v) On 5 th October, 2017, the Court blessed the decision of V Trustees Limited to market the Country House for sale and to remain as trustee and made this order:

> ***"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 [Mr E] 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 their appointed agents for that purpose."

(vi) In defiance of the Court's order, Mr E and/or Mr A instructed the staff at the Country House to frustrate any attempts to market it. They issued proceedings in Bermuda for the removal of V Trustees Limited and for the setting aside of the decision to market the Country House. The Supreme Court of Bermuda declined to exercise jurisdiction.

(vii) Mr A issued proceedings in Europe, seeking an injunction to prevent the sale of the Country House. After a stay to allow for mediation, those proceedings were eventually struck out.

(viii) On 9 th November, 2017, the Court blessed the decision of V Trustees Limited to sell the Country House, a decision that was vigorously opposed by Mr A, who was legally represented.

(ix) In or about March 2018, contracts were exchanged for the sale of the Country House under which vacant possession had to be given by the end of August 2018.

(x) On 23 rd May, 2018, V Trustees Limited, through its wholly owned company which owned the Country House, terminated Mr E's tenancy and peacefully recovered possession of the Country House, a legal consequence of which was that it became the employer of the 14 estate staff.

(xi) Mr E challenged the validity of the termination of the tenancy and sought re-possession of the Country House. V Trustees Limited, through its company, pre-emptively issued its own proceedings for judgment in the amount of the arrears of rental, a declaration that the tenancy had been terminated and a declaration that Mr E was not entitled to renew the tenancy of the Country House. It obtained judgment in the sum of €571,893 on 21 st November, 2018 and in due course, on 10 th September, 2019, was successful in obtaining declarations that Mr E was not entitled to seek renewal of the tenancy, that the tenancy had been validly terminated, that Mr E did not enjoy any rights to relief against forfeiture and that he had not established any legal right to occupation or possession of the Country House. That judgment is now being appealed by Mr E.

(xii) A necessary consequence of the delays brought about by these proceedings was

that the date for rendering up vacant possession of the Country House to the purchaser in August 2018 had passed and the sale could not be completed.

(xiii) As the Court noted in its judgment of 19th December, 2019, the financial position of the N Trust had now become dire and the Court blessed the decision of V Trustees Limited to proceed with the sale of the Country House to the same purchaser (who had taken over the debt due on it), together with certain artworks that he wished to acquire, and this for the reasons set out in that judgment (*Representation of V Trustees Limited (formerly G Trustees) re K and N Trusts* [2019] JRC 249). The Court said this at paragraph 30(i):

> ***"As long ago as 2017, it was clear that the Country House had to be sold and on 10th July 2017, the Court had ordered [Mr A] and [Mr E] to facilitate marketing.*** It is clear from the subsequent history that far from facilitating the process, they have done everything in their power to frustrate it. In particular, [Mr E's] claim to a tenancy of the Country House was the direct cause of [B Limited] being unable to grant the purchaser vacant possession in August 2018, which has led directly to the parlous position [B Limited] has now found itself in. We agree with Advocate Renouf that [Mr A] and [Mr E] have, by their conduct, brought [B Limited] to the brink of insolvency."

(xiv) The Court also said this at paragraph 37:

> ***"In the view of the Court, the Trustee has been prevented by [Mr E] from marketing and selling the Country House in an orderly manner, and that his actions, and those of [Mr A], were in fact inimical to the true interests of the trust estate."***

(xv) The sale of the Country House and the artworks was completed in December 2019. One consequence of Mr E's appeal before the European Court is that €1 million has been retained out of the purchase consideration and will be forfeited to the purchaser if V Trustees Limited is unable to conclude Mr E's claim to a new tenancy within 18 months of the sale completion, namely by May 2021.

(xvi) After repayment of loan principal and interest, the retention of €1 million and other costs and expenses, the net proceeds of sale amounted to €4,665,247. Of that, a further €2,521,049 was deducted in settlement of historic creditors, leaving a net balance of €2,144,198.

Other trusts

17 It is necessary to refer to two other connected trusts of which V Trustees Limited is not trustee. The P Settlement owns Property 1 comprising two flats, one occupied by Mr D and the other by his mother. All members of the family are beneficiaries. This property was valued in April 2015 at £3.85 million and it is charged in favour of the N Trust in the sum of £3.4 million.

18 The O Trust is a purpose trust, the prime purpose of which is cultural. There may be scope for C family members to benefit, but only at the termination of the trust. The assets of the O Trust comprise:

(i) Artworks and chattels valued at £3.7 million.

(ii) A private equity investment [Redacted] currently valued at £0.3 million. In his affidavit, Mr Q explains that he had no information as to the value of this investment until mid-May, 2020, when he was notified that the principal investor is re-structuring the investment and has placed a value on the company which provides an indicative value of the trust's holding of €12 million. There is no immediate prospect of an exit, but there is a belief that this investment has the potential to enable the O Trust to repay its debts or a substantial percentage of them in 5 years' time.

19 The O Trust has loans due to the K Trust in the sum of £14 million and to the N Trust in the sum of £1.4 million.

Current financial position of the K and N Trusts

20 We now turn to the current financial position of these two trusts, which we deal with on a consolidated basis. The assets of the K Trust comprise:

(i) A loan of £10.5 million due by the N Trust.

(ii) The loan of £14 million due by the O Trust.

(iii) Two residential properties known as Property 2, valued at £2 million in September 2016 and Property 3, valued at £350,000 as at September 2013, the former being currently let out and the latter uninhabitable.

(iv) Cash of £0.9 million (at trust level).

(v) A private equity investment and cash together valued at £1.2 million.

21 The consolidated balance sheet of the K Trust as at 5 th April, 2020, shows it as having net assets of £19.3 million.

22 The N Trust owns:

(i) The [Redacted] Estate with a current informally indicated value of £22 million.

(ii) A residential property known as [Property 4], valued in 2015 at £1.7 million and occupied by Mr E's brother, who has tenancy rights over it.

(iii) Chattels (silverware) valued at £1 million.

(iv) The €1 million retention on the sale of the Country House.

(v) A £3.4 million loan receivable from the P Settlement and charged over [Property 1].

(vi) A £1.4 million loan due by the O Trust.

(vii) £0.5 million in cash.

23 The N Trust has the following material liabilities:

(i) A loan of £12.5 million owed to Barclays Bank, which was renewed on 19 th March, 2020, for three years at an interest rate of 2.6% above the bank's base rate. The loan is secured by a legal charge over the [Redacted] Estate and a separate legal charge over [Property 4].

(ii) A loan due to the K Trust in the sum of £10.5 million, which is unsecured and bearing interest at 3.53%, compounding, representing the average cost of borrowing of the two trusts.

24 The consolidated balance sheet for the N Trust as at 5 th April, 2020, shows it as having net assets of £7.2 million, but that includes loans to Mr E, Mrs C and Mr A that may not be recoverable.

25 As can be seen, the financial position of the two trusts has, over time, more than reversed, with some one-fifth of the value now being held by the N Trust for the benefit of the Mrs C and Mr A and some four-fifths of the value being held by the K Trust for the benefit of Mr D.

26 A further exacerbating feature of this is that the Mr A has by his conduct and in support of his father's appeal, caused the N Trust additional costs which, according to the evidence of Mr Q set out in detail in his 6 th affidavit, amounts to some £9.4 million, comprising legal costs in three jurisdictions, third party financing costs caused by the delay in the sale of the Country House, lost opportunity costs of being unable to negotiate the sale of the artwork separately due to the delay, additional estate running costs due to the delay, the €1 million retention and the increased costs of administration.

Mr E

27 Mr E, who is not well, was declared bankrupt in the UK [Redacted] in 2020. He is known to owe £2.2 million to the P settlement and according to the affidavit of Mr Q, he has borrowed £3 million from [Redacted], personally guaranteed by Mr A. He has also been pursued for

non-payment of fees by his English lawyers Wedlake Bell. He has a liability to CGT in respect of a gain realised on the sale in May 2018 of Property 5 owned by the K Trust in the order of £595,000. It is thought that a sale of the [Redacted] Estate by the N Trust would crystallise a CGT liability for Mr E of approximately £2.6 million.

Counsel's advice on Bermudan Law

28 With a view to addressing the imbalances that have arisen between the K and N Trusts and the interests of the children, a number of questions were put to Mr Flavin (who we will refer to as “Counsel”) and with one exception, his conclusions as to the position under Bermudan law were not challenged by any of the parties. We gratefully adopt much of his wording and take them in turn.

Putting the Trusts back together

29 Counsel was asked to consider whether the K Trust could be *“decanted”* into the N Trust (or *vice versa*) in order to put the trusts back together. In short, he advised that theoretically it could under the statutory power of advancement in section 24 of the Bermuda Trustee Act, 1975, coupled with the power to revoke the 1996 appointment, so long as it preserved the exclusion of the Mrs C and Mr A from benefit from the fund, and also preserved the Mr D's vested interest (or had his consent), so it would have to remain a segregated sub-fund within the N Trust. V Trustees Limited would first have to irrevocably appoint a sub-fund within the N Trust from which Mrs C and Mr A and their children were excluded, with a life interest appointed to Mr D in that fund, and then exercise the power of advancement in K. As such, it was difficult to see to what practical difference as a matter of trust law any such exercise of the power could make, leaving aside the issue of any tax consequences. Unless there were significant advantages from an administrative point of view, he could see no real purpose in such an exercise and in so far as the reverse process was concerned, i.e. decanting the N Trust back into the K Trust, Mrs C and the Mr A are irrevocably excluded from benefiting from the K Trust.

30 Counsel noted that Mr E had indicated in August 2015 a hope that it would in due course be possible to weld the two trusts back together again, but in his view, it was not possible to do so and has not been since Mrs C and Mr A were excluded from the K Trust.

Rebalancing between the K and N Trusts

31 Given the financial position, equality between the three children would broadly speaking require the N Trust to have a net value twice that of the K Trust, as Mrs C and Mr A are the two principal beneficiaries of the N Trust and Mr D is (effectively) the sole principal beneficiary of the K Trust.

32 It was clear that Mrs C and Mr A could not be re-added as beneficiaries of the K Trust as they had been irrevocably excluded and nothing in the trust law of Bermuda would allow for that to be overridden. Mr D, by contrast, is a member of the appointed class of the N Trust and so funds could be appointed to him from that trust by use of the overriding powers of appointment in that fund, but obviously that would not assist, since it is the N Trust that is not as valuable as it would need to be to achieve equality.

Loans

33 Simply forgiving the indebtedness of the N Trust to the K Trust would mean that the net value of the N Trust would increase to approximately £17.7 million and that of the K Trust would decrease to approximately £8.8 million. V Trustees Limited had the power to forgive loans in both trusts, and specifically under Clause 17(e) of the First Schedule to the K Trust deed and doubtless under the general law of Bermuda. However, counsel advised that this administrative power is clearly one that V Trustees Limited had to use in accordance with its fundamental duties as trustee, and it has those duties as trustee of both trusts.

34 Whilst the reason for the separation of the funds between the two trusts appears to have been purely fiscally driven, the result was two trusts, each of which has to be dealt with on its own terms, otherwise the separation would have been a sham. The fact that administratively the N and K Trusts have been managed together with the trustees taking a holistic approach did not alter or override the fact that there are two separate trusts with different beneficiaries. Whilst Mr E evidently hoped that the separation could one day be undone, Counsel could not see any way in which that would be possible – if it had been left possible, the tax planning would not have worked. As trustee of the K Trust, V Trustees Limited has to act in the best interests of that fund as a whole, and he could not see how that could extend to forgiving the debt owed to that trust by the N Trust, given that the N Trust is in fact solvent.

35 Whilst it was true that relevant considerations can go beyond the purely financial, and maintaining good relationships within families, for instance, is a desirable thing and something to which trustees can properly have regard, he did not consider that such considerations could be sufficient reason to forgive a substantial inter-trust debt of this order. It could not be a proper use of a discretionary administrative power held by the trustee as trustee of one trust to use that power ultimately to benefit the beneficiaries of the other trust at the expense of the beneficiary of the first trust, and indeed, it seemed outside the purposes for which the power was given. Similar considerations would apply to a decision to forgive the debts due to either trust from the O Trust, which would have a far more severe impact on the K Trust than the N Trust. Although the O Trust appears to be balance sheet insolvent, it would be solvent if both debts to the K and N Trust were forgiven, and it was difficult to see why V Trustees Limited could properly forgive those debts. If the only reason to forgive those debts was to change the relative values of the K and N Trusts because the O Trust owes the K Trust considerably more than it does the N Trust, then that would undoubtedly be an improper use of the power; the power was not

given in either trust for the purpose of equalising the position between them.

36 Counsel therefore concluded that as a matter of Bermudan trust law, V Trustees Limited could not properly rebalance the assets of the two trusts by release of the inter-trust loan. Nor could he see that surrendering its discretion to the Court on this aspect would assist, as the Court would still only have the powers that the trustee has.

Other steps that could be taken to manage the indebtedness

37 In principle, the inter-trust loan could be settled in part by the transfer of assets, such as a stake in the [Redacted] Estate or the £3.4 million debt owed by the P Settlement. The problem with such an approach in the particular circumstances of this case is that the offer to settle or partly settle the debt by V Trustees Limited as trustee of the N Trust would be made to itself as trustee of the K Trust and a conflict between the trustee's interests and duties in its two different offices therefore arises. A Bermudan law trustee, as any other trustee, cannot properly act in such circumstances unless expressly empowered to do so and the trust deeds do not give such power. The N Trustee would be properly concerned to keep as much potential value in the N Trust as possible, and the K Trustee, contrary-wise, to get as much value into the K Trust as possible and since the assets are not simple cash, values will have to be ascribed to them.

38 As a matter of fact, it may well be commercially sensible for a given transaction to be made e.g. the transfer of some appropriate share of the [Redacted] Estate. In addition, the family relationship and the history of the trusts could be an additional reason why the trustee of the K Trust could properly agree to take an asset that should, one day, give a significant income stream, rather than cash now, where cash now would potentially result in the N Trust being unable to generate any income at all. But in these circumstances, anything of the sort could not be a genuine arms length transaction. The N Trust's commercial interests and those of the K Trust inevitably conflict when they have to ascribe values to the assets to be transferred in consideration of the debts. Doubtless it would be possible to obtain neutral, third party valuations, but he did not consider in these circumstances that this would be sufficient to deal with the conflict. Ultimately, V Trustees Limited is considering the step, because it wants to preserve liquidity in the N Trust, and that inevitably means it runs the risk of placing too much weight on the interests of the N Trust over those of the K Trust.

39 Mr D, as effective sole beneficiary of the K Trust, could of course consent to any such proposed transaction, but if he does not, then the proper course of action for V Trustees Limited would be to either resign from one or the other trust, or to surrender its discretion to the Court. The Court could then exercise the power in what it concluded was the best interests of both trusts and their beneficiaries.

40 Short of any transaction to compound or settle the debt whether made by the Court on a

surrender of discretion or with the consent of Mr D, the money remains due and owing, and if Mr D as effective sole beneficiary of the K Trust demands that it is repaid and the terms of the borrowing do not provide for later payment, then it must be repaid, or V Trustees Limited will be in breach of its duties as trustee of the K Trust.

Power to make an appointment in the N Trust

41 This issue was raised with Counsel in order to address the damage done to the N Trust by Mr A and to protect Mrs C from Mr A's conduct by the exercise of the V Trustees Limited overriding power of appointment over certain assets in her favour.

42 Counsel confirmed that the trustee of the N Trust had a wide overriding power of appointment which can be exercised taking into account all relevant matters, disregarding any irrelevant matters and always in accordance with the purpose for which the power was given. In Bermuda, as elsewhere, relevant matters include the position of potential beneficiaries, the history of the trust and the wishes of Mr E. The power must be exercised in accordance with the purpose for which it was given.

43 It was obviously relevant to note that the original transfer of funds to the N Trust was by definition intended to be for the benefit of Mrs C and Mr A, who were expressly described as the principal beneficiaries, but other factors may also be relevant. As a matter of Bermudan trust law, it can be a relevant consideration to be taken into account if one beneficiary has, by his or her inactions, caused loss to the trust fund, which could include non recovered litigation costs suffered by the trust fund, and it is a relevant consideration if a beneficiary is in serious financial difficulties. The second point cuts both ways. On the one hand, the serious need of a beneficiary for funds is clearly a relevant consideration tending towards encouraging the trustee to provide funds, but if, on the other hand, the beneficiary is insolvent (a concern in respect of Mr A), that would tend against making an appointment in his or her favour, as that would simply mean the funds appointed were swallowed up in the insolvency to no avail. The trust is there to benefit beneficiaries, not a trustee in bankruptcy or the creditors of the beneficiaries.

44 The wishes of the settlor were always a relevant consideration, but the weight given to those wishes in Bermudan law would be the same as in English law and, as far as Counsel was aware, under Jersey law. A trustee may properly conclude that a particular settlor's wishes could be given little weight as against other factors, particularly if, for instance, those wishes were based on an unreasonable animus against a particular beneficiary.

45 The fact that Mr E's actions over the last few years have caused loss to the trust fund is not, in Counsel's opinion, something that could be relevant in making or declining an appointment in favour of the beneficiary who had tacitly supported him in those actions. It is only if the loss can be said to flow in part from the actions of the beneficiary himself i.e. if he had taken some active step in support of those actions that he considered it could be a

relevant consideration. Thus, for example, where a beneficiary had himself been a party to legal proceedings which had caused damage to the trust assets or had personally become heavily involved in such proceedings (beyond being a witness) or directly or indirectly funded them by loans or guarantees, or had in some other way personally caused damage to the trust assets, the trustee could properly take that into account. Any such matter would have to be clearly established as a matter of fact.

Liability to reimburse the Settlor for his liability to UK CGT

46 Counsel was asked to advise on the basis of the CGT liability that had arisen on the sale of the Property 5 owned by the K Trust. A statutory indemnity had been contained in Schedule 5 paragraph 6 sub-paragraph (2) of the UK Taxation of Chargeable Gains Act 1992. This was an attempt by English law to impose on trustees who are out of the jurisdiction a liability to indemnify the settlor. The effectiveness of this provision had remained largely untested and Counsel was not aware of any relevant case in Bermuda. He did refer to the Jersey case of *In re the T Settlement* [2002] JRC 33, where Commissioner Hamon expressed some doubt whether the Jersey Court could give effect to an English statutory right of reimbursement against a Jersey trustee.

47 Whilst there was power within the trust deed (Regulation 11) to reimburse such taxes, Clause 23 provided:

> *"Notwithstanding anything herein elsewhere contained no part of the Trust Fund or the income thereof shall either be paid to the Settlor or any spouse of the Settlor (except in a fiduciary or parental capacity) or lent to or applied for the benefit of the Settlor or any spouse of the Settlor and no power or discretion hereunder shall be exercisable so as to confer any benefit whatsoever whether direct or indirect by contract or otherwise on the Settlor or any spouse of the Settlor".*

In Counsel's view, that exclusion seemed complete, and indemnifying Mr E for tax he had already paid would seem to be a breach of the terms of Clause 23, and it followed there was no power in V Trustees Limited to indemnify Mr E in an exercise of its discretion and the Court could not bless any such discretionary decision. V Trustees Limited can only indemnify him if there is a legally enforced obligation on it to do so which overrides Clause 23, so unless the Court to whose jurisdiction V Trustees Limited is subject i.e. the Royal Court of Jersey, orders it to do so by way of enforcement of the English law liability (or possibly declares that it is an obligation enforceable against V Trustees Limited) or an English court gives judgment and has some way of enforcing it in England or all of the beneficiaries agree that it should do so, V Trustees Limited cannot indemnify Mr E without being in breach of trust.

Excluded persons and self-dealing

48 In his supplementary opinion of 6 th July, 2020, Counsel was asked to consider three specific questions raised on behalf of Mr D in relation to the K Trust, which turned on the restrictions governing excluded persons. The general advice given by Counsel is helpful to set out.

49 Clause 22 of the K Trust is in the following terms:

> *"22 Provisions as to Excluded Persons*
>
> *No Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement and in particular but without prejudice to the generality of the foregoing provisions of this Clause:-*
>
> > *(a) The Trust Fund and the income thereof shall henceforth be possessed and enjoyed to the entire exclusion of any such Excluded Person and of any benefit to him by contract or otherwise;*
> >
> > *(b) No part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit either directly or indirectly of any such Excluded Person in any manner or in any circumstances whatsoever; and*
> >
> > *(c) No power or discretion hereby or by an appointment made hereunder or by law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that any such Excluded Person will or may become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever."*

50 The sub-clauses have to be read in the context that they are particular examples of ways in which an Excluded Person cannot benefit *"by virtue or in consequence of"* the K Trust, but the key word here is *"benefit"* and the meaning of "benefit" should, in Counsel's view, be construed against the context of what the Excluded Persons' provisions are all about. The reasons for excluding someone are almost invariably about whether the person is receiving or enjoying something from the settlor's bounty. They are not typically concerned with barring a person from having arms length commercial dealings with the trust, even if those commercial dealings might in the event work out well for them. The fact that they receive something they desire does not mean they are benefiting from the trust. The mischief that exclusion clauses are designed to prevent does not, typically, require that they are barred from arms length dealings with the trust.

51 That does not mean that all exclusion provisions are necessarily limited to whether the Excluded Persons can benefit in that sense and there is nothing to prevent a settlor from providing that an Excluded Person can have no dealings with the trust whatsoever, but absent wording that demands the construction that any dealings with an Excluded Person are impermissible, Counsel could see no reason why an Excluded Person should not, save in so far as the trust clearly and expressly provides otherwise, be able to enter into some relationship with the trustee that a complete stranger to the trust could enter into. Thus, by

reference to Clause 22(a), he did not consider that *"any benefit given by contract or otherwise"* means that an Excluded Person cannot enter into a contract with the trustee at all, or that any contract must be on a positively disadvantageous and onerous terms to the excluded person; it means that the contract cannot be used or permitted to confer bounty on the Excluded Person. Undoubtedly, he said, any trustee would in practice need to be particularly cautious to ensure that they were not doing so, where they might take a broad-brush approach to dealings with someone not expressly constituted an Excluded Person.

52 Excluded Persons are also referred to in Regulation 28, which is in these terms:

> *"28 Transactions with other Trusts*
>
> *The Trustees may in the execution of any of the trusts hereof or in exercise of any of the powers hereby or by law given to them sell property or lend money to or buy property or borrow money from or carry out any other transaction with the trustees of any other trust or the executors or administrators of any estate (not being a trust or estate under which any Excluded Person shall have any beneficial or prospective interest whatsoever) notwithstanding that the Trustees or any of them are or is the same persons or person as those trustees executors or administrators or any of them and where the Trustees are the same persons as those trustees executors or administrators the transaction shall be binding on all persons then or thereafter interested hereunder though effected and evidenced only by an entry in the accounts of the Trustees."*

53 In Counsel's view Regulation 28 is about the self-dealing rule. It means that a single trustee of two different trusts can enter into dealings with itself in its different capacities, notwithstanding the rule about conflicts, without applying to the Court for approval, subject to the rider that this does not apply if the other trust has beneficiaries who are Excluded Persons in the first trust. Without that provision, a trustee of two wholly unconnected trusts (for instance, the vast majority of trust companies) would have to go to court to obtain the sanction of any transaction between those two trusts or fall foul of the self dealing rule. Because there are, in this case, relevant Excluded Persons, the power in Regulation 28 is not available for transactions between the K Trust and the N Trust, but that in counsel's view that did not oust the power of the Court to sanction such a transaction. He said it is long recognised in English law that the court can authorise a transaction that would otherwise be self dealing or otherwise fall foul of the no conflict rule and that jurisdiction does not rest on the provisions of any given trust. He referred in this respect to Lewin on Trusts 20th Edition at 46–044. Indeed, the trustees being disabled as a result of a conflict of interest is one of the express reasons for a surrender of discretion in *Public Trustee v Cooper* 20th December 1999 (unreported). In the Court's judgment of the 19 th December, 2019, (*Representation of V Trustees Limited (formerly G Trustees) re K and N Trusts* [2019] JRC 249) it noted at paragraph 34 the advice of Mr Mello that Bermudan law followed the principles laid down in *Public Trustee v Cooper* citing the Bermudan case of *Re the Thyssen-Bornemisza Continuity Trust; Thybo-Trustees Ltd and another v Baron Thyssen-Bornemisza-de Kaszon and others* 5 ITELR 340. *Public Trustee v Cooper* was first cited with approval in this jurisdiction in the case of *Re S Settlement* [2001] JLR Note

37.

54 Counsel commented that it was readily understandable that the trust deed can authorise some degree of self dealing but require the trustee to fall back on court authorisation where an Excluded Person is concerned, because the situation gives rise not just to a conflict, but to one in which there is an express requirement that some beneficiary on the one side should not benefit – so a greater degree of independent scrutiny is required.

55 Counsel produced a second supplemental opinion dated 31 st July, 2020, dealing with questions raised on behalf of Mrs C, which in the main explored ways in which the restructuring in 1999 might to a greater or lesser extent be challenged. No such challenge has been made or intimated and we will not therefore summarise the advice given.

56 The above advice given by Counsel as to Bermudan law by which the K and N Trusts are governed and which we have to apply was clear and, in our view, consistent with the position if the trusts had been governed by Jersey law. The Court had no difficulty in accepting and applying that advice. However, there was one aspect which was challenged.

Section 47 Bermudan Trustee Act 1975

57 Mr A procured the opinion of Mr Craig McIntyre, a partner in the Bermudan firm of Conyers Dill & Pearman, who advised that Section 47 of the Trustee Act 1975 could be used to achieve some balancing of economic interests between the two trusts, and perhaps other variations of the trusts. Section 47 is in these terms:

> ***"Power of court to authorise transactions relating to trust property***
>
> ***47 (1) Where any transaction affecting or concerning any property vested in trustees is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income*** .
>
> ***(2) The court may, from time to time, rescind or vary any order made under this section or may make any new or further order*** .
>
> ***(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust*** .

(4) In this section, "transaction" includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement."

Mr McIntyre said that Section 47 is not limited to a single trust and has been used to distribute or decant assets among trusts. It had been used to effect transactions of trust property to benefit persons who would otherwise be Excluded Persons. In this respect, he referred to an unnamed Bermudan case in May 2016, which was concerned with a long-standing Bermudan trust and which contained an express prohibition against benefiting US persons who were defined as Excluded Persons. The trustees faced a quandary as all current members of the discretionary class who were descendants of the settlor were US persons, and would likely remain so. There remained the possibility that members of future generations would be non-US persons, but it was not looking likely in the foreseeable future. The trustees felt the prohibition against benefiting US persons was excessive and possibly outdated. Accordingly, they proposed to segregate 20% of the trust property and decant it into a new US trust for the US persons. It was felt this enabled provision for current generation family members, whilst at the same time maintaining provision for future generations, as well as still respecting the clear wishes of the settlor and the express terms of the trust. The Bermudan court agreed with this pragmatic approach and granted the orders under its powers in Section 47. He was able to recount this information from his personal involvement in the case but was unable to share any further details due to a confidentiality order.

58 Counsel considered Section 47 in his third supplementary opinion. He pointed out that the additional power that would have to be sought under Section 47 would be a power that would allow V Trustees Limited as trustee of the K Trust to benefit the beneficiaries of the N Trust at the expense of the beneficiaries of the K Trust and he could not see how such an authorisation would be expedient from the standpoint of the K Trust, even granted that financial considerations are not everything. As Mr McIntyre acknowledged, expediency is to be judged from the standpoint of the trust as a whole, rather than the interests of a particular beneficiary, but the *"trust as a whole"* in this context is the K Trust, not the N Trust and the K Trust together, and the beneficiaries to be considered are those of the K Trust, not those of the N Trust and K Trust together. The trusts have been quite deliberately separated and each had to be considered on its own merits.

59 He agreed with Mr McIntyre that the test is whether the trust would be better equipped to serve its objects with the power proposed than without it, but the objects of the K Trust do not include benefiting the N Trust, so giving the trustees of the K Trust power or authorisation to rebalance the assets of the two trusts in favour of the N Trust does not better equip the trustee of the K Trust to serve its objects. These views were not premised on the Excluded Persons provisions within the K Trust, but the fact that there are those provisions was material and gave rise to a further insurmountable problem with the use of the Section 47. The trustee of the K Trust does not simply lack the power of rebalancing the assets in favour of the N Trust, it is expressly forbidden from benefiting the two principal

beneficiaries of the N Trust. Section 47 deals with situations where “the same cannot be effected by reason of the absence of any power” but the problem here is not merely the absence of the power, it is the presence of other provisions. He doubted very much that it could ever be expedient from the standpoint of the trust as a whole for a trustee to be given power to do something which would necessarily be to the benefit of persons expressly and irrevocably excluded from benefit by the existing terms of the trust. Nor did it seem to him that simply giving such a power would be sufficient, as the Excluded Persons provisions would still be there, and unless that provision was removed (which would, in his opinion, require a variation of the K Trust under Section 48 as the use of Section 47 to remove the provision would be bound by the provision itself), then in his view it would still control the use of any power conferred under Section 47. He concluded that he did not consider it arguable that Section 47 could assist the rebalancing of the trusts.

60 As Advocate Christie, for Mr D, points out, we know very little about this confidential case in which Mr McIntyre was involved and there is no published judgment. No reliance can, therefore, be placed upon it. In any event, we find the analysis of Counsel to be compelling and accept it.

V Trustees Limited's proposal

61 V Trustees Limited was understandably concerned with the inequitable way these two trusts had evolved, in particular, with regard to the position of Mrs C, who had been consistently supportive of V Trustees Limited in its attempts to sell the Country House and who now found herself as the beneficiary of the much diminished N Trust, which she shared with her litigious [sibling], whose conduct had caused substantial losses. His attacks showed no signs of abating. The only way V Trustees Limited could find to allow her to benefit over time was by appropriating to her the [Redacted] Estate, which had the potential for capital growth, and appropriating Property 4 to the Mr A. That proposal was dependent upon the trustee of the K Trust agreeing to enter into a term loan in respect of the monies outstanding under the inter-trust debt, because without that the [Redacted] Estate would have to be sold.

62 Mr Q explained in his 7 th affidavit how the 2017 valuation of [Redacted] Estate of £20,859,500 had been discounted by £8.5 million to take into account the number of farms that were tenanted as against having vacant possession. As tenancies terminated there would be uplifts in value and the farms in question could provide a substantial acreage and opportunity for negotiating with the other tenant farmers. There were other opportunities to generate value which he explained.

63 Two proposals were put forward for consideration by the Court. Under the first proposal:

(i) A fund would be created for Mrs C which would comprise 100% of the [Redacted] Estate net of the Barclays' loan.

(ii) A fund would be created for Mr A under protective trusts because of his potential insolvency, which would comprise Property 4.

(iii) The inter-trust debt to the K Trust would be discharged by transferring to it the secured debt over Property 1, the sale proceeds of other available assets within the N Trust and the creation of a term loan of £5.4 million over 10 years with interest roll-up at HMRC official rates of interest (currently 2.25%).

64 The second proposal was the same save that the N Trust would hold 20% of the [Redacted] Estate for the benefit of Mr D, against a reduction in the term loan from the K Trust to £3.7 million over 10 years at the same rate of interest, thus giving Mr D an opportunity to benefit from the capital appreciation expected in the [Redacted] Estate.

65 These proposals would manifestly be in the best interest of the beneficiaries of the N Trust in that they would allow the retention of the [Redacted] Estate, but in the view of V Trustees Limited, they were also in the best interests of the beneficiaries of the K Trust, and in particular the Mr D, for a number of reasons which it put forward as follows:

(i) Investment yields were at a historic low, so that even if the inter-trust loan was repaid in full, a diversified portfolio of quoted securities within the K Trust would only net 1–1 $^{1}/_{2}$% per annum.

(ii) The N Trust would pay interest at a higher rate that could be achieved through a diversified portfolio. That extra income return justified the retention of the [Redacted] Estate, which Mr D could also benefit from, if part was held for him.

(iii) The COVID-19 Pandemic had caused unprecedented disruption to world economies, the results of which were very hard to predict, but share dividends had been slashed already affecting yields. It was very difficult to predict how this would all end, but the [Redacted] Estate had the unusual characteristic of a substantial capital appreciation yet to come and it was arguably safer to hold on to the [Redacted] Estate as an investment rather than to dispose of it in favour of re-investment elsewhere.

(iv) If the [Redacted] Estate were sold and the K Trust repaid, it could acquire property for occupation by Mr D, but he would still need income for living costs, to meet the cost of using the property and to pay tax on the income and benefits provided. The K Trust could aim for a combination of investing for income and provision of property, but both would of financial necessity be relatively constrained. A yield of 1.25% on £10.5 million was only £131,250 before income tax.

66 During the hearing, Advocate Renouf indicated that V Trustees Limited proposed that instead of 2.25%, the interest rate should represent the average cost of lending to the N Trust from commercial third-party lenders, namely 2.6%, which is the rate now charged by Barclays, the only commercial lender. It was also proposed that the K Trust should be secured by way of a charge over the shares in the company that owned the [Redacted]

Estate.

67 Strutt & Parker had advised Mr Q informally that the sale of the [Redacted] Estate would take between 12 and 18 months to achieve and should realise at least £8.4 million after repayment of the Barclays' loan of £12.5 million. That would be insufficient to repay the whole of the K loan and so V Trustees Limited would have to enforce its security over Property 1 in which Mr D, his wife and child lived in one flat and his mother in the other flat. Furthermore, such a sale would trigger a CGT liability on the part of Mr E's £2.6 million, which his trustee in bankruptcy may seek to enforce on other UK sited assets held by the N Trust, namely Property 4.

Surrender of discretion

68 Under Bermudan law, as under English and Jersey law, V Trustees Limited has a conflict of interest in relation to this proposed transaction between the two trusts, which because of the Excluded Persons provisions within the K Trust are not saved by Regulation 28. V Trustees Limited must therefore apply to the Court and surrender its discretion. Lewin gives this guidance at paragraph 39.09:

> ***"Application surrendering discretion – rule of court***
>
> ***39–09 Where the trustees surrender their discretion to the court, it acts in their place by giving directions.*** In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the ***material circumstances and is not bound by the wishes of any beneficiary.*** The court has, however, no greater powers than the trustees have either under the trust instrument or under the general law."

69 As stated in *Public Trustee v Cooper*, the court will only accept a surrender of discretion for a good reason, the most obvious good reason being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest.

70 The Jersey Court of Appeal in *In re B Settlement* [2010] JLR 653 at paragraph 27 made the point that a trustee who had accepted office in the terms of the trust instrument was not entitled to hand over performance of the trusteeship to the court and that a surrender of discretion should be regarded as a last resort that would normally only be accepted by the Court in relation to a specific exercise of discretion where no sensible alternative exists.

71 We are satisfied in this case that V Trustees Limited is disabled by a conflict of interest in relation to this inter-trust loan and that there is no alternative other than for it to apply to surrender its discretion to the Court. We are also satisfied that there is good reason for this Court to accept, and we do accept, that surrender of discretion.

72 It needs to be borne in mind that this is a surrender of the powers of V Trustees Limited under both trusts in relation to the inter-trust loan. It is not a question of the Court formulating some kind of reasonable compromise akin to a mediation. As Counsel has advised, the Court has to exercise the powers the trustee has under each trust in the best interests of the beneficiaries of that trust.

73 Whilst Mr A did not signify his agreement to the proposed appropriation of the assets of the N Trust as between him and to Mrs C, taking the trust estate as a whole, it was not in contention that the provision of a term loan from the K Trust, which would enable the retention of the [Redacted] Estate, was in the best interests of the N Trust. The issue before the Court was whether the provision of a term loan by the K Trust to the N Trust was in the best interests of the K Trust. We agree with the formulation put forward by Advocate Christie, with which counsel for the other parties concurred, in respect of the transaction that it was proposed should be entered in to between the two trusts:

(i) The Court would need to decide that such a transaction was in the best interests of the K Trust as well as the N Trust and in practice, that means primarily in Mr D's best interests, and

(ii) Because of the Excluded Persons provisions, such a transaction would have to be on arms- length commercial terms, which means no better for the N Trust than would be available to it from a commercial lender.

Mr D

74 The position of Mr D was clear – the inter-trust loan due to the K Trust must be repaid. He did not agree to the transaction proposed by V Trustees Limited and did not want the K Trust to be given an interest in the [Redacted] Estate. In summary, Advocate Christie submitted that:

(i) The transaction was not on commercial terms, as no evidence had been provided that the N Trust could borrow commercially on such terms and self-evidently, it would not be able to do so.

(ii) If it was on commercially available terms, the N Trust could simply borrow on the same terms commercially and repay the K Trust.

(iii) The proposals were not set out in sufficient detail to allow them to be properly considered in any event.

(iv) The proposals were largely not in Mr D's interests.

75 In financial terms, the K Trust would have to wait ten years for the bulk of its money, which would be at risk for the whole of that period. The offered security of the shares in the owning

company gave no protection against the creditors of that company and it would seem in any event that it held title as nominee for V Trustees Limited as opposed to in its own right.

76 Mr Q stated in his 7th affidavit that interest would be deferred/paid as the estate cash-flow permits. The accounts of the N Trust to 5th April, 2020, show that the income from the [Redacted] Estate was £389,026 against which there were estate expenses of £101,051 and interest on the Barclays' loan of £379,882, a total of £480,933, a material annual deficit. Although these figures would fluctuate, it was unlikely that the N Trust would be in a position to pay any interest on the term loan, when Mr D has significant immediate needs as shown in his confidential affidavit. The capital and unpaid interest would therefore accumulate over time increasing the risk to the K Trust.

77 Advocate Christie said it was absurd to suggest that a trustee on receipt of cash of £10.5 million would budget for an income yield from a diversified portfolio of 1–1 $^{1}/_{2}$% per annum. Such a predicted yield could not be taken seriously in relation to a 10-year period.

78 Although the current economic climate is unclear, a sale of [Redacted] Estate would take 12 – 18 months at the earliest, at which time the economic climate would be very different. In any event, no consideration had been given to diversification of assets. Both trusts would be disproportionately exposed to the performance of the agricultural property market, and this single agricultural property in particular. No financial adviser would recommend such an approach.

79 When the Barclays' loan, charged over the [Redacted] Estate, expires in 2023, it would be likely that V Trustees Limited will have to re-finance in the secondary market at higher rates, again increasing the risk to the K Trust.

80 Advocate Christie posed the question, what prudent trustee would invest the major proportion of a trust fund on a 10 year loan to another trust with different beneficiaries, effectively unsecured and which would be unable to actually pay the interest due on it, and this in order to allow that other trust to retain this agricultural estate?

81 Mr D acknowledged that the trusts have provided some measure of support for him and recognised that the survival of the trusts in the position they are now in owed much to the tireless work of Mr Q, but without any criticism of V Trustees Limited, it was clear to him that it could no longer effectively manage the conflict and fulfil its role of trustee of the K Trust independently of its concern for the position of the beneficiaries of the N Trust.

82 He had no doubt that V Trustees Limited genuinely believed it could juggle the various balls that are in play to achieve a successful outcome for all parties, but what had actually happened over the past few years demonstrates that it is an impossible task and it should now consider resigning as trustee of the K Trust and give way to a suitable independent

replacement proposed by him, with the usual arrangements for handover of the trust being made. He had no wish to precipitate a forced sale of the [Redacted] Estate or any other asset and will in principle be prepared to support an orderly sale in accordance with advice of independent professionals. It would be much easier for an independent trustee to negotiate the terms upon which the inter-trust loan would be repaid.

83 A further factor was the continued involvement of Mr A in the N Trust. Should he continue to be in a position to cause losses to the N Trust, including by litigation against V Trustees Limited (which to him appeared extremely likely from Mr A's affidavit) there appeared to be every chance that he would indeed continue to do so. Despite V Trustees Limited's optimism over the value of the [Redacted] Estate in the long term, the experience of the Country House demonstrates that holding it for 10 years and the process of its sale could continue to be the catalyst for litigation and obstruction by Mr A, which could cause significant further loss to the N Trust. Any effective steps to prevent the Elder Child in the future from being in a position to destroy the value in the N Trust would be an extremely significant factor in causing Mr D to prepare to consider giving his support to some accommodation, such as an agreed delay in the sale of the [Redacted] Estate.

84 Under the current administration it appeared as though any progress in relation to the trusts is only achieved at a glacial pace and at great cost. As matters stand, the trusts are simply creating a focus for family dispute and are largely benefiting the various service providers (through no fault of their own) who are attempting to provide a perfect solution to the current problems, when in all likelihood, no such perfect solution exists. The trusts need to return to benefiting their respective beneficiaries.

Position of Mrs C

85 Advocate Thomas took us through some of the history of the trusts from Mrs C's perspective and some of the inter-family correspondence. Without going into the detail, we agree that, using her words, she has been *"blamed, bullied and pressurised"* for taking an entirely realistic and reasonable stance in recognising the need for the sale of the Country House and supporting the efforts of V Trustees Limited to bring that about.

86 The imbalance between the trusts had been brought about by the decision of the predecessor trustees to place the Country House into the N Trust as opposed, for example, to it being owned jointly between the two trusts, and for that trust to borrow extensively from third party lenders and from the K Trust. He said the Court can appreciate why, in the light of this and the history, Mrs C feels the current outcome is wholly unfair. That unfairness is compounded by the impact the actions of Mr A have had upon the value of the N Trust. The affidavit sworn by Mr A made it clear to her that he had every intention of continuing to challenge V Trustees Limited through litigation, which presents a continuing threat to the value of the N Trust. Advocate Thomas submitted that it was entirely fair that, as a matter of principle, Mr A's conduct should be reflected in the share of the N Trust to which he may become entitled.

87 For these reasons, and going forward, Mrs C would like her interest to be entirely separate from Mr A in terms of a ring-fenced fund which shares no common assets with a fund in which Mr A is interested. Her experience of inter-familial disputes led her to recommend that trust property should not be held on behalf of the siblings concurrently.

88 Advocate Thomas recognised the legal constraints upon V Trustees Limited outlined in the advice of Counsel on Bermudan law, and whilst not ideal, Mrs C supported the first proposal put forward by V Trustees Limited as the retention of the [Redacted] Estate was the only way in which the financial damage done to the N Trust could be mitigated in the future.

89 In terms of the proposal that Property 4 should be appropriated for the benefit of Mr A, she pointed out that the net asset value of the N Trust based on the balance sheet as at April 2020 of £7.2 million includes a figure for debts which were, in all likelihood, irrecoverable, in particular a debt owed by Mr A of around £1.2 million. Property 4 represents a significant proportion of what value is left in the N Trust and if it was to be transferred to a fund for Mr A, she recommended that a charge be placed upon it for £1.2 million in favour of her own fund.

90 She recognised that the retention of the [Redacted] Estate would mean that the Barclays' loan would remain in place and would have to be serviced. Her understanding was that there may be a shortfall between income being generated by the estate and the repayments on the Barclays' loan, and she sought some assurance that the liquidity remaining in the N Trust would be sufficient to meet that shortfall.

91 Advocate Thomas asked the Court not to throw this matter back to V Trustees Limited to decide, but to keep it in the hands of the Court, where there was visibility on both sides. He asked that we keep hold of the matter in order to avoid further inter-familial warfare.

Position of Mr A

92 Mr A has filed a lengthy affidavit and skeleton argument, in which he makes serious allegations about the past conduct of V Trustees Limited, accusing it of collusion with a lender in the sale of chattels which was deceptive, the wholly improper management of the trusts, the premeditated manipulation of the beneficiaries to harm the family and its prospects and create division to cover up their wrongdoings and the extent of their allegedly extremely high fee taking.

93 A material portion of his written and oral submissions were devoted, regrettably in our view, to criticisms of Mr D, who he accuses V Trustees Limited of favouring. In terms of this application by V Trustees Limited for directions, he made the following submissions:

(i) He asked for an independent investigation by a regulator, or some such other authority, to examine V Trustees Limited's actions.

(ii) He recommended that Section 47 of the Bermuda Trustee Act 1975 be used to balance the trust funds of the two trusts as recommended by Mr McIntyre.

(iii) He sought an order for the appointment of a new trustee to the N Trust.

94 When asked by the Court about the €1 million retention, he said that this matter should not be associated with him. He was not the tenant and could not withdraw his father's appeal. When pressed by the Court on this, he acknowledged that he had raised money to support his father's claim to a tenancy and his appeal. He explained that because of his father's ill health, his father had requested him to assist in the litigation, which he had done in an administrative capacity.

95 The N Trust stands to lose €1 million if his father's appeal is not dismissed or withdrawn by May 2021 and he was asked by the Court what, as a beneficiary of the N Trust, he could do to prevent such a loss. The most he offered was to write to V Trustees Limited, asking it to take up the issue with the purchaser of the Country House.

96 It is difficult to understand Mr E's claim to a tenancy of the Country House when it is now under new ownership or the purpose of his appeal, particularly when he has now been declared bankrupt. The Court has no doubt that Mr A is very much involved in his father's appeal, which has the prospects of inflicting substantial financial damage upon the N Trust. He is clearly unwilling to take any real steps to prevent that damage occurring and as it is, V Trustees Limited will now have to expend yet more trust money through its lawyers in [Europe] to bring the matter back before the European Court of Appeal, where, hopefully, the trustee in bankruptcy may have no interest in pursuing it.

97 In his oral submissions, Mr A went into some detail as to the history, nature and prospects of the [Redacted] Estate, about which he appeared to be well informed. In his view, it *"washed its face"* as an investment (a view not supported by the figures set out above) and will be very attractive to bank lenders.

Decision

98 The position that V Trustees Limited and the beneficiaries of the two trusts find themselves in is unfortunate, to say the least. At the outset, the K Trust was established for the three children and received the benefit of a substantial fortune, derived from the sale of its stake in Mr E's business. The desire to avoid CGT has led to a restructuring in 1999 that was entirely tax driven and resulted in two trusts with different beneficiaries and different assets.

99 There has been no suggestion of any operative mistake being made during the process of that restructuring, which might have led to it being unwound in whole or in part, and so as Counsel advises, we are left with structures and legal constraints which we have no option but to accept.

100 When V Trustees Limited was appointed in April 2013, it quickly came to appreciate the unsustainable financial position in relation to the N Trust, caused in the main by the Country House. It was a highly emotive issue, in particular for Mr E, who had devoted so much time to its restoration as one of the finest houses of its type in [Europe] and the creation of an associated collection of artworks. Indeed, the entire family took great pride in what Mr E had achieved, as evidenced by Mrs C's letter to him of 26 th April, 2017, explaining her support for the decision of V Trustees Limited to sell the Country House, and in which she said this:

> *"Pa, what you have done for both [the Country House], and for [Redacted] Country Houses has been astounding.* You've given to both a reputation and a standard to be reckoned with. You will always be enormously respected and honoured for your work. No one else could have done it with such brilliance, so much love, care and attention to every detail, with so much pleasure, interest and all to perfection. Please please let us all hold on to this and celebrate it. We are all so immensely proud of you. I hope you know this."

101 Mr Q explained the financial position to the family at a meeting held in July 2016. As pointed out in the Court's judgment of 9 th November, 2017 (paragraph 8), the Country House had running expenses to the order of £500,000 a year, its only income being the annual rental of €100,000 per year payable by the Mr E as tenant, which had not been paid for some years, with the arrears of rental as at 5 th April, 2017 being €501,559.2. In addition, there were substantial borrowings from third party lenders that had to be serviced and a substantial inter-trust loan from the K Trust. The judgment (*Representation of V Trustees Limited (formerly G Trustees) re K and N Trusts* [2019] JRC 249) continued at paragraphs 9 – 13 as follows:

> ***"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 [N] 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 [Mr E] and [Mr A] 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 [Mr E] of 9th 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 [Mr E] and [Mr A] 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, [Mr E] and [Mr A] 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 [Mrs C] ***opposed a change of trustee and supported the proposal that the country house be sold, as did [Mr D].***"

102 The refusal of the Mr E and Mr A to accept the inevitability of the sale of the Country House has been the cause of the division within the family and much of the truly unhappy situation that now prevails. Furthermore, the decision of Mr E and Mr A to defy the direction of the Court to take all reasonable steps within their power to facilitate the marketing of the Country House and indeed their decision to do everything within their power to frustrate the sale, led to the N Trust being reduced to the dire financial position described in paragraphs 23 and 24 of the judgment of 19 th December, 2019, which we set out again:

"23 The financial position of the [N] Trust can be described as dire. Taking first [the company]:-

(i) It owns the Country House and the artworks to be acquired by the purchaser, but it has no material income .

(ii) It has £40,000 in cash .

(iii) The Country House is an expensive asset to insure and maintain (estimated at £500,000 per annum) and at the very minimum, [B Limited] has to pay £20,000 every two weeks to meet the salaries of the staff .

(iv) [B Limited] now has a substantial debt due to the purchaser .

(v) [B Limited] has to fund resistance to the appeal brought by the [Mr E] in [Europe]

25 At trust level the Trustee has no cash and debts (leaving aside inter-trust debt) of £3.3 million, accumulated over time. Its own fees have not been paid for two years. If the sale to the purchaser does not proceed, then there will be no alternative but for [B Limited] to be placed into liquidation. The liquidation of [B Limited] would in turn require the English farming estate to be sold, in order to provide the Trustee with funds to meet its creditors."

103 Whilst we are not in a position to make a finding of fact that the loss caused by Mr A actions extends to the total of £9.4 million set out in Mr Q's 6 th affidavit, we have no doubt that his actions have caused substantial financial damage to the N Trust.

104 The advice of Counsel as to the position under Bermudan law, which in our view equates to the position under Jersey law, is that:

(i) The two trusts cannot be put back together again;

(ii) The two trusts cannot be rebalanced by the Mrs C and Mr A being added back as beneficiaries to the K Trust;

(iii) The inter-trust loan of £10.5 million in favour of the K Trust cannot be written off by the trustee of the K Trust. If Mr D, as the effectively sole beneficiary of the K Trust demands that it be repaid, then it must be repaid. He has made that demand.

105 It necessarily follows that unless terms can be agreed for the debt due to the K Trust to be converted in substantial part into a term loan, the [Redacted] Estate will have to be sold, as there are otherwise insufficient assets in the N Trust to discharge it.

106 V Trustees Limited has put forward proposals in which it would enter into a transaction with itself in its two capacities by which the K Trust will agree to such a conversion. V Trustees Limited cannot enter into that transaction, because of the self dealing rule and Regulation 28, which allows self dealing, does not apply because Mrs C and Mr A are Excluded Persons.

107 In our view, V Trustees Limited is doing its best to come up with a solution to the

unfairness caused by the imbalance between the two trusts, but there is no avoiding the reality that in so doing, for reasons which we understand it is primarily concerned with the interests of the beneficiaries of the N Trust who have lost out as a consequence and, in particular, Mrs C. However, the justification put forward for the K Trust entering into such a transaction does not stand up to scrutiny, for the reasons put forward by Advocate Christie.

108 In essence we cannot see how it can be in the best interests of the K Trust to invest a substantial proportion of the trust fund, against the express wishes of its effectively sole beneficiary Mr D, in a loan to another trust, whose beneficiaries are excluded persons, for a fixed term under which interest would be allowed by the borrower to accumulate and which would effectively be unsecured. All this would be for the purpose of allowing that other trust to retain a particular asset for the benefit of its beneficiaries and would have the effect of depriving the K Trust of the use of those funds to benefit its own beneficiaries for the duration of the term.

109 The first part of the test referred to above is not met. The proposed transaction is simply not in the best interests of the K Trust and in accepting the surrender, we will not direct V Trustees Limited in its capacity as trustee of the K Trust to enter into it.

110 The terms upon which this inter-trust loan should be repaid to the K Trust has to be negotiated at arms-length, and that cannot be done either by V Trustees Limited or indeed by the Court. We agree with Advocate Christie that there is now no option but for a new trustee to be appointed to the K Trust for this purpose.

111 We would expect any new trustee to take into account the history of these two trusts and the family relationships, and in particular the express wish of the Mr D that the N Trust should be given reasonable time as advised to market and sell this very substantial estate. It would be our expectation and hope that the new trustee and V Trustees Limited should be able to agree terms on the repayment of this inter-trust loan by negotiation.

112 We do not agree that V Trustees Limited should also retire as trustee of the N Trust at the instance of Mr A, not least because Mrs C has confidence in it to protect her interests against Mr A's litigious conduct and does not wish it to resign.

113 As to Mr A's other request, it is not within our power on a surrender or in the exercise of our inherent jurisdiction to order a regulator whether here or in the BVI to examine the actions of V Trustees Limited and in any event, we can see no justification for such an investigation. As to Section 47 of the Bermuda Trustee Act 1975 we have accepted the advice of Counsel that it cannot be used to rebalance the two trusts.

114 Quite separately, Advocate Renouf sought the Court's blessing to the following decision of V Trustees Limited, which he communicated to the Court orally and in respect of which there was no surrender, as follows:

"Contingent on the Court deciding that the [Redacted] Estate should not be sold, to create a sub fund or new trust to hold Property 4 for [Mr A] under protected trusts to deal with his possible bankruptcy with a power to revoke if made bankrupt, with the balance being held for the [Mrs C] to the exclusion of [Mr A]"

115 Advocate Renouf later produced a draft resolution to that effect. The Court has not decided that the [Redacted] Estate should be retained and so this matter falls away. However, we would make the following points:

(i) Any decision as to the appropriation of assets as between the Mrs C and Mr A must now wait until it becomes clear what assets will be left in the N Trust following the sale of the [Redacted] Estate and repayment of the inter-trust loan.

(ii) In deciding how to appropriate those assets as between Mrs C and Mr A, we agree that V Trustees Limited should take into account the conduct of Mr A and the substantial financial damage his actions have done to the N Trust.

Conclusion

116 In conclusion, we accept the surrender of V Trustees Limited in relation to the inter-trust loan, but decline to direct it, in its capacity as trustee of the K Trust, to enter into the proposed transaction. We will however give the following directions:

(i) We lift the restriction on V Trustees Limited retiring as trustee of the K Trust imposed on 5 th October 2017 and for the avoidance of doubt, confirm that it is to remain trustee of the N Trust until further order.

(ii) V Trustees Limited should retire as trustee of the K Trust as soon as possible and exercise its powers under Clause 18 of and the 5 th Schedule to the trust deed to appoint a new regulated trustee in this jurisdiction, nominated by Mr D. We will adjourn this representation to 17 th November, 2020 at 9:00am so that we can review the progress made in this respect. That date can be vacated if before then a new trustee has been appointed.

(iii) Upon the appointment of a new trustee, the K Trust will cease to be the subject matter of this representation and the new trustee will not be convened, without leave, to any further applications by V Trustees Limited for directions in relation to the N Trust.

(iv) Because an orderly sale of the [Redacted] Estate is most likely, we authorise V Trustees to take appropriate professional advice from a reputable agent of its choice as to the marketing and sale of this estate.

(v) In the light of the monumental nature of any decision to sell the [Redacted] Estate, we anticipate that V Trustees Limited will require authority from the Court to sell within

given parameters so that it can react without delay to offers made within those parameters. Its proposals for the marketing and sale of the [Redacted] Estate should therefore be circulated to Mrs C and Mr A (with authority to disclose the same or the relevant parts thereof to the new trustee of the K Trust) and the matter brought back before the Court on a date which should be fixed now. For the avoidance of doubt, no further expert evidence as to the marketing and sale of the [Redacted] Estate can be adduced by Mrs C or Mr A without prior leave of the Court. Whether Mrs C and Mr A can have their costs incurred in such an application will depend upon the reasonableness of their conduct.