

# Mourant and Company Retirement Trustees Ltd v JG and HK

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	The Deputy Bailiff
<b>Judgment Date:</b>	20 June 2008
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## Text

[2008] JRC 100

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Allo **and** Newcombe.

In the Matter of the Turino Consolidated Ltd Retirement Trust

Between  
Mourant & Co Retirement Trustees Limited  
Representor  
and  
J G  
First Respondent

H K  
Second Respondent

**Advocate J. Harvey-Hills for the Representor.**

**Advocate L. K. A. Richardson for the First Respondent.**

**Advocate L. J. L. Buckley for the Second Respondent.**

**Authorities**

[\*Chapman v Chapman\* \[1954\] 1 All ER 798.](#)

*Re the H Trust* [\[2006\] JLR 280.](#)

*Re the B Trust* [\[2006\] JLR 562.](#)

*Re the H Trust* [\[2007\] JRC 187.](#)

*Re The Fountain Trust* [\[2005\] JLR 359.](#)

*FM v ASL Trustee Company Limited* [\[2006\] JRC 020A.](#)

Trusts Law (as introduced by the Trusts (Amendment No.4) (Jersey) Law 2006).

*Saunders v Vautier* (1841) Cr & Ph 240.

Matthews & Sowden, The Jersey Law of Trusts (3rd Edition).

The Deputy Bailiff

- 1 This is an application by the representor ("the Trustee") for directions in connection with the Turino Consolidated Ltd. Retirement Trust ("the Trust"). It has become necessary because of divorce proceedings between the first respondent and the second respondent in the Netherlands. Although the parties are no longer married, we propose for convenience to refer to the first respondent as the husband and the second respondent as the wife.

**The background**

**(i) The Trust**

- 2 The husband and the wife were married on 7th September 1988. They lived in the Netherlands. On 22nd July 1992, the husband, as sole director of Turino Consolidated Ltd ("the Principal Employer") sent a letter to the Trustee requesting the formation of a retirement trust, with the husband and the wife to be members of the Trust. The Principal

Employer appears to have been an Irish company established for the purposes of the Trust.

3 The Trust was formed on 26th February 1993 by means of a deed executed by the Principal Employer and the Trustee but was stated to have been effective from 7th September 1992, which was the date upon which the husband and the wife signed applications to become members under the Trust.

4 The contributions made by each member are held on trust by the Trustee in an Accumulated Fund for that member. Rule 4.2 of the trust instrument provides that:-

*"The Trustees will (after making an allowance for their reasonable expenses) allocate to a Member's Accumulated Fund the contributions paid by him and by any Employer in respect of him and a fair share (determined by actuarial advice) of the income, gains and losses arising on the assets of this Retirement Trust."*

5 Rule 5 deals with the benefits on retirement and the key provisions are as follows:-

*"5.1 No Benefits shall be paid or applied from this Retirement Trust to or in respect of a Member while such Member is in any employment with the Employer and the Trustees may accumulate income for the whole or any part of the Trust Period."*

*5.2 Subject to Rule 5.1 the Benefits payable under this Rule during the Trust Period shall be such annuities and lump sums to be paid to, for or in respect of a Member out of that Member's Accumulated Fund as that Member shall direct in writing or, in the absence of such direction and if none is received within three months of it being requested by the Trustees, as the Trustees shall decide."*

*5.3 In order to provide Benefits in accordance with Rule 5.2 the Trustees shall realise such Member's Accumulated Fund or appropriate parts thereof as and when Benefits become payable or are to be secured in accordance with Rule 5.4."*

6 The husband and the wife are the only members of the Trust and the Principal Employer was dissolved many years ago. It follows that either member may call at any time for the benefits referred to in Rule 5.2. They are between them absolutely entitled to the trust fund.

7 It appears from the affidavit of Mr Thomas, the manager of the Trustee with responsibility for the Trust, that, following the creation of the Trust, the husband assigned various assurance policies to the Trust which were credited to his Member's Accumulated Fund. At that stage the wife did not contribute anything to the Trust.

8 The appointed investment adviser to the Trust was a Dutch firm called Independent Consultancy Group of which the relevant principal was Mr Peter Gibney, who appears to

have been the tax and investment adviser to the husband and had advised on the establishment of the Trust.

- 9 In 1994 the parties wished to buy a larger property in the Netherlands namely Somerset Farm, Deelhorstweg 22, 7037, CR Beek, Gem Bergh ("the Property"). It appears that they had until then been living in a property owned by the wife. Mr Gibney advised that the Property should be acquired through the Trust and this is what occurred. Completion took place on 2nd January 1995. The total purchase price (including costs and taxes) was NLG 624,247.13. The Trust contributed NLG 520,177.95 and the wife contributed NLG 104,069.18 from the sale proceeds of the former property. The amount contributed by the Trust was raised by realising the various assurance policies which had been assigned by the husband. Although, prior to the purchase of the Property, the wife's Accumulated Fund was zero, the Trustee considered that the wife's contribution of NLG 104,069.18 to the purchase price of the Property was the equivalent of an indirect contribution to her Accumulated Fund under the Trust. It therefore allocated the Property to the Accumulated Funds of the husband and wife respectively in the proportion of NLG 520,177.95 to NLG 104,069.18. This equates to 83.33% of the Property being allocated to the husband's Accumulated Fund and 16.67% to the wife's Accumulated Fund. The wife also utilised the proceeds of the sale of the former home for subsequent refurbishment and improvements to the Property.
- 10 The Trust's only current asset is the Property. Although, in accordance with Mr Gibney's advice, a rental agreement between the husband and wife on the one hand and the Trustee on the other at the monthly rental of NLG 1,500 was entered into with regard to the Property, only NLG 5,000 has ever been paid by way of rental. That sum has been used towards fees and has been exhausted. The present position is that the Trustee has not received payment in respect of its fees for a number of years and there is no cash in the Trust. The only other asset of the Trust is a loan which was made to the husband in 1993 in the sum of NLG 29,489.11. The Trustee has waived interest on that loan and it remains outstanding.
- 11 As to the value of the Property, a valuation was provided by the firm of Maalderink & Lutka Willink to Mr Gander on 18th May 2000 which valued the Property at not less than NLG 1million (€453,780). A valuation report, commissioned by the wife, was produced by Gerrits Lammers on 11th July 2001, which valued the Property at NLG 1,175,000 (€533,191) for a 'free' sale. The Trust has attempted more recently to value the Property but the wife has refused access to the Property.

### **The divorce proceedings**

- 12 It appears from the various judgments of the Dutch courts (to which we shall refer shortly) that, before their marriage in 1988, the parties entered a notarial deed excluding community of property. However, by notarial deed of 21st June 1996 ("the 1996 variation"), they varied the marital conditions by agreeing that, in the event of divorce, matters should be resolved as though there had been a general community of property between them i.e. assets would

be shared equally.

13 In April 2000 the parties separated and since then the wife has been in sole occupation of the Property. A decree of divorce was granted by the Family Division of the District Court of Zupthen in the Netherlands ("the District Court") on 25th January 2001.

14 On 5th November 2001, following a telephone conversation between the wife and the Trustee in which she stated that she was entitled to 50% of the Property, the Trustee was sent by the wife's legal adviser a certified copy of what was described as a 'letter of wishes' signed by the husband and wife on 17th May 1999 ("the 1999 letter"). It was addressed to the Trustee and we set out the relevant parts as follows:-

*"..... notwithstanding the details of the original purchase of [the Property], ..... in the event that the parties should be divorced from each other ..... that [the Property] and/or all income deriving thereto and/or the proceeds from the sale of [the Property] for any reason whatsoever, shall in future be considered to be held within the Trust to the benefit of each of the parties ..... in the proportions as stated hereunder:-*

*[J G] - 50%, [H K] 50%."*

15 Following receipt of the 1999 letter, the Trustee responded to the wife's legal adviser on 16th November stating *inter alia* "we hereby confirm so long as it is in the beneficiaries' best interests, we will abide by any final court decision in respect of the distribution of this property served upon us." However the Trustee did not at that stage take part in the proceedings or submit to the jurisdiction of the Dutch court.

16 On 21st May 2003 the District Court issued its judgment on the financial aspects of divorce. Although acknowledging that the Trust was recognised by the court and that the assets of the Trust were separate from the assets of the parties, it nevertheless rejected the husband's submission that the Property should be distributed 83.33% - 16.67% as per the interests under the Trust. It held that the parties were bound by the 1999 letter and that accordingly the Property should be sold and the proceeds divided equally between them. It provided a specific mechanism for doing this by ordering that the Property should be valued and offered for sale to the wife; if she did not agree to purchase the Property at the valuation price within one month, the Property should be placed on the open market; and if it was not sold on the open market within three months, it should be sold at public auction.

17 Following this judgment, the husband sent a letter to the Trustee on 12th August 2003 stating that the 1999 letter did not have any standing since it was not an expression of his wishes. He said that it was drafted at the initiative of his ex-wife and she had made him sign it under duress at a time when she knew he was suffering from a severe depression. Furthermore he was extremely tired and vague due to jet lag having only just returned from a night flight via the UK from his work in a very hot climate in India. He provided a new letter

of wishes ("the 2003 letter of wishes") asking that, in the event of his death, the Trustee should hold the assets of his Accumulated Fund for the benefit of his daughter (by a previous marriage).

18 The husband appealed to the District Court of Arnhem ("the Appellate Court"). On 24th February 2004 that court handed down an interim judgment which determined certain matters.

(i) The court rejected the husband's contention that the 1996 variation to the marital conditions should be set aside on the basis that he was suffering at the time from depression, that he did not have the necessary capacity as a result of his bipolar condition and that he authorised the notarial deed to be signed under the undue influence of the wife. In coming to this conclusion the Appellate Court placed some weight on a letter dated 21st August 1995 from the parties to the Trustee but it appears from the evidence before us that that letter was never in fact signed or sent. However the Appellate Court also placed weight upon a letter dated 25th March 1997 from Mr Gibney to the husband in the course of which he (Mr Gibney) said the following:-

*"More importantly ..... all of the present assets within the trust (apart from one small pension plan which probably has no value now) are effectively in your name. I am sure that this is not your intention. I am aware that you have a 50/50 agreement with Helena but that is not enough since Jersey inheritance law is different from Dutch inheritance law. Therefore, when next you are in Holland you **MUST sit down with Helena, make a list of all jointly held assets (including the trust) and lodge this with a notary.** You will then need a fairly simple document - signed by both of you - lodged with the trustees stating that you are both 'tenants in common' of the farm and all land attached to it. That is the English legalese for saying that you are 50/50 owners." ( **emphasis added**)*

(ii) For much the same reasons, the court also rejected the husband's contention that the 1999 letter was signed by him when his capacity was affected by his mental condition, by depression and by jet lag. The court held that the 1999 letter constituted a binding agreement between the parties which was entirely consistent with the 1996 variation and the letter of 25th March 1997 from Mr Gibney.

(iii) In summary the Appellate Court held that there was a binding agreement between the parties that, on divorce, the assets of the Trust would be divided equally between them. The court acknowledged that the assets of the Trust were separate from those of the parties and that the Trustee was not a party to the proceedings. However it took comfort from the letter from the Trustee dated 16th November 2001 (see para 15 above) to the effect that it would abide by any court decision in respect of the division of the property provided it was in the beneficiaries' best interests. The court regarded it as hard to contend that its ruling was not in the best interests of the parties.

(iv) Having dealt with certain other matters the court ordered the husband and wife to



endeavour to reach agreement on the basis of the court's decision.

- 19 The husband and the wife were unable to reach agreement and the matter returned to the Appellate Court which gave its final decision on 8th February 2005. The court said that the wife had produced a valuation of €415,000 for the Property and that the husband had not disputed that valuation. In essence the court ordered that the husband should procure that the Trust sell the Property to the wife and that the purchase price should be increased by a monthly rental of €681 payable by the wife from April 2000 (since when she had been in sole occupation) and reduced by the 'owners costs' such as insurance, improvements etc which the wife had paid since the separation ("the Formula"). The exact terms of the ruling were set out in paragraph 4 of the judgment which provided (in translation):-

***"The court, giving judgment at appeal ..... orders the husband to collaborate in the necessary steps to ensure that the trustee of [the Trust] within three months from today sells [the Property] to the wife and conveys it against payment by the wife to the trust of €415,000, this amount to be **increased by the rent instalments of €681 per month for the period from April 2000 until the date of conveyance and to be reduced by the amount mentioned in ground 2.7 of €19,637 and the owner costs and house insurance premiums paid by the wife in the year 2004 and thereafter until conveyance....."*****

The court also ordered that the loan referred to earlier should be redeemed half and half by the parties.

- 20 As we shall see, differences arose between the parties as to the exact meaning of the order of the Appellate Court and these differences centered upon the court's observations at para 2.7 of the judgment which (in translation) said as follows:-

***"..... in the light of the above, the court will order the husband to take all necessary steps to ensure that the trustee within the - generous - deadline to be indicated sells the house to the wife and conveys it against payment of the above-mentioned sum of €415,000, and the court also points out that it is assuming that, if the contrary is not to be assumed, this amount is indeed a 'market-compatible' price. Sale for half of the estimated value cannot, in the opinion of the court be considered. The wife as the 'beneficiary' must reach a settlement with the trustee, such that the court assumes that, since the assets placed in the trust belong equally to the parties, this can take place in such a way that after the settlement half of the 'purchase price' is paid on the due date and the pledge of the trust assets should not take place in any other way."*** [emphasis added]

- 21 One might have hoped that, given the limited value of the trust assets, the parties would have proceeded by agreement following the decision of the Appellate Court. Sadly this has not happened and the consequence is that costs have been incurred by the Trustee instructing Jersey and Dutch lawyers and the parties have also incurred legal costs.

- 22 We have been taken through the correspondence since the decision of the Appellate Court. It is prolonged and has essentially got nowhere. We do not think it necessary to lengthen this judgment by referring to it in any detail. In essence the wife initially said that the effect of the judgment of the Appellate Court was that she could purchase the property for half of the stipulated sum (i.e. €207,500) with the net proceeds then all going to the husband. The husband and the Trustees did not agree and referred to the emphasised sentence in the passage quoted at para 20 above. Subsequently the wife indicated a willingness to proceed at the price of €415,000 provided that she could be assured that half of the net proceeds of such a sale would immediately be returned to her. The husband, on the other hand, whilst willing initially to agree that the Property should be sold to her for €415,000, argued that the net proceeds received by the Trustee must then be distributed in accordance with the terms of the Trust i.e. 83.33% to him and 16.67% to the wife. More latterly he has become concerned that the valuation is a considerable undervaluation and that accordingly the Trustee should evict the wife, sell the Property on the open market and distribute the proceeds as per the trust deed. The Trustee has been caught in the middle and has said that, in the absence of the agreement of the parties, it has no option but to distribute any proceeds in accordance with the terms of the Trust. It therefore saw no alternative but to seeking the directions of the Court in the absence of agreement. The Trustee also made repeated requests to the wife to allow the Property to be valued but these were refused.
- 23 Eventually the wife returned to the District Court in order to seek to enforce the order of the Appellate Court. She requested the District Court to order the husband to sign a letter to the Trustee instructing it to sell the Property to the wife for the price of €415,000 (adjusted as per the Formula) and to then distribute the net proceeds of that sale (after deduction of the Trustee's costs) on a 50/50 basis to the husband and the wife. The husband argued that the formal part in paragraph 4 of the order of the Appellate Court had not referred to a 50/50 distribution but the District Court rejected his argument, stating that it was clear from the remaining parts of the judgment that it was the intention of the Appellate Court that the Property be divided equally. The husband also argued that, because the Property had probably increased in value, he could not be required to co-operate with the sale by the Trustee at a price of €415,000, as this was below the market value; but this point was also rejected by the District Court.
- 24 In passing the District Court referred to the passage from paragraph 2.7 of the Appellate Court's decision referred to earlier but interestingly, the translated version of the District Court's quotation of para 2.7 reads rather differently from the translation of the judgment of the Appellate Court supplied to the Trustee and the other parties. It reads as follows:-

***"According to the court, the sale at half of the appraised value is not at issue.*** As a 'beneficiary', the wife must settle with the trustee, whereby the court presumes that, given that the trust property must be divided equally among the parties, this may be done in such a manner as to have the wife, on balance, 'pay the purchase price' after the set off and that settlement of the trust property need



not be made otherwise."

This clearly has a rather different meaning from the passage quoted at para 20 above and shows the difficulty of relying upon translations. The District Court went on to clarify that the wife could set off the purchase price of the Property in such a way as to pay, on balance, half the purchase price. However that is not what it ordered, because it ordered the husband to sign the formal declaration annexed to the order which was, as mentioned earlier, an instruction to the Trustee to sell to the wife for €415,000 (as adjusted by the Formula) and to then distribute the net proceeds, after deduction of the Trustee's costs, equally between the husband and the wife. The court also ordered the husband to refrain from any communication between himself and the Trustee with a view to invalidating the letter of instruction and also awarded a penalty should he violate the order.

- 25 The husband subsequently sought to appeal the order of the District Court but he is apparently out of time. He and the wife signed the letter of instruction to the Trustee as directed. The letter of instruction in the form required by the District Court is dated 12th April 2007 ("the 2007 instruction") and was sent to the Trustee on 17th April 2007. However the husband endorsed the 2007 instruction to the effect that it was signed pending appeal, and both before and since, he has made it clear to the Trustee that it does not truly reflect his wishes.
- 26 Because of that, the Trustee has felt unable to act on the 2007 instruction and on 9th August 2007, it instituted the current proceedings seeking the direction of the Court. These were adjourned at the request of the parties on various occasions.
- 27 In November 2007 the wife instituted proceedings before the District Court seeking an order that the Trustee be directed to convey the Property to the wife for half of the figure fixed by the Appellate Court, subject to adjustment according to the Formula. With the approval of this Court, the Trustee appeared before the District Court to put its case. The District Court held on 16th January 2008 that the matter was properly before this Court and that this was the appropriate forum. It therefore declined to adjudicate upon the wife's claim. The wife has appealed that decision but we understand that the appeal has been deferred pending the decision of this Court.

## Submissions

- 28 On behalf of the wife, Advocate Buckley submitted that the Court should direct the Trustee to comply with the order of the Dutch court; in particular by directing that the Property should be sold at the price and in the manner directed by the Dutch court. He pointed out that the Netherlands was the appropriate jurisdiction to which both parties had submitted and appeared to argue their case. The Dutch court had given a final and conclusive judgment which was to the effect that the husband and the wife had reached a binding agreement that, upon divorce, their assets, including the Trust, would be divided equally between them. It was not open to the husband to seek to re-open that finding, which was

binding upon him.

29 Mr Buckley accepted that this Court could not vary the Trust as it was a fixed trust. However he submitted that the Court could achieve the objective of giving effect to the decision of the Dutch court in one of two ways:-

(i) It could treat the 1999 letter and/or the 2007 instruction (both of which were signed by both parties) as varying the Trust on the grounds that the husband and the wife were between them beneficially entitled to the entire trust fund and they could direct the Trustee accordingly.

(ii) Alternatively, it could direct the Trustee to discharge the husband's obligation to the wife (which was in effect to pay her the difference between 16.67% and 50%) by paying half the trust fund to the wife.

30 On behalf of the husband, Advocate Richardson submitted that the Trust must be upheld. It was a fixed trust and the Court had no power to vary it; in particular the general supervisory power of the Court contained in Article 51 of the Trusts (Jersey) Law 1984 ("the Trusts Law") did not confer a power on the Court to vary the terms of a trust (save in the limited administrative respect mentioned in the Article itself). In this context she referred to the decision of the House of Lords in [Chapman v Chapman \[1954\] 1 All ER 798](#).

31 She did not accept that the Dutch court had purported to vary the Trust. But even if it had, it was not open to this Court to enforce or give effect to a foreign judgment in the present circumstances. She referred to a number of the cases which have come before this Court including *Re the H Trust* [\[2006\] JLR 280](#), *Re the B Trust* [\[2006\] JLR 562](#), *Re the H Trust* [\[2007\] JRC 187](#), *Re The Fountain Trust* [\[2005\] JLR 359](#) and *FM v ASL Trustee Company Limited* [\[2006\] JRC 020A](#). The effect of these decisions was that the Court did not 'enforce' a foreign judgment dealing with a Jersey trust. What the Court did was to consider, when exercising its supervisory jurisdiction under Article 51, how far it should direct the trustees to act so as to give effect, wholly or partially, to the foreign judgment. But the extent to which effect could be given to the foreign judgment depended upon whether the trustees had power under the trust deed to act so as to give effect to the judgment. For example, if the foreign judgment purported to vary a Jersey trust by ordering that the trustees pay £1 million to a wife absolutely, the trustees would have power to make such a payment if the wife was a beneficiary. Thus, effect could be given to the foreign judgment not by enforcing it but by the trustees (or the Court in its supervisory jurisdiction) deciding to exercise the discretionary powers which already existed under the trust deed in such a manner so as to give effect to the foreign decision. Conversely, if the foreign court purported to vary the trust in a manner which could not be achieved by the trustees under the existing provisions of the trust deed (e.g. by ordering that £1 million be paid to a wife who was an excluded person and could not be added as a beneficiary), then there was no power in this Court to vary the trust so as to enable effect to be given to the foreign order. In short, the ability to give effect to a foreign order depended upon there being power under the trust deed to act in a manner which would achieve that objective. To the extent, if any, that the Royal Court

may in some earlier cases have indicated that it did have power to vary a trust so as to give effect to a foreign judgment on the principle of comity, those cases were wrongly decided and, in any event, any such ability, she submitted, had been removed by Article 9(4) of the Trusts Law (as introduced by the Trusts (Amendment No.4) (Jersey) Law 2006). As the Trust was a fixed trust, there was no power to distribute the trust fund in any proportion other than 83.33%/16.67%. Accordingly there was no ability to give effect to the judgment of the Dutch court that the trust assets should be held in equal shares for the husband and wife.

- 32 As to the argument that the Court should rely upon the 1999 letter and/or the 2007 instruction, she submitted that the former was written under the influence of the wife at a time when the husband was depressed and suffering from jet lag. Furthermore, it was expressed to be a letter of wishes, not an instruction, and the Trustee had not acted upon it as an instruction. As to the latter, it was written upon the direction of the District Court and clearly did not represent the husband's true intention. The Court should not therefore take either of them as being valid instructions to the Trustee to vary the Trust so as to hold the assets for the husband and wife in equal shares.
- 33 Finally she submitted that if, contrary to her primary submission, the Court determined that the trust fund was now held for the husband and wife equally, the Court should order an updated valuation. There was strong evidence (based on the earlier valuations referred to at para 11) that the sum of €415,000 was an under-valuation at the time of the Appellate Court's decision, but it was certainly so now. The wife should not be able to take advantage of her refusal to allow a valuer into the Property. The husband accepted that the Property could be sold to the wife but only if she paid the true market price.
- 34 On behalf of the Trustee, Mr Harvey-Hills asserted that it was adopting a neutral position as between the husband and wife but, in pursuance of its duty to bring all relevant matters to the attention of the Court, it pointed out the real difficulty which would result from the husband's proposed course of action. The Property was the sole asset of the Trust and there was no liquidity. The Property was situated in the Netherlands and the Dutch courts therefore had ultimate control of the position. The wife would not proceed with any purchase save in accordance with the order of the Appellate Court. If this Court found for the husband, the only way of realising the Property would be to seek to evict the wife before the appropriate court in the Netherlands so as to be able to sell the Property on the open market. The Trustee anticipated that this would be a course of action fraught with difficulty, with limited prospects of success and a substantial likelihood of incurring further costs. The Trustee would be inviting a Dutch court to evict the wife in circumstances where there was in existence an order of the Appellate Court to the effect that she could stay there and should be able to purchase the Property for €415,000, which order the Trustee would be failing to comply with. It seemed highly unlikely that any Dutch court would evict the wife. The more likely outcome was either that the Dutch courts would ensure that the Property was ultimately sold over the head of the Trustee so as to comply with the order of the Appellate Court or there would be an impasse with ownership of the Property remaining in the Trustee, the wife remaining in occupation but without paying any rent and no capital

being available for distribution to the husband. For these reasons the Trustee believed that it would be in the interests of both beneficiaries for effect to be given to the decision of the Appellate Court by selling the Property to the wife for €415,000 adjusted by the Formula and after allowing for the Trustee's costs.

- 35 Mr Harvey-Hills agreed with Advocate Richardson and Advocate Buckley that this Court had no jurisdiction to vary a fixed trust. However, he agreed that the Court could achieve the desired end result by either of the two methods suggested by Advocate Buckley. The Trustee was happy to accept that the Trust had been varied by the parties if this was confirmed by the Court. But, even if the Court found that the parties had themselves varied the Trust so that it was now held for them in equal shares, the question remained as to what action the Trustee should take in connection with the sale of the Property. In normal circumstances it would wish to sell at the market price so as to ensure that each party received an equal share of the trust fund. However, for the reasons just mentioned, this would require it to take action against the wife in the Dutch courts which would be unlikely to succeed and would incur costs where there was no liquidity and the husband was not in a position to fund the Trustee. It therefore sought directions that, in the unusual circumstances of this case, it should be authorised to sell the Property to the wife for the sum of €415,000 either by way of receiving the full price (adjusted by the Formula) and then paying the net receipts to the beneficiaries in equal shares or by netting off the consideration after allowing for the Trustee's costs, the Formula and the wife's 50% interest.

## Discussion

- 36 On any view the present position is highly unsatisfactory. The husband is aged 63 and has since the separation lived in England in rented accommodation. He continues to suffer from his medical condition and relies on state benefits for his income. Indeed, following the hearing he suffered a relapse in his mental condition and was declared unfit to give instructions to his advocate. The wife is aged 55. She suffered from polio when young and has had 'Bechterw' disease from 1990. She has been assessed as being 100% occupationally disabled since 1988 and she relies upon Dutch state benefits for her income.
- 37 The parties' sole capital asset is the Property. The dispute between them has eaten into the amount which each of them may ultimately receive. The Court is not aware of the extent of any legal fees which they may individually have incurred but their failure to resolve matters by agreement has meant that the Trustee has spent much time on the matter, which has generated substantial fees payable to the Trustee. Furthermore, the Trustee has had to seek legal advice in both Jersey and the Netherlands. The Court was informed that outstanding remuneration and legal fees of the Trustee may amount to as much as €200,000. It is clearly in the interests of both beneficiaries that this matter be brought to a conclusion as soon as possible whilst there is still some equity left in the Property.

- 38 However the Court can only act in accordance with the law. The Trust is a fixed trust. All

counsel agreed that the Court has no power of its own volition to vary such a trust. Advocate Richardson's submissions are correct. Even if, which is disputed, the Appellate Court has purported to vary the Trust so that it is held equally for both beneficiaries, there would be no power in this Court to enforce or give effect to any such judgment because this Court has no power to vary a fixed trust (save in the circumstances envisaged by Article 47 where the Court may approve on behalf of minors and unascertained beneficiaries a variation which is agreed by all the adult beneficiaries).

- 39 However, in our judgment, the Appellate Court was scrupulous not to purport to vary the terms of the Trust. It made clear that it accepted the existence of the Trust and that the assets of the Trust were separate from those of the husband and wife. What it did hold was that the husband and the wife had entered into a binding agreement that, in the event of divorce, the assets would be shared equally between them and that this agreement extended to the assets of the Trust. Because, between them, they were entitled to the entire beneficial interest of the Trust, that was an agreement which they could put into effect. The Appellate Court rejected the husband's case that he did not have the necessary mental capacity because of his illness or that he was under the undue influence of the wife or that his jetlag was relevant. In our judgment the finding that there was such an agreement is binding upon both parties and the husband is estopped from denying the agreement. Indeed Advocate Richardson did not argue to the contrary.
- 40 It is trite law (the rule in *Saunders v Vautier* (1841) Cr & Ph 240) that where all the beneficiaries of a trust are in existence, have been ascertained and are of full age, they may require the trustees to terminate the trust. This is reflected in Article 43(3) of the Trusts Law. It is equally true that they can vary the terms of the trust. As Matthews & Sowden, The Jersey Law of Trusts (3rd Edition) correctly state at para 13.6:-

***"Just as all the beneficiaries of a trust, if of full age and sound mind, can put an end to a trust and direct the trustees to transfer the trust property as they direct (para 15.12 below) so too they can vary the trusts of the settlement.*** In a sense, this is just one application of the rule that beneficiaries who between them own the trust property can direct how it be dealt with ...."

- 41 In our judgment the 1999 letter was effective to vary the Trust once it was communicated to the Trustee in November 2001. The letter was signed by the husband and the wife who between them were beneficially entitled to the whole of the trust fund. The letter directed the Trustee that, in the event of divorce (which has happened) the Property (as the sole asset of the Trust) should be held for the husband and wife in equal shares. The fact that the 1999 letter is headed 'letter of wishes' makes no difference in our judgment. The text of the letter was in terms which amounted to a direction to the Trustee to vary the terms of the Trust so as to hold the trust fund equally for the parties in the event of a divorce. We hold that the Trustee was entitled to treat the Trust as varied by the 1999 letter.
- 42 It is true that, since August 2003, the husband has purported to renege on that direction, but in our judgment he is not entitled to do so. Having giving the direction to the Trustee, the



trust fund was held upon the terms of the Trust as varied by the 1999 letter i.e. for the parties equally. It could only be further varied by the direction of both beneficiaries and that has not been forthcoming. It follows that the Trustee continues to hold the trust fund upon trust for the husband and the wife in equal shares as directed by the 1999 letter.

- 43 We would emphasise that this part of our decision does not arise directly out of the decision of the Appellate Court. The Trust has not been varied by reason of any order of the Appellate Court or any order of this Court. Nor is the 2007 instruction relevant; we agree that that instruction was given under the compulsion of the District Court and cannot be relied upon. The Trust was varied, in accordance with standard principles of trust law, by the two beneficiaries themselves giving the appropriate direction to the Trustee in the 1999 letter. The sole relevance of the decision of the Appellate Court in this context is that that Court found the husband to be of sound mind and not under the undue influence of the wife when he signed the 1999 letter. As we have said, it is not open to the husband, having had the opportunity of arguing the matter fully in the Dutch court, to now go behind that finding. But in any event there was clearly ample evidence to support the finding of the Dutch court given that the terms of the 1999 letter are entirely consistent with the 1996 variation and with the letter of 25th March 1997 from Mr Gibney referred to earlier. The upshot therefore is that the Trustee holds the trust fund upon trust for the husband and the wife in equal shares.
- 44 The Trustee seeks then the direction of the Court as to what action it should take in relation to the Property.
- 45 The legal position is that a trustee is under a duty to act in the best interests of the beneficiaries and to be impartial as between them. Thus, in ordinary circumstances, the duty of the Trustee in this case would be to sell the Property for the best price that could be obtained i.e. its current market value - whether such sale was to the wife or to a third party. Only by selling the Property for its full market value would the Trustee be fulfilling its duty to the beneficiaries and ensuring that they each benefited equally from the trust fund.
- 46 It is at this point that the existence of the order of the Dutch court becomes relevant. The fact is that the Property is situated in the Netherlands and is therefore subject to the ultimate control of the Dutch court. The husband argues that the Trustee should not comply with the order of the Appellate Court. He says that the Trustee should obtain a current market valuation and should only sell the Property to the wife (if she is willing to proceed) or to a third party at that price. If the wife will not agree to purchase the Property for its current market value, the Trustee should take proceedings in the Dutch courts to evict her so that it can sell to a third party.
- 47 In our judgment the difficulties of such a course are correctly summarised in the submissions of the Trustee recorded at para 34 above. On the evidence presently before us, it would not seem to be a practical proposition. The likely outcome would be the incurring of further time and expense by the Trustee (to the prejudice of the beneficiaries) with no satisfactory outcome. We think it would be more damaging to the interests of the



beneficiaries (including the husband) than to proceed with a sale at the price of €415,000. At least, by that route, the husband would receive something pursuant to the sale whereas, for the reasons articulated by the Trustee, he may well not receive anything if the Trustee endeavours to proceed in the Netherlands in contravention of the order of the Appellate Court.

48 However, we have to say that, although the husband must bear considerable responsibility for much of the delay in this matter, it does seem rather unfair that, if in fact the value of the Property is more than €415,000, the husband should receive a sum calculated by reference to the lesser figure. The agreement between the parties, which was upheld by the Dutch court, was that the assets of the parties, including the Property, should be divided equally between them. There would in fact be no equal division if the wife were to be able to buy the Property at less than its true market value.

49 We think that the appropriate method of proceeding would be as follows:-

(i) The Trustee should take legal advice in the Netherlands on whether there are any steps open to it to seek to achieve a situation whereby the Property is re-valued and sold at its current market value, whether this is by application to the Dutch court to vary its existing order, by taking proceedings to evict the wife and sell to a third party or otherwise.

(ii) If the Trustee is advised that there are good prospects of achieving a sale at current market value, all well and good. It could then seek further directions from this Court as to whether to proceed with the advised course of action.

(iii) If, as perhaps seems more likely, the Trustee is advised that the order of the Appellate Court is binding in the Netherlands and that there is no good prospect of achieving an outcome whereby it can sell the Property for its current market valuation, it would be in order for the Trustee to sell to the wife at €415,000 because, in the particular circumstances of this case, that it is the best price that it can achieve. A trustee should not be criticised for bowing to the inevitable by complying with an order of the court in whose jurisdiction the real property in question is situated. The price should of course be adjusted as per the Formula laid down by the Appellate Court and should also take account of the Trustee's costs (to which we shall refer in a moment). We do not think it matters whether the sale goes ahead by way of payment of the gross price (adjusted by the Formula) to the Trustee, deduction of the Trustee's fees and the prompt distribution of 50% of what is left to each of the parties or by a netting off on the part of the wife whereby she only has to pay the net amount (after deduction of her 50% of the net proceeds after allowing for the Trustee's fees and the Formula) to the Trustee. The difference in outcome would merely be one of short term cash flow.

50 Under Rule 14 of the trust instrument, the Trustee is entitled to remuneration as well as to reimbursement of its proper expenses. The entitlement of each of the beneficiaries to half of

the trust fund is therefore subject to prior discharge of the remuneration and expenses of the Trustee. It follows that the Trustee is entitled to deduct from the sale price the amount of its reasonable remuneration and proper expenses and the beneficiaries are entitled only to the net amount left after payment of such remuneration and expenses.

- 51 Both the husband and the wife have made criticisms of the Trustee although, not surprisingly, they have done so from opposite standpoints. Both are clearly concerned at the level of fees and expenses which are said to have been incurred. It is not for us today to rule on the level of fees or expenses billed or claimed by the Trustee. However, in order to try and assist the parties in resolving this matter by agreement, we think it right to make certain observations:-
- (i) Although we have held that the 1999 letter was effective to vary the Trust with effect from November 2001, we do not think it unreasonable for the Trustee to have required the comfort of an order of this Court in view of the subsequent changes in position by the husband.
  - (ii) Given the lack of agreement between the beneficiaries and the concern raised over the valuation used by the Appellate Court, we do not think it unreasonable for the Trustee to have required an order from this Court before agreeing to sell the Property to the wife at a valuation of €415,000.
  - (iii) Given the wording of para 2.7 of the judgment of the Appellate Court of 8th February 2005 as contained in the original translation (quoted at para 20 above) we do not think it unreasonable for the Trustee to have been unwilling to proceed by way of a sale at a price which netted off the wife's 50% interest.
  - (iv) We do not consider it to have been unreasonable for the Trustee to have instructed Jersey and Dutch lawyers to advise it in connection with these matters.
- 52 In summary, we direct the Trustee to proceed as set out in para 49. We are willing to hear counsel on the exact terms of the order.