HSBC Trustee (CI) Ltd v Siu Hing Kwong

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Grime, Sparrow
Judgment Date:	15 December 2017
Neutral Citation:	[2017] JRC 214A
Date:	15 December 2017
Court:	Royal Court

Text

[2017] JRC 214A

Royal Court

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Grime and Sparrow.

In the Matter of in the Matter of the KSH no. 4 Trust, the KSH no. 5 Trust, the KSH No. 6 Trust and the Gk and Jk Trust

Between
HSBC Trustee (CI) Limited
Representor
and
(1) Siu Hing Kwong
(2) Walter Ping Sheung Kwok (on his own behalf and as representative of his unborn issue)
(3) Thomas Ping Kwong Kwok (on his own behalf and as representative of his unborn issue)

(4) Adam Kai Fai Kwok
(5) Kimberly Hew Chee Kwok
(6) Dominic Kai Kuan Kwok
(7) Raymond Ping Luen Kwok (on his own behalf and as representative of his unborn issue)
(8) Edward Ho Lai Kwok
(9) Joyce Kwok
(10) Christopher Kai Wang Kwok
(11) Geoffrey Kai Chun Kwok (on his own behalf and as representative of his unborn issue)
(12) Jonathan Kai Ho Kwok (on his own behalf and as representative of his unborn issue)
(13) Lesley Wai San Kwok (on her own behalf and as representative of her unborn issue)
Respondents

Advocate N A K Williams **for the Representor**

Advocate J D Kelleher **for the First Respondent**

Advocate A D Hoy **for the Second Respondent**

Advocate J M P Gleeson **for the Third to Sixth Respondents**.

Advocate J Harvey-Hills **for the Seventh to Tenth Respondents**.

The Eleventh, Twelfth and Thirteenth Respondents did not appear and were not represented.

Authorities

Re S Settlement [2001] JLR N 37 .

Re Otto Poon Trust [2015] JCA 109 .

Cotton v Brudenell-Bruce [2014] EWCA Civ 1312 .

Pitt v Holt [2013] 2 AC 108 .

Investec Trust (Guernsey) Limited v Glenalla Properties Limited (29th October 2014)

Trust — application by the Representor for the court's blessing to the proposed segregation.

THE COMMISSIONER:

1 This is an application by the Representor (“the Trustee”) as trustee of four trusts for the Court's blessing of a momentous decision. That decision involves:-

(i) dividing certain specified assets held by the four trusts in question between trusts established for the family branches of the settlor's three sons;

(ii) taking certain preparatory steps to ensure that the above division is carried out fairly and reasonably, and in the most tax-efficient manner; and

(iii) taking certain preparatory steps to place itself in a position to make top up payments to equalise the total amounts segregated to each branch.

2 We shall, without meaning any disrespect, describe the family members (other than the First Respondent) by their English first names in accordance with the practice which has been followed in the papers before the Court.

The Trusts

3 The four trusts which are the subject of this application ("the Trusts") were established by the First Respondent ("the settlor") on 11 th June 2009. The Trustee was the original trustee. The settlor is the mother of the Second Respondent ("Walter"), the Third Respondent ("Thomas") and the Seventh Respondent ("Raymond").

4 The Trusts are all governed by Jersey law and the courts of Jersey are specified as the forum for administration. The Trustee is a Jersey company carrying on trust business in the Island. The Court therefore has jurisdiction in respect of the Trusts. They are all discretionary trusts although the class of beneficiaries varies. That is because, as we shall see, the intention has always been that the three branches of the family (i.e. the family of each son) should be treated equally.

5 The beneficiaries of the KSH No. 4 Trust ("the No. 4 Trust") are the settlor and the issue of Walter. He has three adult children, namely the Eleventh to Thirteenth Respondents ("Geoffrey", "Jonathan" and "Lesley"). It is to be noted that Walter himself is not a beneficiary of this Trust.

6 The beneficiaries of the KSH No. 5 Trust ("the No. 5 Trust") are the settlor, Thomas and his issue. The Fourth to Sixth Respondents are Thomas' adult children.

7 The beneficiaries of the KSH No. 6 Trust ("the No. 6 Trust") are the settlor, Raymond and his issue. Raymond has three adult children, namely the Eighth to Tenth Respondents.

8 The beneficiaries of the GK and JK Trust ("the GK and JK Trust") are the settlor, Geoffrey and his issue, and Jonathan and his issue. Again, Walter is not a beneficiary.

9 The Trusts between them own four holding companies ("Holdcos"). The Holdcos are held

by the Trusts in the following proportions:-

(i) No. 4 Trust 9/60 ths

(ii) No. 5 Trust 20/60 ths

(iii) No. 6 Trust 20/60 ths

(iv) GK and JK Trust 11/60 ths

As can be seen therefore, each branch of the family (ie Walter's branch, Thomas' branch and Raymond's branch) has a 1/3 rd interest in the Holdcos with Walter's branch being represented by a combination of the No. 4 Trust and the GK and JK Trust. However, unlike Thomas and Raymond, Walter is not personally a beneficiary of those trusts which are for the benefit of his branch of the family.

10 The Holdcos hold, directly or indirectly, shares in a series of underlying companies which in turn own a range of assets including properties in Hong Kong, Canada, US and Malaysia; cash; alternative investments; listed equities; and interests in trading companies. The most recent valuation shows that the assets have a very considerable value. There are some 233 companies under the Trusts, which hold these assets. The assets were originally derived from the wealth of the settlor's late husband and father of Walter, Thomas and Raymond (“the Father”).

11 None of the companies within the Trusts is administered by the Trustee. Such administration has always been carried out by the settlor's family office (“the Family Office”).

12 As a result, there are specific provisions (known conventionally as anti-Bartlett provisions) limiting the Trustee's duties and powers in respect of underlying companies. These are set out at clause 13 of the trust deed of each of the Trusts and we would summarise the key elements of that clause as follows:-

(i) The Trustee shall not be ‘ *bound or required to exercise any control the Trustee may have over or to interfere in or become involved in the administration, management or conduct of the business or affairs of any company….*’.

(ii) The Trustee ‘ *shall leave the administration, management and conduct of the business and affairs of any company … to the directors, officers and other persons authorised to take part in the administration, management or conduct thereof and the Trustee shall not be bound or required to supervise such directors, officers or other persons so long as the Trustee shallnot have actual knowledge of any dishonesty relating to such business or affairs on the part of any of them*’.

(iii) The Trustee ‘ *shall assume at all times that the administration, management and conduct of the business and affairs of any company … is being carried on competently, honestly, diligently and in the best interests of the Trustee …*’.

(iv) The Trustee ' *shall not be bound or required at any time to take any steps at all to ascertain whether or not the assumptions [above] are correct*'.

(v) The Trustee ' *shall not be bound or required to obtain or to seek in any way whatsoever to obtain any information regarding the administration, management or conduct of the business or affairs or any other matter relating to any company … from the persons involved in such administration, management or conduct*..'.

(vi) The Trustee ' *shall assume that such information as is supplied to it by any person relating to any company …is accurate and truthful unless the Trustee shall have actual knowledge to the contrary and the Trustee shall not be bound or required at any time to take any steps at all to ascertain whether or not the information is accurate and truthful*.' [emphasis added]

The expression 'company' includes a company in which the Trustee has a controlling interest, whether directly or indirectly.

Background

13 The Court has received evidence comprising four (first, third, fourth and fifth) affidavits from Jacqueline Marsh on behalf of the Trustee, an affirmation from the settlor, an affirmation from Raymond, an affidavit from Thomas, and three affirmations from Walter together with voluminous exhibits to the various affidavits and affirmations. We have carefully considered all the material to which we have been referred. However, we propose only to refer in this judgment to those matters and documents which we consider essential in order to explain our decision.

14 In order to put the decision of the Trustee in context, it is necessary to record briefly some of the family history.

15 The family wealth originates from a company ("the Main Company" or "SHKP") built up by the Father. The family's interest in the Main Company and in other assets ("the Other Assets") have traditionally been held in a complex series of trust structures. The Trusts hold no shares in the Main Company; the family's interests in the Main Company are held separately.

16 The Father died in 1990. It seems to be agreed by all parties that his wishes were that the family wealth should be held as to 55% for the settlor as his widow and 15% for each of the families of Walter, Thomas and Raymond.

17 In August 2002, for personal reasons, Walter was removed as a beneficiary of most of the trusts which then existed. According to the Trustee, that was with his agreement. Although removed, he remained eligible to be added back as a beneficiary. His issue all remained

beneficiaries.

18 In August 2004, the settlor and the three sons signed a Memorandum of Understanding ("the 2004 MOU"). This dealt for the most part with how the shares in the Main Company were to be dealt with and it reiterated at Clause 2.2 the concept of the 55%/15%/15%/15% split. Clause 9 dealt with Other Assets ie assets other than shares in the Main Company.

19 On 7 th December, 2006, the settlor and the three sons entered into a further Memorandum of Understanding ("the 2006 MOU") to reflect changes in the structures which had been holding shares in the Main Company. Clause 1.4 stated that the 2006 MOU superseded the 2004 MOU. Most of the provisions of the 2006 MOU were concerned with how the shares in the Main Company were to be dealt with. However Clause 9 dealt with Other Assets. In view of the importance which Walter places on the 2006 MOU, we set out the relevant parts of Clause 9:-

> *"9. Assets other than SHKP Shares*
>
> *9.1 It is hereby agreed and declared that, in respect of all assets held by all Kwok family trusts (namely trusts under which [the settlor] and/or each of her three sons are beneficiaries) being assets other than SHKP Shares held by the [New King Yip Trust], following the death of [the settlor] such assets should be divided equally between trusts for the benefit of her three sons (or their respective families) unless and to the extent that the representatives of the Sub-Trusts appointed pursuant to paragraph 5 above shall unanimously agree otherwise.* The trusts to receive the assets shall be:-
>
> *…*
>
> *9.2 It is hereby further agreed that if in respect of any one asset (other than SHKP Shares) the representatives of the Sub-Trusts appointed pursuant to paragraph 5 above are unable to concur amongst themselves after the death of [the settlor] as to whether that asset should be retained or sold or redeveloped or otherwise altered or improved, then any one of such representatives may give a notice to the others of them in writing to the effect that if no consensus is reached within six months of the date of such notice acceptable to them, then the asset the subject of the disagreement shall be sold and the proceeds of sale shall be distributed in accordance with the provisions of paragraph 9.1 above."*
> [emphasis added]

20 The reference to the representatives of the Sub-Trusts was to Walter, Thomas and Raymond. As well as being signed by the settlor and the three sons, the 2006 MOU was also signed by HSBC International Trustee Limited (HSBCIT), a company incorporated in the BVI, in its capacity as trustee of the New King Yip Trust and the King Yip Sub-Trust. Between them these two trusts held the interests in the Main Company.

21 During the course of 2007, relations between Walter on the one hand and Thomas and Raymond on the other deteriorated. Some of the affidavits, particularly those of Walter, deal with this aspect but it is not necessary for us to record the detail and the Trustee was not involved. The upshot was that in May 2008, Walter was removed as chairman and CEO of the Main Company. He challenged this in the Hong Kong courts but that challenge failed.

The 2009 reorganisation

22 The Trusts were established by the settlor on 11 th June, 2009, as part of a general reorganisation in connection with Other Assets. In view of the submissions made on behalf of Walter, it is necessary to record the evidence of Ms Marsh, on behalf of the Trustee, as to what occurred at the time.

23 The assets in the Trusts have to a substantial extent come indirectly from three previous trusts, namely a Cayman Islands trust called the New King Yip Overseas Trust, a Hong Kong trust called the Lai Cheong Trust and a BVI trust called the New Lai Cheong Trust. HSBCIT was the previous trustee of the Lai Cheong Trust and the New Lai Cheong Trust. Unrelated companies were the previous trustees of the New King Yip Overseas Trust.

24 Ms Marsh records that, following discussions with the family's advisers, the Trustee became the trustee of the Lai Cheong Trust and the New Lai Cheong Trust in August 2008 in place of HSBCIT (the Hong Kong branch of which was closing) and on 25 th June 2009 the Trustee also became trustee of the New King Yip Overseas Trust.

25 The trust fund of the New King Yip Overseas Trust comprised shares in two of the Holdcos. On 28 th July 2009, the Trustee appointed the entire trust fund of the New King Yip Overseas Trust to the settlor. The next day, she gifted these shares to the Trusts which later came to be held in the relevant proportions in which they are now held. Legal title to the shares in the two Holdcos was vested in the Trustee at all times (albeit as nominee for the settlor for one day). Ms Marsh asserts that no underlying assets were dissipated during the course of this restructuring and that what left the New King Yip Overseas Trust was passed through to the Trusts.

26 The third Holdco was an asset of the New Lai Cheong Trust and in 2011, the Trustee appointed the shares in that Holdco to the Trusts in the relevant proportions. On 12 th October, 2011, the Trustee, as trustee of the Lai Cheong Trust, restructured various shareholdings so that the shares in the relevant companies became owned by another company within that trust called King Yip Holdings International Limited. On 14 th October, 2011, the shares in King Yip Holdings International Limited were appointed by the Trustee, as trustee of the Lai Cheong Trust, to the settlor who on the same day gifted the shares in King Yip Holdings International Limited to the third Holdco.

27 The fourth Holdco was incorporated on 12 th April, 2011, by the settlor. The underlying companies were previously held by a trust known as the Glamour Trust (of which the Trustee was not the trustee) and these were transferred into the ownership of the fourth Holdco prior to the settlor gifting the shares in the fourth Holdco to the Trusts in the relevant proportions on 14 th October 2011.

28 As already stated, Walter was not personally a beneficiary of the No. 4 Trust or the GK and JK Trust (being those trusts for the benefit of his branch of the family) but neither was he a beneficiary of the trusts from which the assets came in 2009, having as already stated been removed (revocably) as a beneficiary of those trusts in 2002.

The Heads of Agreement

29 On 27 th January, 2014, the settlor and the three sons (together "the Principal Family Members") entered into Heads of Agreement ("the HOA"). This followed a letter before action and the provision by Walter of a draft writ of summons in the Hong Kong High Court whereby he sought relief as a result of his alleged wrongful exclusion from benefits and enjoyment of rights and interests in the shares in the Main Company. The claim was based largely on obligations said to arise under the 2006 MOU.

30 The HOA was intended to avert the need for litigation and the Trustee and HSBCIT were named as parties to the HOA. However, they did not sign it on the basis that they did not think it right to fetter their discretion in any way. It was therefore signed only by the settlor and the three sons and they are the only four persons bound by it. In outline, the HOA contained three separate parts (described as stage 1, stage 2 and stage 3). Stages 1 and 2 related to shares in the Main Company whereas stage 3 related to Other Assets. The key part of the HOA for present purposes is stage 3 as the Trusts do not hold any shares in the Main Company.

31 The relevant provisions of the HOA are as follows:-

> *"2. Upon the signing of these Heads of Agreement, the obligations set out in Stage one and Stage two will become irrevocably and immediately enforceable, and will be severable from the remainder of the terms of these Heads of Agreement. …*
>
> *3. Contemporaneously with the execution of these Heads of Agreement the parties shall enter into a Tolling Agreement on such terms as set out in Appendix F, which shall provide for no proceedings to be commenced and time not to run in respect of any claims between the parties for a fixed period of 12 months commencing from the date of the Tolling Agreement to allow the negotiation (where herein provided for) and implementation of the detailed arrangements contemplated herein*.

…

Stage Three – Family Private Assets

20. 15% of the assets within the private assets of the Family (being the assets directly or indirectly jointly held or managed for the benefit of all of Madam Kwong, Walter Kwok, Thomas Kwok and Raymond Kwok (together the "Family"), which assets are not (1) shares of SHKP, (2) those that are solely Madam Kwong's assets, (3) those that are solely Walter Kwok's assets, (4) those that are solely Thomas Kwok's assets and (5) those that are solely Raymond Kwok's assets) (the "Family Assets"), are to be managed by Walter Kwok for the lifetime of Madam Kwong, which assets shall be held in a trust (the "New WK Private Assets Trust") separate from the current trust structure. Madam Kwong shall remain the appointor and a beneficiary of such trust during her lifetime. The income of such trust shall accumulate during Madam Kwong's lifetime. After Madam Kwong's lifetime, Walter Kwok shall be the succeeding appointor and the trust assets may then vest in Walter Kwok on the passing of Madam Kwong. These arrangements shall be made and accepted by Walter Kwok in full and final satisfaction of all and any claims that Walter Kwok may have on the private assets of the Family and the assets that are solely Madam Kwong's assets (including cash, properties and other assets), and all and any trusts established by Madam Kwong together with the trustees of such trusts and all beneficiaries thereunder.

21. Upon the establishment of the New WK Private Assets Trust, Walter Kwok shall simultaneously execute an irrevocable and unconditional and immediately effective waiver and release of any claims that he has or might have in respect of the Family Assets, (inclusive of the balance of the Family assets that do not comprise the 15% that Walter Kwok is to receive under paragraph 20 above and that are to be held in the New WK Private Assets Trust), the assets that are solely Madam Kwong's assets (including cash, properties and all other assets) and all and any trusts established by Madam Kwong.

22. Such 15% of the relevant assets of the Family which form the subject matter of the New WK Private Assets Trust shall include (but not be limited to):

(i) the following San Francisco properties:

(a) [named property];

(b) [named property];

(c) [named property];

(d) The Family's 45% interest in Cheung & Kwok Holdings, Inc which owns property located in Millbrae; and

(e) The Family's 45% interest in California Lucky Man Enterprises, Inc which owns property in Millbrae;

and

(ii) the Holiday Inn Express Hotel in Causeway Bay;

provided that the aggregate value of the properties listed in (i) and (ii) above (collectively, the "Properties") does not exceed 15% of the aggregate value of the Family Assets at the time when the Family Assets (including the Properties) are valued (the "Valuation Date") for the purposes of the comparison of the Properties with the Family Assets in order that the Properties can be placed in the New WK Private Assets Trust.

23. The aggregate value of all the Family Assets shall be determined by the valuation assigned to them on the Valuation Date with such valuation (the cost of which shall be borne by the Family Assets) to be undertaken by independent valuers in the relevant jurisdictions where the assets are located and such valuers shall be appointed by Madam Kwong after consultation with Walter Kwok, Thomas Kwok and Raymond Kwok and Madam Kwong's decision on appointment shall be final. Within three months after the Valuation Date, Madam Kwong shall procure the Properties be vested in the New WK Private Assets Trust. In the event that the aggregate value of the Properties is less than 15% of the aggregate value of the Family Assets, additional cash and/or any other properties as agreed between Madam Kwong, Walter Kwok, Thomas Kwok and Raymond Kwok of such value which is equivalent to the shortfall shall be vested in the New WK Private Assets Trust. In the event that the aggregate value of the Properties exceeds 15% of the aggregate value of the Family Assets, Walter Kwok shall pay such amount of cash or kind which is equivalent to the excess to Madam Kwong who shall return it to the Family Assets.

24. In the event that: (i) Thomas Kwok and/or Thomas Kwok's family, and (ii) Raymond Kwok and /or Raymond Kwok's family, subsequently receive a distribution of the Family Assets that exceeds in total 30% of the aggregate value of the Family Assets (inclusive of the assets held by the New WK Private Assets Trust) at the time of such distribution, there shall be a distribution jointly to Geoffrey Kwok and Jonathan Kwok that is similar to the distribution (to the extent that it is beyond 30%) received by one of (i) Thomas Kwok and/or Thomas Kwok's family and/or (ii) Raymond Kwok and/or Raymond Kwok's family. The arrangement in this paragraph shall be encapsulated in a further agreement between the Parties.

…

26. The Parties shall use their best endeavours to procure that the aforesaid arrangements contemplated in Stage Three be completed within 12 months from the date of these Heads of Agreement. The Parties will take all such action and execute all such documents as may be necessary to give effect to the arrangements contemplated in Stage Three.

Release from Claims

27. The settlement shall be comprehensive and full and final in respect of all and any claims which Walter Kwok has or may have against the parties. In implementing these Heads of Agreement, the parties will take any and all necessary steps to implement the settlement. To the extent reasonably necessary for Walter Kwok to take legal and/or accounting advice for the purpose of these Heads of Agreement, Madam Kwong will provide him with access to the relevant trust documents and accounts to the extent she is able to enable him to do so, and Thomas Kwok and Raymond Kwok shall not refuse or cause to be refused any such access.

…

Further Assurance

32. Each Party agrees:

…

(ii) to provide any other Party with access (to the extent it is in that Party's power) to all documents necessary or reasonably desirable to properly implement and/or give effect to these Heads of Agreement and the transactions contemplated herein, and to refrain from causing or procuring any other entity from denying a Party with such access to documents.

…

41. In the event that all the Parties other than HSBC Trustee and/or HSBC International Trustee have executed and delivered these Heads of Agreement, the Parties acknowledge that these Heads of Agreement shall constitute legal, binding and enforceable obligations as among all these Parties other than HSBC Trustee and/or HSBC International Trustee. The Parties undertake to take such actions and execute such documents promptly as may be necessary in order to give effect to these Heads of Agreement, including (to the extent required and whilst recognising that the relevant trusts are discretionary in nature) exercising their powers as Appointors or Guardians of any trust to take steps to request the compliance of HSBC Trustee and/or HSBC International Trustee (and any successors and assigns) or their replacement as trustee.

Entire Agreement

42. These Heads of Agreement and each document referred to in it constitutes the entire agreement and supersedes any previous agreement, understanding or arrangement among the Parties relating to the subject matter of these Heads of Agreement, save and except this clause shall not prevent Walter Kwok from pursuing any claims following the expiry of the Tolling Agreement that are preserved by such agreement."

32 Various other clauses of the HOA emphasise that the amounts agreed to be paid under the HOA are to be in full and final settlement in respect of any claims which Walter may have. Finally, Clause 49 provides that the HOA is governed by the law of Hong Kong and the courts of Hong Kong shall have exclusive jurisdiction in respect of any disputes concerning the HOA.

33 In summary therefore, under the HOA 15% of the Family Assets (as defined in the HOA) were to be appointed to a new trust, the assets of which Walter would manage during the settlor's life and from which he could benefit after her death. That 15% would include the properties listed in clause 22 (“Assets for Walter”) together with any top up required to bring the amount up to 15%, such top up to be in paid in cash or by means of such properties as may be agreed between the Principal Family Members. Payment of this 15% would be in full and final settlement of any claims by Walter to Family Assets.

The settlor's request

34 Although stages 1 and 2 of the HOA have apparently been substantially put into effect, little progress has been made in relation to stage 3. In a statutory declaration dated 13 th July, 2015, the settlor described the exchanges she had with the sons and stated that, in accordance with Clause 23 of the HOA, she was nominating CBRE to carry out the required property valuations. She also stated that the Family Office had appointed independent certified public accountants WM Sum and Co (“Sum”) to prepare a financial summary of the stage 3 assets. The statutory declaration went on to say that, upon completion of the financial summary, 15% of the aggregate value of the assets (including the Assets for Walter), would be transferred to an independent private trust to be managed by Walter. She went on to say that she had also decided to transfer an equivalent 15% into a designated trust for Thomas and a similar amount into a designated trust for Raymond, so that the three brothers would each be able to manage their 15% share.

35 On 3 rd February, 2016, the settlor sent a written request to the Trustee (“the Request”) asking it to assist by effecting a distribution of assets to reflect the HOA on the basis that the majority of the stage 3 assets were held by the Trusts. She referred to the valuations by CBRE and the schedule of assets produced by Sum (which contained valuations of the non-property assets and referred to the CBRE valuations for property assets) and noted that these had been sent to her three sons in late 2015. Both the CBRE and Sum valuations had been calculated for two alternative valuation dates, namely 27 th January 2014 (being the date of the HOA) and 30 th June 2015. The settlor considered that the date of the HOA was the better date to take.

36 She asked in effect that the Trustee transfer the Assets for Walter to the No. 4 Trust and then consider how to revise the relevant provisions of that Trust or distribute the assets to another separate trust to allow Walter to manage the assets. She also asked that a 15% distribution should be made to the No. 5 Trust for the benefit of Thomas and his family and

a further 15% to the No. 6 Trust for the benefit of Raymond and his family. In the case of each of the No. 5 and No. 6 Trust, she specified certain assets which she wished to be distributed to them. We would refer to the listed assets for the No. 5 Trust as the “Assets for Thomas” and those for the No. 6 Trust as “Assets for Raymond”. She said that cash should be used to make up any shortfall in the 15% for all three distributions.

37 There then followed lengthy discussions involving the Trustee and lawyers for the settlor and the brothers in connection with the Request. It is not necessary to record these in detail. Suffice it to say that Walter objected to what was proposed. He raised a number of matters but a key concern of his was that there had been a failure to make adequate disclosure pursuant to Clauses 27 and 32(ii) of the HOA and that this was necessary in order to ascertain the overall assets. Only once one had a figure for 100% could one work out what was necessary to constitute 15% thereof. We shall elaborate on this aspect when considering Walter's objections later in this judgment. Walter also objected to the fact that it was proposed to make distributions in favour of Thomas and Raymond. He said that this could not be done without his consent by reason of the provisions of clause 9.2 of the 2006 MOU and that furthermore the HOA only envisaged distributions to or for the benefit of his family.

38 It became clear to the Trustee that there was an impasse and accordingly on 26th June, 2016, the Trustee wrote to the Principal Family Members setting out its proposals and inviting the parties to meet to talk through the proposed plan. These meetings took place but did not succeed in resolving matters. In order to try and provide some comfort on the valuation, the Trustee decided to instruct an independent firm to review the CBRE and Sum valuations. The firm of PricewaterhouseCoopers (“PwC”) was instructed by the Trustee in September 2016. Phase 1 of their work comprised (i) identification of the inventory of the assets which constituted the 100% figure (“the Relevant Assets”), including obtaining and analysing existing lists of assets (including a schedule of assets and valuations provided by the Family Office to Sum) and audited and/or management accounts of the underlying companies; (ii) review of the valuations of the real estate assets done by CBRE (including to assess appropriateness of approach and key assumptions); (iii) review of the valuations of the other assets done by Sum; and (iv) other matters such as the effect of changes and the value of liquid assets and liabilities and intercompany receivables and payables between the companies owned by the Trusts.

39 The Trustee provided a draft of PwC's phase 1 report (“the Phase 1 Report”) to the Principal Family Members on 26th January 2017. PwC concluded that the valuation work done by Sum and CBRE was broadly reasonable but with reservations in respect of two property valuations and one investment in another company together with certain joint venture assets and yachts and vehicles. It also identified substantial liabilities as at the date of the HOA (“the Liabilities”) which had not been included in the Sum report.

40 Following distribution of the Phase 1 Report, a further meeting took place between the Trustee and Walter on 14th February, 2017, following which Peter Yuen, Hong Kong

Solicitors acting for Walter, wrote a further letter on 22 nd February reiterating Walter's concerns. These related to the fact that PwC had not audited the list of Relevant Entities (i.e. the entities within the Trusts as augmented by the Canadian assets to which we refer later).

41 On 26 th February 2017, the Trustee, having taken written advice from Ogier and Jonathan Hilliard QC decided to:-

(i) segregate the property assets specified in the Request into separate trusts for the benefit of Walter, Thomas and Raymond (and their respective branches) pursuant to the Request. The details of the steps to be taken would need to be decided in future following advice from PwC about the mechanism and from tax advisers about the most tax-efficient way of constructing such mechanism. However, in principle, pursuant to the Request, the Trustee considered it right to segregate these particular assets in the way requested. The Trustee believed that this would generate significant progress in the pursuit of family harmony;

(ii) take a number of steps to arrive at a final valuation of the Relevant Assets for the purposes of considering the question of any top up payments ("Top Up Transfers"). The Trustee decided to use the HOA date for the purpose of valuation coupled with a mechanism to make adjustments to the results of this valuation to take account of relevant transfers of value between the various specified property assets since the HOA date. The Trustee also proposed to identify the Relevant Assets (being the assets used to calculate the 100% figure) by reference to the assets identified in the Phase 1 Report.

42 In more detail, the segregation would involve:-

(i) (a) transferring the Assets for Walter either to the No. 4 Trust with Walter being added as a beneficiary immediately following the segregation and payment of the Top Up Transfers, at which time the No. 4 Trust would only hold the 15% of the Relevant Assets for the benefit of Walter and his issue (and no interest in assets held for other family members) or

(b) transferring the Assets for Walter to a new trust vehicle (the "New WK Private Assets Trust") of which Walter and his family would be beneficiaries;

(ii) transferring the Assets for Thomas to the No. 5 Trust;

(iii) transferring the Assets for Raymond to the No. 6 Trust.

In each case there would be Top Up Transfers to reach the 15% figure.

43 We should explain at this stage that the Assets for Thomas include certain construction sites and land in Canada together with related companies ("the Canadian Properties"). The Canadian Properties are held in Canadian Trusts with separate trustees. However the

Canadian trustees have agreed that they are willing to facilitate the transfer of the Canadian Properties to the No. 5 Trust. The exact mechanics of that have changed since the initial decision of the Trustee, but nothing turns on that and we do not need to deal with it in this judgment.

44 The Trustee proposes to calculate the 100% figure by reference to what it has called the Relevant Assets. This comprises all the assets in the Trusts (as listed in the Phase 1 Report) together with the Canadian Properties. The Trustee has however excluded from the definition of Relevant Assets three companies (listed at para 4.28 of Ms Marsh's first affidavit) which hold assets which the Trustee understands are assets derived from the settlor's personal wealth. These include her home, a property in Hong Kong, holiday homes in various locations and investments. However, all other assets in the Trusts have been included in the Relevant Assets. The Trustee has also agreed to the settlor's request that the Liabilities referred to at para 39 above will all be allocated against the 55% remaining in the Trusts. This effectively increases the value of the assets appointed for the benefit of Raymond, Thomas, Walter and their respective families to above 15%, because the 15% will be calculated by reference to the gross Relevant Assets rather than the net Relevant Assets.

45 Following the filing of the various affidavits in this case (and in particular that of Walter) the Trustee revisited the matter at a board meeting on 30 th June, 2017, to consider whether it was still right to proceed with the segregation and to apply to this Court for its blessing. It concluded that it was.

46 In her affirmation the settlor confirms that, after her death, she wishes the 55% remaining in the Trust (together with her personal assets) to be allocated equally between the three branches of the family, but with the share for Walter's family going to the GK and JK Trust.

The law

47 The test applied by this Court on an application for the blessing of a momentous decision is well established. It was held in *Re S Settlement* [2001] JLR N 37 that the Court must satisfy itself that (i) the trustee's decision has been formed in good faith, (ii) the decision is one which a reasonable trustee properly instructed could have reached, and (iii) the decision has not been vitiated by any actual or potential conflict of interest.

48 It follows from (ii) that the test is one of rationality. When a court is deciding whether or not to bless a momentous decision, it is not exercising its own discretion. The issue is whether the decision falls within the range of decisions that a trustee, properly exercising its powers, was reasonably entitled to make even if the court would balance the factors differently and might have reached a different decision.

49 The principles described in *Re S Settlement* have been recently affirmed by the Court of

Appeal in *Re Otto Poon Trust* [2015] JCA 109 and at paragraph 17 the Court of Appeal rejected the idea of introducing a new and additional requirement that a trustee must in all cases prove that its decision making process has been properly carried out. As the Court said at paragraph 17 " ***a decision maker can consider matters carefully and still reach an irrational decision, and conversely an entirely rational decision can be reached on the basis of superficial thought processes***."

50 The Court went on to say at paragraph 18:-

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

51 We were also referred to some helpful observations of the English Court of Appeal (per Vos LJ) in *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312 as follows:-

> ***"78. This aspect of the argument raised in sharp focus the procedure that is adopted when trustees seek the approval of the court to a momentous transaction. The procedure is intended to be quick and accessible. The question was raised as to what ought to happen when issues of contested fact are raised that the CRP Part 8 procedure is not well adapted to resolve. … In such a case, the court can always order that the issues of fact are tried under the Part 7 procedure, or anyway after disclosure and oral evidence. I do not, however, think that such a situation would frequently arise, because the trustees are not asking the court to find facts. They are asking the court to decide whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue*** .
>
> …
>
> ***84. … The authorities that I have mentioned above that emphasise the need for caution in approving a trustee's decision to undertake a momentous transaction need, I think, to be placed in context. The court***

will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason .

…

86. The decision that these trustees have reached is indeed a momentous one. The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways .

87. Finally, in this context, the fact that the beneficiary is in a weaker position than he would be, after full disclosure and cross-examination at a trial of an action to challenge the trustees' actions cannot, by itself, mean that the court should withhold consent. It is true that court approval will prevent a later challenge. But if the court is given sufficient and appropriate material on which to act, it should not withhold consent just in case something better might in the future turn up."

52 What can undoubtedly be said in this case is that the Trustee has considered the matter very carefully. It has taken detailed legal advice from well qualified lawyers in Hong Kong and Jersey as well as from leading English counsel. It has appointed its own independent financial advisers (PwC) to advise on the matter. It has consulted widely and has given consideration to the issues raised by Walter in opposition to the proposed segregation. The minutes of its meeting of 26 th February, 2017, cover some 21 pages and give detailed consideration to the relevant issues; and the minutes of the meeting of 11 th June, 2017, cover a further 5 pages considering the further issues which had arisen since the earlier decision. However, that is by no means decisive. As the Court of Appeal said in *Otto Poon* in the passage cited above, a decision maker can consider matters carefully and still reach an irrational decision. The question for this Court is whether the decision reached by the Trustee was a reasonable one.

The Trustee's reasons

53 We shall deal later in this judgment with the Trustee's position concerning Walter's objections to its decision and therefore do not address this aspect at this stage. The Trustee's reasons are contained in the minutes of its two meetings but we would summarise the key points as follows:-

(i) The HOA envisaged a segregation of 15% of the Other Assets for trusts for Walter and his family.

(ii) It was envisaged that this would proceed promptly but it has not so far proved

possible for this to occur by agreement.

(iii) There was disharmony in the family and a lack of progress in putting the HOA into effect was not in the interests of the beneficiaries, nor was paralysis of the Trusts.

(iv) The proposed segregation would be consistent with the general approach which had been adopted by the family of 15% of the assets being allocated to trusts for the benefit of the each son and their respective families, with 55% remaining in trusts for the settlor.

(v) The settlor was now 88. She was anxious that matters should be resolved while she was still alive. She had requested the segregation as she felt it would help to give a clean break as envisaged in the HOA and would help alleviate the acrimony within the family, which was her sincere wish. The Request, she said, was reasonable as between the three branches of the family and consistent with the wishes not only of herself but also of her late husband. As was made clear by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108 at para 61 “the settlor's wishes are always a material consideration in the exercise of fiduciary duties”.

(vi) The proposed segregation was supported by Raymond and Thomas. Geoffrey and Jonathan (being Walter's sons) were neutral.

(vii) The segregation would in fact benefit Walter more than was envisaged under the HOA as he would, following the segregation, be a beneficiary of the amended No. 4 Trust and/or the new WK Private Assets Trust and would be capable of benefitting immediately whereas the HOA merely envisaged him managing the 15% allocation until the death of the settlor and only benefitting thereafter.

(viii) For all of these reasons the proposed segregation appeared to be in the best interests of the beneficiaries as a whole.

54 On the face of it, those reasons would appear to be eminently reasonable. However, that preliminary view has then to be considered in the light of Walter's objections, which we now turn to consider.

Walter's objections

55 During the course of the correspondence and in his affirmations and skeleton argument, Walter has raised a number of objections. In our judgment, the key ones are as follows and we shall consider them in turn, although some of them are closely linked.

(i) Genuineness of the settlor's wishes

56 In his affirmations, Walter raised the question as to whether the Request represents the settlor's genuine wishes. He contends that she has very limited understanding and records

at paragraph 11 of his second affirmation that he meets her on a weekly basis and during one such meeting in early June 2017 she indicated that (i) she was unaware of the Trustee's proposed segregation, (ii) she has not signed anything regarding such proposed segregation and (iii) she had not met with her lawyers regarding such proposed segregation.

57 In response to the suggestion made by Walter, Clifford Chance, the settlor's solicitors in Hong Kong, wrote a letter dated 27 th June, 2017, to the Trustee strongly refuting any such suggestion. The letter reiterated that Clifford Chance were retained by the settlor alone in relation to the current matters. It said they had met with the settlor on many occasions over the years in order to ascertain her wishes and take instructions from her. In addition to the negotiation and preparation of the HOA, they oversaw the production and execution of the Request and also the production of her affirmation for the present proceedings. In all cases, documents had been produced following discussion with her and on the basis of instructions received from her and she was carefully taken through such documents and they were explained to her in Cantonese before they were signed by her. In accordance with best practice, the documents were signed in the presence of two doctors and an independent solicitor. The letter went on to say the following:-

> *"1.4 We have found [the settlor] able to give clear and independent instructions at all relevant times.* We have not observed any signs of undue influence. [The settlor's] instructions to us have been consistent. We are in no doubt that she wishes to see the Feb 2016 LOW and the HOA implemented and the disputes between her three sons to that extent resolved during her lifetime. She has been clear that the achievement of closure in these matters during her life is of major importance to her."

58 The Trustee has also responded to the suggestion. In her fourth affidavit Miss Marsh said the following at paragraph 3.8:-

> *"(c) Finally, the Trustee has not itself seen any evidence substantiating Walter's comments about [the settlor] personally (and her understanding of current issues).* I personally have met [the settlor] many times since 1996, and she has always been able to articulate her wishes independently and clearly (through interpreters, where necessary). This includes a meeting that I attended with my colleague Bernard Rennell (also a representative of the Trustee) very recently in July 2016.
>
> *(d) To make this point even further, the Trustee has also met with all of the Principal Family Members (including the settlor) individually as part of its consultation process.* In this regard, the Trustee has not noticed any signs of [the settlor] being unduly influenced by Thomas or Raymond. All of the Principal Family Members have strong views on this matter, but the Trustee's perception is that they all hold those views independently. The Trustee does not, therefore, consider that there is any substance to the criticisms from its perspective, and therefore does not consider that this is an impediment to proceeding with the

application."

59 In the light of the strong refutation from Clifford Chance and the Trustee's own impression of the settlor's understanding, we consider that it was perfectly reasonable for the Trustee to proceed on the basis that the Request from the settlor does indeed represent her genuine wishes and that she has not been unduly influenced by Thomas or Raymond.

(ii) Effect of the 2006 MOU and the HOA

60 In his first affirmation, Walter asserts that the Trustee is bound by the terms of the 2006 MOU and that the effect of clause 9.2 is that no family assets may be dealt with without the consent of all the brothers. As he has not consented to the proposed distribution of assets to trusts for the benefit of Thomas and Raymond as requested by the settlor, the Trustee would be acting in breach of the 2006 MOU if it complied with the Request.

61 In support, he relies upon an opinion dated 1 st June, 2017, from Martin Mann QC (English counsel) and Edward Tang (Hong Kong counsel) which concludes that HSBCIT is bound because it signed the 2006 MOU and that (para 33) " *It follows, of course, that the Representor is likewise bound*". No reason is given for this conclusion other than that, at paragraph 4 of the opinion, the Trustee is described as the 'successor' to HSBCIT.

62 In response, the Trustee has obtained legal advice on Hong Kong law from Norton Rose Fulbright ("Norton Rose") and advice on Jersey law from Jonathan Hilliard QC/Ogier, each of whom has concluded that, under their respective legal systems, the Trustee is not bound by the 2006 MOU.

63 It is not strictly necessary for us to resolve this matter as the question is whether the Trustee has acted reasonably in deciding that it is not so bound. However, in our judgment, not only has it acted reasonably but much the better view is that the Trustee is not bound. Our reasons for so concluding are those set out in detail by Norton Rose and by the Hilliard/Ogier opinion. In very brief summary:-

(i) The contractual obligation undertaken by a trustee is a personal liability. As the Guernsey Court of Appeal said in its judgment in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (29 th October 2014) at para 23:-

> ***"… We begin by observing the fundamental principle of the general law of trusts, which is as much part of the law of Jersey … as it is in most other jurisdictions, that a trust has no distinct or separate legal personality.*** A third party who engages in any transaction or matter with a person who is a trustee engages with that person, and any proceedings in respect of the transaction or matter are to be taken against that person. It is the person with whom the third party has engaged in the transaction or

matter who requires to satisfy any liability which arises from it. …"

That is why an outgoing trustee remains liable for obligations incurred while he was trustee and often seeks security for such liabilities before surrendering trust property. This would not be necessary if such liabilities were automatically transferred. The incoming trustee only becomes liable for events occurring after taking over from the outgoing trustee unless or until contractual obligations assumed by the outgoing trustee have been assigned or novated to the incoming trustee.

(ii) That alone is sufficient to resolve the matter. The 2006 MOU was signed by HSBCIT, not by the Trustee. But even if it were argued that an incoming trustee could somehow, without more, be liable for contractual obligations undertaken by an outgoing trustee, that would not assist in this case. That is because HSBCIT signed the 2006 MOU as trustee of the New King Yip Trust and the King Yip Sub-Trust. The Trustee is trustee of the Trusts, which are quite different and were not even in existence in 2006. Indeed, the New King Yip Trust and the King Yip Sub-Trust were not even the predecessor trusts of the Trusts (ie the trusts from which the assets of the Trusts indirectly came). We therefore do not see any way in which the Trustee, as trustee of the Trusts, can be said to be bound by the fact that a different entity, HSBCIT, as trustee of different trusts, signed the 2006 MOU.

64 In his skeleton argument and at the hearing, Advocate Hoy approached the matter rather differently. He did not press the point that the Trustee was legally bound by the 2006 MOU but he argued that segregation in the manner planned by the Trustee would result in the settlor and, implicitly, Thomas and Raymond, acting in a manner which was inconsistent with their binding contractual obligations under the 2006 MOU and the HOA. This would involve the Court knowingly sanctioning breaches of those agreements. That was not something which a reasonable trustee would do and the Court should not bless a decision which had that effect.

65 We accept that the issue of whether the 2006 MOU is binding on the settlor and the three sons – as to which according to Norton Rose there is some doubt – and the proper construction of the 2006 MOU (if it is legally binding) is a matter for determination under the law of Hong Kong and that the courts of Hong Kong are the proper forum for deciding that issue. However, as stated above, the Trustee is entitled to reach a view on the likely outcome of any such litigation and to take that into account when deciding how to proceed. The question for us is whether it has acted unreasonably.

66 In our judgment, it is entirely reasonable to reach the view that the segregation proposed by the Trustee would not place the settlor or Thomas and Raymond in breach of their obligations under the 2006 MOU. That is for the following reasons:-

(i) Walter asserts in his first affirmation (see paras 47, 115 and 123(5)) that the effect of clause 9 of the 2006 MOU is that, both before and after the settlor's death, the unanimous consent of the three brothers is required before any assets (other than shares in the Main Company) held under the Kwok Family Trusts may be dealt with.

As he has not consented to any distribution of the assets earmarked for Thomas and Raymond under the segregation, that would be a breach of clause 9.2 of the 2006 MOU.

(ii) It seems to us highly unlikely that that would be the view of the Hong Kong court. The passages which we have emphasised when setting out clause 9 at paragraph 19 above make it clear that clause 9.1 and clause 9.2 are both concerned only with the situation after the death of the settlor. The clause is silent about any restriction before her death. In view of the specific reference to the fact that the provision takes effect after her death, we do not think one can imply that the clauses also have effect during her life.

(iii) Accordingly we think the Trustee is entitled to take the view that it is highly unlikely that a Hong Kong court would hold that the segregation would amount to a breach of the 2006 MOU on the part of any of the settlor, Thomas or Raymond.

(iv) Similarly, we do not think that there is anything in the HOA to preclude the segregation. Walter argues that there is no provision for distributions for the benefit of Thomas or Raymond in the HOA; it is only concerned with distributions to Walter's family. We accept that it is primarily concerned with distributions to Walter because it was reached in order to settle Walter's threatened litigation in Hong Kong. However, there is nothing in the HOA to prohibit distributions to Thomas or Raymond or their families and indeed clause 24 specifically envisages the possibility of such distributions, because it provides that, should such distributions be made and should they exceed in total 30%, there will be a top up distribution to Geoffrey and Jonathan to match the excess distribution to Thomas and Raymond's family.

(v) Walter further argues that the segregation would result in the Trustee encouraging a breach by the settlor, Thomas and Raymond of their legally binding obligations under the HOA and therefore should not be blessed. Such a breach would occur, he says, because Walter would not be receiving 15% of the Family Assets as defined in the HOA. We deal with this point in the next following section of this judgment.

67 For these reasons, we do not see that the provisions of the 2006 MOU (if it is still in effect and is legally binding upon the Principal Family Members) or the HOA make it unreasonable for the Trustee to proceed as it intends to do.

(iii) Disclosure; ascertainment of the Family Assets

68 Clause 20 of the HOA provides for 15% of the ‘Family Assets’ to be allocated to a trust to be managed by Walter during the lifetime of the settlor. Family Assets are defined at clause 20 of the HOA as assets directly or indirectly jointly held or managed for the benefit of all of the settlor, Walter, Thomas and Raymond which assets are not (i) shares of the Main Company, (ii) those which are solely assets of the settlor, Walter, Thomas or Raymond.

69 Walter submits (at paras 89 and 125 of his first affirmation) that Family Assets therefore include:-

> (i) private assets that had prior to the date of the HOA been held for the family's benefit under the Family Trusts but had been alienated therefrom as a result of or prior to the 2009 reorganisation (eg the settlor's residence in Hong Kong); and
>
> (ii) any private assets that were purchased with or funded by the Family Assets which were not held under a family trust (eg a development in London) (see para 89 of Walter's first affirmation).

70 He contends (correctly) that before one can fix upon 15% of something, one has to know what 100% of that something is. He contends that, in order to ascertain the totality of the Family Assets, it is necessary for there to be full disclosure of the financial records of all the underlying assets (both since 2009 and before) in order to see whether any assets have 'gone missing' during the course of the 2009 reorganisation or whether there has been leakage of funds to acquire private assets for one or more of the Principal Family Members. That is why, he said, clauses 27 and 32(ii) of the HOA provided that there should be disclosure of financial records to Walter as necessary to give effect to the HOA.

71 He asserts that, in breach of those obligations under the HOA, proper disclosure has not been made and accordingly he has not been able to ascertain the extent of the Family Assets and therefore the 100% figure from which the 15% should be calculated. Indeed, the Trustee was calculating its segregation by reference to the Relevant Assets. These were not the same as the Family Assets and accordingly, he therefore does not accept that the segregation envisaged by the Trustee will fulfil the obligations under clause 20 of the HOA.

72 Nor is he satisfied that the work done by PWC has cured the position. It is clear, he submits, that the list of entities provided by the Family Office has been accepted and indeed that is not disputed. As he has been excluded from the Family Office since his removal from the Main Company, he is not content to rely on the accuracy or veracity of what the Family Office states. Furthermore, he says, PWC have not answered satisfactorily some of the queries raised on Walter's behalf by KPMG.

73 In addition, he says that the Trustee has gone back on its assurance. He says that at a meeting on 24 th October, 2016 Mr Rennell, a representative of the Trustee, confirmed that (i) the Trustee would satisfy itself that what had been part of the Family Assets had gone into the current trust structures and would check for the presence of other assets prior to the establishment of the Trusts, and (ii) it would give PwC information (such as lists/schedule of assets under the Kwok Family Trusts) prepared and kept by the Trustee throughout the years on the Family Assets starting from 2008 in order to see the changes of the assets each year.

74 We would summarise the key elements of the Trustee's response to these concerns as

follows:-

(i) It accepts that the list of Relevant Entities (ie all the companies within the Trusts) was provided by the Family Office and that PwC and Sum were not asked to check whether the list was complete. The sheer number of entities within the structure made it impossible for the Trustee to administer them; hence the powerful anti-Bartlett provisions in the trust deeds of all the Trusts. However, the Trustee carried out an annual review and the list of Relevant Entities prepared by the Family Office was consistent with the information which it held as to the entities within the Trusts.

(ii) What PwC was asked to do was to establish a complete list of the assets of the Relevant Entities and to review the valuation and other work done by Sum and CBRE. In the course of this exercise, they reviewed the financial statements/management accounts of all the Relevant Entities. These had not suggested any missing Relevant Entities. They had spent approximately one month in the Family Office and stated in the Phase 1 Report that they had had good access to the Family Office who had been responsive to their questions and requests for clarification on the information received. In particular they had had access to four named senior management staff at the Family Office.

(iii) Walter's concerns as to whether the list of Relevant Entities was complete was expressed in general terms. Nothing from its own knowledge and records or from PwC's work led the Trustee to conclude that the Family Office had omitted any Relevant Entities.

(iv) As to the valuation of the assets in the Relevant Entities, PwC had met with KPMG (instructed by Walter) on three occasions to discuss points raised by KPMG as to the valuations. PwC had therefore been made aware of KPMG's concerns and had been able to take them into account. PwC remained of the view that the valuations were reasonable and the Trustee had no reason not to rely on PwC's advice.

(v) Walter's key concern was that he had not received the full disclosure to which he was entitled under the HOA and therefore could not ascertain whether some of the Family Assets which existed at the time of the 2006 MOU had subsequently ‘gone missing’ either before or during the course of the 2009 reorganisation such that they were no longer reflected in the assets of the Trusts or had been used to pay for assets which were now held for the benefit of the settlor, Thomas or Raymond. In relation to that concern:-

(a) The Trustee was not aware of any assets having gone missing and, because of its involvement as Trustee of three of the trusts from which assets came during the 2009 reorganisation, it had a reasonable level of comfort in relation to its belief that no assets had been diverted during the course of that reorganisation.

(b) Again, Walter's concern was essentially a general one without specifics. He had raised concerns over certain specified companies and assets and where he had done this, the Trustee had looked into the matter. In each case there had

been an innocent explanation eg the asset had been sold and the company dissolved or the company had changed its name.

(c) The Trustee had given disclosure of a considerable amount of material but accepted that it had not given disclosure to the extent requested by Walter. In the Trustee's view, this was unreasonable given the lack of concrete reasons for thinking that there would be a material difference between the Relevant Assets and the Family Assets. Walter was requiring full disclosure of all relevant documents in relation to each entity of the Trusts; for example, he was asking for a detailed breakdown and supporting documents in relation to all assets held in any country by each company in the structure, including, in the case of cash, a complete breakdown by bank and bank account and details of movements in cash and other assets. He was also requesting such information in relation to all assets which had been in the trust structures prior to 2009. This would be a massive task. Such information could only be obtained from the Family Office in any event or would require the Trustee to start exercising its power as shareholder down through all the various levels contrary to the procedure envisaged by the anti-Bartlett provisions and in circumstances where no concrete grounds for suspicion had been produced.

(d) As Walter was not personally a beneficiary of the trusts from which the assets of the Trusts came in 2009 and was similarly not personally a beneficiary of the Trusts, it was hard to see what reason there might be for anyone to procure that assets should be diverted either before or during the 2009 reorganisation.

(vi) Although the Trustee was seeking to assist the settlor to give effect to the HOA, it was not a party to the HOA and was not asserting that the segregation would fulfil all the obligations under clause 20 of the HOA (although it had no reason to believe that it would not). If Walter was entitled to more disclosure under the HOA or if, after the segregation, he considered that he had not received the 15% to which he was entitled under the HOA, it remained open to him to take the proceedings (which he had threatened) in Hong Kong to enforce the HOA. If the Hong Kong court were to hold that he was entitled to more assets than he had received in the segregation (because the 100% figure for Family Assets was greater than the 100% figure for Relevant Assets) the fact was that 55% of the assets of the Trusts would remain in the Trusts as at present and there would therefore be ample scope for the Trustee, should it think fit at the time, to appoint further assets for the benefit of Walter in the light of any decision of the Hong Kong court. As stated earlier, the settlor has expressed the wish that after her death the 55% should be held equally for the three branches of the family.

(vii) As to the assertion that the Trustee had gone back on an assurance to investigate the pre 2009 position, Ms Marsh in her fourth affidavit exhibited the minutes of the meeting on 24 th October, 2016, which involved representatives of the Trustee and PwC together with Peter Yuen and members of KPMG and others together with Walter. It is clear from those minutes that Walter asserted that he expected the Trustee to identify assets which were no longer in the structures which ought to be

taken into account as part of the segregation exercise and that he summarised the agreed action plan at the end as being to work on verifying 100% of the assets – tracing back to 2008. The minutes do not specifically refer to the Trustee agreeing to that although there is reference, in the context of the Trustee verifying the completeness of the Relevant Assets, to Mr Rennell asserting that the matter was being looked at although HSBC was not trustee of some of the Trusts so it would not have a complete history of the original source of funding. In the absence of evidence from other persons (other than Walter) attending at the meeting, it is not clear exactly what was agreed but we accept that the likelihood is that the Trustee indicated it would try and investigate the position pre 2009. To that extent it may well have retreated from what Mr Rennell said on its behalf at that meeting.

75 In our judgment, the Trustee has acted reasonably in maintaining its decision despite Walter's objections on this aspect. Without seeking to repeat the Trustee's reasoning unduly, we would summarise our reasons for so concluding as follows:-

(i) No concrete grounds have been given by Walter for believing that assets have gone missing since the 2006 MOU either during the course of the 2009 reorganisation or by distributions to trusts for the benefit of individual members of the family. When concerns have been raised about specific companies or assets, the Trustee has investigated and established that there is a satisfactory explanation (eg change of name or sale of asset). There is therefore no evidence (as opposed to Walter's suspicion) that the Relevant Assets are less than the Family Assets.

(ii) When pressed by the Court as to the grounds for Walter's concern on this topic, Advocate Hoy could refer only to the deterioration in the relationship between Walter and the other members of the family and the fact that he had been excluded from the Family Office since his removal from the Main Company, with the Family Office since then being under the control, as Walter saw it, of Raymond. These two matters had, he submitted, given rise to reasonable grounds for suspicion on Walter's part. We do not agree that this is so in the absence of some evidence that assets have been diverted or paid out for the benefit of individual beneficiaries.

(iii) Given the Trustee's own knowledge of the 2009 reorganisation, its knowledge of the Trusts since then and the work undertaken by PwC, it is reasonable for the Trustee to have reached the conclusion that such general unspecific concerns are insufficient to require it to undertake the enormous investigations going back over many years which Walter is requesting it to undertake for the purposes of giving full disclosure.

(iv) Based on the information which it has, the Trustee reasonably believes that complying with the Request by effecting the segregation in the manner proposed is consistent with the HOA and will enable the settlor, Thomas and Raymond to fulfil their obligations under clause 20 of the HOA. In particular, it is reasonable for the Trustee, on the information which it has at present, to think that the Relevant Assets do not differ from the Family Assets.

(v) But, should Walter institute litigation to obtain enforcement of the HOA against the settlor, Thomas and Raymond and should the Hong Kong court order further disclosure and should this result in a finding that the Relevant Assets are less than the Family Assets (because some have been diverted at some stage or have been used to buy assets held personally for the settlor or other members of the family), there is nothing to prevent the Trustee at that stage from making a further distribution to trusts for the benefit of Walter so as to bring his family share up to 15% of the correct figure. In other words, what the Trustee is proposing will either result in satisfaction of the obligations under clause 20 of the HOA or (if the Trustee is wrong) will result in partial satisfaction of the obligations under that clause. Even if the latter is the case, that does not seem to us to be a reason for doing nothing at this stage given the inability of the family to come to agreement since 2014 and given the age of the settlor.

(vi) We accept that the Trustee may have retreated somewhat from what Mr Rennell said at the meeting on 24 th October 2016 but the issue is whether the stance now taken by the Trustee is reasonable or not. For the reasons we have given we conclude that it is, notwithstanding anything Mr Rennell may have said.

(iv) The Valuation Date

76 As can be seen from the extracts from the HOA set out at para 31 above, the Valuation Date is not defined; it is simply stated to be the date upon which the various assets are to be valued. All parties are agreed that a single valuation date is required for all the assets so as to ensure consistency and fairness. But whereas the Trustee (supported by the settlor, Thomas and Raymond) considers that the Valuation Date should be the date of the HOA, Walter submits that a current valuation should be undertaken.

77 Originally, Walter was in favour of the date of the HOA. Thus on 8 th April 2014 his then solicitors wrote to Clifford Chance and said the following:-

> *"Further, our client is of the view that the Private Assets should reflect a valuation date as at the date of the Heads of Agreement, and that this would be the generally accepted common practice involving property transactions.* Importantly, to address your earlier concerns, that approach would mean that any steps our client takes in managing those assets will not affect the valuation for stage 3 purposes; the economic benefit and burden would effectively have passed to him as at the date of the Heads of Agreement.
>
> …
>
> *Taking the valuation date as at the date of signing the Heads of Agreement is consistent with the approach adopted by the family in the past, and also provides a degree of certainty as to the valuation process.* Further, this approach will avoid the need to account for fluctuations of the value of the Private Assets during the period of time it takes to complete stage 3."

78 However, Walter now submits that a current valuation should be taken and we would summarise his reasons for so submitting as follows:-

(i) Further to his submission discussed in the previous section, he submits there can be no fair valuation until all the Family Assets have been identified and this requires the full disclosure for which he has contended.

(ii) The parties envisaged in the HOA that stage 3 would be completed within 12 months and thus at that stage it was reasonable to take the date of the HOA as valuation date. However, three years have now passed and fairness requires a current valuation in order to ensure that the 15% figure is accurate.

(iii) The Assets for Walter pursuant to the HOA consist largely (although not entirely) of assets situated in the United States whereas the assets now to be allocated to Thomas and Raymond consist largely of Hong Kong property (other than the Canadian Properties in respect of Thomas). Property values in Hong Kong have increased at a very much greater rate than those in the United States and accordingly, taking a historical valuation date operates to Walter's prejudice.

79 The Trustee accepts that the question of the valuation date is finely balanced. At its meeting on 26 th February, 2017, the Trustee listed the points in favour of the HOA valuation date and those in favour of a current valuation date. It concluded on balance that the merits of the HOA date outweighed the merits of a current date. The reasons in favour of the HOA date were summarised as follows:-

(i) Since the date of the HOA, Walter had been managing the properties set aside for him. Thus such an approach was equitable in that it allowed Walter to reap the benefit of his management of those assets. Similarly, Raymond and Thomas had been involved in the management of at least some of the assets which were now to be allocated to them.

(ii) That approach was consistent with Walter's suggestion in 2014.

(iii) Valuations had already been carried out by reference to the HOA date.

(iv) It was the wish of the settlor, supported by Raymond and Thomas.

(v) Whilst the terms of the HOA were only one factor to take into account because the Trustee was not bound by them, clause 26 envisaged that the full stage 3 arrangements should be completed within 12 months; so it was not envisaged that the valuation date would be a number of years after the execution of the HOA.

(vi) The transfer of any value out of an entity since 2014 could be addressed in the manner suggested by PwC in the Phase 1 Report without the need for the significant extra time, cost and effort of updating the valuations of all assets to their present day value.

80 In our judgment, the decision of the Trustee to take the HOA valuation date cannot possibly be categorised as unreasonable. Much work has been undertaken to calculate the values as at that date whereas to use a more current date would require the entire exercise to be done again at great time and expense. Furthermore, the fact that Walter has been managing the properties set aside for him since the HOA (and that Raymond and Thomas have been managing some of the assets now to be allocated to them) makes it fair to take the HOA date for the reasons suggested by Walter's lawyers back in 2014. Each son will therefore take the benefit or burden in relation to the assets he has been managing. It is reasonable for the Trustee to take the view that the fact that Hong Kong property may have increased in value more than US property should not lead to the need for a current valuation. It was Walter who agreed to take the US assets in the HOA and therefore took the risk that in the future they might increase less than Hong Kong property.

(v) The alternative course of action

81 Advocate Hoy submitted that Walter would be willing to undertake to institute proceedings in Hong Kong within 60 days in the form of the draft originating summons presented to the Court. These proceedings would seek a ruling on the proper interpretation of the Valuation Date and would also seek specific performance of clauses 26 and 32 of the HOA in connection with disclosure of the documents and information as set out in appendix 1 to the draft originating summons. As previously mentioned, this disclosure would be extremely wide ranging. It was submitted that, in the light of that undertaking, it would be reasonable to adjourn the current proceedings with final decisions as to segregation of the assets of the Trusts being taken after the outcome of the Hong Kong proceedings was known. He reminded the Court that, in view of the value of the Trusts, a 1% error in valuation would amount to a substantial sum. There was no urgent need for the segregation to proceed and deferring matters until the outcome of the proposed Hong Kong litigation would ensure that what eventually took place would be consistent with the HOA.

82 We accept that it is reasonable for the Trustee not to defer matters. As already mentioned, the parties have been in discussion since 2014 but nothing has been resolved. There is no good reason to think that an adjournment would result in successful negotiations. If the matter has to await the outcome of litigation in Hong Kong, that is likely to be some time off. We think it is entirely reasonable for the Trustee to conclude that it would wish to resolve matters as far as possible whilst the settlor is still alive, both for her sake and the sake of the family and that it is therefore reasonable to proceed rather than adjourn matters for possible litigation in Hong Kong.

(vi) Unfairness of the allocation of assets

83 Advocate Hoy submits that the allocation of assets proposed by the Trustee will operate unfairly towards Walter. He submitted that the properties to be allocated to Walter constituted (valued as at the date of the HOA) approximately 9% of the Relevant Assets.

Thus there would need to be a Top Up Transfer of approximately 6% so as to reach 15% in total. He submitted that the properties to be allocated to Thomas and Raymond pursuant to the Request (again valued as at the date of the HOA) constituted a greater percentage than 9%, with the result that the Top Up Transfers required for them would be less.

84 On the basis (i) that cash would be used for the Top Up Transfers, (ii) that property had increased in value since 2014 much more than cash, and (iii) that property produced a greater income return than cash, this would be unfair to Walter as it would mean that, in reality, Thomas and Raymond would be receiving more than him and they would also be receiving a greater proportion of their 15% in property as opposed to cash.

85 In reply, Advocate Williams stated that no final decision had been made on the composition of Top Up Transfers and that the Trustee would be willing to consider the allocation of further properties as part of any Top Up Transfers.

86 This aspect does not call for blessing by this Court at present as no final decision has been taken. However, in case it is of assistance to the Trustee, our view is that there is much force in Advocate Hoy's submission. In our judgment, it would be fair – and might well help assuage Walter's feelings that he is being unfairly treated – if the Trustee were to consider allocating properties in Hong Kong as part of the Top Up Transfers for Walter and do its best to see that the percentage of property (as opposed to cash) for each of the three brothers is as similar as possible. Allocation of property as opposed to cash would be fairer. Furthermore, allocation of Hong Kong property to Walter might assist in meeting his feeling that he has received less than his brothers because US property has increased less than Hong Kong property.

(vii) Other matters

87 During the course of his three affirmations and the correspondence to which we have been referred, other points were made on Walter's behalf in connection with detailed aspects of the proposed segregation. We have considered all the points made in the affirmations and in the correspondence to which we were referred. However, we do not think it necessary to deal in this judgment with every point raised but we have endeavoured to deal with those matters which seem to us to be the key concerns.

Conclusion

88 In summary, we have no hesitation in concluding that the decision of the Trustee to segregate the Trusts in the manner proposed falls within the band of decisions reasonably open to a properly instructed trustee. In relation to Walter's key concern that the segregation will not result in his receiving what he is entitled to under the HOA, the segregation will not in any way prevent him from enforcing his rights under the HOA if he feels that they are not being honoured. If the Trustee is correct, the segregation should result in satisfaction of

Walter's rights under the HOA. If the Trustee is wrong (so that 100% is larger than they believe), the segregation would result only in partial satisfaction of his rights. In the event of a court in Hong Kong holding that he is entitled to greater disclosure, that can ultimately be given. If the Hong Kong court decides that he is entitled to a greater proportion of assets in order to constitute his 15% share, there will be nothing to prevent the Trustee from appointing additional assets out of the 55% which remains in the Trusts.

89 For the reasons we have given, we gave the Court's blessing to the proposed segregation in the detailed terms contained in the Act.