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## MM v SG Hambros

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	19 February 2010
<b>Neutral Citation:</b>	[2010] JRC 37
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<b>Court:</b>	Royal Court
<b>Date:</b>	19 February 2010

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### Text

[2010] JRC 37

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff, **and** Jurats de Veulle **and** Morgan.

Between  
MM  
Representor  
and  
S G Hambros Trust Company (Channel Islands) Limited  
First Respondent  
and  
AM

## Second Respondent

**Advocate M. C. Goulborn for the Representor.**

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

**Advocate D. J. Benest for the Second Respondent.**

**Authorities**

Trusts (Jersey) Law 1984.

*S v L and Bedell Cristin Trustees Limited* [\[2005\] JRC 109](#).

*S v L and Bedell Cristin Trustees Limited* [2005] JLR N 34.

Bailiff

**THE**

- 1 This is an application by the Representor under Article 51 of the Trusts (Jersey) Law 1984 (“the 1984 Law”) for an order overturning the decision of the first Respondent (“the Trustee”) as trustee of The K Trust (“the Trust”) to sell a substantial property in central London (“the property”) and directing that the property be retained as part of the trust fund. At the hearing, the Court rejected the application and we now give our reasons.

**Background**

- 2 The Trust was established by declaration of trust executed by Hambros Channel Islands Trust Corporation Limited. A lady called Madam H (“the settlor”) provided the trust fund. The Trust is governed by the law of Jersey and the Trustee was appointed trustee in place of the original trustee on 2nd March, 1998.
- 3 Under the trust deed there is a life interest in favour of AM who is the daughter of the settlor, with remainder to the settlor. On 26th September, 2001, the settlor assigned her reversionary interest in the trust fund to the Representor, who is her son and the younger brother of AM. Accordingly the trust fund is now held upon trust to pay the income to AM during her life (with power to advance capital to her subject to the written consent of the settlor) with remainder to the Representor. The settlor is now aged 87, AM is aged 54 and the Representor is aged 50.
- 4 The sole asset of the Trust comprises the entire issue of share capital of a Jersey company

called K Limited. The company's sole asset in turn is the property. The property was acquired by the company in August 1987 following which it was substantially refurbished. The settlor provided the initial purchase price of £890,000 and also the funds for refurbishment. Following refurbishment the property was occupied by AM on a rent free basis until 1997, following which it was let on commercial terms until September 2002. At that stage the property remained empty until August 2003 and Savills, the estate agent appointed by the Trustee, advised that the property required refurbishment. In August 2003 the property was again let and the tenant paid six months rent in advance which funded refurbishment of the property to a condition suitable for occupation by a tenant. Thereafter the tenant continued to rent the property until 15th March, 2008, since when it has remained vacant. The property has required a certain amount of maintenance, particularly in relation to drainage problems. In total since 1998, the Trustee has expended some £184,398 on repairs, maintenance and upkeep. During that period, the total paid out to AM as life tenant has been £365,324. From 2003 to 2008, the Trustee lost contact with AM, but that has now been re-established.

- 5 In December 2007, Savills advised the Trustee that, in order to rent the property at a good rent, a considerable amount of refurbishment would need to be undertaken to the property. They estimated the market value of the property to be in the region of £5M.
- 6 In November 2008, Savills provided a detailed report. They considered that at that time the property in its current state would be worth about £3.95M. If refurbishment was carried out as advised, the property would be worth approximately £5.5M. As to rental income, Savills estimated an income of £93,600 pa in its present state although they advised that it was highly likely that the property would not let at all in its current condition. After refurbishment as proposed, Savills estimated a rental income of approximately £280,000 pa. As to the cost of refurbishment two estimates were provided which did not involve the employment of an architect. In very broad terms it seemed likely that the refurbishment would come to some £800,000 inclusive of VAT and Savills charges. Varying estimates had been obtained previously with one in September 2008 being in the sum of £1.3M + VAT and other costs.
- 7 We should at this stage refer to communications between the Trustee and the settlor and Representor. On 30th April, 2008, the Trustee wrote to the settlor's then lawyers in Hong Kong making it clear that it was no longer possible to let the property without significant financial expenditure and that unless the settlor was willing and able to add sufficient funds to the Trust, the Trustee would have no option but to sell the property. The letter made it clear that the Trustee would welcome the opportunity of discussing the matter with the settlor and receive her comments.
- 8 There then followed correspondence between the Trustee and Messrs Seeger and Seeger, a firm of lawyers in Washington DC instructed by the settlor and the Representor. The Trustee informed them of the amounts required for refurbishment and made it clear that there were really only two options. Either the property was refurbished with funds provided by the settlor or it was sold with the proceeds being invested. Doing nothing was not an

option. Conversely it was made clear by the settlor that she and the Representor did not want the property to be sold. There was very little progress and on 16th October, the Trustee e-mailed to say that a decision really needed to be made soon. It wanted to give all parties the opportunity to be consulted but if funds were not forthcoming for refurbishment soon, the Trustee would have to sell. That produced a response that the settlor and the Representor now wished to instruct a UK lawyer, a Miss de Rougemont. Miss de Rougemont wrote suggesting that a loan should be taken which would be repayable out of the rental income. The Trustee correctly responded that it was not permissible to reduce the life tenant's income so as to repay the capital of a loan, which would of course be for the benefit of the remainderman.

- 9 There was no real progress and in early March 2009 Advocate Goulborn was instructed on behalf of the Representor. Although there was a telephone conversation between Advocate Goulborn and the Trustee on 20th April, 2009, at which point the Trustee outlined its concerns, nothing further was heard and eventually the Trustee e-mailed Advocate Goulborn on 22nd June saying that if it had not heard by 10th July, it would place the property on the market for sale. On 3rd August it wrote to the settlor saying that it had been asking for assistance to fund renovation works for several months but that no progress had been made. It said that it was now liaising with the agents and would proceed to place the property on the market on 1st September unless the settlor had contacted it with positive funding arrangements prior to that date.
- 10 On 5th August Advocate Goulborn wrote to say that the Representor was prepared to rent the property on a long lease at either 2% of the current market value or at the last rental figure achieved, whichever was the lower. The Trustee did not accept this suggestion and on 20th October said that it had decided to place the property on the market. The next day it instructed Savills as sole agents to market the property for sale. On 29th October Savills received an offer of £5.15M. Following various discussions Savills then advised that the property should be offered by informal tender with an increased guide price of £5.25M. On 4th November Savills were instructed accordingly and a closing date of 27th November was set for informal tenders.
- 11 The Trustee's decision to proceed with the sale produced a flurry of activity from the settlor. By e-mail dated 10th November from Advocate Goulborn, it was said that the settlor would be prepared to meet the costs of the refurbishment on the basis that such costs were paid back to the settlor over an agreed period from the increased rental income. The Trustee replied on 16th November advising that it was not acceptable for capital expenditure to be paid from income in a case where there was a life tenant. The Trustee said that it remained prepared to consider the following options, namely the settlement of additional funds by the settlor to cover the cost of refurbishment or provision by the settlor of an interest free loan to fund the refurbishment, which would be repayable only when the property was sold. The Trustee also informed Advocate Goulborn that the closing date for offers to purchase was 27th November. On 20th November Advocate Goulborn e-mailed to say that the Representor was prepared to provide the funds to refurbish the property and asked for confirmation that the property would be removed from the market forthwith. The Trustee

declined so to do on 24th November pointing out that the settlor and the Representor had had many months to make such an offer. The Trustee added that, if it was to consider acceptance of a loan, it would need to have loan documentation in place and be in receipt of cleared funds before close of business on 27th November.

- 12 On 26th November Miss de Rougemont e-mailed to say that the settlor had agreed to put forward a bank guarantee of £700,000 for the refurbishment of the property. On 27th November the Trustee responded to say that it would be willing to accept £700,000 by way of additional accretion to the trust fund but in order to withdraw the property from sale, the Trustee required to be in receipt of cleared funds in this sum and a further £700,000 to be held by the Trustee's lawyers to be drawn against the costs of refurbishment should they exceed the sum of £700,000, on the basis that the estimate of costs was now somewhat out of date.
- 13 Subsequently the news of the tenders came in and the Trustee decided that, in view of the fact that two offers had come in at over £6M, which was well in excess of what was anticipated, it proposed now to sell the property. The highest offer, being £6,170,000, has now been accepted subject to contract and subject to the decision of this Court.

## The law

- 14 This is not a case where the Trustee has surrendered its discretion to the Court. On the contrary, the Trustee has decided to proceed with a sale of the property and to accept the offer of £6.17M. The Representor seeks to persuade the Court to overturn that decision and direct the Trustee to retain the property.
- 15 The Court's approach in such matters is well established and is not disputed by counsel. It is conveniently summarised in paragraphs 22 and 23 of *S v L and Bedell Cristin Trustees Limited* [2005] JRC 109 and [2005] JLR N 34:-

***“22. The Court agrees with Mr Le Cocq. Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as Mr Sinel submits, the jurisdiction of the Court must be exercised on a sensible and principled basis. A settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If Mr Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do).”***

***23. We are not to be taken as approving every part of paragraph 29–100 of Lewin which we have set out above. We have not analysed or heard argument on every sub-paragraph in detail. But in our judgment the paragraph provides a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. We draw particular attention to paragraph (4). The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated by one or more of the sort of circumstances set out in Lewin."***

- 16 The second relevant principle, which is agreed by all counsel, is that, in the case of a trust such as this, the Trustee must hold a fair balance between the interests of the life tenant and those of the remainderman.

## Submissions

- 17 The Representor submitted that the property should be retained and in this he was supported by the settlor. He pointed out that the Trustee had always indicated that it would be willing to retain the property if the settlor would agree to fund the necessary refurbishment. Although it was late in the day, the settlor had now agreed to provide £700,000 for the refurbishment.
- 18 In his affidavit the Representor pointed out that AM had been married twice. On her first divorce the matrimonial home, which had been paid for by the settlor, was awarded to AM's daughter and on her second divorce, funds which the settlor had put into the second matrimonial home for refurbishments had never been returned. This was one of the reasons for putting the property into a trust. It was intended to ensure that, no matter what happened to her in the future, AM would always have a roof over her head. Secondly, he submitted that, if the property were suitably refurbished, there would be a good prospect of achieving a substantial rental and therefore providing AM with a reasonable income. Furthermore, he felt that in the long term the property would provide better returns than alternative investments and therefore his interest as remainderman would be better served by the property's retention.
- 19 The Trustee pointed out that it has shown considerable patience in attempting to proceed by agreement. It first approached the settlor some 19 months ago in April 2008 making it clear that unless the funds necessary to carry out the refurbishment were to be provided by the settlor, the property would have to be sold. Since then it had engaged in correspondence in turn with lawyers in Washington, London and Jersey without any



progress. It was only on 20th November, 2009, some seven days before the closing date for the informal tenders, that the Representor said that he would provide the funds for refurbishment but without any detail. It was only one day before the closing date that the suggestion of a bank guarantee for £700,000 was put forward. Even now it was not clear whether enough would be contributed to carry out the necessary works of refurbishment. Even if it were, there would be delay whilst the work was carried out before the property could be let again so as to produce an income.

- 20 The decision to place the property on the market had produced an offer far exceeding the Trustee's and Savills' expectations and the firm advice from Savills was to accept it. Given the present state of the market, it was an extremely good price. The Trustee had taken advice from SG Hambros Private Banking on the investment of the sale proceeds and the Income and Growth model suggested (40% bonds, 5.5% cash, 35% equities, 19.5% alternatives) was estimated to produce an income of £124,768 per annum (a yield of 2.08%). This would also provide growth in the long term for the remainderman. Such investment could be achieved fairly promptly which, bearing in mind that there had been no income to the trust fund since the tenant vacated the property in March 2008, was also a relevant factor.
- 21 AM also filed an affidavit. This disclosed some of the personal issues between the Representor and the settlor on the one hand and AM on the other. She stated that, whereas in the past she has benefited from her mother's generosity, this appears now to be at an end and her salary from the family business has also ceased. The uncertainty surrounding her finances has led her to seek employment as an interior designer but she has come late to the work force. She lives in Hong Kong and is now in need of income from the Trust. Indeed, she pointed out that, on 11th December, 2009, she had received a letter from the company which owns the property in which she lives, which company is apparently owned by the settlor and the Representor. That letter gives her until 31st January to vacate the property. She therefore supports the Trustee's decision to sell the property so that she can receive an adequate income from the Trust as she will now be very dependent upon that income.

## Decision

- 22 The Court cannot possibly categorise the decision of the Trustee as unreasonable; on the contrary we find it to be an eminently reasonable decision.
- 23 It is clearly essential to refurbish the property if it is to be rented. The Trustee has no funds with which to do so. The settlor has had 19 months in order to come up with proposals to provide the necessary funds, but failed to do so until a matter of a few days before the closing date for informal tenders. The price offered for the property is clearly an exceptionally good one and exceeds by a considerable margin all the various valuations over the last couple of years. Investment of the sale proceeds will provide a reasonable income for the life tenant but will also provide the prospect of capital growth for the

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remainderman. If the property is not sold, there is no certainty as to whether the settlor will come up with the necessary funds and how long this might take.

- 24 For these reasons we refused the application to overturn the Trustee's decision. We ordered the costs of the Trustee and AM to come out of the capital of the trust fund on the usual indemnity basis.