

# Link Trustee Services (Jersey) Ltd v C and D and E and F and G and H

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Nicolle, Blampied
<b>Judgment Date:</b>	21 February 2018
<b>Neutral Citation:</b>	[2018] JRC 43
<b>Reported In:</b>	[2018] JRC 43
<b>Court:</b>	Royal Court
<b>Date:</b>	21 February 2018

**vLex Document Id:** VLEX-793094445

**Link:** <https://justis.vlex.com/vid/link-trustee-services-jersey-793094445>

## Text

[2018] JRC 043

Royal Court

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Nicolle and Blampied

Between  
Link Trustee Services (Jersey) Limited  
Representor  
and  
C  
First Respondent  
and

D  
Second Respondent

and

E  
Third Respondent

and

F  
Fourth Respondent

and

G  
Fifth Respondent

and

H  
Sixth Respondent

**Advocate A. Kistler for the Representor.**

## **Authorities**

Trusts (Jersey) Law 1984.

*Barclays Wealth Trustees (Jersey) Limited & Dreelan v HMRC* [\[2017\] EWCA Civ 1512](#) .

UK Finance (No 2) Act 2017.

Inheritance Tax Act 1984.

*In the matter of the Z Trust* [\[2016\] \(1\) JLR 132](#) .

*In the matter of the L Trust* [\[2017\] JRC 191](#) .

*The S Trust and the T Trust* [\[2015\] JRC 259](#) .

*The E Trust and the F Trust* [\[2014\] JRC 107](#) .

Halsbury's Laws of England Agency Volume 1 (2017)/4.

Trust — application by the Representor to set aside the exercise of a power of appointment

**THE COMMISSIONER:**

- 1 The representor applies to set aside the exercise of a power of appointment under Articles 47G and/or 47H of the Trusts (Jersey) Law 1984 ("the Trusts Law") and for orders consequential thereto.
- 2 The representor is trustee of the B Trust ("the Trust"), a Jersey law discretionary trust established by deed of settlement dated 4<sup>th</sup> April, 2008, between the first respondent as settlor ("the settlor") and the representor.
- 3 The beneficiaries of the Trust were the settlor, the second respondent who was the settlor's then wife (and who, for convenience, we will refer to as "the settlor's wife") and the children and remoter issue of their marriage and/or union. They have four children, namely the third to sixth respondents, each of whom has been appointed to represent their own children and remoter issue (there are presently no remoter issue).
- 4 At the time of the creation of the Trust, the settlor was not deemed domiciled in the United Kingdom for inheritance tax purposes, and he was, therefore, able to create an excluded property trust, the main benefit of which, as advised by KPMG, was that any assets held within the Trust which were situated outside the United Kingdom, would be outside the scope of the United Kingdom inheritance tax, even if the settlor subsequently became deemed domiciled in the United Kingdom for inheritance tax purposes.
- 5 The settlor settled shares in a successful business founded by him upon the Trust, which were then transferred by the representor to a segmented offshore insurance bond ("the Bond").
- 6 In 2014, it was proposed to separate the financial interests of the settlor and the settlor's wife (they subsequently divorced) so as to provide them with a separate fund for their primary benefit. Advice was sought from Wiggin Osborne Fullerlove, Solicitors, in Cheltenham as to the most tax efficient way of giving effect to this and they advised that:–
  - (i) it would be appropriate for a new separate discretionary trust to be established for the benefit of the settlor's wife, and the children of the family, in anticipation of the finalisation of the divorce between them and financial arrangements relating to it;
  - (ii) on the assumption that the Trust was established at a time when the settlor was foreign domiciled and was not deemed UK domiciled, it was potentially outside the scope of inheritance tax (i.e. it was excluded property), provided that all its assets had foreign *situs*;
  - (iii) in those circumstances, the ownership of the foreign *situs* assets within the new trust would, under the then current law, also similarly be outside the scope of inheritance tax; and,

(iv) the transfer of those assets from the Trust to a new trust would be entirely neutral for inheritance tax purposes.

- 7 On the basis of that advice, the representor exercised its powers of appointment under the Trust to create a new trust ("the New Trust") and appointed to it 31 segments of the Bond ("the Bond Segments" which expression includes the property from time to time representing the same). The settlor's wife and the children and remoter issue were beneficiaries of the New Trust, but the settlor was excluded as a beneficiary. In the same appointment, the representor excluded the settlor's wife as a beneficiary of the Trust. Accordingly the settlor remained a beneficiary of the Trust but was excluded from the New Trust and the settlor's wife was a beneficiary of the New Trust but excluded from the Trust. The children and remoter issue remained beneficiaries of both trusts.
- 8 We were informed that the 2015 balance sheets of the two trusts showed that the Trust was then valued at approximately US\$200M and the New Trust at approximately US\$25M.
- 9 In April 2016, the representor obtained from Ernst & Young a review of the UK tax position of the Trust and the New Trust (it remained trustee of both) and was advised that the establishment of the New Trust and the appointment to it of the Bond Segments had given rise to significant inheritance tax consequences:-
- (i) it was the domicile of the settlor at the date when the appointment into the New Trust occurred that was relevant for inheritance tax purposes;
  - (ii) at that time, the settlor was deemed domiciled in the United Kingdom; and
  - (iii) the settlor's deemed UK domicile at that date brought the assets of the New Trust within the scope of inheritance tax, since it was no longer considered to be excluded property, but was instead relevant property for inheritance tax purposes.
- 10 Accordingly, the representor was advised that the effect of the establishment of the New Trust and the transfer to it of the Bond Segments at a time when the settlor was deemed UK domiciled for inheritance tax purposes was that a 10 year anniversary charge to inheritance tax would apply in relation to the assets of the New Trust as at 4<sup>th</sup> April 2018 (being 10 years from the establishment of the Trust) although there would be a reduction in rate of 24/40ths in relation to the time that the Bond Segments, which are now held within the New Trust, were held within the Trust.
- 11 It was estimated that the charge which will fall due in April 2018 will be approximately US\$1.45M (based on the current value of the Bond Segments). The 10 year anniversary charge will continue to apply to the New Trust for so long as it exists and there will also be inheritance tax exit charges to the extent that capital leaves the New Trust.

- 12 The advice of Ernst & Young was confirmed in a joint opinion from Amanda Hardy QC and

Harriet Brown, both English tax counsel, dated 13<sup>th</sup> October, 2016. Wiggin Osborne Fullerlove denied that their advice was wrong, relying upon the effect of the English Court of Appeal decision in *Barclays Wealth Trustees (Jersey) Limited & Dreelan v HMRC* [2017] EWCA Civ 1512.

- 13 Without going into the decision in the *Barclays Wealth* case, it suffices to say that the matter was referred back to Amanda Hardy QC, who on 5<sup>th</sup> December 2017 advised that:–
- (i) The effect of the Court of Appeal's decision in the *Barclays Wealth* case was that whilst the Bond Segments were deemed to remain comprised in the Trust throughout, pursuant to the deeming provisions in the Inheritance Tax Act 1984 section 81(1), it ceased to be excluded property and became relevant property for inheritance tax purposes whilst it remained in the New Trust, as the settlor was deemed domiciled at the time of its appointment to the New Trust.
  - (ii) The inheritance tax consequences are that whilst the Bond Segments remain within the New Trust there will be a 10 year anniversary charge to inheritance tax (the first 10 year charge falling due on 4<sup>th</sup> April 2018) and, if the Bond Segments ceased to be relevant property between the 10 year anniversaries, there would be an exit charge under section 63 of the Inheritance Tax Act 1984.
  - (iii) If the Bond Segments were to be transferred back to the Trust, in the absence of a successful appeal by HMRC to the Supreme Court in the *Barclays Wealth* case, they would again become excluded property.

The Court accepts that advice.

- 14 A transfer back of the Bond Segments to the Trust is not a solution open to the representor in its capacity as trustee of the New Trust, as the settlor is an excluded person under the New Trust, and pursuant to clause 10, is incapable of taking any benefit from the New Trust or having any power exercised in such a manner as might benefit him. Even if these assets could be transferred back to the Trust, the settlor's wife could not thereafter benefit, as she has been irrevocably excluded as a beneficiary of the Trust.
- 15 The representor applies, therefore, for the creation of the New Trust and the appointment to it of the Bond Segments to be set aside.

### **Administrative actions undertaken**

- 16 Having set out the central issue facing the representor, it is necessary to recite a number of actions undertaken by the representor as trustee of the New Trust, which need to be taken into consideration:–
- (i) On 11<sup>th</sup> September, 2015, the representor appointed the sum of US\$1,750,000 to

the settlor's wife, declaring that with effect from that date, that sum would be held on trust for her absolutely, and shall be transferred to her as she shall reasonably direct. She subsequently directed that she only needed US\$1,000,000, which was paid to her, the representor dealing with the balance of US\$750,000 by purporting to resolve that the total amount to be appointed to her was US\$1,000,000 and not US\$1,750,000. The representor has been advised, in our view correctly, that given the absolute terms of the original appointment of US\$1,750,000, it could not re-visit that appointment in this way, and that accordingly the sum of \$750,000 is still held on trust for the settlor's wife absolutely (but subject to the relief sought in the Representation).

(ii) On 20<sup>th</sup> November 2015, a loan of US\$5,000,000 was taken from J P Morgan International Bank Limited ("J P Morgan") secured over the Bond Segments. That sum was on lent by the representor to the settlor's wife. On 12<sup>th</sup> April, 2016, J P Morgan offered an increased loan facility in the sum of US\$20,000,000, which was accepted by the representor on 10<sup>th</sup> May, 2016. Further drawdowns were made by the representor on 11<sup>th</sup> May, 2016, and 13<sup>th</sup> May, 2016, in the total sum of US\$3,125,000, which were on lent by the representor to the settlor's wife to finance the purchase of a property in the United Kingdom for the children. The lending received from J P Morgan is hereinafter referred to as the "J P Morgan loan".

The representor has been advised that following the enactment of the UK Finance (No 2) Act 2017, by which a new schedule A1 was inserted into the Inheritance Tax Act 1984, a loan will be a relevant loan and will not be excluded property, if and to the extent that the money made available under the loan is used to finance, directly or indirectly, the acquisition by an individual, of a UK residential property interest. The representor has been advised that the consequence of this will be that there will be a 10 year anniversary charge to inheritance tax as at 4<sup>th</sup> April, 2018, (being the 10 year anniversary of the Trust) in respect of the benefit to the representor of any such portion of the loan. The representor is further advised that there is nothing that can now be done prior to the 4<sup>th</sup> April, 2018, to prevent such a charge to inheritance tax arising.

(iii) In or about 26<sup>th</sup> February, 2016, the representor was advised by its financial advisers that the calculation that had been made with regard to the division of assets between the settlor and the settlor's wife was incorrect, and that the New Trust should have received 32 Bond segments rather than 31. Accordingly, on 2<sup>nd</sup> March, 2016, the representor assigned or purported to assign, an additional segment of the Bond from the Trust to the New Trust. The representor has been advised, in our view correctly, that this assignment is invalid as being *ultra vires* its powers, in that the settlor's wife was an excluded person under the Trust at the time it was made.

(iv) On 23<sup>rd</sup> May 2017, at the request of the settlor's wife, the representor resolved to purchase a property outside the United Kingdom for £1,350,000 for the property and £50,000 for the contents. The representor is currently funding the refurbishment of the property in anticipation of the settlor's wife living in it.

## Legal principles

### Article 47G of the Trusts Law — Power to set aside the exercise of powers in relation to a trust or trust property due to mistake

- 17 Pursuant to Article 47G of the Trusts Law, the Court may, on the application of a trustee, declare that the exercise of a power by a trustee over, or in relation to a trust or trust property, is voidable and –

***“a. has such effect as the Court may determine; or***

***b. is of no effect from the time of its exercise.”***

- 18 The circumstances in which the Court may make such an order are where the trustee:–

***“a. made a mistake in relation to the exercise of his or her power; and***

***b. would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and***

***c. the mistake is of so serious a character as to render it just for the court to make a declaration under this Article.”***

It is well established that a mistake as to tax consequences may amount to a mistake of sufficiently serious character as to render it just for the Court to grant relief under Article 47G (see, for example, *In the matter of the Z Trust* [\[2016\] \(1\) JLR 132](#)).

### Article 47H of the Trusts Law — Power to set aside the exercise of fiduciary powers in relation to a trust or trust property.

- 19 Pursuant to Article 47H of the Trusts Law, the Court may, on the application of a trustee, declare that the exercise of a power by a trustee over, or in relation to a trust, or trust property, is voidable and –

***“a. has such effect as the court may determine; or***

***b. is of no effect from the time of its exercise.”***

- 20 The circumstances in which the Court may grant relief are where the trustee:–

***“a. failed to take into account any relevant considerations; and***

***b. would not have exercised the power, or would not have exercised the power to the way it was so exercised, but for that failure to take into account relevant considerations.”***



21 The facts of the present case are similar to those in the case of *In the matter of the L Trust* [2017] JRC 191, where the Court declared void under both Articles 47G and 47H an instrument of variation and appointment of a joint life interest made by the trustee on the basis that:–

- (i) The trustee was mistaken as to the tax consequences of the appointment, and held an incorrect belief that it would not create any tax issues for the L Trust (for the purposes of Article 47G); and
- (ii) Due to incorrect advice, the trustee did not take into account the true tax consequences of the proposed appointment under the instrument, and would not have exercised the power in the way that it did had the representor received the correct advice (for the purposes of Article 47H).

## Decision

22 The Court proceeds principally on the ground of mistake under Article 47G. We are satisfied from the evidence that:–

- (i) In the creation of the New Trust, we were not dealing with an “artificial” tax scheme of the kind criticised by the Court in the case of *The S Trust and the T Trust* [2015] JRC 259, although despite that criticism, the Court in that case granted the relief sought. The purpose in creating the New Trust was to separate out the interests of the settlor and the settlor's wife following the breakdown in their relationship, and this without prejudicing the interests of their children.
- (ii) The appointment proceeded on clear advice that it was neutral for inheritance tax purposes.
- (iii) If the representor had known the correct tax position, it would not have appointed the Bond Segments to the New Trust and indeed, would not have established the New Trust. Instead, it would either have taken no steps at all, or more likely, it would have established a sub-fund for the benefit of the settlor's wife, but within the Trust. The representor has been advised that such a step would not have caused the Bond Segments to become relevant property for inheritance tax purposes, and that it would have remained excluded property throughout.
- (iv) The inheritance tax consequences of the appointment of the Bond Segments to the New Trust are sufficiently serious to render it just for the Court to grant the relief sought. The amount of tax that will fall due in April 2018 will be approximately US\$1.45M, and that is after the reduction of 24/40ths, a reduction that would not apply at the next 10 year anniversary. There will also be exit charges to inheritance tax in the event that capital is distributed from the New Trust, as indeed it has been already.

23 There is no requirement that proceedings must first be taken against Wiggin Osborne



Fullerlove (see *The E Trust and the F Trust* [2014] JRC 107 and *The S Trust and the T Trust*), proceedings which, judging from the correspondence we have seen, would be resisted, giving rise not only to the substantial costs that would be incurred in financing such a claim, but also to further years of uncertainty.

- 24 The beneficiaries have all agreed to the appointment being set aside, the children on their own behalves and on behalf of their own issue. HMRC have been notified of the application, and have responded in writing saying that they do not wish to be joined in to the proceedings and have no comment to make.
- 25 The only third party that would be affected by the relief sought being granted is J P Morgan, who advanced the J P Morgan loan to the representor in its capacity as trustee of the New Trust, secured over the Bond Segments comprised within the trust fund of the New Trust. J P Morgan has been notified of the application, and has taken advice from Ogier. Its position, set out in Ogier's letter of 1<sup>st</sup> February, 2018, is that it has no objection to the relief being granted, provided that it enjoys the same status in relation to the Trust as it does in relation to the New Trust, in respect of which:–
- (i) the loan security will need to be ratified by the Court and we comment on that below;
  - (ii) the secured life insurance policy issued under the Bond will need to be amended to the name of the Trust, and
  - (iii) the loan and security agreements, governed by English law, will need to be rectified.
- 26 It is clear that these issues can be resolved as between J P Morgan and the representor, and their respective legal advisers, and the granting of relief will be made subject to that.
- 27 In summary, we conclude that it is just for the Court to grant the relief sought under Article 47G on the grounds of mistake by declaring that the exercise by the representor of its powers by which the New Trust was established and the Bond Segments appointed was voidable and of no effect from the date of the exercise, for the following reasons:–
- (i) There were genuine reasons for the arrangements that were put in place regarding the New Trust.
  - (ii) Unexpected and significant tax liabilities have accrued as a consequence of these arrangements.
  - (iii) The beneficiaries have given their consent, and it is anticipated that J P Morgan will also consent subject to its position being confirmed as above.
  - (iv) HMRC have not objected to the relief being sought.

28 With regard to the Court's jurisdiction under Article 47H, the true tax consequences of the creation of the New Trust and the appointment of the Bond Segments were clearly a relevant consideration that the representor should have taken into account when considering the exercise its powers. As a result of incorrect advice received, those tax consequences were not taken into account by the representor, which would not have exercised the power in the way that it did had it received correct advice and taken into account the true tax consequences arising from the exercise of its powers. By virtue of Article 47H(4), it does not matter whether or not the failure to take a relevant circumstance into account occurred by any lack of care or fault on the part of the representor or its advisers. We would therefore also grant the relief sought under Article 47H.

### Consequential orders

- 29 Pursuant to Article 47I(3) of the Trusts Law, and without prejudice to the wide jurisdiction under Article 51 of the Trusts Law, the Court “ **may, consequential upon a declaration being made under any of Articles 47E to 47H, make such order as it thinks fit**”
- 30 *In the Matter of the Z Trust*, the Court utilised its jurisdiction under Article 47I(3) to set aside “**as a necessary consequence**” of setting aside a power of appointment of UK resident trustees: (i) the transfer of the retired trustee's shareholding in a company to a UK nominee director; (ii) the appointment of the UK nominee director; and (iii) the resignation of the retired trust company's officers as directors and officers of the company. This was on the basis that the Court considered there to be a “**sufficient link**” between the aforementioned transactions such that they could be treated as “ **one related transaction**” (see paragraphs 41–46 of the judgment).
- 31 We accept that there is a “ **sufficient link**” between:–
- (i) the establishment of the New Trust and the appointment of the Bond Segments;
  - (ii) The exclusion of the settlor's wife as a beneficiary of the Trust; and
  - (iii) The appointment to her of US\$1,750,000
- such that having set aside the establishment of the New Trust and the appointment to it of the Bond Segments, it would be appropriate to declare voidable and of no effect the exclusion of the settlor's wife from the Trust and the appointment to her of US\$1,750,000.
- 32 With regard to the exclusion of the settlor's wife, she only became an excluded person under the Trust on the basis that the New Trust was being established for her benefit, thereby creating separate funds for her and the settlor, from which the other could not benefit. She would not otherwise have ceased to be a beneficiary under the Trust. The exclusion of the settlor's wife was made under the same instrument as exercised the power of appointment, and was clearly part and parcel of the same transaction and falls to be set

aside if the appointment to which it is integral is set aside.

- 33 With regard to the appointment to the settlor's wife of US\$1,750,000, if the Court sets aside the establishment of the New Trust *ab initio*, then it would follow that the representor, when it purported to make this appointment to her, was purporting to act as trustee of a trust that did not exist, and sought to exercise a power under the New Trust which it did not have. It transferred funds *ex hypothesi* comprising part of the trust fund of the Trust, but without turning its mind to considerations relevant to the Trust and without intending to exercise any of the powers it held in that capacity. The appointment cannot be regarded as a valid exercise of any power of the trustee in that capacity and for the reasons set out below no application was made for its ratification.
- 34 The settlor's wife will therefore be liable to return to the representor the US\$1,000,000 that she has received pursuant to this appointment, whether by repayment or set off against any further appointment that the representor, as trustee of the Trust, may make in her favour, and she has consented to relief being sought on this basis.

### **Ratification**

- 35 On the basis that the Court grants the relief being sought, the representor seeks an order ratifying the administrative actions taken by it in its capacity as trustee of the New Trust as valid actions on behalf of the Trust.
- 36 In the *Z Trust*, which involved an invalid appointment of a trustee, the Court distinguished between three forms of ratification or confirmation, all of which may have substantially the same practical result but which are conceptually distinct:—
- (i) confirmation by perfection of an imperfect act or transaction (ratification properly so-called). The Court accepted that this form of confirmation is available in relation to administrative actions of a trustee and regardless of whether the original act was voidable or void;
  - (ii) confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect. It is essential for this form of confirmation that there be a continuing power or discretion which enables the trustee to achieve what was intended to be achieved by the original transaction; and
  - (iii) confirmation by non-intervention in acts or omissions which were not or may not have been authorized but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the authority of duly constituted trustees. The trustee resolves not to act due to the waste of time and money that would be involved in seeking to undo the invalid action and to recover trust property, or because it would otherwise not be in the best interests of the

beneficiaries to do so.

37 In the *Z Trust*, the Court held that the parties' objectives in that case were better achieved by orders based on confirmation by replacement and confirmation by non-intervention (i.e. the second and third forms of confirmation). However, in the present case, Advocate Kistler, on behalf of the representor, submitted that the preferred approach, which would best achieve the representor's objectives, and which would protect the interests of all relevant parties, would be an order based on confirmation by perfection of an imperfect act or transaction (i.e. the first form of confirmation).

38 With regard to the first form of confirmation, the Court in the *Z Trust* said at paragraph 65 that:–

***“the availability of the first form of confirmation depends on the existence of an act or transaction which is capable of being perfected, whether by act of the parties or an order of the Court.*** Usually an act or transaction which is confirmed by the first form of confirmation is voidable rather than void, or unenforceable against a particular party unless confirmed by that party. But conceptually there is no reason why an act or transaction which is initially invalid should not be validated or treated as valid by reason of some subsequent act or agreement of the parties or order of the Court.”

39 The Court in the *Z Trust* referred at paragraph 65(i) to an opinion obtained by Lynton Tucker, who gave examples of the first form of confirmation, such as “confirmation by a principal of a ***contract entered into by an agent without authority, confirmation by a company of acts done by directors which are voidable by reason of an undisclosed interest, and confirmation by a donor of a gift made as a result of undue influence***”.

40 Advocate Kistler submitted that as a matter of principle under English law, the acts of an agent entered into without the authority of the principal and subsequently ratified by the principal constitutes the relationship of principal and agent retrospectively (see *Halsbury's Laws of England Agency Volume 1 (2017)/4* at paragraph 58) and there was no reason to suppose that principle would not be recognised under Jersey law.

41 With regard to the J P Morgan loan, the representor entered into this in its capacity as trustee of the New Trust. Accordingly, if the Court sets aside the establishment of the New Trust and the appointment to it of the Bond Segments, the representor would not have had the power to enter into the J P Morgan loan in that capacity. However, the entry into the J P Morgan loan would have been an appropriate exercise of the representor's power as trustee of the Trust. Pursuant to clause 6 of the first schedule of the Trust, the representor may “borrow money or other property for any purpose connected with the trusts of this Trust”. The representor has in fact entered into a contractual commitment with J P Morgan, and received funds by way of loan from J P Morgan. Accordingly, Advocate Kistler submitted that it would be appropriate for a consequential order to be made by which the J

P Morgan loan is ratified as a valid action of the representor as trustee of the Trust, and the representor is directed to enter into any necessary documents to perfect the J P Morgan loan. An order is also sought by the representor that the payment of interest in respect of the J P Morgan loan is ratified as a valid action of the representor as trustee of the Trust.

- 42 In relation to the loans to the settlor's wife, likewise, Advocate Kistler submitted that the representor entered into these in its capacity as trustee of the New Trust. Accordingly, if the Court sets aside the establishment of the New Trust and the appointment of the Bond Segments to it, the representor would not have had the power to make the loans in that capacity. However, the making of the loans would have been an appropriate exercise of the representor's power as trustee of the Trust. Pursuant to clause 5 of the first schedule of the Trust, the representor "shall have the power to lend the whole or any part of the trust fund to any person who may for the time being be a Beneficiary ...". The representor has in fact lent funds belonging to the Trust to a beneficiary (the exclusion of the settlor's wife having been set aside) and has an enforceable claim for repayment of that loan. Accordingly Advocate Kistler submitted that it would be appropriate for a consequential order to be made by which the loans are ratified as valid actions of the representor as trustee of the Trust, with the effect that the benefit of the loans is held on the trusts of the Trust, and the representor is directed to enter into any necessary documents to achieve such perfection.
- 43 With regard to the purchase of the property, again, the representor purchased the property in its capacity as trustee of the New Trust. However, the purchase of the property would have been an appropriate exercise of the representor's power as trustee of the Trust. Pursuant to clause 1 and clause 2 of the first schedule of the Trust, the representor has broad powers to invest the trust property in "*property of whatsoever nature*", including the purchase of a property as a residence for any person who is a beneficiary. The representor has in fact purchased the property with funds belonging to the Trust for the benefit of a beneficiary (the exclusion of the settlor's wife having been set aside) and accordingly, Advocate Kistler submitted that it would be appropriate for a consequential order to be made by which the purchase of the property is ratified as a valid action of the representor as trustee of the Trust, with the effect that the property is held on the trusts of the Trust, and the representor is directed to perfect its title to the property by instructing agents to update the relevant Land Registry to record the representor as owner of the property as trustee of the Trust, rather than the New Trust and to take any other ancillary actions required to perfect the purchase.
- 44 In terms of the representor having funded the refurbishment of the property, Advocate Kistler sought an order that the refurbishments are ratified as valid actions of the representor as trustee of the Trust, and that the representor is directed to take any actions required to perfect the funding of the refurbishments. Finally, withdrawals were made from the Bond Segments to fund certain of the administrative actions undertaken by the representor. Accordingly, an order is also sought that the withdrawals of funds from the Bond Segments are ratified as valid actions of the representor as trustee of the Trust.

45 Advocate Kistler pointed out that there are notable differences between the background to

the *Z Trust* case and the present matter, which explain why an order based on the first form of confirmation would be appropriate in this case but not in the *Z Trust* (see paragraph 81 of the judgment). In particular:—

(i) In the *Z Trust*, the actions which were to be ratified included acts and omissions of a company, as well as the trustee. Lynton Tucker (to whose opinion the Court referred) said that “ **questions might well be raised whether the Court can or should directly ratify acts of a company.** But if the matter is approached in terms of the second and third forms of confirmation there is no difficulty at all.”

(ii) The Court was concerned in the *Z Trust* with potential adverse tax consequences which might have arisen as a consequence of the first form of confirmation, in circumstances where the acts or omissions of the company or at company level were carried out in the UK, which may have “ **encouraged HMRC to contend that the effect of ratification is that the Jersey Court has endorsed and provided a legal basis for central management and control being lawfully carried on in England.**”

(iii) In the present matter (unlike the *Z Trust*), ratification is sought of administrative acts only. In the *Z Trust*, there was a dispositive act, which the Court said would be better dealt with by the second or third forms of confirmation.

- 46 We agree that perfection of these steps as valid administrative actions of the Trust, in light of the order setting aside the establishment of the New Trust, is the logical and natural outcome. If the representor had taken no steps at all or had created a separate sub fund for the settlor's wife, it is likely that the representor would have taken and advanced the loans, purchased the property and funded its refurbishment as trustees of the Trust or in respect of such sub fund.
- 47 These were administrative acts of the representor, which are capable of being perfected. A loan has been taken by the representor from J P Morgan. Loans have been made by the representor to the settlor's wife, and a property purchased and refurbished by the representor. It had no power to do so as trustee of the New Trust, and that is being set aside, but it had power to do so under the Trust, and we can see no reason why those administrative acts should not be validated by order of the Court.
- 48 Advocate Kistler did not seek ratification of the appointment of US\$1,750,000 to the settlor's wife, because this purported to be an exercise of a dispositive as opposed to an administrative power. Quoting from the judgment in the *Z Trust* case at paragraph 76:—

**“76 .... Validation of invalid exercises of dispositive powers stands on a different footing since this does or may involve a change in the beneficial trusts. For example, if a fund is held on trusts for the benefit of A and trustees de son tort purport to appoint that fund on trusts for the benefit of B in exercise of a power of appointment conferred on the duly constituted trustees, then the appointment is invalid and the fund remains held on trusts for the benefit of A. If the court intervenes to validate the invalid**



***appointment by a ratification order, then the fund becomes held (for the first time) on trusts for the benefit of B and the trusts are changed. That is so even though duly constituted trustees could have appointed in favour of B or can in the future appoint in favour of B. The court has, under the principles of Chapman v Chapman (4) (followed in In re IMK Family Trusts (8), no power to do that save in accordance with statutory authority (which in Jersey is conferred by act. 47(1) of the Trusts Law (corresponding to the English Variation of Trusts Act 1958) or in the context of compromise of a genuine dispute concerning a trust."***

- 49 In addition the settlor's wife has since stated that she only wished to receive US\$1,000,000 and it would not therefore be appropriate for the representor to be directed to exercise its power under the Trust to the same effect as the appointment of US\$1,750,000. Furthermore counsel had advised that in the light of the difficulties arising from the fact that this appointment was purportedly made from relevant property for inheritance tax purposes, it would be preferable to set it aside in its entirety.

### **The protector**

- 50 It transpires that in bringing this application the representor's legal advisors had overlooked the need to notify the protector of the New Trust. Accordingly before the Court could proceed with any of the relief sought, it will be necessary for the protector to be notified of the application, and given the opportunity of intervening within 14 days, if it had grounds to do so.

### **Conclusion**

- 51 In conclusion, and subject to J P Morgan's consent to the relief set out below and to the protector being given notice of the application and not intervening within 14 days, the Court will:—
- (i) Declare that the assignment by the representor of an additional segment of the Bond from the Trust to the New Trust on 2<sup>nd</sup> March 2016 was *ultra vires* the representor's powers and is therefore void and of no effect.
  - (ii) Declare that the exercise by the representor of its powers by which the New Trust was established and the Bond Segments were appointed to the New Trust is voidable and of no effect from the date of the exercise of the representor's powers.
  - (iii) Declare that the exercise by the representor of its power of exclusion pursuant to which (a) the representor declared that the settlor's wife shall cease to be a beneficiary of the Trust and (b) the settlor's wife accordingly became an excluded person within the terms of the Trust is voidable and of no effect from the time of its exercise.



(iv) Declare that the exercise by the representor of its power of appointment by which it made an appointment of capital in the sum of US\$1,750,000 to the settlor's wife is voidable and of no effect from the time of the exercise of the power of appointment.

(v) Order that the following administrative actions of the representor be ratified as valid actions of the representor as trustee of the Trust which will take effect from the date of each action, and directed the representor to enter into any necessary documents, and/or to take any action to perfect such administrative actions, namely:–

(a) the J P Morgan loan, the security given in relation thereto, and the payment of interest on the J P Morgan loan;

(b) loans advanced to the settlor's wife during the period 20<sup>th</sup> November 2015 to 13<sup>th</sup> May 2016 in the total sum of US\$8,125,000;

(c) the purchase of the property for the sum of £1,350,000 and of the contents for £50,000;

(d) the payments made by the representor to fund the refurbishment of the property; and

(e) the withdrawals of funds from the Bond Segments.

(vi) Order that the representor's costs of and incidental to the representation be paid out of the assets of the Trust on the trustee basis.