The Trafalgar Trust

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
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Text

In the Matter of the Trafalgar Trust
And in the Matter of the Representation of Sequent (Guernsey) Limited

[2021] JRC 327

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **and** Jurats Ronge **and** Averty

ROYAL COURT

(Samedi)

Trust.

Authorities

Re Shinorvic [2012] JRC 081.

Slade LJ in *Bond v Pickford* [1983] STC 517.

Lewin on Trusts (20 th Edition).

Roome v Edwards [1982] AC, 279

Ewart v Taylor (Inspector of Taxes) [1993] STC 321

Brightman J in *Hart v Briscoe* [1979] Ch 1

Marley v Rawlins [2014] UKSE 2

Crociani v Crociani [2014] (1) JLR 426.

Grand View Private Trust Company Limited v Wong [2020] (Bermuda) Civil Appeal No. 5A of 2019

Nolan v Minerva [2014] (2) JLR 117

Crociani v Crociani [2017] JRC 146

Futter v Futter [2010] IPLR 147

E, L, O and R Trusts [2008] JLR 360

Schumacher v Clarke [2019] EWHC 1031 (Ch)

Carafe Trust [2005] JLR 159

Public Trustee v Cooper [2001] WTLR 901

Caversham v Andrew Crichton [2008] JRC 065

Advocate B. J. Lincoln **of the Trustees**.

Advocate H. Sharp **for the Settlor and B and connected beneficiaries**.

Advocate D. Evans **for E and F and connected beneficiaries**.

Advocate P. D. James **for the minors and unborn beneficiaries**.

Deputy Bailiff

THE

1 We heard argument for three days in this matter concluding 4 th February 2021 and reserved our reasons for the decisions that we made during this hearing.

2 There were three discrete issues before us which were termed the validity issue, the

Trusteeship issue and the funding issue respectively. We will deal with each in turn and the order in which they were argued before us.

The validity issue

3 The Trafalgar Trust ("the Trust") was established by irrevocable settlement governed by Jersey law on Christmas Eve 1985. The Trust was made between the settlor, [Redacted] ("Z") ("the Settlor") and Cantrade Trust Company Limited ("the Original Trustee").

4 The validity issue relates to the validity of the 1986 Appointment, executed on Christmas Eve 1986 by which it is said that the majority of the Trust fund ("the Settled Fund") was appointed on new trust which the Trustee argues did not amount to a resettlement. It is argued on behalf of the Settlor and [Redacted] ("B"), one of the three sons of the Settlor and one of the three principal beneficiaries under the Trust that the 1986 Appointment ("the 1986 Appointment") was *ultra vires* the Trust and is therefore void.

5 Originally various other allegations were made about the Instrument, in particular that its execution amounted to a fraud on a power. These allegations have now been abandoned by the Settlor and B and the sole issue is whether or not the 1986 Appointment was *ultra vires*.

6 There are two aspects to this argument. First it is said by the Settlor and B that the exercise of the power of appointment under the Trust which led to the execution of the 1986 Appointment was a resettlement of the Trust.

7 Secondly, it is said that the power of appointment under the Trust was insufficiently wide to permit resettlement. Accordingly, the exercise of the power of appointment by the 1986 Appointment was *ultra vires* and is consequently void *ab initio* and of no effect.

8 It is convenient to consider whether the terms of the Trust, in particular the power of appointment, permitted resettlement and thereafter to consider whether, on the facts, there was a resettlement in this case.

9 We note that the Trustee took a neutral stance on the validity issue until directed on 20 th July 2020 by the Court to put forward in its Reply to the Points of Claim pleaded by the Settlor and B such arguments as could reasonably be advanced to support the validity of the Instrument.

The relevant terms of the Trust

10 Pursuant to the terms of the Trust, the beneficiaries were the issue of the Settlor and all

their spouses, widows and widowers, together with any charity or person other than the Trustee appointed as an additional beneficiary under the terms of the Trust. Various instruments that have been executed subsequently in relation to the beneficial class we do not set out in this judgment as they are not germane to the matters which we need to decide.

11 The Trust period was 100 years from the date of the Trust, or such earlier date as the Trustee shall determine.

12 Clause 2.1 of the Trust contained a power of appointment in the following terms ("the Power of Appointment"):

> ***"The Trustees shall hold the Trust Fund and the income thereof upon such trusts and with and subject to such charges powers and provisions whatever in favour or for the benefit of all or any one or more of the Beneficiaries as the Trustees in their absolute and unfettered discretion shall at any time or times during the Discretionary Period in writing revocably or irrevocably appoint."***

13 The Trust went on to provide that:

> ***"2.2 In any such appointment the Trustees may:***
>
> ***2.2.1 direct that the Trust Fund or any part or parts thereof shall be transferred or paid to and held by any persons or person in any part of the world as trustees or trustee thereof (whose receipt shall be a good discharge to any other trustees or trustee accordingly);***
>
> ***2.2.2 provide for the appointment or remuneration of trustees on any terms and conditions whatever;***
>
> ***2.2.3 direct or authorise the investment in any manner of the Trust Fund or any part or parts thereof by or at the discretion of any persons or person in any part of the world;***
>
> ***2.2.4 create protective or discretionary trusts or powers operative or exercisable at the discretion of any persons or person in any part of the world;***
>
> ***2.2.5 delegate in any manner and to any extent to any persons or person in any part of the world the exercise at any time or times within the Discretionary Period of this power of appointment; and*** ,
>
> ***2.2.6 generally make or confer in favour or for the benefit of all or any of the Beneficiaries all such dispositions charges discretions or powers exercisable by any person in any part of the world and whether of a beneficial or administrative nature or in relation to the whole or any part of***

the capital or income of the Trust Fund as an absolute owner could lawfully make or confer of or in relation to any property belonging to him beneficially (regard being had nevertheless to any applicable law relating to remoteness and the provisions of Clause 11 hereof).”

14 Clause 3 set out the administrative powers of the Trustees.

15 Clause 11 under the title “Exclusions” provided:

“No power or discretion hereby or by law conferred on the Trustees or the Settlor or any other person shall (notwithstanding anything to the contrary expressed or implied in this Settlement) be exercisable in such manner as to cause any part of the capital or income or capitalised income of the Trust Fund in any circumstances whatsoever to become applied for the benefit of or payable to the Settlor or any wife of the Settlor.”

16 As to the relevant terms of the 1986 Appointment, the recital says that it is *“supplemental to a Settlement known as [The Trust]”*. It is further recited:

“Clause 2.1 of the [the Trust] confers a power of appointment upon the trustees for the time being thereof .

The persons named specified described or referred to in Part I of the Schedule hereto are beneficiaries of [the Trust] .

The property now subject to the trusts of [the Trust] is specified in Part II of the Schedule hereto .

The Original Trustees are the present trustees of [the Trust] and have determined to exercise their powers in the manner hereinafter appearing.”

17 The 1986 Appointment went on to define the “Appointed Trustees” as *“the Original Trustees or other the trustees for the time being and from time to time of the trusts hereby created”*. The “Appointed Fund” was the property specified in Part II of the Schedule, i.e. the whole (apart from the small initial settled sum) of the Trust assets transferred under the Instrument. The “Appointed Beneficiaries” were the persons described or referred to in Part I of the Schedule, i.e. the same beneficiaries as the Trust.

18 The duration of the *“Appointed Period”* was 100 years from Christmas Eve 1985 or such earlier date as the Appointed Trustees shall declare.

19 The 1986 Appointment is irrevocable provided that from the date of its execution the Appointed Trustees should hold the Appointed Fund and the income thereof “upon the trust and in the manner following that is to say”. The 1986 Appointment went on to provide the

Appointed Trustees with full powers to, *inter alia*, deal with the Appointed Fund. The terms of the 1986 Appointment are extensive and having set out the, *inter alia*, powers of the Appointed Trustees in respect of capital and income provided that "subject as aforesaid and in so far as not inconsistent herewith powers and provisions identical to those contained in [the Trust] shall apply to the Appointed Fund and the income thereof subject to the modification thereto set out in Clause 3 hereof".

20 Clause 3 provided "The aforementioned modifications to the powers and provisions contained in [the Trust] are as following it being expressly provided that no such modifications shall in any way affect or prejudice the Instrument of Appointment or any part thereof".

21 Clause 3 went on to list a number of matters that were terms of the 1986 Appointment but modified from the provisions in the Trust. This included, relevant for the purpose of this application, that any new trustees were to be appointed by the Appointed Trustees and not, as was provided by the Trust, the Settlor during his lifetime.

22 Accordingly, virtually all the assets of the Trust (shares in an Italian company in which the three principal beneficiaries work and which was founded by the Settlor) constituted the Appointed Fund and they are, if valid, now held for the Appointed Beneficiaries during the Appointed Period pursuant to the terms of the 1986 Appointment.

23 In March 1992 the Original Trustee executed a further instrument ("the 1992 Appointment") pursuant to the 1986 Appointment which revoked the 1986 Appointment and reappointed the Appointed Fund on identical trust save that the description of the Appointed Beneficiaries was modified.

24 Subsequently, in October 1999 the Settlor, the Original Trustee (its name had changed by this stage but we will still refer to it as the Original Trustee) and Rothschild Trust Jersey Limited ("Rothschild Jersey") were parties to an instrument pursuant to which the Settlor purported to appoint Rothschild Jersey as Successor Trustee to the Original Trustee with the latter retiring. It is said that this Instrument of Retirement and Appointment was invalid because only the Original Trustee could appoint a successor. However, applying the principles in *Re Shinorvic* [2012] JRC 081, it is very likely that the Court would hold that the 1999 Instrument of Retirement and Appointment was valid, given the Original Trustee's power to appoint a successor/additional trustee and the fact that it was a signature to the document, the Court would most likely impute an intention to the Original Trustee to exercise its powers to retire in favour of Rothschild Jersey.

25 If the 1986 Appointment is valid, then the Original Trustee could have appointed Rothschild Jersey as additional Trustee and then retired. Accordingly, any errors in the 1999 Instrument of Retirement and Appointment are probably of no consequence. Nonetheless on various dates in 2000 steps were taken by the Original Trustee and

Rothschild Jersey to remedy any defects in the appointment of Rothschild Jersey. Subsequently, in 2003 Rothschild Trust Guernsey Limited ("Rothschild Guernsey") was appointed an Additional Trustee and shortly thereafter Rothschild Jersey retired as Trustee.

26 Owing to various difficulties which arose between the Trustee on one hand and the Settlor on the other, in December 2017 the Settlor appointed two individuals as Additional Trustees to hold office alongside Rothschild Guernsey ("the Trustee") namely [Redacted] ("Mr C") and [Redacted] (Mr D"). The reasons for this appointment we will consider in more detail below when we consider the trusteeship issue.

The scope of the power of appointment

27 The Trustee says that the terms of Clause 2 of the Trust were broad enough to permit resettlement, notwithstanding the Trustee's submission that this was not a resettlement.

28 The Settlor and B argue, in summary, that there is no express power in the Trust to permit resettlement and rely upon the judgment of Slade LJ in *Bond v Pickford* [1983] STC 517 where he said:

> ***"I feel no doubt that, as a matter of trust law, trustees who are given a discretionary power to direct which of the beneficiaries shall take the trust property and for what interests, do not have the power thereby to remove assets from the original settlement, by subjecting them to the trust of a separate settlement unless the instrument which gave them power expressly or by necessary implication authorises them so to do.*** In the absence of such ***authority, any exercise of the power, other than one which renders persons beneficially absolutely entitled to the relevant assets, will leave those assets subject to the trust of the original settlement … and the trustees of the original settlement will remain responsible for them accordingly, in that capacity."***

29 Reference was also made to Lewin on Trusts (20 th Edition). At paragraph 3–054 Lewin observes under the title "Powers which authorise the creation of a new settlement" that:

> ***"The first thing to decide in such a case is whether the power was wide enough to enable a new settlement to be created.*** If the power is a general power of appointment, it is clearly wide enough for that purpose …
>
> ***The statutory power of advancement and any other similar powers expressed to enable property to be "applied" generally for the "benefit" of a beneficiary also allow it to be put into a new settlement for the beneficiary's benefit."***

30 At 3–055 Lewin says:

> ***"More difficult is the question whether a special power of appointment authorises the creation of a separate settlement.*** The appointed trusts are treated as written back into the original settlement, and only if the power is in broader terms than is normal does it authorise the creation of a separate settlement."

31 There does not appear to be a great deal of authority in this area and Lewin observes "what words in a power of appointment authorise a transfer to a new settlement is the question of construction that has not arisen in a reported case for nearly 90 years, and is not an easy one."

32 The skeleton argument filed on behalf of the Settlor and B accepted that the terms of the power of appointment were *"relatively wide"*.

33 We find that the provisions of Clause 2.2 of the Trust were sufficiently wide to permit resettlement, particularly the provisions at 2.2.1 and 2.2.4. The power conferred on the Trustee by Clause 2.1 could hardly be any wider than it is. It is true that it is expressed as a power of appointment rather than the power to apply capital for the benefit of a beneficiary, the latter said in Lewin (3–054, 3–061 (footnote 291), 3–063) to be more readily construed as authorising a resettlement, but the ancillary provisions in Clause 2.2 – especially Clause 2.2.6 – give the Trustee a power to make a wide variety of appointments including resettlement. Given the terms of Clause 2.2.6, and the power to transfer to other trustees in Clause 2.2.1, the Trustee must have been able to put the assets into a wholly new settlement. Accordingly, the Original Trustee was entitled to resettle the assets of the Trust on a new trust outside the terms of the Trust, although it would need to ensure that it did not contravene the provisions of Clause 11 of the Trust.

Resettlement

34 In view of the Court's findings in relation to the scope of the Power of Appointment, it is not strictly necessary to consider whether or not the 1986 Appointment did effect a resettlement as contended for by the Settlor and B, or whether it did not and in fact amounts to what is described by the Trustee as a "intra-settlement appointment of fresh trust on altered terms". It is said on behalf of the Settlor and B that the starting point is that identified by Lord Wilberforce in *Roome v Edwards* [1982] AC, 279, House of Lords, at page 292 to 293:

> ***"Since "settlement" and "trusts" are legal terms, which are also used by businessmen or laymen in a business or practical sense, I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common sense manner to the facts under examination, would conclude.*** To take two fairly typical cases. Many

settlements contain powers to appoint a part or a proportion of the trust property to beneficiaries: some may also confer power to appoint separate trustees of the property so appointed, or such power may be conferred by law (Trustee Act 1925, s 37). It is established doctrine that the trusts declared by a document exercising a special power of appointment are to be read into the original settlement *Muir v. Muir* [1943] AC 468). ***If such a power is exercised, whether or not separate trustees are appointed, I do not think that it would be natural for such a person as I have presupposed to say that a separate settlement had been created: still less so if it were found that provisions of the original settlement continued to apply to the appointed fund, or that the appointed fund were liable, in certain events, to fall back into the rest of the settled property.*** On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts."

35 In these circumstances it is contended that this was a new settlement as contemporaneous correspondence in September 1986 referred to the appointment being to " *a new Trust*". The Settlor's case is summarised in the Points of Claim. They are:

(i) The 1986 Appointment dealt with the entirety of the Trust Fund, save for $100;

(ii) Managerial provisions from the Original Trust were expressly included in the 1986 Appointment – the editors of Lewin remark that the express inclusion of such powers pointed towards and not away from a separate new settlement. This is also consistent with *Ewart v Taylor (Inspector of Taxes)* [1993] STC 321;

(iii) The 1986 Appointment had the effect that there was no need to refer to the original settlement and the Original Trustees were accordingly *functus officio*. The Trustee's assertion that it was still necessary to refer to original various clauses of the Trust, it is said misses the point because all those provisions were expressly incorporated into the 1986 Appointment – the Original Trust instrument had no independent function. Although the same Trustee remained in office, the appointment referred to this as the Appointed Trustee in contradistinction to the Original Trustee.

(iv) The accounts of the Trust did not refer to two trusts being in existence following the 1986 Appointment. In *Ewart v Taylor* this fact was held to be inconclusive;

(v) Completely new trust powers and provisions were created – consistent with the *"extreme example"* of when an appointment might create a separate settlement which was given by Brightman J in *Hart v Briscoe* [1979] Ch 1 at page 8;

(vi) The power of appointing new trustees was given to the newly appointed trustee. This is said to be consistent with the approach taken in *Ewart v Taylor* and is

accepted by the Trustee.

36 Lewin observes at 3–057:

> ***"It can be difficult to decide whether a new settlement has been created, and in borderline cases no precise guidelines can be laid down, but certain landmarks can be discerned."***

37 Lewin goes on to consider the type of power used to affect an appointment; and provides examples of appointments that created and appointments that did not create new trusts. Every case is fact dependent and the Court gained little assistance from considering the facts of previous cases. As to general principles, we were assisted by the judgment of Lord Wilberforce in *Roome v Edwards* at page 293A where he said "There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists. One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition bringing a separate settlement into existence. These indicia may be helpful, but they are not decisive … There are so many possible combinations of fact that even when these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole."

38 The Trustee disputes that the 1986 Appointment amounts to a resettlement.

39 The Trustee argues that when interpreting the 1986 Appointment it is necessary to "*identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context*" (*Marley v Rawlins* [2014] UKSE 2, paragraph 20, applied by the Court of Appeal in *Crociani v Crociani* [2014] (1) JLR 426). It is argued that the presumed intention of the Settlor and the Original Trustee as makers of the Trust Instrument in 1985 was to afford the trustee of the Trust a significant amount of flexibility to appoint new trusts within the four walls of the Trust as it thinks fit. It is said to be clear that the Settlor's subjective view as to what the terms of the Trust meant cannot be used to interpret them (see *Grand View Private Trust Company Limited v Wong* [2020] (Bermuda) Civil Appeal No. 5A of 2019).

40 The Trustee also describes the 1986 Appointment as amounting to a *"variation of the terms of the Trust"* and reference is made to Thomas on Powers (2nd Edition) which says at paragraph 16.03 in a section dealing with powers of amendment that:

> ***"A power to amend may expressly bear that description or it may take the form for power to add to, or to vary, modify or alter the terms or provisions in question.*** Whatever its description, and whatever its scope, the exercise of any such power will cause some change to occur. In this sense, any power to amend resembles a power to appoint or a power to revoke. It is clearly the case that in any particular instance, there may be an overlap between several, if not

> all such powers. A power of appointment may be wide enough to permit an addition to, or a variation, modification, alteration or amendment of administrative provisions, without there having to be an appointment of the trust fund itself or any dealing with the beneficial interests."

41 Although this may be true in principle, in this case there was no power to amend the Trust contained in the Trust instrument. It is not necessary or appropriate in our view to construe the exercise of the power of appointment in 1986 as having amended the terms of the Trust. The provisions in Clause 3 of the 1986 Appointment which contain "modifications to the powers and provisions contained in the Trust" are in our view modifications for the purpose of the new trust/fund only and do not purport to amend the terms of the Trust.

42 This has the consequence that modifications such as that to the provision in relation to the appointment of new trustees affect only the new trust and not the Trust. Looking at the 1986 Appointment as a whole, we note that it is irrevocable (an essential feature of a new settlement else the assets would not have been cut loose from the original settlement); that it holds separate and defined property amounting to effectively the whole of the funds which were held in the Trust; that the terms of the new trust/fund are different and separate from the Trust and that although both the Trust and the assets subject to the 1986 Appointment currently have a single trustee there is no difficulty in principle with them having separate trustees.

43 In *Ewart v Taylor* an appointment under a special power of appointment was held to create a new settlement. Trusts were appointed exhausting the whole beneficial interest, managerial powers from the original settlement were expressly incorporated and the power appointing new trustees was conferred on a new appointor. There were two further considerations, namely the appointment was made as part of a final distribution to the fund (not this case) and the trust accounts were drawn up on the footing that it no longer formed part of a trust (again not this case). Even with the absence of the two latter factors in this case, we note that in *Ewart v Taylor* Vinelott J said at page 777:

> ***"The facts that Angela's appointment created exhaustive trusts of a separate part of the trust fund comprised in the EC3 Settlement, that the important powers of management can be taken to have been incorporated into Angela's appointment and that the power of appointing new trustees of Angela's appointment is not vested in the person having power to appoint new trustees of the EC3 Settlement, taken together, at least balance if they do not outweigh the inference of presumption founded on the fact that Angela's appointment was created by the exercise of a conventional power of appointment."***

44 Having regard to all the circumstances in this case, particularly those matters considered at paragraph 42 above, we have come to the clear conclusion that this was in fact a new settlement that was created by the 1986 Appointment but, nonetheless, a valid one. Clause 2 of the Trust was in sufficiently broad terms to allow the resettlement of the trust fund on to

a new settlement and, accordingly, the 1986 Appointment was made intra vires the power of appointment in clause 2.

45 In the circumstances we do not need to consider the issues of acquiescence or laches but as they have been the subject of submissions, we do make succinct findings in relation to those arguments.

Acquiescence

46 The Trustee argued that the Settlor and B were prevented from seeking the relief they sought by virtue of acquiescence on the part of the Settlor.

47 It is said that the 1986 Appointment "lay undisturbed for over 30 years, its validity only having been called into question by the Settlor in 2018 (with [B] later supporting his father in this challenge)". The Trustee relied upon a fax dated 12 th September 1986 located on the file of Mourant du Feu and Jeune, advisers to the Original Trustee at the time, and produced following a meeting with the Settlor in which the proposed amendments to the Trust were discussed. The fax stated that the proposed changes were requested in order to comply with US tax law and had to be finalised in early October – the Settlor stated that he was a US citizen at the time of the 1986 Appointment. It is said that the fax showed that the Settlor had attended a meeting with advisers from England, Italy and the USA and the result was the request that his powers to appoint a successor and additional trustees should be removed. The required change to the clause regarding successor trustees set out in the September 1986 fax found its expression in the terms of the 1986 Appointment. Further, it is said that the Settlor approved the wording of the 1986 Appointment in draft by his Third Letter of Wishes dated 4 th November 1986. Accordingly, it is alleged that the Settlor gave his consent and approval for the 1986 Appointment before it was entered into and subsequently, by reference to documentation to which he was a party such as the 1992 consolidation of the Trust, affirmed the 1986 Appointment.

48 It has been held that the Jersey law of acquiescence is the same as English law – see *Nolan v Minerva* [2014] (2) JLR 117 and *Crociani v Crociani* [2017] JRC 146 (see in particular paragraphs 379 – 390). In *Crociani*, the Court said that in order for the trustees to rely upon the defence of acquiescence they would need to show:

(a) the beneficiary must be of full age and capacity;

(b) the beneficiary must have the requisite knowledge; and

(c) the release must not be wrung from the beneficiary by distress or error.

49 The Court went on to say that there were two aspects of knowledge:

As to this, the Court said at paragraph 380:

> ***"The second, and relevant condition for our purposes, is that the beneficiary must have the requisite degree of knowledge.*** Wilberforce J, after reviewing the authorities, summarised the position as follows in *Re Pauling's Settlement* [1962] 1 WLR 86 ***at 108:-***
>
> ***"The Court has to consider all the circumstances in which the concurrence of the [beneficiary] was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees; that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."***
>
> (a) concurrence or agreement; and
>
> (b) an understanding of what the beneficiary was concurring in or agreeing to.

50 Although this is not a claim for breach of trust, in our view the same principles apply and there is no reason why the declaratory relief sought by B and the Settlor, which itself is a form of equitable relief, may not be defeated on the grounds of acquiescence.

51 It is said on behalf of the Settlor that there can be no question of acquiescence (or laches) because as late as December 2017 the Trustee and the Settlor assumed that the Settlor had a power to appoint Trustees. On 5 th January 2018 the Trustee wrote to the Settlor reminding him that his power of appointment was a fiduciary power and sought to ensure that he exercised it in a fiduciary manner. As we have found, the Settlor retained his power to appoint Trustees of the Trust, but not of the Appointed Fund which, we have found, amounts to a separate Trust.

52 Notwithstanding the erroneous representations made by the Trustee in correspondence in January 2018, we find that the Settlor is barred by acquiescence from complaining now about the terms and effect of the 1986 Appointment. In view of the circumstances set out at paragraph 47 above, it is simply far too late for the Settlor to complain about the 1986 Appointment. As to B, however, we agree with counsel for the Settlor and B that the same arguments do not apply to him and accordingly he is not barred from bringing this challenge which we have already dealt with on its merits.

Laches

53 The Trustee's arguments are much the same – there was a delay of over thirty years prior to the contention that the 1986 Appointment is invalid during which period of time all

successive trustees and beneficiaries have relied upon the validity of the Appointment. Laches is founded upon the equitable maxim *'delay defeat equities'*. Mere delay can disentitle a plaintiff to discretionary equitable relief.

54 At paragraph 41–114, Lewin says:

> ***"….mere delay may disentitle a claimant to discretionary equitable relief such as an injunction, or to set aside a transaction between trustee and beneficiary, but to disentitle a claimant to compensation for breach of trust there must be something more than delay in suing, such as a change of position by the defendant, actual waiver or acquiescence, or some other circumstance or conduct that makes it inequitable for the claimants still to assert a claim. Knowledge that a clear breach of trust is being committed and a failure to object to it may of course give rise to a reasonable inference of assent to the breach, constituting consent to it."***

55 It was argued that the difficulty with the Trustee's assertion that the Settlor or B's claims are defeated by laches is that these are not claims for equitable relief but for, in terms of the assertion that the 1986 Appointment is void on the grounds that it is a resettlement and therefore *ultra vires*, an argument arising from construction and not, for example exercise of discretion. The fact dependent arguments originally advanced by the Settlor arising from the circumstances surrounding the 1986 Appointment, which may have been defeated by laches, were abandoned prior to the hearing. Accordingly, it was said that neither the Settlor nor B were barred by laches in contending for the invalidity of the Appointment on the grounds pursued and set out above.

56 In respect of the defences of acquiescence or laches, although the Settlor is not a beneficiary of the Trust, he cannot be, in our view, in any better position than a beneficiary of the Trust.

57 The Trustee drew our attention to the decision of Norris J at first instance, in *Futter v Futter* [2010] IPLR 147, where, in the context of a private family trust, he said that the grant of a declaration is discretionary and, accordingly, ' *matters affecting conscience of the parties, including laches or acquiescence, can be taken into account by the Court in deciding what (if any) relief to grant*'.

58 We agree with the Trustee. The declaratory relief sought by B and the Settlor may be defeated on the grounds of laches. In the case of the Settlor, the delay is such that he is not entitled to discretionary equitable relief, including the declaration sought. However, we do not make such a finding in relation to B in the circumstances of this case.

The Trusteeship issue

59 On 4 th February 2021, we ordered that:

> ***"(a) the Trustee, having surrendered its discretion in respect of whether or not it should retire as trustee and in respect of its power to appoint an additional trustee of the Settled Fund to the Court, the Court directed that the Trustee shall appoint Accuro Trust (Jersey) Limited, One The Esplanade, St Helier ("Accuro") as Appointed Trustee (as defined in the Settled Fund) and thereafter forthwith shall retire as trustee of the Settled Fund (subject to 3 below);***
>
> ***(b) [Mr C] and [Mr D] be removed as trustees of [the Trust] (assets $100); and***
>
> ***(c) the Trustee shall retire as trustee of [the Trust] upon the Settlor appointing Accuro as trustee of [the Trust], the said retirement being on such terms, if any, as the Court shall direct."***

60 We now give our reasons for making the orders we made on 4 th February 2021 in relation to the Trusteeship.

61 The Trustee stated that it was neutral as to whether it should retire as Trustee of the Trust, but initially (until requested to do so by the Court) did not surrender its discretion.

62 When the request that the Trustee retire was first made there was, and remained at the hearing, a divergence between the views of B (his views were in line with the Settlor) on the one hand and E and F on the other. Accordingly, two of the three principal beneficiaries of the Trust did not think that the Trustee ought to resign. The Trustee said that having explored the concerns expressed by B as to their conduct of the trusteeship the Trustee was unable, having consulted E and F, to conclude that it was in the best interests of the beneficiaries for it to retire and therefore it was difficult, if not impossible, for it conclude that it ought to do so. For those reasons the Trustee had sought the directions of the Court.

63 In essence, F and E expressed the view that the Trustee had always acted impartially, professionally, and in the interests of the beneficiaries of the Trust. Seven other beneficiaries of the Trust shared their views and did not support the retirement or removal of the Trustee. They wrote to the Court accordingly. F and E expressed the view in summary that not only was there no basis for the Trustee to retire, but if the Trustee was to retire it would set a dangerous precedent for the future trusteeship of the Trust in that a beneficiary could simply assert that it had lost trust and confidence in the Trustee and the Trusteeship would be changed again causing disruption and resulting in the incurring of additional expense; and that the request for the Trustee to retire was an attempt by the Settlor and B to assert control over the Trust.

64 To understand the concerns expressed by B it is necessary to briefly consider the business

of Company A, the principal asset of the Trust. It was difficulties within the business, and the Trustee's involvement in the same, which led on 20 th December 2018 to Taylor Wessing on behalf of the Settlor to ask the Trustee to retire in favour of another Jersey regulated trust company. In the Trustee's reply dated 21 st December 2018, the Trustee indicated that it had *'no plans to retire'* as Trustee of the Trust, but would consider the request on condition that the assertions that the Trustee was not the sole Trustee of the Trust and that the Trust and that the Trustee did not have the power to appoint new trustees were withdrawn. This demand was made in the context of the appointment of two other individuals, Mr C and Mr D as co-Trustees of the Trust. We will return to the correspondence between the Trustee and Taylor Wessing below.

65 On behalf of B and the Settlor, it was said that it had been plain for a long time that the Trustee was unable and unwilling to devote sufficient time to a complex Trust and that it had put its own concerns about being sued for breach of trust above the legitimate concerns of the beneficiaries.

66 The Settlor is eighty-nine, born in Country 1. His three children and many of his eight grandchildren now work in the family business which he has built up over decades. It had always been the Settlor's wish that the business should continue and provide opportunity for members of the family to work hard, as he has, within it.

67 Company A is the holding company of the family business, 49% owned by the Trust and 16% owned by separate holding/trust structures belonging to or settled by each of the three main beneficiaries (E, B and F) and 2% remaining held by the Settlor. The company holds interests in three sub-divisions each run by one of the brothers. On 5 th December 2016, H wrote to the Trustee, stating that B had asked for a meeting of the shareholders of the Company A Group in view of his concerns for the financial situation of Company A1, which ran the manufacturing activities in the Country 1 part of the business. The email was couched in terms which suggested that the Trustee had very little knowledge of the Company A Group and its underlying businesses. H was described in an affidavit sworn on behalf of the Trustee as being a representative of the family. H's email to the Trustee concluded *'I believe some of the participants would be pleased for the 49% trust shareholder to attend and this is the reason why I wanted to talk to you and discuss'*. The meeting was to take place the following week in Country 1.

68 In a call with the Trustee on 6 th December 2016, it was agreed that H was to represent the Trustee at the general meeting of the company, which he did.

69 In a supplemental email dated 13 th December 2016, H said that *'All parties are looking to the [M]Trust [sic] as 'the shareholder' which can break the current no-decision balance'*. The email set out in detail the problems facing the business and was written after a meeting of the other shareholders including the Settlor. The meeting lasted five hours and no vote was taken. The response of the Trustee was to say that they had a colleague in Geneva

who spoke Language 1 and travelled to Country 1 frequently and *'It may be that we ask her to come and meet with you to discuss the situation more fully and ascertain exactly what is expected from the Trustee'*. In Mr H's reply on 14 th December 2017, he spoke about a number of immediate problems facing the business which might *'snowball'*. There was reference to a *'crisis scenario'*. H's correspondent at the Trustee, Debbie Broome, wrote to Mr Penney, who was the lead individual in Rothschild in its capacity as Trustee suggesting an 'industrial plan' be prepared, as suggested by H in one of his comprehensive emails attached. Mr Penney replied *'I don't understand what an industrial plan is'* and asked for a meeting to be set up with H.

70 There was further correspondence between H and Mr Penney in February, March and July 2017. An internal memorandum from Mr Penny dated 17 th July 2017 was pointed to by counsel for B and the Settlor and said to be particularly unhelpful. It began by saying that H had contacted the Trustee about the financial crisis impacting Company A on 19 th December 2016 – in fact, he had done so before that date. The memo said that on 20 th December 2016 the Trustee had requested a meeting and reserved the right to hire outside consultants to help protect the Trustee's shareholding. In fact, the relevant correspondence did not request a meeting but threatened to convene a general meeting ' *to discuss these matters in person*' which the Trustee did not convene. The memorandum went on to say that on 9 th July 2017 the Trustee was sent the accounts in Language 1 with no covering explanation in English and notified of an AGM on 18 th July 2017. Mr Penney said *'We are about to embark on the holiday season and it is not possible travel at short notice at this time of year'*. This is a surprising assertion for a Trustee to make in relation to a significant structure where the Trustee was on notice of real difficulty at corporate level in relation to the sole asset of the Trust in circumstances where the request for assistance had been made by H who described himself in his email of 14 th October 2017 as *'Their [the beneficiaries] common representative to the trustee for years, they now see me as if I was 'the' trustee… you can imagine the pressure I was put in…'*.

71 One complaint was that it took ten months for Mr Penney to arrive in Country 1. On 20 th September 2017, H wrote to Mr Penney and Miss Broome asking the Trustee to come to an extraordinary meeting and noting that the Trust was not represented on the board. Mr Penney's reply of the same day was discouraging, asking if it was *'worth it?'*, bearing in mind the cost would be up to £7,000 including *'8 hours of my time'*. Mr Penney said ' *I can come to [City 1] if that is what everyone wants'*. He acknowledged that:

> ***"…as a strategic shareholder of 49% of the equity the trustees can be criticised by beneficiaries if they just sit on the shareholding and do not take active steps to protect their asset.*** Ultimately if the company is going to fail the beneficiaries' [sic] can criticise the trustees for failing to protect the value of the trust fund although I am not sure how we are supposed to find a buyer for a 49% interest in a private company like this."

72 In H's reply on 24 th September 2017, he said *'…as far as I understand this is far from an*

unrecoverable situation.' He said *'I believe that a 49% shareholder has a role to play'* and that *'Before thinking to private equity or other solutions, it seems to me there could be other less compromising yet effective steps that could be taken…'*.

73 H sent a lengthy email to Mr Penney on 3 rd October 2017 in which he said that Mr Penney *'showing up at the meeting is very important and will create the momentum needed to sort out a solution'*. He painted a picture of family disunity particularly between F and B, with F believing that B wanted to drain resources in favour of the Country 1 business, and B believing that F lacked sufficient experience and dedication to the family business. Various solutions were suggested which it is not necessary to set out as they are detailed and, in any event, would be commercially sensitive even now. On 3 rd October 2017, Mr Penney wrote to H in relation to the forthcoming EGM in Country 1 and said ' *What I want to do is achieve the whole thing [in] a day and get home the same day.* We are incredibly busy with a number of projects and we are very short of resources'.

74 On 4 th October 2017, Mr Penney said that he had booked a flight for 18 th October 2017. He was coming for a day trip. He said ' *I will read all you have said and prepare for the meeting.* I assume you will tell them we are coming that day as I have not been in direct contact with any of them'.

75 When Mr Penney finally arrived in October the point is made that he should have gone for two to three days and met the family in order to understand the situation on the ground. It was said on behalf of B and the Settlor that this illustrated that the structure was not a priority for the Trustee and Mr Penney said that he did not want to go to Country 1. H was never paid by the Trustee or retained by the Trustee. He was simply an adviser to the brothers but the Trustee was relying on H as if he was their agent. Accordingly, the material that the Trustee was receiving was second hand and received from someone who owed no duty to the Trustee at all.

76 Mr Penney produced an internal memorandum on 17 th October 2017 in respect of the issues affecting the Company A Group. His email to H is illuminating. He said *'Obviously I do not know the situation on the ground and am relying on your briefing, I know nothing about the [redacted] business, I am a foreigner and an outsider…I have a limited knowledge of business governance and usually it is a father/son problem or a sibling rivalry or a combination of both'*. He went on to say that getting in a new CEO into the business is 'not going to solve the fundamental problem which is getting these guys to look at themselves and understand why they are in this situation'.

77 At the EGM on 18 th October 2017 it was resolved to seek an independent consultants' report on the issues affecting the Company A Group. In the Trustee's memo dated 6 th December 2017 to one of the Company A companies which included the three brothers, the Trustee floated the suggestion of winding up the Trust and distributing the shares to each of the three shareholders (i.e. the brothers) or *'retire in favour of another trustee who is happy*

to act in breach of its duty'. These suggestions were made in the context of the Trustee saying that it was obliged to consider the interests of the beneficiaries as a whole and improve the profitability of the group and increase shareholder value.

78 B and the Settlor say that, having done not very much, Mr Penney effectively wanted to wash his hands of Company A and the beneficiaries as is further revealed by his email dated 18 th December 2017 to H in which he said:

> ***'It seems that with the exception of [F], the family want to sleepwalk into insolvency and sue [the Trustee] for the resulting loss of value*** .
>
> ***The settlor has absolutely no powers under the trust deed to remove the trustee or appoint a new trustee.*** We can appoint a new corporate trustee or two individuals and then retire .
>
> ***…my recommendation…is that we offer to reign [sic] in favour of a corporate trustee / two individuals of [the settlor's] choosing and in the absence of a candidate by end of January, we will distribute the shares equally to those existing shareholders who are beneficiaries pro rata.*** I cannot see any reputable organisation willing to take over this situation and do nothing .
>
> ***Given this attitude and that they are not paying invoices, I see little point in spending more time on this?"***

79 It was said on behalf of the Settlor and B that Mr Penney's dominant concern was *'eliminating risk to himself, not acting in the interest of the beneficiaries'*. It was said that the Trustee had become defensive and was not observing the duty of loyalty to the beneficiaries.

80 In Mr Penney's affidavit at page 45, he said that H had *'inadvertently forwarded'* his email dated 18 th December 2017 to the Settlor. It is not clear why Mr Penney thinks or implies that H should have kept the Trustee's emails to himself. Understandably, the Settlor took exception to the contents of this email, including the phrase *'sleepwalk into insolvency'*. On 22 nd December 2017, Mr Penney wrote to H, copied to other staff at the Trustee, expressing reluctance to attend an EGM. He said:

> ***"I can come over on 9 January if there is any point.*** There is no point in my incurring a cost of €5–6000 of a whole day travelling to attend if we are going to be asked to stand down so that is the first thing to resolve. If we are not being asked to stand down, then it is disappointing to note that nearly ten weeks since we last met there is no proposal on the table from the management as to how they propose to resolve the conflict between them and restructure the business to reduce costs and increase profitability. This only confirms to the trustee that the present management is sclerotic and unable to save this business from ultimate insolvency."

81 The Settlor's reaction to the Trustee's stance was, on 29 th December 2017, to purport to appoint Mr C and Mr D as additional trustees of the Trust. On 5 th January, Ms Karen Farman, of the Trustee, responded to the Settlor bringing to his attention that a power to appoint additional trustees of the Trust was *'almost certainly a fiduciary power'*, which he needed to exercise in the best interests for the beneficiaries.

82 On 10 th January 2018, the Settlor wrote to the Trustee arguing that his power had been exercised in the best interests of all the beneficiaries and saying that *'I have been duly informed that in many occasions you have clearly prospected the possibility to wind up the trust and distribute the shares to the beneficiaries…or to retire in favor of another trustee'*.

83 On 15 th January 2018, the Trustee wrote to the Settlor correctly advising him that, pursuant to the terms of the 1986 Appointment, he no longer had the power to appoint trustees of the Trust and accordingly the purported appointments of Mr C and Mr D were not valid.

84 On 13 th April 2018, Mr Penney wrote to the Settlor stating *inter alia* that "If the whole family, (meaning yourself and your three sons) can identify and agree upon a suitable independent trustee, we are of course willing to appoint and then retire in favour of such trustee".

85 The Settlor and B say that the Trustee should have resigned at about this time in favour of a new trustee. They say the Trustee had insufficient time and inclination to properly manage this Trust and was more concerned about its own position.

86 Without making a finding to this effect, the Court had some sympathy for the arguments of B and the Settlor. The Trustee's internal correspondence and correspondence with H did not suggest that this was a trustee that was prepared when asked to assist the family and prioritise their concerns and work together to promote, not only harmony between the beneficiaries, but also the success of the underlying business.

87 The Trustee did not accept that it had been dilatory in aspects of its trusteeship. The Trustee says that the assets of the Trust comprise a specialist family business and whilst the Trustee has, over the years, maintained an appropriate level of oversight, it has only intervened and offered specific assistance in relation to the Company A Group when asked to by the beneficiaries involved in the business. This had generally been when one or more of the family members had reached out to the Trustee and asked it to become involved. This occurred in 2009 when the three sons approached the Trustee, again via H, their representative. It occurred again in connection with the restructuring of the Company A Group in 2014. The Trustee similarly assisted, it is said, when asked to do so in 2016 and thereafter when there was conflict between the brothers and certain parts of the group were in financial difficulty. As to the EGM in October 2017, Mr Penney said he flew over for the

day and spent four hours in City 1 and before the EGM met separately with the Settlor, E, F and B. Each meeting was half an hour and Mr Penney accepts he had been criticised on the basis that the meetings were *'rushed'*. Somewhat surprisingly, Mr Penney says *'…it would have been costly and unnecessary for me to stay overnight in [City 2], and I am always mindful of the need to keep costs down as far as possible'*.

88 B's son, G, complains that during the short meeting he had alone with Mr Penney, Mr Penney asked why the family do not consider selling the company and investing the proceeds in stocks and shares. Mr Penney said that this was a *'conversation starter'*. Bearing in mind the shortness of the meetings, this was perhaps an unusual remark for Mr Penney to have made in the circumstances. G said:

> ***"The meeting felt very rushed and Mr Penney did not appear to me to be particularly well informed.*** He was very focused on the relationship between my father and his brothers and the effect this had on the management, and in turn the performance, of the underlying businesses rather than any key financial data or the market conditions."

Mr Penney said he already had the financial data and wanted to understand the dynamics affecting the management of the group.

89 Mr Penney returned to London after the meeting with *'every intention of instructing someone to produce a consultant's report'*. However, on his return to London he spoke to a Rothschild banker in the [redacted] sector, a specialist in Frankfurt and a managing director of Rothschild in City 2. They expressed the view that it would be difficult to get a consultant's report at all and such a report would be expensive. Accordingly, he felt that the Trustee should not obtain the report (which the beneficiaries understood was going to be obtained) and, thereafter, that is why he prepared his October memo requesting the mandate to headhunt to identify a new CEO. This chain of events perhaps begs the question as to why Mr Penney did not make these enquiries before the meeting in order that he was properly briefed as to whether or not it was appropriate to instruct a consultant.

90 It is important to bear in mind that it was the Trustee that proposed that an external consultant should be brought in to analyse the group's prospects. In those circumstances, there was unanimous agreement to engage an independent external consultant to conduct a review.

91 We have referred to the memorandum subsequently sent by Mr Penney in which he indicated the Trustee had changed its mind. In our view, it was insufficient for the Trustee both in October and December to communicate to the beneficiaries by memoranda. This was the sort of communication, bearing in mind its importance, that should have the subject of a proper conference call or, indeed, Mr Penney attending upon the family again, or asking someone else on behalf of the Trustee to do so. It is perhaps unsurprising the Settlor felt 'very frustrated' in consequence.

92 The correspondence between law firms in relation to the retirement of the Trustee has been, in our view, unnecessarily protracted. Having offered to retire in April 2018, it took three years for this to happen. This was too long for this issue to remain unresolved. It was clear from the middle of 2018 onwards that the relationship between the Settlor and B on the one hand and the Trustee on the other had come to an end, and at that stage it might have been appropriate for the Trustee to seek directions as to the future of the trusteeship. Indeed, on 16 th July 2018, Mr Penney wrote a file note recording that he had been told by the Settlor that *'He deemed our relationship closed with no chance of mending it', and 'In short we are not the legitimate trustee in anymore'*. Mr Penney said this:

> *"…left the trustee in a somewhat uncomfortable position as we hold 49% of a private company where we are on notice that there is conflict between the board and the financial situation of the company is failing.* We owe a duty of care to the next generation of beneficiaries who are all now adults and yet we are prohibited from contact with the settlor or the beneficiaries. This might well be a situation where we would need to seek to apply to court to be discharged as trustee or at least seek directions on what we should do."

93 In fact, the Trustee's Representation was not issued until over a year later on 17 th October 2019 and the Trustee did not issue its summons asking for directions from the Court until 12 th January 2021 – that summons being heard by the Court less than a month later.

94 In late 2018, it was advertised that the Trustee was being sold to a Mr Martin. The Settlor indicated that it did not want Mr Martin to become the new Trustee of the Trust and on 20 th December 2018 nominated Jersey Trust Company (JTC) as new Trustee, with Mr D and Mr C retiring at the same time as the Trustee, with matters being resolved by 31 st December 2018. B supported this request, but E and F did not. On 17 th April 2019, the Trustee said that it found itself in a *'difficult position'*. Again, this might have been a good time to seek directions. The Trustee wrote exploring *'options'* and summarised at length the history of the Trust and the Trustee's position, repeating that the Trustee was willing to retire and would do so for the interests of the beneficiaries as a whole. As there was no such agreement, the Trustee said there were *'only two options'* – i.e. a resolution out of Court or *'Court directions'*.

95 On 6 th June 2019, the advocates for the Settlor and B stated that the Trustee was unreasonably refusing to retire and was clinging to the Trusteeship and that they had instructions to issue a summons seeking the removal of the Trustee.

96 On 17 th June 2019, the Trustee wrote to the Settlor and the three sons, noting that the Settlor and B wanted the Trustee to retire in favour of JTC but the other two principal beneficiaries did not, saying that they would wish to explore, with all four of them, *'working together to find a suitable replacement trustee who has your collective support'*.

97 On 2 nd September 2019, lawyers for the Trustee wrote to Taylor Wessing, now acting for the Settlor and B, asking them not to make an application to the Royal Court pending *'consultation across the beneficial class'*. By this time the Settlor and B had suggested another possible Jersey regulated trustee – Zedra. Zedra was put forward on 12 th July 2019. On 29 th July 2019, the Trustee said that it was content to put forward Zedra as a possible replacement trustee to E and F. The Trustee regarded Zedra as a suitable replacement trustee. Neither JTC nor Zedra had spoken to either the Settlor or B, and both appeared to be independent. By now there was no direct contact at all between the Trustee on the one hand and the Settlor and B on the other.

98 On 20 th September 2019, the Trustee's lawyers wrote to Taylor Wessing discouraging them from issuing proceedings seeking the Trustee's removal, saying that such an application would be *'wholly misguided'* and that their client would be ' *highly unlikely to succeed*' in such an application. This was written after Taylor Wessing had chased for a response in relation to the Trustee resigning in favour of Zedra.

99 On 27 th September 2019, the Trustee's lawyers wrote to Taylor Wessing saying that *'…we have considered that one possible alternative course is for the Trustee to seek directions from the Royal Court of Jersey as to how best to proceed on this and other issues'*. It was said that the costs of such an application could be a *'six-figure sum'*. Mediation in City 2 was suggested. The letter also said that there was *'no objective reason'* for the Trustee to retire or for it to be removed, and that it was the *'strong wish of the majority of the principal beneficiaries'* that the Trustee remains in office.

100 On 2 nd October 2019, Taylor Wessing wrote to the Trustee's lawyers saying *inter alia 'As we have set out multiple times in correspondence, our clients both the Settlor… and the beneficiary [B]… have lost trust and confidence in your client as Trustee and in these circumstances our clients ask that your client resign and a new, independent trustee be appointed to take matters further'*. The letter went on to criticise comments made in the letter from the Trustee's lawyers in relation to the Company A Group and addressed Mr Penney's unsuitableness as a representative of the Trustee. The letter said that mediation was unlikely to be productive on the central issue, namely, whether or not the Trustee would resign. Nonetheless, Taylor Wessing said that they would be prepared to meet in the near future, namely on 7, 8 or 9 October 2019 for a discussion in London.

101 There then followed a long period of tit for tat correspondence which is not necessary to set out. Extensive affidavit evidence was exchanged. Opinions of counsel were traded, including English leading counsel instructed on behalf of the Trustee.

102 On 29 th April 2020, Advocate James who, by then, had been appointed guardian *ad litem* of the minor and unborn beneficiaries of the Trust, said, having reviewed the evidence filed at that point:

> ***"As a general proposition it is perfectly true, as [F] and [E] say, that a trusteeship should not be bound or forced to change simply because, say, a given beneficiary happens to disagree with a trustee's opinion.*** However I have cause to wonder whether the particular circumstances of this case have moved beyond the application of general propositions. The personal and working relationships which seem to be particularly important and necessary in the circumstances of the Trust and its company and business structure appear to have deteriorated to such an extent that the Trust and the benefit to its beneficiaries are being damaged, as witness the proceedings themselves and the considerable negativity and cost – and opportunity costs, including in terms of time and constructive business focus – that they are bringing to bear."

103 It is a pity that this note of caution was not heeded by all parties on receipt of that letter and tools downed and cudgels put to one side. As Advocate James said to us on the issue of the Trusteeship when the Representation was heard, this trust was created to house a business for the future generations, not just to provide cash, but offer opportunities to the family. It was necessary for all the beneficiaries to have confidence in the Trustee. By the time the Representation was heard, there was one Trustee available, Accuro, to which no party had any objection. He said it was *'crystal clear'* from the way in which the case was put, on behalf of the Settlor and B, that their concerns were not invented. He could understand why it was that B feels why he does and why he believes that the Trustee was not committed to the Trust at the time of need. It was proper for the Trustee, in Advocate James' view, to have regard to its possible exposure. But now the prospect of good future relationships between the current Trustee and some of the beneficiaries was remote. A change of trustee will be costly and disruptive, but the cost of the new trusteeship is less than the cost of disharmony over the years. Accordingly, he was in favour of the appointment of a new trustee.

104 As to F and E, they were both content with the Trustee and its Trusteeship. They regarded the Settlor's appointment of two new trustees as a *'hostile move'*, designed to take control of the Trust and the underlying corporate vehicles.

105 Counsel for E and F agreed with much of what was said by Mr Penney on behalf of the Trustee, and agreed with Mr Penney's proposition that it was not the Trustee's conduct which had had adverse effect on the administration of the Trust but the Settlor and B's stance towards the Trustee.

The relevant legal principles

106 The Trustee was seeking directions in order to resign as Trustee. Quite properly, in these circumstances, the Guardian raised whether or not the trustee removal authorities which were cited were on point. He was correct to do so because a distinction needs to be drawn between a trustee being removed against its wishes, even in circumstances where it is 'neutral' as to whether or not it should be removed, and a trustee which surrenders its

discretion to the Court. In the event of a trustee wishing to remain in office because it is satisfied that it is in the best interests of the beneficiaries that it should do so, then there is a reasonably high hurdle for the party seeking the removal of a trustee to overcome. However, in circumstances where the trustee has surrendered its discretion, then the Court steps into the shoes of the trustee and itself acts in the best interests of the beneficiaries, having regard to all the circumstances of the case.

107 At the outset of this case, the Trustee had not surrendered its discretion and it seemed to the Court that owing to the Trustee's stance, i.e. that it was *'neutral'* on the question of removal, it was appropriate that the Trustee should surrender its discretion. The Trustee could not be compelled to do so, but ultimately in the course of the hearing agreed to do so. Nonetheless, in the circumstances, it is appropriate to briefly distinguish the approach of the Court in cases where, on the one hand, the trustee resists removal and, on the other, where it surrenders its discretion.

108 The test for removal of trustees was considered by the Royal Court in the matter of the *E, L, O and R Trusts* [2008] JLR 360. In that case, the trustee refused to resign until proceedings seeking its removal were brought against it. Shortly before the Representation was due to be heard the trustee agreed to resign. At paragraph 27 of the judgment, Birt, Deputy Bailiff (as he then was), under the title *'Retirement and removal of a trustee'* said:

> ***"27. In** Eiro v Equinox Trustees Limited, **this Court approved (albeit by reference to the 17th Edition) the following passage from Lewin on Trusts (18th Edition) para 13–49 and 13–50:-***
>
> ***"13–49 The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour.*** In cases of positive misconduct, the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity .
>
> ***13–50 Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for removal of a trustee.*** But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by over-charges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustees' duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed."
>
> ***This Court has also regularly had regard to the observations of Lord Blackburn in** Letterstedt v Broers* [1884] 9 AC 371 ***at 386–387** .*
>
> ***28. The Court may of course remove a trustee where he has failed to***

recognise a conflict of interest. See *Hunter v Hunter* [1938] NZLR 520. ***Clearly, when faced with a request to retire, a trustee should bear in mind the principles applied by the Court in connection with its jurisdiction to remove trustees."***

109 As to the observations of Lord Blackburn in *Letterstedt v Broers* at page 386 to 387, relevant extracts of the judgment provide:

> ***"It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising…is merely ancillary to its principal duty, to see that the trusts are properly executed… And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed…***
>
> ***….As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; …***
>
> ***In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries.*** Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case .
>
> ***It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees…"*** [emphasis added]

110 Lewin on Trusts, 20th Edition, at 14–076 and 14–077 states:

> ***" The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour.*** In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above

general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity .

The views of the beneficiaries may be relevant to an exercise of the court's inherent jurisdiction, though it rarely suffices to say that a beneficiary has fallen out with a trustee. Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed. In assessing the significance of friction or hostility between original trustees or executors and a beneficiary, it is relevant to have regard to the fact that they were chosen by the settlor or testator and evidence as to his reasons for that choice….” [emphasis added]

111 It was said on behalf of E and F that in considering whether to exercise ‘ *so delicate a jurisdiction as that of removing trustees*’, the Court must consider the welfare of the beneficiaries as a whole and friction or hostility between the beneficiaries and the trustee (here, principally B towards the Trustee) is not enough to justify removal of the Trustee. It is necessary for there to be evidence to the effect that the trust will not be properly executed in the interest of the beneficiaries.

112 It is not necessary for us to conclude whether or not the Court would have removed the Trustee were this to be a hostile removal application and not the surrender of a discretion. It might have been necessary to hear some of the deponents cross-examined on their affidavits in order for the Court to reach a conclusion on this issue.

113 We have not reached a conclusion on such an approach as counsel for the Settlor and B drew to our attention the decision of *Schumacher v Clarke* [2019] EWHC 1031 (Ch), where Chief Master Marsh held that it will often suffice for the Court to conclude that a party has made out a good arguable case about the conduct of the trustee without the need for a contested hearing or determination of disputed facts. In such circumstances, removal can and should be achieved quickly without the need to determine such facts. Chief Master Marsh said:

“The power of the Court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the Court to conclude that a party has made out a good arguable case about the issues that are raised… The Court proceeds in a pragmatic way… Plainly it will rarely suffice for the claimant, whether a beneficiary, executor or trustee, merely to say that they have fallen out with the person or representatives or trustees and / or that some action or behaviour is unsatisfactory. The personal representative or trustees should not be held

hostage to allegations which may simply be mischievous. On the other hand, if, when the personal representative's or a trustee's response is considered, the Court has real concerns about the welfare of the beneficiaries, the Court is likely to exercise its powers without determining disputed issues of fact. What it then does in the exercise of those powers will, of course, depend on the circumstances of the case."

114 Chief Master Marsh went on to say at paragraph 21 of the judgment:

> ***"ii. An application under s50 or under the inherent jurisdiction invariably in the course of the administration of the estate or the trust… delay can be damaging. It would be wrong to characterise the procedure under section 50 or under the inherent jurisdiction as a summary one, but it needs to lead to a resolution as quickly as possible*** .
>
> ***iii. The administration of an estate or a trust can often lead to tension and indeed feelings often run high. It is essential for the court to avoid as far as possible providing a forum for the parties merely to vent their complaints about each other. The core issue is whether the continuation in office of one or more of the parties is detrimental to the interests of the beneficiaries*** .
>
> ***iv. Often the application to remove an executor or administrator or a trustee is a precursor to a… claim for breach of trust. It is very important that when dealing with such an application, as in the claim before me, the court does not make findings of fact which, in another context, may be of influence."***

115 We regard these principles as a useful guide in such cases.

116 In view of the Trustee's surrender of discretion, the Court stands in the shoes of the Trustee and has all the powers of a trustee pursuant to the 1986 Appointment. At 39–099 Lewin says "Where the trustees surrender their discretion to the court, it acts in their place by giving directions. In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The court has however, no greater powers than the trustees have either under the trust instrument or under the general law". Accordingly, the Court is now exercising the power of the Trustee to retire pursuant to clause 7, which provides that a trustee may retire at any time but shall not take effect unless and until there is at least one corporate or two individual trustees to act as continuing trustees. The Court accepts that it is perfectly true that a trustee is not required to retire simply because the given beneficiary happens to disagree with the trustee's position, or even when there has been a long-standing hostility between the trustee and one or more beneficiaries.

117 We found that the relationship between the Trustee and certain beneficiaries had

deteriorated significantly for it to be permanently unworkable and therefore not in the interests of the beneficiaries as a whole for the Trustee to remain in office. Without making any findings adverse to him, Mr Penney was not the right man at the right time for this particular Trust; the relationship with H was unstructured and poorly understood; bearing in mind the heavy reliance placed on him by the Trustee, it should have been structured properly and it was not. In short, the Trustee's position had become untenable and whatever the underlying merits of the Settlor's and B's complaints, we were satisfied that they were not driven by tactical considerations.

118 For these reasons and for those advanced in argument by the Guardian, we conclude that in the particular circumstance of this case the personal and working relationships which is important and necessary in order for the Trust and its underlying companies to thrive, have deteriorated to such an extent that the interests of the beneficiaries as a whole are being adversely affected as evidenced in these proceedings, their costs and the ill will that has been generated. In those circumstances, particularly as all beneficiaries and, indeed, the retiring Trustee are content with the appointment of Accuro as new trustee, the Court directs that the Trustee appoint Accuro as Appointed Trustee as defined in the '1986 Appointment' and thereafter, forthwith, retire as Trustee of the Settled Fund, subject to such security, if any, as the Court shall direct shall be provided to the Trustee in respect of its costs and other expenses prior to retirement and further ordered that Mr C and Mr D be removed as Trustees of the Trust.

The funding issue

119 Having heard argument from the parties in respect of the outstanding Trustee fees, costs and expenses, the Court made various orders on 4 th February 2021 having first noted that:

We ordered that the Trustee's retirement shall take effect once it receives a sum equal to 70% of its outstanding liabilities invoiced (such liabilities invoiced to date being the subject of detailed breakdowns to be communicated to the beneficiaries forthwith and such a breakdown to accompany any unbilled costs when they are billed) in respect of the Settled Fund due on its retirement, with the remaining 30% being subject to an agreement between the Trustee and the new trustee as to reasonable security for the same. The full sum outstanding by way of capital and income pursuant to the loan agreement between the Trustee and the Company shall be paid on account of currently billed and outstanding fees costs and expenses within one month of the date of this order, by way of a contribution to the sum equal to the said 70% of total liabilities.

(i) the beneficiaries will have to agree a new funding mechanism for the purpose of funding a portion of the fees payable to the Trustee prior to its retirement and for the funding of the new trustee;

(ii) B should ensure that he procures a contribution to the outstanding Trustee fees matching the sums procured by E and F in 2020;

(iii) none of the orders made below affect or in any way derogate from the right of any beneficiary to challenge the fees, costs and expenses either by way of assessment on taxation, or by way of an action in breach of trust or otherwise; and

(iv) the Trustee's undertaking to repay any sums which fall to be repaid under (iii) above or as agreed with any of the beneficiaries.

120 We further ordered that there should be liberty to the parties to apply in respect of the above orders, their enforcement and any necessary variation of the same and should Accuro decline to accept the appointment as trustee. No such applications have been made to us since we gave our decisions.

121 The reasons for making these orders are summarised below.

122 The Trust has significant funding issues. The only asset apart from the Trustee's shares in the Company A holding company was a loan repayable to the Trustee. At the date of the hearing, the outstanding balance due came to approximately £328,000, whereas the Trustee's outstanding fees, including fees payable to the Guardian's law firm, totalled, including withholding tax, in excess of £600,000. Accordingly, even if the loan was to be repaid in full there would be insufficient funds to discharge the current outstanding liabilities of the Trust. The historic practice within the Trust has been for relatively little cash to be held at trust level and, when the Trustee required funding, money has flowed equally from each division of the Company A business run by each of the brothers. Further, owing to recent difficulties, B has not authorised payments matching those of E and F. In any event, the Trustee has not received proposals from the directors of Company A as to either when the remaining sums due under the loan will be repaid and/or how a reasonable level of ongoing funding can be achieved. In short, there needs to be a new funding mechanism as reflected by the recitals to the order made as set out above at paragraph 119 (i) and (ii).

123 In view of the need to resolve this issue, the Court agreed that the Trustee's summons dealing with funding would be heard at the same time as the other applications, which we have considered above, in order that the Trustee's costs and expenses should not amount to an impediment to retirement. As to recent payments, the Trustee received £100,000 in additional funds from companies attributable to F and E, and nothing from the part of the business attributable to B. The Trustee's demand for repayment of the income part of the loan on 17 th September 2020 had not met with a positive response from the Company A Group. The outstanding options available to the Trustee were unattractive and included borrowing against the shares, selling the shares or in some manner securing dividend payments arising from its shareholding. The Trustee argued that the resolution of its funding issues was ancillary to and a necessary part of retirement. In principle, we agreed with this submission. The assets of the underlying companies are substantial, approximately €230 million and the business could (it was said) afford to repay the loan and address the other outstanding fee issues if it wished to do so.

124 The Trustee's position was that if it was directed to retire it would be prepared to do so once it received a sum equal to 75% of its outstanding liabilities of the Trust at the point of retirement with reasonable security for the balance. The Trustee referred to Lewin at 17–077:

> ***"Normally a retiring trustee will, before a new trustee is appointed, pay or reimburse himself out of the trust property in respect of expenses incurred by him, or fees due to him, down to the date of appointment of the new trustee."***

125 Reference was made to Jersey authorities, in particular the *Carafe Trust* [2005] JLR 159, where Birt, Deputy Bailiff (as he then was), said at paragraph 37:

> ***"A retiring trustee is entitled to be paid its fees before retiring.*** However, fee disputes often arise. In those circumstances, a trustee is entitled to security for its disputed fees. But it is not entitled to exert improper pressure to agree the fees by withholding the entire trust fund; nor is it entitled to security over the whole trust fund. An escrow arrangement of the nature proposed gives the retiring trustee all the security to which it is entitled."

126 The Trustee quite properly raised that, as the majority of the Trustee fees comprise administration costs and fees incurred by its lawyers, that the Trustee had a conflict of interest in seeking directions from the Court which would enable itself and its legal advisers to be paid as creditors of the Trust. We agreed with the Trustee's submission that the conflict of interest falls within the third category referred to by Hart J in *Public Trustee v Cooper* [2001] WTLR 901, namely where a trustee may honestly and reasonably believe that, notwithstanding a conflict, they are nevertheless able fairly and reasonably to make a decision, i.e. in this case to issue a Representation in relation to its own fees and seek the directions of the Court in relation to this matter. It was quite proper in the circumstances of this case for the Trustee to take the view that the directions sought in respect of its fees were in the best interests of the Trust estate and the beneficiaries notwithstanding this conflict.

127 It was said on behalf of the Trustee that the Court was not being asked to directly determine in this hearing whether or not the Trustee fees had been unreasonably incurred and whatever order the Court made should not close the door on the beneficiaries being able to challenge the Trustee fees and expenses – hence, the terms of the third and fourth recital referred to above.

128 Counsel for B and the Settlor invited the Court to dismiss the Trustee's summons in relation to its costs which, as is plain from the order referred to above, we elected not to do. It was appropriate and necessary to make an order permitting the issue of the trusteeship to be resolved now. In the event that the Court made an order, it was submitted that the Trustee should only be entitled to payment of 30% of its outstanding fees and other expenses at this stage, with the balance to be the subject of future challenge. Even the

discharge of 30% of the fees may be subject to future challenge as the claims by the beneficiaries may extinguish such payment, and the Trustee in those circumstances would receive nothing at all on account of its outstanding fees and would need to refund the Trust accordingly. It is said, on behalf of B and the Settlor, that the Trustee should have resigned in 2018 when it said it would and it is responsible for its trustee fees and the costs and expenses of other parties which have been incurred since. The right order in those circumstances is that the Trustee shall be deprived of its costs of and incidental to the Representation and should be ordered to pay the costs of all the other parties on the issue of the trusteeship at least. Alternatively, it is said that the inevitability of the Trustee's resignation should have been clear to them since the date they received the letter from Advocate James on 29 th April 2020 referred to above. Reliance was placed on the case of *Caversham Trustees v Andrew Crichton* [2008] JRC 065, in which the Court held, in summary, that reasonable security for a retiring trustee depended on the circumstances of the case. There was no general principle that a trustee should accept an escrow arrangement in a dispute over fees and, on the facts of that case, it was not unreasonable for the trustee to refuse such an arrangement proposed by the settlor which did not include a mechanism for finally determining the issue. However, the attempt by the trustee to retain the whole of the assets pending payment of their fees had been unreasonable and the trustee had been guilty of delay in failing to transfer the trust assets timeously – they should have been transferred nine months after the transfer process was commenced and, in fact, they took much longer.

129 The Guardian said it was inappropriate for the Trust to remain cashflow insolvent and the funding issue needs to be grappled with and resolved as soon as possible so as to draw a line between current disputes and to enable the future trusteeship to flourish, regardless of the identity of the trustee. Resolution of the funding issue must involve payment of the Trustee's fees and expenses reasonably incurred to date without prejudice to the beneficiaries' right to challenge the fees and expenses incurred by the Trustee. Indeed, unless there was a proper funding mechanism in place then the new identified trustee, Accuro, would not be confident that the trusteeship was one worth accepting. We agree that a clear message needs to be sent to the beneficiaries to the effect that they cannot use trustee fees as a bargaining chip with the Trustee. A mechanism needs to be in place to ensure that fees will be paid without difficulty. The Guardian proposed the Court should make orders directly against E, F and B, in the absence of them providing undertakings to ensure that a substantial percentage of the Trustee's fees are paid now.

130 Although there was merit in that argument, there were procedural hurdles in the way of making orders which would probably need to be considered against various corporate entities outside the jurisdiction which were not parties to the proceedings, and undertakings from the beneficiaries in the terms suggested were unlikely to be forthcoming.

131 In relation to the costs of the validity issue, the Trustee had been directed on 20 th July 2020 by the Court whilst maintaining a neutral stance, to carry out such reasonable enquiries as were necessary in respect of matters relevant to the validity issue, including replying to B and the Settlor's points of claims, filing a skeleton argument and putting forth

such arguments as could reasonably be advanced to support the validity of the 1986 Appointment and be indemnified out of the Trust for the costs of so doing. Those costs will not be insignificant and are the Trustee's costs in any event.

132 We were urged to set out a timetable for resolution of the cost issues, in particular requiring the Settlor, B and the other beneficiaries objecting to the Trustee's costs to indicate that they wish to make a complaint within two weeks and to particularise those complaints within two months, with an appropriate period given for the Trustee to reply and therefore the matter, if not resolved by way of mediation or otherwise, referred to the Court.

133 E and F said that the issue of costs should not be *'kicked down the road'* but should be resolved to the extent possible now. Both E and F had met their funding obligations to the Trustee until recent times and, now that a change of trusteeship had been directed by the Court they were committed to ensuring a smooth transition. F and E both indicated that they would comply with any directions made by the Court in order to bring matters to a swift conclusion, and noted that the Trust needed to be put on a sound footing come what may.

134 Having heard the submissions of the parties, we ordered that the Trustee's retirement should take effect once it received a sum equal to 70% of its outstanding invoice liabilities (such liabilities being subject to detailed breakdowns to be communicated to the beneficiaries forthwith), with the remaining 30% being subject to an agreement between the Trustee and the new trustee as to reasonable security for the same.

135 We thought it appropriate to leave the question of security for the remaining 30% to be negotiated between the new trustee which would be legal owner of the 49% shareholding of the Company A Group once the shares were transferred. We also ordered that the outstanding capital and income due under the loan agreement should be paid on account of the outstanding fees, costs and expenses within one month of the date of the order by way of a contribution to the said 70% of total liabilities ordered to be paid.

136 If the terms of this judgment result in the parties needing to agree a mechanism for determining the incidence of any outstanding costs, fees and liabilities, which have not yet been the subject of agreement, then we would urge the parties to endeavour to attempt to agree such a mechanism between themselves and then invite the Court to make such further ancillary orders as are appropriate by correspondence without involving the costs associated with further hearings and, in the circumstances, without the need for the issue of further Representations by any of the parties.