Trust - application by the Trustee for the Court's blessing to sell the sole asset of the trust.

# [2018]JRC171

**ROYAL COURT**
**(Samedi)**

**14 September 2018**

**Before : Sir Michael Birt, Esq., Commissioner, and Jurats Crill and Christensen**

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| **Between** | **Hawksford Jersey Limited** | **Representor** |
| **And** | **A** | **First Respondent** |
| **And** | **B** | **Second Respondent** |
| **And** | **C** | **Third Respondent** |
| **And** | **D** | **Fourth Respondent** |

IN THE MATTER OF THE H TRUST

**Advocate J. M. G. Renouf for Representor.**

**Advocate J. M. Sheedy for the First Respondent.**

**Advocate N. D. E. Addis for the Second and Third Respondents.**

**The Fourth Respondent did not appear and was not represented.**

**JUDGMENT**

**THE COMMISSIONER:**

1. This is an application by the Representor ("the Trustee") for the Court's blessing of a decision which the Trustee has taken to sell what is essentially the sole asset of a trust. The Trustee's decision is supported by the First Respondent ("the elder son") but opposed by the Second and Third Respondents ("the younger son", "the daughter" and together "the siblings").

**Background**

2. The trust in question ("the Trust") was established by deed of settlement dated 3rd May 1979 made between the settlor and the original trustee. The settlor and his family resided in Kenya. The settlor is the father of the First, Second and Third Respondents and was the husband of the Fourth Respondent ("the widow"). He died in 1984.

3. Following his death, there has been considerable litigation concerning his estate including an appeal to the Judicial Committee of the Privy Council. According to the affidavit of the younger son, litigation continued until 2006 and it was only at that stage that a grant of probate was issued in Kenya. Following the grant of probate, the widow as executor, gave a power of attorney to the elder son. It is alleged by the siblings that the elder son has at all times been in control of the estate, which has not yet been distributed. The younger son asserts that there are currently nine court cases in two jurisdictions concerning the control and governance of companies belonging to the estate. We emphasise that it is not for this Court to establish whether the criticisms made by the siblings of the elder brother are correct or not; the only relevance of these matters is that there is a history of difficulty and dispute between the elder son on the one hand and the siblings on the other.

4. The Trust is a conventional discretionary trust governed by the law of Jersey. The named beneficiaries are the four Respondents although the trustee has power to add to the class of beneficiaries. The Trustee has been the trustee of the Trust since June 2009.

5. The Trust has only one material asset. This is a wholly owned Jersey company ("the Company") which in turn owns a property in London ("the Property"). The Property was acquired by the Company in October 1981 for £80,000. It has been used by the beneficiaries and their families when they visit London.

6. Neither the Company nor the Trustee has any funds with which to pay for the maintenance and upkeep of the Property. The expectation has been that family members who used the Property would pay for its outgoings. Both the elder son and the siblings say that they are owed money by the Trust for amounts that they have contributed to the upkeep of the Property. However, the Trustee asserts that these sums are not capable of easy assessment because the various beneficiaries have not provided receipts etc for sums which they say they have expended in relation to the Property.

7. According to the affidavit of Ms Cordelia Miller, a director of the Trustee, the Trust is illiquid and has become cashflow insolvent, in the sense that the Trustee is not able to discharge the liabilities which have arisen in connection with the Trust (or the Company) as they have fallen due. She gives three categories of liability as an example:-

   (i) There are fees owed to the Trustee in connection with administration of the Trust and the Company. As at the end of April 2018, these were said to total £94,640 together with a further £17,500 in connection with attempts to broker an agreement between the beneficiaries in connection with the Property. The Trust also owes the sum of £1,595 as at March 2018 to LSL Corporate Clients Department ("LSL"), the appointed property manager for the Property. There are also ongoing fees of LSL and the various utility companies which have to be paid.

   (ii) As mentioned earlier, there are the amounts claimed by the elder son and the younger son in respect of expenses which they say they have personally incurred.

   (iii) The Property has deteriorated because of the lack of ability to pay for its maintenance and upkeep and is now in need of renovation and modernisation. There are no funds with which to undertake such work.

8. Given the illiquidity of the Trust, the Trustee indicated to the beneficiaries in 2016 that the Property might have to be sold. This caused a divergence of opinion, with the elder son supporting the liquidation of the Trust's asset and the distribution of the proceeds and the younger son (supported by the daughter) strongly resisting the same. The Trustee was sympathetic to the younger son's desire to retain the Property provided the elder son could realise his interest. The Property was marketed for sale in July 2016 which resulted in offers from third parties of between £1m and £1.15m being received. The elder son's view was that one of these offers should be accepted. The Trustee decided to give the siblings a chance to match the offers received either by purchasing the Property out of the Trust or effectively buying out the elder brother's share within the trust structure. The siblings indicated their agreement to this and proposed a 10% deposit against the purchase of the Property which would be completed by the end of September 2016. The younger son eventually reverted to the Trustee with an offer to pay £30,000 as a deposit but with a further £333,000 to follow on to buy out the older brother's interest in the Trust. In fact the younger son only provided a deposit of £15,000 and, according to the Trustee, his impetus or ability to make the deal work appeared to fade such that it appeared no longer to be pursued.

9. That opinion of the Trustee is strongly challenged by the younger son. He asserts that the obstacle to the matter proceeding was the inability of the Trustee to respond to requests for information or action. He points out that a Mr Robinson took over as the point of contact in May 2015 but was subsequently affected by ill health, which meant that he was replaced by a Mr Carr in February 2017. The younger son asserts that correspondence with Mr Carr was limited and often slow. He states that in September 2016, Mr Robinson failed to turn up to a meeting in London even though the younger son had flown over from Kenya for the meeting. We heard no evidence on this matter from the Trustee and therefore are unable to make any findings in relation to this aspect. In any event, we do not consider it to be relevant to the issue which we have to decide. In due course the £15,000 that the younger son had paid by way of partial deposit was used to settle some of the outstanding invoices of professional fees of the Trustee. Again, there is a dispute between the younger son and the Trustee as to whether the younger son consented to the use of the partial deposit in this way.

10. Discussions took place during the course of June 2017, about an arrangement which would enable the siblings to buy out the elder son's interest. However, these did not come to a successful conclusion.

11. On 27th September 2017, Le Gallais & Luce, on behalf of the younger son, wrote to the Trustee with two alternative proposals. Under the first proposal the siblings would settle the Trustee's outstanding fees and the administration of the Trust would be moved to a new trustee. Under the second proposal, it was suggested that the siblings would settle the outstanding fees and provide funds to renovate the Property so that it could then be rented, with the rental being used to pay future fees and repayment of the renovation costs. Shortly afterwards, a new trustee was proposed and it was said that Investec Bank (Channel Islands) Limited ("Investec") was prepared to lend £500,000 which would be sufficient to cover any payment to the elder son in satisfaction of his interest in the Trust.

12. The Trustee subsequently put this proposal to the elder son but, through Advocate Sheedy, the proposal was unequivocally rejected.

13. On 10th November 2017, Advocate Renouf wrote to both Le Gallais & Luce and Advocate Sheedy to say that, in view of the inability of the parties to reach agreement, the Trustee proposed to instruct agents with a view to the Property being placed on the market for sale.

14. In this resumé, we have not referred to all the various negotiations and proposals – only those which seem essential in order to set out the background.

15. It is in those circumstances that the Trustee in due course presented the Representation which is presently before the Court. The Trustee's proposal is to sell the Property at the best price which can reasonably be achieved and that, following such sale, the Company should be wound up with the proceeds of sale of the Property and any other assets of the Company being applied by the Trustee towards:-

(i) meeting the costs of the marketing and sale of the Property (including LSL's fees);

(ii) meeting the costs of winding up the Company and terminating the Trust;

(iii) discharging the outstanding liabilities of the Trust; and

(iv) distributing the balance amongst the four beneficiaries equally.

16. The Trustee acknowledges that there is a dispute as to the amounts allegedly owed to the elder son and/or the siblings and in respect of its own fees. It therefore proposed that the hearing should be in two parts. On the first occasion the Court would decide whether the Property should be sold. At the second hearing the Court would resolve the question of the liabilities and the fees and how the net proceeds should be applied.

17. Advocate Renouf made clear at the beginning of the hearing that he was only asking the Court to consider the first aspect at this stage, namely should the Trustee's decision to sell the Property be approved.

**The law**

18. The Court's approach when considering whether to bless a momentous decision is well established and was conveniently summarised by the Court of Appeal in Kan –v- HSBC International Trustee Limited [2015] (1) JLR N 31; Rep of Otto Poon Trust [2015] JCA 109 at paragraph 14 of the judgment in the following terms:-

> ***"14. Where a trustee has made a momentous decision, that is a decision of real importance for the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction. As explained in Re S Settlement [2001] JLR N 37, the court must satisfy itself (i) first, that the trustee's decision has been formed in good faith,***

***(ii) second, that the decision is one which a reasonable trustee properly instructed could have reached; and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest…."***

19. The Court of Appeal refused to introduce an additional requirement, namely that the trustee must also prove in detail that it has given proper consideration to the matter under scrutiny, setting out in detail the steps taken by the trustee and the considerations which inform the trustee's decision. It pointed at paragraph 17 that a decision maker could consider matters carefully and still reach an irrational decision, and conversely an entirely rational decision could be reached on the basis of superficial thought processes. However, the judgment of Bompas JA went on to say at para 19:-

***"19. That is not to suggest that the court should take a lax approach, or that it should approve any trustee's application without due consideration. There is a threshold that must be crossed; the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. As was pointed out in Re Y Trust [2011] JLR 464 (citing with approval Lewin on Trusts (18th ed.), at para 29 – 299)… the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed. Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the test itself. Furthermore, each case will need to be decided on its own facts and the degree of detail that is required from a trustee cannot be uniform in all circumstances. In some cases, a trustee's decision may come out of the blue, and if so it may require both the beneficiaries and the court to be given the background and the context in considerable detail; in other cases, such as this, a trustee's decision may emerge from a situation that is well known to the interested parties, and that is likely to have an impact on the degree of detail required from the trustee by the court."***

**The positions of the parties**

20. As well as the affidavit from Ms Miller on behalf of the Trustee, the Court was provided with affidavits from the elder son, the younger son and the daughter.

**(i) The Trustee**

21. We have not been provided with any minutes setting out the Trustee's decision or the reasons for it. However, the affidavit of Ms Miller suggests that the main consideration is that the Trust is cash-flow insolvent and cannot pay its creditors, of which the Trustee itself is the largest because of outstanding fees. The Trustee acknowledges the desirability of retaining the Property where some of the beneficiaries wish to do so, but asserts that it has explored whether this is possible by way of the siblings buying out the elder son's interest and agreement has not proved possible; the siblings have not formulated any sufficiently concrete and workable proposal. In these circumstances, the Trustee considers that there is no alternative to a sale.

22. The Trustee acknowledges that it has not taken any tax advice. It says that is because it does not have the means to do so by reason of the Trust's illiquidity. Ms Miller asserted in her affidavit that the beneficiaries should each obtain their own tax advice. The Trustee would intend to appoint its own tax adviser in relation to ATED and CGT liabilities prior to the making of any distributions from the proceeds of sale.

**(ii) The elder son**

23. The elder son supports the proposal that the Property should be sold and the proceeds, after settlement of the liabilities, distributed equally between the four beneficiaries. Indeed, he asserts that he has been pressing for a sale since he stopped paying the outgoings for the Property in 2014. The siblings have failed to come up with concrete proposals not only to pay him his share but also to reimburse him for the amounts which he has loaned the Trust in respect of outgoings up to 2014. He says that even the proposals now put forward on behalf of the siblings are too vague and uncertain. There is therefore no alternative to a sale followed by liquidation of the Company.

24. However, he did not support the application for the Court to bless the Trustee's decision to sell. In the first place, it was not a momentous decision. The Trustee had a power of sale and could exercise it without the Court's approval. Where the trust structure was insolvent, this was the obvious thing to do and it was not therefore a momentous decision which should trouble the

Court. The Court should not be so lax about blessing decisions as to encourage trustees to seek approval when they did not need to do so.

25. Furthermore, the Trustee should have sold the Property much earlier. It should, for example, have accepted the offers put forward in July 2016. It knew the Trust was insolvent and the Property was deteriorating, but it had done nothing since then other than to allow fees to accumulate, thus causing prejudice to the beneficiaries. There were real grounds for the beneficiaries to be able sue for breach of trust in respect of the loss caused by the Trustee's inaction during this period and approval by the Court would prevent the beneficiaries from making such a claim.

26. A further reason, he submitted, for not blessing the decision was that the Trustee had a clear conflict of interest in that it was the major creditor and sale of the Property would result in payment of its fees. Despite this obvious conflict, there was no mention in Ms Miller's affidavit of this conflict of interest.

27. In summary, the Trustee should be left to sell the Property, settle the liabilities, liquidate the Company and distribute the proceeds equally between the four beneficiaries without the approval of the Court.

**(iii) The siblings**

28. The siblings wish to retain the Property as they wish to continue to use it. Furthermore, they believe that sale of the Property in its present rather dilapidated state would result in sale at an undervalue.

29. Their proposal is that a new trustee, Saffery Champness in Geneva should be appointed as trustee in place of the Trustee. The affidavit of the younger son exhibited a letter from Saffery Champness dated 6th July, 2018, indicating that it would be willing to act as trustee '*subject to full and complete due diligence documentation in relation to both the trust, the settlor and all named beneficiaries being provided to us.'* The Trustee would then borrow from Investec. The Court was shown a letter dated 5th July, 2017, from Investec setting out terms of a possible loan. The letter emphasises that it is not a formal offer letter and is merely something which sets out terms which could be put to Investec's credit committee. In short, the proposal is that there would be a loan of up to £500,000 for five years so that a distribution could be made to the elder son in respect of his share and the balance used for refurbishment of the Property. Investec's proposal for a loan was subject to a valuation report which would confirm the current minimum market

value of the Property at a specified figure and would also confirm an estimated rental value of £40,000 per annum after refurbishment. The proposal of the siblings is that the Property should be rented in order to service the loan.

30. The siblings submit that, in the circumstances where at least two (and possibly three – see below) of the four beneficiaries wish the Property to be retained and where they have put forward proposals which would achieve payment out of the elder son's share, it is unreasonable for the Trustee to insist upon a sale.

31. A further reason given by the siblings relates to tax. The younger son's affidavit exhibited a report dated 29th June, 2018, from Saffrey Champness, chartered accountants in London, which sets out the tax consequences of selling the Property and distributing the proceeds with two of the beneficiaries acquiring a replacement property in the UK ("scenario 1") and an alternative where the Company is liquidated so that the Property is owned by the Trust with the Trustee then obtaining a loan in order that the elder son can be paid out his share ("scenario 2").

32. The relevant tax charges all arise from ATED, which is a tax related to residential property in the UK owned by a foreign company. The Trustee has failed to pay the annual ATED charge since it was introduced or submit any ATED tax returns. There will thus be liability to the annual ATED charge for the relevant years together with penalties and late payment interest.

33. There will also be ATED capital gains tax (ATED CGT). There appear to be two alternative methods of calculating this, namely the default rebasing method and the time apportioned method. The report from Saffrey Champness suggests that the latter will lead to a lower charge to ATED CGT.

34. Paragraph 44 of the younger son's affidavit appears to suggest that the overall ATED charges will be less under scenario 2 than under scenario 1. We must confess that we were unable to derive this proposition from the report from Saffrey Champness and Advocate Addis was unable to assist us. Paragraph 3.2 of the report seems to say clearly that the ATED charges (both annual and CGT) will remain the same under scenario 2 as for scenario 1. What is clear, however, is that, if the siblings purchased a new property following sale of the Property and distribution of the proceeds, they would have to pay stamp duty on the new purchase. If the new property was worth £758,000 (representing the siblings' possible proceeds of sale from the Property), stamp duty of nearly £47,000 would be payable. On the material before us, that would appear to be the only tax disadvantage to the siblings of a sale of the Property and purchase of a new property as compared with retention of the Property and payment out of the elder son's share following the obtaining of a loan.

35. In response to the criticism that the siblings have not progressed matters or come up with concrete proposals, they assert that this has been due to a lack of initiative and provision of information by the Trustee. They assert that personnel have changed regularly and the Trustee has been unable to assist with the amount which it accepts may be owed to the elder son nor has it acknowledged the amounts which may be owed to the siblings. It has simply left the siblings and the elder son to try and come to an agreement, which has not proved possible given the difficult family background and the lack of information from the Trustee.

36. In summary, the siblings submit that the Court should not bless the Trustee's proposal to sell the Property but should instead indicate that the Trustee should pursue vigorously the proposal put forward by the siblings whereby the Property could be retained but the elder son's interest paid out to him, with him thereafter being excluded as a beneficiary of the Trust. This would enable the siblings and their families to retain a residential property in London without incurring the stamp duty payable on purchasing a replacement property.

**(iv) The widow**

37. The position of the widow is not clear. In a letter of wishes dated '2009' the widow indicated that, during her lifetime, she would like the trustees primarily to have regard to her wishes in connection with the administration and distribution of the funds in the Trust. She went on to say that after her death, she would like the whole of the trust fund to be held for the benefit of her three children in equal shares. In relation to the Property she said this:-

> *"In particular, [the Property] registered in the name of the [Company] which in turn is wholly owned by the [Trust] is to be considered an asset held for the benefit of all three of my children named above in equal shares.*
>
> *Furthermore, as all three children and their respective families use the property and stay there from time to time when they visit the UK from Nairobi, to the extent that funds may be needed to cover the property expenses and outgoings, including the maintenance and upkeep of the property, it is my hope and expectation that they will contribute sufficient funds in equal proportions to cover such outgoings, and also the running cost and fees charged by [the trustees] for administering the structure."*

38. In an email dated 8th October, 2014, Mr John Perkins of the Trustee reported to the first three Respondents on the outcome of recent meetings in Nairobi and said in relation to the Property:-

*"Your mother indicated to me that her preference was for the property to be retained for the benefit of the family, and this also accords with the letter provided by [the elder son] at our meeting on 24th September, 2014, addressed to the original trustees, Compendium Trust and dated 27th September 1982, being an indication of your father's wishes concerning the property."*

39. These are of course not recent expressions of her wishes. Proceedings have been served upon her via Advocate Sheedy although he does not act for the widow; he only acts for the elder son. He initially sent an email dated 4th June 2018 to Advocate Renouf stating:-

*"I can confirm that the papers have been provided by my client to his mother. She has told him her position, which is that she would like the property sold and the net proceeds divided three ways between her children. She does not expect a distribution from the fund."*

It must be noted that the widow lives with the elder son and his wife in Kenya.

40. Subsequently Advocate Sheedy emailed on 27th June 2018 to Advocate Renouf to say this:-

*"I write further to the trustee's request that I ascertain, through my client, [the widow's] position in respect of the proceedings that have now been listed for a hearing in the above matter.*

*My client had understood his mother's position to be that she wished the property to be sold and the proceeds divided equally between her three children. You are aware there is disagreement between my client and his brother concerning the sale of the property. My client's sister's position has been unclear although if she is now represented by Natalie, I assume they share the same position. Having attempted to obtain written confirmation from [the widow] as to her wishes, she is, perhaps understandably, reluctant to be seen to 'pick a side' between her children.*

*I understand that [the widow] is currently in the United States. She is aware of the proceedings and the timetable agreed between us and the other parties. She would no doubt engage with the proceedings, or with the trustee directly, if and when she chooses to do so."*

**Discussion**

41. The first issue is whether this is a momentous decision. Advocate Sheedy submits that it is not. In our judgment, however, it undoubtedly is. It will result in the sale of the sole asset of the Trust, the termination of the Trust and distribution of the entire trust fund. Furthermore, the decision is taken in circumstances where there is strong disagreement amongst the beneficiaries. In our judgment, contention amongst the beneficiaries may well turn a decision which should otherwise be taken by trustees without recourse to the Court into a 'momentous' one where it is reasonable to seek the Court's approval. As Lewin on Trusts (19th ed.) puts it at para 27-077:-

> ***"An application for approval without the surrender of the trustees' discretion will typically be made where the decision is particularly momentous for the trust, such as a decision to sell a family estate, to dispose of a controlling interest in a family company or to exercise a power of advancement by applying the bulk of the trust assets to charitable purposes at the request of the life tenant. The existence or likelihood of contention within the trust will be material to the trustees' decision to apply to court… No doubt an application made when the decision for the trustees is neither momentous nor otherwise difficult will be refused and where an application is inappropriate the trustees may be made to pay the costs."***

42. We agree with the last sentence of the above extract and with Advocate Sheedy's point that the Court should not encourage trustees to seek the approval of the Court when it is really not necessary. However, the Court of Appeal, in the passage from Kan quoted at para 18 above described a '*momentous'* decision as a decision '*of real importance to the trust'*. For the reasons given in the preceding paragraph and noting that there is indeed contention amongst the beneficiaries, we are satisfied that the sale of the Property is a decision of real importance to the Trust and it is perfectly reasonable for the Trustee to seek the Court's blessing.

43. Advocate Sheedy further submitted that, even if the Court agreed with the decision to sell the Property, it should not bless the decision because this would prevent the beneficiaries from suing the Trustee for breach of trust arising from its conduct leading up to the sale i.e. delaying the sale for several years leading to deterioration of the Property and the unnecessary incurring of fees and expenses.

44. In our judgment, this submission misunderstands the effect of the Court's decision to bless a decision. All that is blessed (so that the beneficiaries are thereafter unable to sue for breach of trust) is the decision itself. Thus, in this case, if the Court were to bless the decision to sell the Property, the beneficiaries could not complain about the decision to sell the Property at this time.

No allegation for breach of trust could be brought on the basis that the Property should not have been sold. However, blessing the decision to sell at this time says nothing about whether the Property should have been sold earlier and whether failure to sell earlier would amount to a breach of trust. Thus, contrary to Advocate Sheedy's submission, the blessing of the decision to sell would not prevent a beneficiary from bringing an action for breach of trust against the Trustee, if so advised, for its delay in selling the Property.

45. However, that position does not arise because, having considered the various submissions made to us, the Court has decided not to bless the Trustee's decision to sell the Property at this time. We reach that conclusion for a number of reasons.

46. The first relates to conflict of interest. It is patently obvious that the Trustee has a conflict of interest in relation to its decision to sell the Property. It had outstanding fees of some £120,000 as at the end of April 2018 and a sale of the Property is the most obvious way in which it will be able to recover such fees. The existence of a conflict of interest does not of itself mean that trustees may not take a decision or that the Court will not bless such a decision. As Lewin put it at para 27-077 (when considering a blessing application):-

> ***"The court may also entertain an application where the trustees have a conflict of interest, without requiring them to surrender their discretion, and if the power might rationally be exercised in many different ways, that course may save the expense of evidence and argument on the way in which the court should exercise the discretion."***

47. The issue of conflict of interest was also helpfully addressed in Representation of Centre [2009] JRC 109 where, at para 30 of his judgment, Clyde-Smith, Commissioner quoted with approval the observation of Hart J in Public Trustee –v- Cooper (2001) WTLR 901, which was as follows:-

> ***"Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.***

***Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.***

***Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that that decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."***

48. We are satisfied that the conflict in this case falls within the third category. It is not so pervasive as to disable the Trustee from taking the decision in question and require it to surrender its discretion to the Court. However, where there is a conflict of interest and a trustee subsequently seeks the blessing of the Court to the decision which it has taken, it is of fundamental importance that the trustee address the conflict issue and be seen to do so. Thus, in the present case, we would have expected to have seen minutes in which, when reaching its decision, the Trustee acknowledged the existence of the conflict but went on to explain why, despite the conflict, it was nevertheless in the interests of the beneficiaries/trust estate that the Property be sold.

49. But the Trustee's application is completely silent about the conflict of interest. Neither the representation itself nor the affidavit of Ms Miller makes any mention of it. Both documents do of course disclose the existence of the Trustee's outstanding fees but that is not the same point. What is important is that the Trustee should be seen, when making its decision, to have been aware of its conflict of interest, to have taken it into account and to have considered clearly why, despite the conflict, it is nevertheless in the interests of the trust estate/beneficiaries to reach the relevant decision.

50. As we say, neither the representation nor the affidavit of Ms Miller makes any mention of this conflict of interest. There is therefore simply no evidence before the Court that the Trustee acknowledged its conflict of interest when reaching its decision to sell the Property. Although during the course of the hearing, Advocate Renouf accepted the existence of the conflict, it was far too late to rescue the position as the decision was taken long before that point.

51. Where there is a conflict of interest, the Court will give heightened scrutiny to the decision for which approval is sought. We are not to be taken as laying down a rule that, where a conflict of interest has not been acknowledged and disclosed, the Court will invariably refuse its approval. The decision may be so obviously appropriate that the Court should nevertheless approve it. However, failure to disclose and acknowledge a conflict of interest when reaching a decision, is likely to make it much more difficult for the Court to be satisfied that the decision has not in fact been influenced by the conflict.

52. Secondly, the Trustee did not consider the tax consequences of its decision at the time it made its decision. It has explained that it did not feel it could incur the costs of seeking tax advice because it had no liquid funds. In the circumstances of this case, we would reject that as a proper excuse. The Trust has a substantial asset in the form of the Property and there is no question but that the Trustee will at some stage be able to obtain reimbursement for its reasonable fees and expenses out of the trust property. This is not a case of an impoverished trustee who could not afford the outlay in obtaining advice or of a situation where there are no assets from which the outlay can eventually be recovered.

53. Although the tax advice obtained by the siblings suggests that there will be no difference in terms of ATED payable as between the Trustee's proposal and that of the siblings, it is clear that, if the siblings wish to purchase a replacement property for the Property, they will be worse off to the tune of some £47,000 because of the stamp duty payable on acquisition of the replacement property. This would clearly be an important factor for the Trustee to have considered when deciding whether to sell or to give the siblings a further opportunity to buy out the elder brother's interest; but the Trustee did not consider it because it was not aware of the position, having taken no tax advice.

54. Thirdly, we are not satisfied that it is reasonable to insist on a sale at this particular stage. This is a situation where two out of the four beneficiaries wish to retain the Property for their use. Where a situation of this nature arises, the natural course for any trustee, before deciding that the property in question must be sold, is to see if there is any way for the beneficiaries who wish to retain the property to buy out the interest of those who wish to realise their share.

55. We acknowledge that the proposals put forward by the siblings have not always been very specific or evidence based and the elder brother has been adamantly in favour of a sale. However, in our judgment, it was premature to decide in November 2017 that there was no alternative to a sale. There appears to be a real possibility – we put it no higher than that in view of the qualified nature of the letter from Investec – that funds can be obtained which would enable the elder son to be paid out both in relation to his share and such loans as are due to him, and for

the Property to be renovated so that it can be let and, upon any eventual sale, realise its maximum value. It was, in our judgment, incumbent upon the Trustee to be proactive in seeking to establish whether there was any alternative to sale. Whilst acknowledging the difficulties under which the Trustee was labouring, we nevertheless feel that it adopted a rather passive stance and simply left the beneficiaries to see if they could reach an agreement. It seems to us that, in circumstances such as this, a trustee's duty goes a little further and it should be proactive in establishing whether there is any means by which the property in question can be retained for the benefit of those beneficiaries who wish it to be retained.

56. In this respect it is clear that the amounts (if any) owed to the elder son and siblings respectively need to be ascertained. The accounts of the Company produced for this hearing seem to have included ascertainable amounts owed to the elder son up to December 2015 (which was after he ceased to pay) but the sum then disappears from subsequent accounts without explanation. We have not been referred to any accounts which deal with the position of the siblings and indeed the siblings complain in their evidence of the lack of accounts provide by the Trustee. It seems to us that it is incumbent upon the Trustee to resolve this aspect, which should assist as the parties will then only be left with the issue of the value of the Property. Such value should of course be its current value.

57. Fourthly, although this was not a point relied upon by the parties, there is no clear explanation as to why the Trustee proposes to divide the proceeds into four rather than three shares. The position of the widow has not been ascertained but there is some suggestion that she does not wish to receive a share. We would have thought it preferable to ascertain her position, if possible, prior to reaching a final decision.

58. Putting all these matters together, we are not content to approve the sale of the Property at this time. It is of course for the Trustee to decide how to proceed in the light of our decision. The fact that the Court has withheld its approval does not mean that the Trustee may not proceed with the sale. It simply means that, if it decides to proceed, it will not have a court order to protect it from any allegation of breach of trust in respect of the sale.

59. However, we would recommend that the siblings be given a clear deadline to come up with concrete proposals for funding, amounts to be paid etc. which the Trustee and the elder son can then consider. Ultimately, it is a matter for the Trustee as to how much the elder son should be paid by way of distribution prior to his being excluded as a beneficiary and the Trustee should lead proactively in seeing whether a satisfactory solution can be reached. In the event of the siblings failing to come up with a definitive workable solution which is provably financed within a reasonable period and which the Trustee considers should produce a fair value for the elder son's

interest, it would of course then be reasonable for the Trustee to conclude that there was no alternative to a sale and either to proceed with the sale itself or to apply anew to this Court for approval.

**Authorities**

Kan –v- HSBC International Trustee Limited [2015] (1) JLR Note 31.

Rep of Otto Poon Trust [2015] JCA 109.

Lewin on Trusts (19th ed.).

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