In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018: 40

IN THE MATTER OF THE X TRUSTS

JUDGMENT

(in Camera)

Application by corporate trustees for directions as to whether they should remain in office-submission by certain beneficiaries that directors of corporate trustees should be removed-test for removal-whether court has jurisdiction to compel directors to resign-whether requirements for removal made out

Date of hearing: July 2-5, 2018
Date of Judgment: July 12, 2018

Mrs Elspeth Talbot Rice QC and Mr Edward Cumming QC of counsel and Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiffs ("the Trustees")

Mr David Brownbill QC and Mr Andrew Holden of counsel and Ms Fozeia Rana-Fahy, MJM Limited for D1, D4-8 and D13

Mr Brian Green QC and Ms Anna Littler of counsel and Mr Matthew Watson, Cox Hallett Wilkinson Limited, for D2-D3

Ms Lilla Zuill, Zuill & Co., for D9-D12

Introductory

1. By an Originating Summons issued on February 21, 2018, which was amended on April 23, 2018, the Trustees sought directions in relation to various matters relating to the administration of the X Trusts. The present Judgment relates to their application

under paragraph 12(b) of the Amended Originating Summons for directions as to "*whether they should remain as trustees of the X trusts or retire*".

2. The Trustees are private trust companies which have for some years been responsible for managing the Trusts which control underlying assets worth billions of dollars. The beneficiaries may for present purposes be described as falling into two family branches, the Y branch which contends that the Trustees are liable to be removed and the Z branch which contends that they are not. The Trustees adopted an essentially neutral position although their counsel firmly challenged any suggestion of wrongdoing on their part.

3. The need for the directions arose in the following way. Following meetings between the Trustees and beneficiaries on July 18-19, 2017, the Trustees produced a 'Proposed Plan' for the future of the X Trusts ("the Proposed Plan"). The Y branch expressed shock and dismay at certain aspects of the Proposed Plan, in particular the fact that the Trustees had reached firm decisions to usher in "epochal" changes to the trust structure without adequately consulting the Y branch. It was complained that it was no longer possible for the Y branch to have any confidence in the ability of the Trustees to manage the proposed restructuring in a fair manner.

4. As the present application was dealt with on the basis of affidavit evidence untested by cross-examination, it was ultimately common ground that it was <u>not</u> open to me to make any findings of bad faith or dishonesty against the Trustees. This also meant that the Court was generally bound to accept that each deponent believed the truth of their sworn assertions, and could only resolve factual contentions or draw disputed inferences where a controversial contention was either clearly right or clearly wrong.

5. The following questions arose for determination:

   (a) what was the legal test for removal of a trustee?

   (b) did the Court have the power to require directors of a corporate trustee to resign as opposed to removing the corporate trustee where a case for removal was made out?

   (c) since the directors of the Trustee had offered their resignations in the event that the Court determined it was appropriate for them to resign, should the Court signify that resignation is appropriate in respect of some or all of the directors?

6. The Trustees formally adopted a neutral position allowing the case for and against removal to be argued by the senior limb (supported by a junior limb) of the Y branch and by the senior Z branch respectively.

Factual matrix

7. Although the factual background to the X Trusts and the present controversy was necessarily fully explained to the Court, the factual matrix may be described quite concisely based on the view I have formed of the governing legal principles and most pertinent facts.

8. The Trusts are discretionary and the bulk of the assets held by the Trusts were first settled on trust between 1949 and 1959. By a Letter of Wishes dated September 6, 1961, the Settlors provided that "*without seeking in any way to restrict the Trustees in the exercise of their discretionary powers*", the Trusts then in existence "*should be regarded as being primarily two parts for the benefit of*" of the Z branch "*and as to one part for the benefit of*" the Y branch.

9. This notional allocation was confirmed in a Family Accord dated November 6, 1995 which was expressed to be binding between the beneficiaries but not legally enforceable and which was intended to last for five years. By a May 25, 2001 Memorandum of Understanding (the "MOU"), the beneficiaries agreed, inter alia, as follows:

> "*1. ..It is now thought better for such trusts to be treated on a one Family group basis without such split, and for management of such trusts to be carried out with this in mind….*"

10. It was common ground that it was neither necessary nor appropriate for me to resolve the hotly disputed question as to the true significance of the MOU on the pre-existing notional allocation position. On May 16, 2016, senior members of the Z branch notified the Trustees and Protectors that they were withdrawing from the MOU. The Y branch was copied with this communication. On May 17, 2016, a senior representative of the Y branch responded stating, *inter alia*:

> "*…I do not consider myself bound by the 1995 Agreement, which has not existed or been operative for 15 years, and I refuse now to yield to their negative action or be deemed part of it…Until we reach an Accord that is fit for the future, I venture that there is no longer any agreement in place which binds the 2 families to their common interest. I regard this as a precarious and*

irresponsible position in which to have placed the Family, its Trustees and Protectors…"

11. On August 31, 2016, an advisor to the Z branch fleshed out the case to the Trustees and Protectors for a return to the 2/3rds 1/3rd split coupled with a division of the trusts into two, with separate trustees for each branch. The same advisor gave a presentation to the Trustees on November 2, 2017 and a presentation to the senior Y branch on November 9, 2017. Mishcon de Reya on behalf of the senior Y branch set out their stall on the way forward in a measured and non-confrontational letter dated February 23, 2017. The first of several discussion points listed was "*One family*":

> "*…Accordingly, the family support the explicit endorsement of a 'one family' approach to the Family Trusts, entailing a continuation of unified management of the settlements.*"

12. On April 28, 2017 the senior Z branch member sent a dossier to the Trustees to reinforce his case and to urge the Trustees to act speedily. On May 31, 2017, Macfarlanes (on behalf of the senior Z branch) rejected Mishcon's May 8, 2017 mediation proposal. The Trustees and the legal teams for the two branches prepared for meetings which were scheduled without any great controversy for July 18-19, 2017. The Trustees sought advice from Nicholas Le Poidevin QC in early June. On July 13, 2017, Mishcon asked the Trustees' then solicitors Withers "*what it is the directors believe the trustees are being asked* [by the Z branch] *to do*". Withers did not respond to this query. On July 15, 2017, Nicholas Le Poidevin QC issued his Advice to the Trustees. On the question of whether the trustees "*should or should not take a decision at this stage*" (whether or not they did was hotly contested at the hearing), Leading Counsel opined as follows:

> "*45. There is no single correct legal answer. It is a matter for the trustees' discretion-both whether they take a decision at all and, if so, what it should be. But family feelings are such that saying nothing is likely to be the worst option.*"

13. On July 26, 2017, the Trustees issued a Proposed Plan which was updated on August 31, 2017. The Proposed Plan was according to its terms a statement of proposed courses of action intended to be used as the basis for further consultations before final decisions were taken:

"*2.5 Prior to implementation of the Proposed Plan, the Trustees intend to consult all first and second generation Family members. The Trustees will also give consideration to making an application to the Bermuda Court for approval of the Proposed Plan prior to full implementation.*"

14. That said, the various proposed positions were expressed in terms which suggested, ignoring paragraph 2.5, that final decisions had been made. To my mind the most significant proposals were the following:

    (a) "*the Trustees consider that it is currently in the best interests of the Family Trusts to continue to operate the management of the family Trusts through the single, unified group of four Trustee companies*…" (3.3(a)) (Y branch "gain");

    (b) the interests of the Z branch in the Trusts "*are as to 2/3*" and "*as to 1/3*" for the benefit of the Y branch (Z branch "gain").

15. The "decision" to support the appointment of a Z branch member as a non-executive director, of which much was made in argument, appeared to me to be a comparatively minor matter in the sense that it lay outside of the radius of the most pressing concerns. Indeed, Mr Le Poidevin QC in his Advice based on his instructions viewed the notional allocation issue as being "*at the centre of the current friction*" (paragraph 36).

16. The present trustee removal dispute in my judgment only first became apparent when Mishcon forwarded a Memorandum to the Trustees setting out the senior Y branch's response to the Proposed Plan under cover of their letter dated September 15, 2017. The change of tone when compared with earlier communications lent a distinct 'no more Mr Nice Guy' flavour to the September 15, 2017 missive. The Memorandum began with the following sabre-rattling opening paragraph:

    "*1. Our clients are shocked and extremely concerned by the content of the Trustees 'Proposed Plan…'This memorandum sets out the ways in which the decisions contained in the Trustees' Plan and the process through which it was formulated are fatally flawed.*"

17. The Memorandum continued:

"*4… In circumstances in which it is difficult for our clients to maintain trust and confidence in the Trustees given their actions to date, our clients are considering requesting the resignation of the directors of the Trustees, and/or applying for the removal of the Trustees from office. Our clients' rights are fully reserved.*

5. We invite the Trustees to disavow the process by which they have purported to reach such manifestly flawed decisions, and to enter a process of mediation with our clients with a view to reaching a rational decision as to the future of the Trusts. In the course of this process our clients will require the Trustees to explain how they can remain in office given the shortcomings set out in this memorandum."

18. The Memorandum then proceeds to attack the flaws in the process which led to the Trustees' "decisions" before most specifically explaining why it was not open to the Trustees to return to the 2/3^{rds} /1/3rd split principle which had last been applied in 1995 (paragraphs 23-43). The 'decision' is then said to be "*internally inconsistent*" and "*incoherent*". The approval of a senior Z branch member as a non-executive director is said to be "*misconceived*". Macfarlanes in their December 1, 2017 Commentary on this Memorandum made the following overall comment (at page 1):

> "*The Mishcon memorandum is lengthy but assiduously avoids the issues that the Trustees, Protectors and family must now confront, preferring an aggressive and negative approach that substitutes criticism and threat for constructive engagement.*"

19. The senior Z branch's response to the Proposed Plan was forwarded to the Trustees under cover of a Macfarlanes letter dated September 29, 2017. This memorandum stated that as regards the Trustees' rejection of their desired 'two trust' solution, "*the family accepts this*" (paragraph 3.2). However, the memorandum went on to call for a "*clearer allocation of the Continuation Fund as between the two branches of the Family now*" (5.9). In overall terms, the Senior Z branch supported the Proposed Plan. Its main continuing concern was expressed to be ensuring the longevity of the underlying business.

20. The conflict appeared to me not to be just about the "split" in economic terms. Dissatisfaction seemingly centred on the influence which the notional allocation carried with it. Before the September 15, 2017 Mishcon Memorandum complained that "*the Trustees have robbed our clients of their right as settlors and beneficiaries to be properly consulted prior to the making of decisions in relation to the Trusts*"

(paragraph 17), Mr Le Poidevin QC in his July 15, 2017 Advice to the Trustees had sagely observed (at paragraph 38):

> "*In short, it seems that the allocations…are about influence-the beneficiaries might prefer to say control-rather than money.*"

21. As his Advice makes clear, the main controversy turned on how notional allocations are to be made in respect of the so-called "Rump" (not actual allocations). It seems clear to me from other evidence that these notional allocations would impact on the likely weight accorded to the views of the respective family branches.

22. At the end of the day, the Y branch's elaborate legal 'dance' seemed to me to be more driven by impulses of 'heart and soul' than cold commercial logic, evoking the spirit of Aretha Franklin's famous lyrics: "*R-E-S-P-E-C-T. Find out what it means to me…. I got to have a little respect*…"

Legal findings: the test for removal

23. There was no real controversy as to what the basic test for removal of a trustee was. There were competing arguments as to whether the impugned conduct of the Trustees in the present case was capable of supporting a case for removal. The legal test is a broad one. Reference to past cases on removal, as Mrs Talbot Rice QC aptly noted, "*gives one a feel but probably no more than that*" in terms of illuminating what kinds of conduct justify removal.

24. The Court's inherent supervisory jurisdiction over trusts includes the power to remove a trustee where this is required for the welfare of the beneficiaries, who are entitled to have their trusts administered by proper persons: '*Lewin on Trusts*', 19th edition, paragraph 13-063. The test is as simple and flexible as this and is supported by various authorities to which I was referred. Most authoritatively, in *Letterstedt-v-Broers* (1884) 9 App Cas 371 Lord Blackburn (delivering the advice of the Privy Council) opined as follows (at 386-387):

> "*It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-*

contentious cases. 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. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. 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 of great nicety…"

25. This judicial statement is not simply important because it confirms that the key consideration is whether removal is necessary to ensure the due administration of the relevant trusts. It is also significant for elucidating an enduring feature of trust practice, which was well settled by the late nineteenth century. The practice was perhaps inspired by the observation of the Lord Chancellor in the vintage case of *Uvedale-v-Ettrick* (1682) 2 Ch Cas 130, upon which Mr Brownbill QC relied. The Lord Chancellor opined: "*I like not that a man should be ambitious of a Trust, when he can get nothing but trouble by it.*" Be that as it may, it seems that trustees will often form their own judgment as to whether grounds for removal are made out and tender their resignation, making it unnecessary for the Court to formally adjudicate a removal application. In the instant case, however, the Trustees have not themselves offered to resign and there is no application to remove them as such. Instead the more nuanced approach of seeking the resignation of the 'offending' directors has been adopted. The directors have nonetheless confirmed that they will resign if the Court considers that they should take this course.

26. Mr Green QC was content to rely upon the law on removal as explained by the Trustees' counsel. However, in response to questions from the Bench at the end of the third day of the hearing, he submitted that the legal test was essentially an objective one. In this regard he relied upon the following *dicta* of Patten LJ (commenting on the passage from *Letterstedt* recited in the preceding paragraph of the present Judgment) in *National Westminster Bank Plc-v-Lucas* [2014] EWCA Civ 1632 (Court of Appeal, at paragraph 83):

> "*83. But, as Lord Blackburn indicated in this passage, the direct intervention by the Court in the administration of a trust or an estate by the removal of the trustee or personal representative has, for the most part, to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances.*"

27. In terms of illustrating how the removal principles are factually applied, Mr Brownbill QC heavily relied on two cases which warrant mention. Firstly, *Letterstedt* (at page 389), where Lord Blackburn stated:

> "*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. But where the hostility is grounded in on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.*"

28. In her opening Mrs Talbot Rice QC noted that the beneficiaries in the present case were merely discretionary ones. Secondly, the case for removal was supported by reference to *Jones et al-v-Firkin-Flood* [2008] EWHC 2417 (Ch) where Briggs J observed:

> "*291. In my judgment it is obvious that there must be a change from the present body of Trustees. The more difficult question is whether all or only some of them, and if so who, should be removed.*

> *292.In my judgment, the governing criterion, consistent with the need to have regard first and foremost to the interests of the beneficiaries, is to constitute a body of trustees who will be able with the minimum of expense and dissention, and in particular with as little as possible further assistance from the court, to restore the administration of the Trust to a basis capable of commanding the confidence and respect of all its beneficiaries, and dealing impartially with their separate claims to consideration for distribution.*"

29. This case concerned, substantially if not wholly, "*broad discretionary trusts*" (paragraph 3). Mrs Talbot Rice QC noted the cogency of the findings which supported the case for removal in that case. For instance, Briggs J pivotally found as follows:

> "*239. I regret to have to say that the facts as I have found them reveal not merely a number of isolated breaches of trust by the Trustees, but rather a total abdication of their duties by all of them, save only in relation to their concurrence in the beneficial sale of the family companies negotiated largely by Ian.*
>
> *240. At the outset, they failed to appraise themselves of the nature and extent of their duties. They failed to prepare, or to have prepared, estate or trust accounts. They failed to meet to consider whether in the interests of the beneficiaries it was appropriate to leave the Trust property as they received it, in the form of shares in private companies producing no dividends, or to consider whether the beneficiaries' interests required them as controlling shareholders to request, and if necessary impose, a dividend policy. They never considered as Trustees whether the benefits in salary and in kind which Ian arranged, as a director, to be provided to his siblings and to himself were appropriate.*"

30. Mrs Talbot Rice QC also referred the Court to an important illustration of the removal principles at play in the context of a case where a failure to balance competing constituencies was alleged. In the first instance decision in *National Westminster Bank-v-Lucas* [2014] EWHC 653 (Ch), the executor (a bank) of Jimmy Savile's estate had to grapple with the possibility that the claims of individual beneficiaries and a trust would be extinguished by competing personal injury claims. The trust supported by the individual beneficiaries applied to remove the executor. Sales J held in a passage to which the Trustees' counsel helpfully drew to my attention:

> "*83. There are many contexts in which trustees or those in equivalent positions, such as personal representatives of a deceased person, have to make judgments which involve striking a balance between different competing interests and which may thus adversely affect some persons claiming under the trust or in respect of the estate of the deceased. It is to be expected that in such cases there will often be an element of friction between the trustee or personal representative and those disappointed by their decisions. This is not in itself a good ground to remove the trustee or personal representative from their office.*"

31. This was, it should be noted, a case where the removal applicants had claims against the relevant estate far more tangible than discretionary beneficiaries who are, save perhaps as regards appointments actually made or promised to them, technically merely objects of a discretionary power. Mr Brownbill QC relied on an earlier passage in the same judgment to support his central submission that removal could be justified by a failure to behave impartially:

> "*76. In my view, no good case has been made out by the Trust or the individual beneficiaries to indicate that, in negotiating the Scheme and in now asking the court for approval to implement it, the Bank has acted or will act in any way unreasonably or without fair and proper regard to the interests which ought to be taken into account in deciding how the estate should be administered.*"

32. I am guided by the above principles in approaching the question of whether a case for removal has been made out. The senior Y branch's principal complaint is that the Trustees changed the longstanding basis on which Trust allocations had notionally been made by making precipitous final decisions at the prompting of the Z branch of the family. This complaint is on its face a potentially valid one, subject to an objective assessment of its merits in the particular legal context of the X Trusts.

Legal findings: jurisdiction to remove one or more of the directors of the corporate Trustees

33. In my judgment when the respective arguments are properly analysed, there is no meaningful jurisdictional controversy to be resolved. The following crucial points were ultimately agreed:

(a) the Court has no jurisdiction to direct the removal of the directors from the relevant corporate boards. That power lies with the relevant shareholders;

(b) the Court has jurisdiction to indicate that it would be in the best interests of the Trusts if the directors were to resign in circumstances where they have agreed to be bound by any such indication signified by this Court in deciding the present application.

34. Mrs Talbot Rice QC in opening and in reply submitted that it would be jurisprudentially unsound for the Court to direct the removal of a director from one or more of the Trustees' boards. Mr Green QC described the removal claim referred to in Mr Brownbill QC's Skeleton as analogous to a 'dog-leg claim' as a non-point, not pursued in oral argument. These arguments did not do justice to the subtlety of the point advanced by Mr Brownbill QC in oral argument. He submitted that the Court "*can take any step to secure the proper administration of a trust. And this …supervisory jurisdiction when it comes to a trust is regularly exercised in completely new and novel situations*". This point was buttressed by reference to, *inter alia*, *Crociani-v-Crociani* [2014] 17 ITELR 624 (Privy Council) and the following pronouncements by Lord Neuberger:

> "*36. In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced. In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see eg Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] 2 AC 709 para 51, where Lord Walker of Gestingthorpe referred to "the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts". This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts.*"

35. The breadth and flexibility of the Court's supervisory jurisdiction over trusts is confirmed rather than undermined by the concession made in the instant case. The directors of corporate Trustees, whom the Court has no power to formally remove,

have expressly conceded that the Court may validly decide whether or not it is desirable for them to resign, if a case for removing the Trustees is made out.

36. It would be surprising if the Court could not validly make similar findings in circumstances where the directors did not expressly agree to any directions the Court might give as to the desirability of a resignation. It is also difficult to conceive that the Court could not, in circumstances where (a) a corporate trustee's directors served multiple clients, and (b) a prima facie case for removal of the corporate trustee was made out, direct (or signify) that a director's continued deployment in the administration of a particular trust would, be inconsistent with the due administration of the relevant trust. There is no need to resolve these questions in the present case but in general terms the oral submissions of Mr Brownbill QC on the flexibility of this Court's supervisory jurisdiction over trusts were fundamentally sound.

37. In summary, I find that the Court has no jurisdiction to direct the removal of one or more of the directors. The Court does possess the inherent jurisdiction in supervising a Bermudian trust to signify that rather than removing the corporate trustees it would be desirable if one or more of the directors resign. The existence of this jurisdiction was implicitly conceded by the Trustees in the present case.

Findings: has a case for removal of the Trustees been made out?

38. I accept entirely that the senior members of the Y branch have, as they have deposed, subjectively lost confidence in the directors' lack of impartiality such that they would like to see them resign. However what this Court must assess is whether, objectively, "*the breakdown in relations is likely to jeopardise the proper administration of the trust*": Patten LJ in *National Westminster Bank-v-Lucas* [2014] EWCA Civ 1632 (at paragraph 83). Resolving this question essentially requires consideration of:

    (a) the extent to which the X Trusts require impartiality between conflicting classes of beneficiaries; and

    (b) the extent to which the Trustees have, as alleged by the senior Y branch, made "*epochal*" (to use Mr Brownbill QC's phrase) changes to the way the Trusts are administered in a flawed and unfair manner.

39. While the importance of a sense of impartiality from the perspective of two divided camps of discretionary beneficiaries cannot be doubted in human terms, in strictly legal terms impartiality has far less significance in the present context. Present divisions between the two branches predominantly centre on, in my judgment, concerns about influence and control, rather than actual legal entitlements. In *National Westminster Bank-v-Lucas*, by way of contrast, the rival groups of claimants were estate beneficiaries with fixed interests concerned that contingent creditors' claims against the estate might exhaust the fund the beneficiaries were interested in. The comparatively ethereal nature of the present beneficiaries' strict legal rights in

relation to the X Trusts is best demonstrated by the Advice of Mr Le Poidevin QC to the Trustees on the general legal principles at play:

> "*8. First, when settlements confer discretionary powers on trustees they mean what they say. The discretion is that of the trustees (though, as here, the consent of a protector may be required). No one beneficiary, however senior, can dictate to the trustees what to do; nor can any group or even a majority of beneficiaries do so…*
>
> *9. Trustees may decide from time to time for and against exercising a given discretionary power. But powers are to be exercised in the circumstances existing at the time… So trustees are not permitted (unless the trust instrument allows it) to enter into any form of commitment for or against exercising a power in the future. They are entitled to adopt a policy but only as long as they do not bind themselves in advance…*
>
> *19. There is no binding legal obligation to consult all the beneficiaries – often that would anyway be impossible-or any of the beneficiaries at all. But it is usual to consult the major beneficiaries on major decisions….*
>
> *20. Though the trustees cannot bind themselves as to the future exercise of powers, it is relevant for them to take into consideration how they have administered the trust in the past, if they have raised reasonable expectations in beneficiaries. But having regard to such expectations, if any, does not necessarily mean giving effect to them…*
>
> *24. …it is nonetheless relevant for the trustees to take into account-not to be bound by- the wishes of settlors and beneficiaries.*"

40. In short, the Trustees were not legally required to consult, even on an "epochal" decision, although they clearly did so. And while they were entitled to take into account any representations by either the Y or Z branch, they were not bound to accede to them. This was the advice the Trustees obtained in advance of the July 18-19, 2017 meetings and the issuance of the Proposed Plan.

41. In light of the Advice the Trustees received on the governing legal principles, together with the fact that the Trustees and their directors are clearly trust professionals, the assertion that they capitulated to the demands of the Z branch is inherently improbable. The record shows that after the Z branch resiled from the MOU in May 2016, the Trustees took so much time to resolve the thorny issue that both branches (the Z branch in greater depth, it seems to me, than the Y branch) urged them to act decisively and quickly. The July 18-19 meetings were convened with no complaints from the Y branch about timing and after the Trustees had taken advice from Leading Counsel. A week later, the Proposed Plan was produced. In my judgment the criticisms of the procedure followed by the Trustees, objectively viewed in the legal context of the present discretionary Trusts, do not constitute grounds for a loss of confidence in the due administration of the Trusts.

42. The procedural complaints were in large part dependent upon the prior assumption that the Proposed Plan promulgated seismic changes to the way the Trusts had been administered for 15 years. In my judgment it is impossible to fairly construe the Proposed Plan as embodying final decisions on anything let alone the pivotal notional allocation issue. This is not simply because the document was entitled "*Proposed Plan*", but also because the Proposed Plan explicitly stated, as noted above:

> "*2.5 Prior to implementation of the Proposed Plan, the Trustees intend to consult all first and second generation Family members. The Trustees will also give consideration to making an application to the Bermuda Court for approval of the Proposed Plan prior to full implementation.*"

43. It makes sense that the Trustees should have expressed firm provisional views, rather than either making final decisions or not expressing any provisional views, because Leading Counsel had advised them that "*saying nothing is likely to be the worst option.*" They adopted a moderate middle course. I reject the submission that this portion of the Advice indicates that the Trustees elected to make final decisions. My finding that no final and arguably epochal decisions were made by the Trustees leaves the case for removal hanging by a very slender thread.

44. It remains to consider the more nuanced criticism, which was in my judgment the high point of the removal case, that even if no final decisions were made the Trustees had acted rashly by expressing even provisional views on a contentious topic in circumstances which left the senior Y branch shocked and surprised. This alternative analysis must also be rejected in light of the uncontested evidence of the prelude to the Proposed Plan. The record shows that the Y branch was well aware of the fact that the Z branch had withdrawn from the MOU as early as May 2016. It was known that the Trustees were being asked to revert to the pre-2001 notional allocation principles, a proposal which was explicitly contested that same month. Having regard to (a) the temperate tone of the communications between the Y branch and the Trustees over the matter between in and about September 2016 and the July 18-19, 2017 meetings, and (b) Mishcon's suggestion at a March 20, 2017 meeting that the Trustees had to "*make decisions*", there was no demonstrable basis for the Trustees to anticipate the strong reaction to the Proposed Plan which erupted on September 15, 2017.

45. In any event, even if the Trustees had anticipated a violent reaction to their firm provisional views, they were entitled to accept the advice of Mr Le Poidevin QC that "*saying nothing is likely to be the worst option.*" It follows that, assuming in favour of the senior Y branch that they have genuinely lost trust and confidence in the Trustees, the relevant facts objectively viewed fall far short of supporting a case for their removal. In the final analysis, there is no basis for signifying the desirability of one or more of the directors resigning.

46. The Trustees have, as Mrs Talbot Rice QC pointed out, already taken steps to pursue some degree of rapprochement by proposing a meeting between two new directors and the Y branch. This development was welcomed by Mr Brownbill QC. In my

judgment there is no risk to the due administration of the Trusts in the requisite legal sense.

Summary

47. Paragraph 12(b) of the Originating Summons is resolved in the following way. I direct that the Trustees (and the impugned directors) should remain in office.

48. As I myself demit office on Saturday July 14, 2018, I would invite written submissions on costs by close of business today (Thursday July 12, 2018) so that any decision on costs can be given on July 13, 2018. That assumes, however, that costs cannot be agreed.

Dated this 12th day of July 2018 _____
IAN RC KAWALEY CJ