



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 130 OF 2021 (ASCJ)

IN THE MATTER OF AN APPLICATION UNDER SECTION 48 OF THE TRUSTS ACT
(2021 REVISION)

AND IN THE MATTER OF HSBC TRUSTEE (C.I.) LIMITED AS TRUSTEE OF THE H
SETTLEMENT

Hearing and decision: 21 May 2022

Written reasons delivered on 15 October 22 but published 15 December 2022

Representations: Hector Robinson KC with Janaki Tampi, and David Ramsaran of
Mourants for HSBC Trustee (C.I. Limited)
Tom Lowe KC with John Harris of Nelsons for the other parties

Headnote

Trustee's application for the "blessing of the Court of its momentous decision to distribute its assets and dissolve the Trust - review of applicable case law - factors for consideration.

Reasons for Decision

1. By this application, HSBC Trustee (C.I.) Limited (the **Trustee**), acting as trustee of H Trust (the **Trust**), seeks the court's blessing of its decision, made pursuant to its powers under the Trust, to make a final distribution of the Trust assets (the **Proposed Final Distribution**). The intention is to benefit the settlors' family and preferred charities, who are either current beneficiaries or whom the Trustee intends to add as beneficiaries of the Trust. The application seeks to invoke the court's inherent jurisdiction in equity to supervise trustees as well as its concurrent jurisdiction under section 48 of the Trusts Act (2021 Revision) and Order 85, rule 7, Grand Court Rules (2022 Consolidation).

2. The application was supported mainly by three affidavits of Mr Peter J Stent, senior trust manager of the Trustee, sworn respectively on 12 July 2021 (**Stent 1**), 31 January 2022 (**Stent 2**) and 19 April 2022 (**Stent 3**). These affidavits set out the details of the background to the Trust, the relevant history prior to and leading up to the Trustee making the decision to make this final distribution of the trust assets and to wind up the Trust, the Trustee's decision making process and details of the Trustee's decision.
3. On 4 August 2021, I made orders for preservation of the confidentiality of the proceedings and gave directions as to the persons to be served with notice of the proceedings. This judgment has been anonymised pursuant to that order to protect the identity of the Trust, the settlors, the individual beneficiaries and the intended beneficiaries. The essential reason for that order were concerns for the personal security of beneficiaries in their places of residence should their access to wealth become publicised.

Background

4. The Trust was established by a deed of trust executed on 26 May 2006 (the **Trust Deed**) between HSBC International Trustee Limited (the **Original Trustee**) and the settlors, Mexican residents, S1 and his wife, S2. The Original Trustee was replaced as trustee by HSBC Trustee (Guernsey) Limited (**HTGL**) on 17 November 2009, which was in turn replaced as trustee by the current Trustee on 30 June 2014.
5. The Trust's assets comprise shares in two Bahamian companies - H Corp, which holds an investment portfolio comprising cash, equities and fixed income securities; and V1, which owns a residential apartment in Miami, Florida.
6. The Trust Deed created two classes of beneficiaries: "Discretionary Lifetime Beneficiaries" and (ii) "Discretionary Beneficiaries". The Discretionary Lifetime Beneficiaries are defined to be the persons for whose benefit, the trustee of the Trust held the capital and income of the trust fund until the date of the death of the last surviving settlor, defined in the Trust Deed as the "Division Date". The Discretionary Beneficiaries are defined as the persons for whose benefit, the trustee holds the trust

fund from the Division Date. The Division Date was 16 September 2017, being the date of death of S1, who had been predeceased by S2.

7. Pursuant to clause 6.1(b) of the Trust Deed, the settlors (or settlor) who *"are from time to time living and not Incapacitated"* had the reserved power, by written instrument, to add to the class of Discretionary Lifetime Beneficiaries. Further, by clause 6.1(c), the settlors *'living and not Incapacitated'* had the power, by written instrument, to declare that members of the class of Discretionary Lifetime Beneficiaries specified in the instrument be excluded from benefit under the Trust.
8. The Trust Deed identifies the Discretionary Beneficiaries as the settlors, and their only two children, DB2 and DB1. During the lifetimes of the settlors, generous distributions were made from the Trust to the settlors themselves and to DB2 and DB1.
9. By a deed of addition dated 17 August 2015, acting pursuant to a letter of request signed by S1, then the sole surviving settlor, the Trustee added six individuals to the class of Discretionary Beneficiaries. Three of these persons were relatives of the settlors. One was a business associate of the settlors and the other two were the widows of former business associates of the settlors. Following a further written request signed by S1 dated 13 May 2015, the Trustee made significant distributions to each of the persons added to the class of Discretionary Beneficiaries pursuant to the deed of addition dated 17 August 2015.
10. The Trust Deed identifies the Discretionary Beneficiaries, and consequently the beneficiaries of the Trust following the death of the settlors, as: DB1, DB2, DB3, DB4, DB5, DB6, DB7, DB8, DB9, DB10, Eishel Nuestro Hogar Murio (*"Eishel"*) (a charitable entity), and OSE Mexico (another charitable entity).
11. Under paragraph 1(c) of Schedule IV to the Trust Deed, the trustee for the time being has the power by instrument to declare that persons or objects be excluded from the class of Discretionary Beneficiaries. Following a written request signed by S1 and dated 13 May 2015, the Trustee by deed of exclusion dated 14 August 2017, removed DB11, DB8 and DB10 from the class of Discretionary Beneficiaries.

12. Three of the Discretionary Beneficiaries named in Schedule IV having died, namely DB3, DB9 and DB10, the class of Discretionary Beneficiaries at the time of the hearing before me comprised: DB2, DB1, DB3, DB4, Eishel and OSE Mexico. DB2 and DB1 are the settlors' only two children. DB3 and DB4 are nephews of the settlors on S2's side of the family. Eishel and OSE Mexico are the charitable entities on whom the settlors had conferred benefits during their lifetimes.

The letters of wishes

13. The settlors made six letters of wishes between 26 May 2006, the date the Trust was established, and 16 September 2017, the date of S1's death. The first five letters of wishes pre-date the death of S2 on 23 October 2014 and were each signed by the settlors jointly. The last letter of wishes, dated 9 April 2015 (the **2005 letter of wishes**), was signed by S1 solely, after the death of S2, his wife.
14. The letters of wishes signed jointly by the settlors consistently expressed the settlors' wish that the following distributions should be made from the Trust after their death:
- (a) distributions of US\$1 million to each of DB3 and DB10;
 - (b) distributions of US\$500,000 to each of DB4, DB8 and DB11;
 - (c) a distribution of US\$200,000 to DB7 and, following his death on 14 June 2014, to his wife;
 - (d) in all but one letter of wishes, distributions of either US\$500,000 or US\$1 million to DB12 (now deceased);
 - (e) in all but one letter of wishes, distributions of US\$500,000 to each of Eishel and OSE Mexico;
 - (f) in all but two letters of wishes, distributions to or for the benefit of the settlors' grandchildren, namely NDB1, NDB4, NDB6, NDB3 and NDB2, none of whom were beneficiaries of the trust, in amounts collectively between US\$1.3 million and US\$3 million; and

- (g) for the balance of the Trust assets to be distributed to and/or for the benefit of DB2 and DB1.

The 2015 letter of wishes

15. The 2015 letter of wishes states that that S1 wished that following his death, the Trust fund should be distributed as follows:
 - (a) US\$500,000 to the NDB5;
 - (b) US\$1.7m into 'The Grandchildren's Trust', for the benefit of the settlors' grandchildren; and
 - (c) for the balance to be set aside in trusts for the benefit of DB2 and DB1.
16. The 2015 letter of wishes may therefore be distinguished from the earlier letters of wishes in that the 2015 letter of wishes, among other factors:
 - (a) was executed by S1 solely and not by the settlors jointly (as S2 had died on 23 October 2014);
 - (b) proposed, for the first time, a distribution to NDB5 (which is not at present a Discretionary Beneficiary of the Trust); and
 - (c) did not propose any distributions to DB4, DB3, Eishel or OSE Mexico.

The prior proceedings

17. Following the death of the last surviving settlor, DB2 and DB1 in 2017 commenced proceedings against the Trustee in which they alleged breach of trust on the part of the Trustee on the basis of allegations that S1, the last surviving settlor, had lost mental capacity from mid-2014 to the date of his death in 2017; that the Trustee was aware, or ought to have been aware of S1's lack of mental incapacity; that all acts carried out, powers exercised and all directions, instruments and letters of wishes issued by S1 to the Trustee during that period were invalid, with the purported result that the powers exercised by the Trustee pursuant to those instructions, directions and letters of wishes were liable to be set aside.

18. The powers exercised by the Trustee during the period of S1's alleged incapacity include: the execution of a deed of addition, pursuant to which the Trustee added a number of persons to the class of Discretionary Lifetime Beneficiaries; significant distributions made to each of the beneficiaries added pursuant to the deed of addition; and a deed of exclusion pursuant to which the Trustee removed and excluded as beneficiaries those persons who were added as beneficiaries and to whom the Trustee had made distributions. The 2015 letter of wishes was also issued during this period.
19. DB1 and DB2 sought in the prior proceedings, among other relief, orders for the restoration to the Trust fund of the amounts distributed by the Trustee to the persons added pursuant to the impugned deed of addition. The Trustee denies the allegation made against it in the prior proceedings, including the allegation that S1 was mentally incapacitated at any material time, and that any of the deeds executed by the Trustee, or that any of the distributions made by the Trustee were liable to be set aside.
20. The prior proceedings were wholly discontinued by DB2 and DB1 on 25 November 2019. The Trustee maintains, and this has not been disputed, that the discontinuance of the prior proceedings did not result from any compromise or offer of settlement made by the Trustee.
21. Notwithstanding, the Trustee contends that following the grave allegations made against it in the prior proceedings, it would be difficult for the Trustee to feel that it continued to enjoy the level of trust and confidence from the beneficiaries necessary for the Trustee to discharge its functions and duties effectively. That trust and confidence, according to the Trustee, will not likely be restored merely by virtue of the prior proceedings having been discontinued. The Trustee therefore decided, following consultation with DB2 and DB1, who are the principal beneficiaries of the Trust, to make the proposed Final Distribution.

The legal principles

22. As the Trustee seeks the blessing of a decision made pursuant to powers which the Trustee has under the Trust Deed, which decision the Trustee contends is '*particularly momentous*', and in respect of which the Trustee does not seek to surrender its discretion

to the Court for the Court to decide the matter, the application falls within 'Category 2' of the four well-established categories of trustee applications identified by Robert Walker J (as he then was) in an unreported judgment, forever identified with the judgment of Hart J in *Public Trustee v Cooper*.¹ These categories have been recognised and adopted in numerous decisions of this court.²

23. The court must approach an application of this type 'with caution',³ since the effect of the court's blessing is that beneficiaries of the Trust become thereby bound without further right to sue for breach of trust on the basis of the decision so blessed.⁴ Concomitantly, because of this effect, trustees who seek the court's blessing under this jurisdiction have an onerous burden 'to make full and frank disclosure by giving the court all information relevant to the exercise of the court's discretion to give its blessing to the trustee's proposed conduct...'⁵
24. The court's role however, is emphatically not to replace the trustee as decision maker. The authors of *Lewin on Trusts 20th Ed* (*Lewin*), citing decisions of the courts of England and Wales, Jersey, Guernsey and the Isle of Man, states the court's role as follows:

'The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty's to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with

¹ EWHC, Chancery Division, 20 December 1999.

² See: *Al-Ibraheem v Bank of Butterfield International (Cayman) Limited* [2000 CILR 507] (Smellie CJ); *In re the Q Trusts* [2001 CILR 481]; *In re A Trust* (unreported, 17 January 2019) (Kawaley J), at paragraph 11; *In re B Trust* (unreported, 20 August 2019) (Smellie CJ); *Butterfield Trust (Cayman) Limited v A, B, C, et al* (unreported, 24 June 2020) (Kawaley J); *AA v BB and Colin Shaw* (unreported, 14 February 2020) (Smellie CJ).

³ *Lewin on Trusts*, 20th edition, paragraph 39-096.

⁴ *Lewin*, paragraph 39-096, citing *Richard v Mackay* [2008] W.T.L.R. 1667.

⁵ *Al-Ibraheem v Bank of Butterfield*, per Smellie CJ, at p 517; *Tamlin v Edgar* [2011] EWHC 3949 (Ch); *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312; *In re A Trust*, above.

*limits of rationality and honesty; it does not withhold approval merely because it would not have itself exercised the power in the way proposed.*⁶

25. This statement of the principle was adopted by this court in *AA v BB and Colin Shaw*, which also identified four questions derived from the applicable authorities, which the court should ask itself when presented with this type of application:

- '(1) *Does the trustee have the necessary power to enter into the proposed transaction?*
- (2) *Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?*
- (3) *Is the Court satisfied that this is a view that a reasonable trustee (having undertaken the same enquiries and faced with the same circumstances), could properly have arrived at?*
- (4) *Is the trustee operating under a conflict of interest, which would prevent the Court from approving the trustee's decision?'*⁷

26. The above questions are part restatement, part reformulation of the duties of the court formulated by Hart J in *Public Trustee v Cooper*, adopted by a number of common law courts, and summarised in *Lewin* as the requirements of the trustee as follows:

- '(1) *The trustees have in fact formed the opinion that they should act in the way for which they seek approval;*
- (2) *The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at; and*
- (3) *The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.*⁸

⁶ *Lewin*, paragraph 39-095.

⁷ *AA v BB and Colin Shaw*, above, paragraph 4.

⁸ *Lewin*, paragraph 39-095.

27. The Jersey courts, in their own restatement or reformulation of the principles, have specifically enumerated a requirement that the court should ask itself the question whether the trustee has made the decision in good faith,⁹ although it might well be said that this adds nothing to the requirements that the trustee must demonstrate that it has in fact made the decision and that the decision is not vitiated by any conflict of interest.
28. The Jersey Court of Appeal in *Kay v HSBC International Trustee Limited*¹⁰ however declined an invitation to introduce a new and additional requirement that a trustee must in all cases prove precisely what was done by the trustee in giving consideration to the decision. This decision is however, not to be seen as derogating from the overriding duty of the trustee to place all relevant material facts before the court, including details of the decision making process,¹¹ to satisfy the court that it has developed 'a coherent plan of action',¹² and that the trustee's decision is well-reasoned and supported by cogent, well-documented evidence.¹³

The Proposed Final Distribution

29. The Trustee proposes to appoint and distribute the entirety of the Trust assets to or for the benefit of, the children, grandchildren and other family members of the settlors, and charities which the settlors, throughout their lifetimes, demonstrated a wish to benefit. All of the intended objects of the proposed exercise of Trustee's powers of appointment and distribution are among the class of beneficiaries currently entitled to benefit under the Trust Deed, or are persons and charities, not currently members of the relevant beneficiary class, but whom the Trustee proposes to add to the relevant beneficiary class pursuant to the Trustee's power to add beneficiaries under the Trust Deed.

⁹ See *HSBC International Trustee Limited v Otto & Ors* [2014] JRC 254A, paragraph 18; *Ocorian Limited and Ocorian (UK) Limited v B and others* [2021] JRC 208.

¹⁰ [2015] JCA 109.

¹¹ See *Al-Ibraheem v Bank of Butterfield*, above; *Tamlin v Edgar*, above; *Cotton v Earl of Cardigan*, above; *In re A Trust*, above.

¹² *Butterfield Trust (Cayman) Limited v A, B, C, et al*, above, at paragraph 13.

¹³ *In re A Trust*, (above), at paragraph 11.

30. The Trustee proposes to effect the Final Distribution as follows:
- (a) by deed of addition adding NDB1, NDB4, NDB3, NDB2 and NDB5 to the class of Discretionary Beneficiaries;
 - (b) by deed of appointment effecting the appointment of the following cash sums to the following Discretionary Beneficiaries:
 - (i) US\$500,000 to or for the benefit of NDB1;
 - (ii) US\$500,000 to or for the benefit of NDB4;
 - (iii) US\$500,000 to or for the benefit of DB4;
 - (iv) US\$100,000 to or for the benefit of Eishel;
 - (v) US\$100,000 to or for the benefit of OSE Mexico; and
 - (vi) US\$300,000 to or for the benefit of the NDB5,(together the **Cash Distributions**);
 - (c) by deed of appointment effect an appointment to the trustee of a trust to be to be known as the K Trust to be established for the benefit of DB2 and his two sons, NDB3 and NDB2, as follows:
 - (i) the sum of US\$1 million, US\$500,000 of which is to be held upon the trusts to be established under the K Trust for the benefit of NDB3, and US\$500,000 of which is to be held upon the trusts to be established under the K Trust for the benefit of NDB2;
 - (ii) 50% of the shares of V1 and 50% of the balance of the Trust Fund, excluding the remaining shares in V1., and excluding DB2's portion of the costs of these proceedings, to be held upon the trusts to be established under the K Trust for the benefit of DB2;

(d) by deed of appointment effect an appointment of 50% of the shares of V1 and the balance of the Trust Fund, following the appointments for the benefit of DB2, and DB1's portion of the costs of these proceedings, to the trustee of a trust to be established for the benefit of DB1, to be known as the M Trust.

31. The Trustee in its evidence also set out the details of the transfers and payments it will make to effect the distributions and appointments.

A momentous decision?

32. There was no dispute that a decision to distribute the entire trust fund is a momentous decision.¹⁴ The Trustee contends that there are in the present case further factors which justify the decision of the Trustee to have its decision to make the Proposed Final Distribution blessed by the court.
33. The first relates to the history of the matter, particularly in relation to the prior proceedings. The second arises from the fact that there is at present no Protector appointed in respect of the Trust.

The relevance of the prior proceedings

34. The Trustee contends that notwithstanding the discontinuance of the prior proceedings, in light of the grave allegations made against the Trustee in those proceedings, the Trustee would find it difficult to feel that it continued to enjoy the level of trust and confidence from the beneficiaries necessary for it to discharge its functions and duties effectively. According to the Trustee, that trust and confidence will not likely be restored merely by virtue of the prior proceedings having been discontinued.
35. The Trustee submits that the reasonable options open to a trustee in such circumstances would be to retire or, as the Trustee has decided in this case, following consultation with the beneficiaries, to make a final distribution of the Trust assets, especially where this appears to have been within the contemplation of the settlors. Moreover, the application

¹⁴ The extract from the judgment of Robert Walker J quoted in *Public Trustee v Cooper*, cites as examples of momentous decisions, 'a decision by a trustee to sell a family estate or to sell a controlling interest in a family company'. See also, *Butterfield Trust (Cayman) Limited v A, B, C, et al* (above); and *in re A Trust* (above).

for the blessing by the court of that decision provides the opportunity for scrutiny of the decision to ensure that it is being made *bona fide* in the interests of the beneficiaries and not for any collateral purpose which might be said to have arisen from the fact that very serious allegations of misconduct had been made against the Trustee in the prior proceedings.

The Protector

36. Another reason given by the Trustee for seeking the court's approval of the Proposed Final Distribution relates to the fact that there was, at the time of the hearing, no person occupying the role of "Protector" of the Trust. The Trust Deed creates the role of Protector to take effect from the Division Date,¹⁵ upon nomination by the settlors, or the last surviving settlor, and written consent by the person nominated.¹⁶ The Trust Deed provides that where there is no person acting in the role of Protector, the Trustee may appoint a person as Protector subject to the written consent of the person so nominated.¹⁷
37. The Protector, once appointed has, among the powers conferred, the power to remove and replace a trustee.¹⁸ Further, once a Protector has been appointed, a number of the Trustee's powers may only be exercised following the provision of notice to the Protector.¹⁹ These powers include some of the Trustee's powers relevant to the Trustee's decision to make the Proposed Final Distribution and to terminate the Trust, namely:
- (a) the power to add to the class of Discretionary Beneficiaries;²⁰
 - (b) the power of appointment;²¹
 - (c) the power to pay or apply capital;²² and

¹⁵ The '*Division Date*' is defined to mean the date of death of the second of the settlors to die.

¹⁶ Paragraph 1.2 of Schedule V of the Trust Deed.

¹⁷ Paragraph 1.5 of Schedule V.

¹⁸ Paragraph 5 of Schedule V.

¹⁹ Paragraph 5.2 of Schedule V.

²⁰ Paragraph 1(b) of Schedule IV.

²¹ Paragraph 2 of Schedule IV.

²² Paragraph 3(c) of Schedule IV.

(d) the power to pay, transfer or appoint Trust assets to another trust.²³

38. According to the Trustee's evidence, both the settlors had, in a letter of wishes made 31 July 2014, nominated P, a nephew of the settlors, as the Protector. Following the death of S2, in the 2015 letter of wishes, S1 also nominated P as the Protector.
39. This 2015 letter of wishes was one of the documents the validity of which were impliedly impugned in the prior proceedings. The prior proceedings also alleged that S1 signed the impugned documents under the undue influence of P.
40. When the Trustee contacted P to enquire whether he would consent to accepting the nomination as Protector, he understandably declined due to the allegations of undue influence which had been made against him. Following the discontinuance of the prior proceedings, the Trustee did not exercise the power to appoint a Protector, given the Trustee's decision, following consultation with the beneficiaries, to make the Proposed Final Distribution.
41. The Trustee contends that although the Trustee has no strict obligation to appoint a Protector, given the nature of the powers and functions conferred on a person performing the role of Protector, it is at least arguable that the role of the Protector, if appointed, is to provide some degree of oversight over the performance of the Trustee's duties and functions, with the Protector having the ultimate discretion to remove and replace the Trustee. The Trustee expressed the view that the absence of a Protector in the circumstances is yet another reason for the Trustee to subject its decision to the scrutiny of the court in an application such as this. This, according to the Trustee, is particularly the case in circumstances where the Protector, if appointed, would have had the opportunity for oversight of some of the very powers the Trustee has now decided to exercise.
42. The Trustee also directed the court's attention to paragraph 13 of the directions order made in the prior proceedings on 3 August 2018. There, the court ordered that the Trustee:

²³ Paragraph 5 of Schedule IV.

'shall not be required to appoint a Protector of the Trust pending determination of these proceedings, subject to the Trustee providing the following undertakings:

...

(i) the Trustee undertakes to apply to the Court for directions before it exercises any of the powers identified in paragraph 5.2 of Schedule V of [the Trust Deed] ...'

43. The Trustee expressed the view that although, by virtue of their discontinuance, the prior proceedings are no longer pending, with the effect that the Trustee is discharged of the undertakings given pursuant to the directions order, it is still prudent, in the absence of a Protector having been appointed, that the Trustee should seek the directions of the court prior to the exercise of any of the powers in paragraph 5.2 of Schedule V.
44. These are all reasonable concerns which I accepted would inform a trustee's decision to apply for the sanctions of the Court.

Does the Trustee have the powers to make the proposed Final Decision?

The Trustee's express powers under the Trust Deed

45. The Trustee contends that it has the powers under the Trust Deed to make the Proposed Final Distribution. As for the power to add beneficiaries to the class of Discretionary Beneficiaries,²⁴ the Trustee relies on paragraph 1(b) of Schedule IV, pursuant to which the Trustee *'may from time to time, during the Trust Period, add to the class of Discretionary Beneficiaries any one or more persons or classes of persons (or charitable objects) as the Trustees may, subject to the application (if any) of the rule against perpetuities, decide and no Discretionary Beneficiary may prevent such addition.'* That is the power pursuant to which the Trustee proposes to add the Settlor's grandchildren and the charity Eishel to the class of Discretionary Beneficiaries.
46. The Trust Deed also confers express powers on the Trustee pursuant to which it may make distributions to the members of the class of Discretionary Beneficiaries, and to appoint Trust assets upon separate trusts for the benefit of any member of that class. In

²⁴ Those beneficiaries whose benefit takes effect from and after the Division Date.

respect of the distributions to the grandchildren and the charities, paragraph 2 of Schedule IV provides that the Trustee '*shall hold the capital and income of the Trust Fund:*

- (a) *on any trusts in favour of, or for the benefit of, all or any one or more of the Discretionary Beneficiaries, exclusive of the other or others of them;*
- (b) *in any shares or proportions if more than one Discretionary Beneficiary; and*
- (c) *with and subject to any:*
 - (i) *powers and provisions for maintenance, education or other benefit or for the accumulation of income;*
 - (ii) *administrative powers; and*
 - (iii) *discretionary or protective powers or trusts;*

that the trustees may in their absolute discretion appoint (and these trusts and powers may be delegated to any extent to any person or persons, whether or not including the Trustees or any of them) ...'

47. Paragraph 2 of Schedule IV also confers the power to make the proposed distributions to the grandchildren.
48. In respect of the appointments upon the M Trust and the K Trust, paragraph 5 of Schedule IV provides:

'Subject to any appointments under paragraph 2 above, and subject to the application (if any) of the rule against perpetuities, the Trustees may (notwithstanding the trusts, powers and provisions contained in the previous provisions of this Schedule IV) pay, transfer or appoint any income or capital of the Trust Fund to, or in favour of, the trustees of any other trust wherever established or existing under which all or any one or more of the Discretionary Beneficiaries is or are interested (whether or not the persons interested or capable of benefiting under that other trust include persons other than the Discretionary Beneficiaries), but only if the Trustees, in their absolute discretion, consider that payment, transfer or appointment to be for the benefit of all or one or more of the Discretionary Beneficiaries.'

49. The M Trust, by its terms, requires its trustee to hold the assets appointed upon trust for the benefit of DB1, DB1's spouse, children and remoter issue, which the Trustee considers will be for the benefit of DB1 and her children NDB4 and NDB1, who will, at the time of appointment, be members of the class of Discretionary Beneficiaries.
50. The K Trust, by its terms, requires the trustee of that trust to hold (i) US\$500,000 for the benefit of each of NDB3 and NDB2 while they are under the age of 25, and to distribute the remaining funds to them when they attain 25, and (ii) the remaining assets appointed upon those trusts for the benefit of DB2, his spouse, his children NDB3 and NDB2 and remoter issue, which the Trustee is entitled to conclude will be for the benefit of DB2, NDB3 and NDB2 who, at the time of the appointment, will be members of the class of Discretionary Beneficiaries.

Is the Trustee vested with the powers under the Trust Deed?

51. Paragraphs 8 to 14 of Stent 3, posited in fulfilment of the Trustee's duty of full and frank disclosure, address the circumstances leading to the execution by the Trustee of the Deed of Amendment, Appointment and Ratification dated 9 September 2020 (**DAAR**). Stent 3 points out that in the course of preparing for this application to the court, the question arose as to whether a trustee's power under the Trust Deed to appoint a replacement trustee may validly be exercised by '*instrument*', or whether such an appointment must be done by deed, and in the latter case, whether the Instrument of Retirement and Appointment of Trustee dated 30 June 2014 (the **IORA**) is a deed, or otherwise effected a valid appointment of the Trustee as replacement trustee for HTGL.
52. By the terms of its recitals, the ultimate purpose of the DAAR is to validate the retirement of HTGL and the appointment of the Trustee from the date of execution of the IORA and to validate all powers exercised by the Trustee from the date of the IORA to the date of the DAAR. The Trustee contends that it was validly appointed by the IORA, but in the event the IORA did not effect a valid appointment of the Trustee, that appointment was effectively validated by the DAAR.
53. The Trustee states that it raised this issue because it may arguably be regarded as relevant to whether the Trustee was validly appointed, and if not, whether the DAAR is

effective to confirm the Trustee's appointment and to ratify the exercises of powers by the Trustee since the date of the IORA. These issues, according to the Trustee, are in turn relevant to whether the Trustee has the powers under the Trust Deed, the exercise of which are the subject of this blessing application.

54. Since the court was not requested to pronounce on the validity of either the IORA or the DAAR, I merely note that the Trustee has raised the issue and has given the beneficiaries the opportunity to address it if they so choose. I note further that none of the beneficiaries have expressed any concerns regarding the validity of the Trustee's appointment arising from this issue or otherwise.

Is the Proposed Final Decision a decision which a reasonable body of trustees could properly make?

55. This court has recently regarded this requirement as one which engages the court in determining whether the trustee has met what is described as '*the rationality standard*'.²⁵ To satisfy the rationality standard a trustee must demonstrate that:

- (a) its decision is well-reasoned and supported by cogent, well-documented evidence;²⁶
- (b) its decision is rational, a concept which '*...imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and ... an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse*';²⁷
- (c) it has taken relevant matters into account and has ignored irrelevant matters,²⁸ a duty which requires trustees to '*inform themselves, before taking a decision, of matters*

²⁵ See *AA v BB and Colin Shaw*, above, at paragraph 6, citing *Lewin*, 19th ed., paragraph 27-079 to 27-080 (being the same as *Lewin*, 20th ed. cited above).

²⁶ *In re A Trust*, (above) at paragraph 1.

²⁷ Per Lord Sumption in *Hayes v Willoughby* [2013] 1 W.L.R. 935 at paragraph 14, UKSC, cited and applied to the trusts context by *Lewin*, above, at paragraph 29-036.

²⁸ *Lewin*, above at paragraph 29-041, citing *Edge v Pensions Ombudsman* [2000] Ch. 602 at 627, EWCA.

*material to it, including where necessary advice from appropriate experts such as lawyers, accountants, actuaries, surveyors or scientists;*²⁹

- (d) it has consulted with and sought the agreement of the adult beneficiaries, or at least the primary beneficiaries;
 - (e) it has undertaken due enquiries into the circumstances of the beneficiaries, but where the beneficiary class is wide, this need not extend to each and every conceivable member of the beneficiary class;³⁰ and
 - (f) should '*give great weight to the settlor's wishes, either expressed from time to time during [the settlors'] lifetime or recorded, usually in documentary form, before his death.*'³¹
56. The Trustee contends that its decision to make the Proposed Final Distribution is a rational and logical decision for a trustee to take following the now withdrawn allegations made against the Trustee in the prior proceedings. The decision was taken in consultation with DB1 and DB2, the primary beneficiaries of the Trust, who had made the allegations against the Trustee in the prior proceedings.
57. The Trustee also contends that the decision was taken after detailed consultation with and consideration of the circumstances of all the current beneficiaries, as well as with those whom the Trustee proposes to add as beneficiaries.
58. The Trustee's proposed execution plan for the decision is submitted to be coherent and comprehensive. It was, it is said arrived at following consideration of all the material factors, including tax advice from experts in the USA and Mexico, in order that the Trustee may be satisfied that the decision will be for the benefit of, and not detrimental to the beneficiaries.

²⁹ *Lewin*, above, paragraph 29-041, citing *Stannard v Fisons Pensions Trust Ltd* [1992] I.R.L.R. 27, EWCA; *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All E.R. 705 at 717, cited and approved in *Pitt v Holt* [2013] 2 A.C. 108 at paragraph 10. See also *per* Lord Oliver in *Marley v Mutual Security Bank and Trust Co Ltd* [1991] 3 All ER 198, PC, at p 201.

³⁰ *AA v BB and Colin Shaw*, above, at paragraph 35, citing with approval the statement in *Lewin*, 19th edition, at paragraph 30-032 (equivalent of *Lewin* at paragraph 33-033 that a trustee need not '*survey the world from China to Peru.*'

³¹ *Lewin*, above, paragraph 29-046.

59. The Trustee also avows to have given careful consideration to, and the decision largely follows and gives effect to the wishes of the settlors as expressed in their various letters of wishes, or which were otherwise communicated to the Trustee during the lifetime of the settlors, and of the sole surviving settlor after S2 passed away.
60. I am content that the Trustee has supported this application with cogent evidence setting out the details of the decision of its decision-making process. And further, that the Trustee has made full disclosure of the material facts relevant to the court's consideration of the application.

The Trustee's deliberations

61. The Trustee also provides the following summary of the steps it took and the matters it took into account in the process of making its decision:
- (a) contacting the Discretionary Beneficiaries to determine their needs and resources;
 - (b) previous distributions made out of the Trust;
 - (c) gifts and donations made by the settlors during their lifetimes;
 - (d) the letters of wishes;
 - (e) statements made by S1 of his wishes after the 2015 letter of wishes was executed;
 - (f) the responses received from the Discretionary Beneficiaries to the Proposed Final Distribution and in relation to their health, age and financial security; and
 - (g) tax advice received from pre-eminent law firms, McDermott Will & Emery and Baker & McKenzie, on the tax implications of the proposed distributions on the Trust and on the beneficiaries subject to the tax jurisdictions of the USA and Mexico respectively.

I note that there was ample evidence before the court with respect to each of these steps and considerations.

62. During the course of the hearing, I was also taken through the tax advice obtained by the Trustee from McDermott Will & Emery, which addressed the US tax implications of the Proposed Final Distribution, and from Baker & McKenzie with respect to the Mexican tax implications. I was also taken through the relevant provisions of the draft trust instruments for the K Trust which is to be established for the benefit of DB2, NDB3 and NDB2, as well as the proposed instrument for the M Trust, which is to be established for the benefit of DB2.
63. Prominent among the matters considered by the Trustee, I am told, were the wishes of the settlors as set out in the letters of wishes. According to the Trustee's evidence, its decision is in large part consistent with, though not in all cases identical to, wishes expressed by the settlors, or the last surviving settlor, in the series of letters of wishes provided to the Trustee through its relationship managers, or through oral discussions and correspondence between the settlors and the Trustee's relationship managers.
64. The Trustee was of course well entitled to have regard to and, where appropriate, to follow the wishes of the settlors as expressed in their letters of wishes. The authors of *Lewin*, in a passage cited with approval by this court in *AA v BB and Colin Shaw*³², states that not only are trustees entitled to take account of the settlors' wishes, but that they '*are bound to do so*,³³ even if in the proper exercise of discretion they do not act accordingly.³⁴
65. The Trustee, correctly, in my view did not seek to follow the letters of wishes slavishly. The Trustee took into account changed circumstances since the issue of the letters of wishes, including distributions made during the lifetimes of the settlors, the death of one intended object of the settlors' bounty, and the results of consultations with and investigations into the means of beneficiaries.
66. One example of this was the Trustee's decision not to make a distribution to DB3, in respect of whom the settlors repeatedly expressed the wish that the Trustee should

³² At p 15-16.

³³ *Lewin*, above, paragraph 29-046.

make a distribution. Following consultation with DB3 as to his current means, the Trustee decided not to make a distribution to him. In a notable variation from the approach it took in relation to DB3, the Trustee, following consultation with DB1 and DB2, decided to make a distribution to DB4, who had expressed the view that his means were sufficient for his own circumstances, but who sought a distribution towards the care and benefit of his sister DB10, who had previously been removed as a Discretionary Beneficiary, but who was suffering from ill health.

67. The Trustee also did not follow exactly the letters of wishes regarding the amount of distributions to be made to Eishel and OSE Mexico. This followed the Trustee's investigations as to benefits conferred on these charities during the lifetimes of the settlors.

Consultation with beneficiaries

68. The Trustee states that it recognised that it was always the settlors' intention that DB2 and DB1 ought to be the primary beneficiaries of the Trust. Accordingly, the Trustee engaged at length with each of them through their respective professional advisers with respect to matters such as the structure and terms of the trusts upon which the assets were to be appointed for the benefit of DB2, DB1 and their respective children. This consultation included consideration of the issues to be addressed in the tax advice obtained by the Trustee with respect to the benefits to be conferred on each of them.
69. As set out in Stent 2 there was also detailed consultation with each of the other beneficiaries and the other intended objects of the exercise of the Trustee's powers pursuant to the Final Distribution.

Pre-conditions of the Proposed Final Distribution

70. The Trustee has requested each of the intended beneficiaries of the Final Distribution to execute and return to the Trustee a deed of indemnity with respect to their respective distributions. The Trustee states that it requires the indemnity in each case to cover unknown future third party liabilities arising at a time when the Trustee no longer has access to the Trust fund. The amount of the indemnity in each case does not exceed the

amount to be distributed to or appointed for the benefit of each beneficiary under the Final Distribution.

71. In any event, each of the beneficiaries and intended beneficiaries, except one, provided a duly executed deed of indemnity as requested by the Trustee. With respect to the beneficiary who had not, at the time of the hearing, signed and returned a deed of indemnity, the Trustee proposed a variation of the Proposed Final Distribution whereby the Trustee would distribute the amount intended for that beneficiary to other beneficiaries.

Is the Proposed Final Decision vitiated by conflict of interest?

72. The Trustee asserts that it has no relevant conflict which is capable of vitiating the Proposed Final Decision. According to the Trustee, any conflict which arose by virtue of the prior proceedings was removed by the unconditional discontinuance of those proceedings. The Trustee relies on the fact that it made no agreement and entered into no compromise in relation to the discontinuance of the prior proceedings. I accepted these assertions as properly founded.
73. No other issue which could cause a potential conflict was brought to the court's attention.

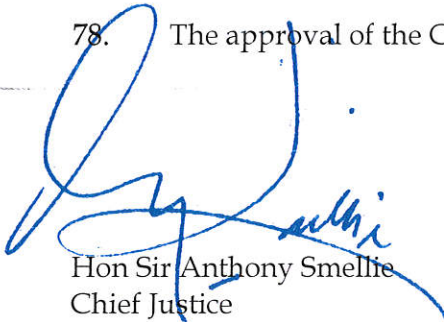
The Trustee's fees and expenses

74. The Trustee sets out in its evidence the basis on which it proposes to charge its fees arising in relation to the Final Distribution. These fees, amounting to approximately US\$245,000, will be based on a percentage of the Trust assets.
75. The basis of the Trustee's fees falls within the terms of the fee agreement concluded with the settlors, a copy of which was exhibited with the Trustee's evidence. The Trustee pointed out that the fee payable on that basis would be significantly less than if the Trustee had charged its usual hourly rates, which the Trustee contends it was also entitled to do in the circumstances, in accordance with the terms of its fee agreement.
76. I note that no beneficiary has raised any objection to the basis of the Trustee's fees.

Conclusion

77. I found to be persuasive the foregoing detailed discussion of the history of the Trust and the reasons for the Trustee's decision – one which I accept is “momentous” – for making the final distributions and dissolving the Trust. As discussed, the Trustee has sought to comply with the requirements of the case, in particular those set out in *AA and BB v Colin Shaw*, to be satisfied in order to attract the court's approval of its decision.

78. The approval of the Court was accordingly granted.

A handwritten signature in blue ink, appearing to read 'Anthony Smellie', is written over the text of paragraph 78. The signature is fluid and cursive, with a large loop at the top.

Hon Sir Anthony Smellie
Chief Justice

15 October 2022