In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 321
2018: No. 382

CONSOLIDATED ACTIONS 2018: No 321 and 2018: No 382

IN THE MATTER OF THE R TRUST

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr David Kessaram, Cox Hallett Wilkinson, for the Wife** **Mr Ben Adamson, Conyers, for the Trustees** **Mr Andrew Martin, MJM Limited, for the Daughter**
Dates of Hearing:	**6 & 7 May 2019**
Date of Judgment:	**3 June 2019**

JUDGMENT

Public Trustee v Cooper application seeking approval of a momentous decision; Relevance of wishes of the Settlor; whether trustees bound to give reasons for not following the wishes of settlor; test of reasonableness

Introduction

1. These proceedings were commenced by Originating Summons filed by the wife ("the Wife") of the late AA ("the Settlor"), dated 28 September 2018. The proceedings named as Defendants: RFS, the Trustee of the R Trust ("the Trustee" and "the Trust" respectively), and the daughter of the Settlor ("the Daughter").

2. On 19 November 2018, the Trustee commenced separate proceedings by filing its separate Originating Summons and naming the Wife and the Daughter as Defendants. Both proceedings were consolidated by an Order of this court dated 29 November 2018.

3. By Originating Summons dated 28 September 2018, the Wife seeks a declaration from the Court that:

    (1) Clauses 6 and 7 of the Last Will and Testament of the Settlor dated 19 April 2011 ("the Will"), represent the last wishes of the Settlor with respect to certain real property situated in the US ("the Property"); or alternatively, with respect to all the shares of the Bermuda company ("the Company"), which on the date of the Will owned and still owns the Property and which shares were at the date of the Will and are still owned and held by the Trustee of the Trust;

    (2) That on the true construction of Clauses 6 and 7 of the Will, it was the Settlor's wish that the Property or, alternatively, the shares of the Company be given to the Wife outright and that the Wife leave the Property to the Daughter in her last will and testament; and

    (3) A declaration that the Trustee is bound to take into account, in carrying out its duties as Trustee, the wishes of the Settlor as expressed in Clauses 6 and 7 of the Will.

4. By Originating Summons dated 19 November 2018, the Trustee seeks the approval and or sanction of the Court relating to decision by the Trustee to appoint the Property (or the shares in the Company holding the property) to a new trust domiciled in the United States on terms that provide that the Property is held for the Wife for her lifetime and then for the Daughter and the Daughter's issue. In essence, this is an application by the Trustee for the blessing of the Court of a momentous decision in accordance with the guidance given in *Public Trustee v Cooper* [2001] WTLR 901.

5. The application made by the Wife is supported by her initial affidavit dated 14 September 2018 and the application made by the Trustee is supported by the affidavit of Nadine Francis, a director of the Trustee Company, dated 5 November 2018. Following the direction order dated 29 November 2018, further evidence has been filed in the form of the First Affidavit of the Daughter dated 20 December 2018, Second Affidavit of the Wife dated 11 January 2019, and Second Affidavit of Nadine Francis dated 31 January 2019.

Factual Background

6. The factual background to the consolidated applications is taken from the First Affidavit Nadine Francis.

7. The relevant Trust Deed is dated 29 December 1995. The beneficiaries of the Trust were originally the Daughter, the Daughter's issue, the University of A and "any other charity". On 12 February 1999, the Settlor was added as a beneficiary and, on 12 December 2007, the Wife was added as a beneficiary for lifetime and, on 30 April 2009, she was added as a full beneficiary. The current beneficiaries of the Trust are now:

    (1) The Daughter and her issue. The Daughter is the Settlor's only natural child, born during his first marriage. The Daughter has three small children;

    (2) The Wife, who is the Settlor's third wife and has four children from a previous marriage. The Wife and the Settlor married in 2004;

    (3) A University. The Settlor had a close relationship with the University and was a major benefactor to the University; and

    (4) Any other charity.

8. The Trust's assets came directly or indirectly from the Settlor, now deceased. The Settlor died suddenly in 2013.

9. The Trustee considers and has always considered that the Trust to be a family trust for the benefit of the Settlor's wife and his children. The Settlor made a generous provision for A University through other trusts and endowments. For this reason, the Trustee has never made appointments to the University (or to any other charities) from the Trust and does not currently intend to.

10. The Trust owns shares in a number of companies, which in turn own various portfolio investments (worth approximately $3 million in total) and a valuable and large property in the USA. The Settlor felt an emotional attachment to the Property, which was purchased in 1982. The Daughter spent time there as a child. The Wife also spent time there. The Property is important to the family.

11. On 28 October 2008, the Settlor provided the Trust with a Letter of Wishes which states:

    "*The Trust gives you wide discretionary powers over capital and income, including the power to distribute either capital or income within a very long period amongst the specified class of beneficiaries.*

    While I am aware that these discretions are under your absolute and unfettered control, you may find it helpful if I express in this letter my considered view as to how I would like you to exercise them. In view of recent changes in my circumstances, I now revise my request as follows:

    With regard to [the Property] (held by the Trust through the Company) it is my expressed desire that:

During my lifetime I would wish you to treat me… as primary beneficiary, entitled the use and occupation of [the Property];

Should my wife… survive me then after my death, I would wish [the Wife] to have sole use and occupation of [the Property];

After [the Wife's] death, I would wish my daughter... to be solely entitled to [the Property], to be utilized both as to capital and income as she desires."

While the 2008 Letter of Wishes expresses the Settlor's wishes with respect to E, and does not specifically refer to the fact that the Trust in fact owns the Company rather than E directly, the Trustee has never placed any weight on this distinction.

12. On 19 April 2011, the Settlor executed his Will. The Will refers to the Property at clauses 6 and 7;

    (1) Clause 6 states:

    "I give [the Wife] free of any taxes or duties [the Property]…

    In the event the [Property] is at the time of my death in the name of [the Company], then I give and request that all shares in the Company are to be owned by my wife. It is my wish that the [Property] should not be subdivided during my wife's lifetime and that when my wife dies the property should pass to my daughter..."

    (2) Clause 7 states:

    "I request that [my wife] have a Will that bequests [the Property]…to [my daughter] after both my wife and I are dead."

13. It appears to be common ground that the Will is drafted on the assumption that the Settlor owned or would own the Property (directly or indirectly) at the time of his death. The Settlor did not however at the date of his death own the Property or the shares in the Company which owned the Property. The Property continues to be an asset of the Trust and it falls upon the Trustee to appoint this asset amongst the beneficiaries of the Trust.

14. In coming to its decision in relation to the appointment of the Property, the Trustee engaged in correspondence with the Wife and the Daughter and invited their views as to the distribution of the Property.

15. In his letter of 11 February 2016, Mr Andrew Stone of Kozusko Harris Duncan, US attorneys acting on behalf of the Daughter, set out certain tax restructuring proposals which took into account the interests of the individual beneficiaries of the Trust, all of whom are US citizens.

16. The Wife's Bermuda attorneys, Cox Hallett Wilkinson Limited ("CHW"), responded to the letter from Mr Stone by their letter of 7 May 2018 and took the following position on behalf of the Wife in relation to the Property:

    (1) The Letter of Wishes was followed approximately three years afterwards by the Will. The Will contains the last expression of the Settlor's wishes with respect to the Property before he died. The Will "*supersedes"* the Letter of Wishes.

    (2) The Wife disagrees that the Letter of Wishes and the Will are *"not in conflict"* with respect to the Property. Whereas the Letter of Wishes only expresses the wish that the Wife had the use and occupation of the Property after the Settlor's death with the Daughter becoming solely entitled after the Wife's death. The Will expresses the wish that the Property be appointed to the Wife outright. This is a clear conflict.

    (3) The Will contains a wish that the Wife leave the Property to the Daughter in her will. This is expressed as a "*request"* made to the Wife and not to the Trustee. The Trustee could have no say in what the Wife decides to do with the Property. As far as the Trustee is concerned, the Settlor's wish is that the Wife should have the Property and the decision as to whether the Property passes to the Daughter eventually was to be the Wife's and not the Trustee's.

17. The Trustee's Bermuda attorneys, Conyers, responded to CHW by the letter of 8 June 2018 and advised that the Trustee was considering a number of important issues in relation to the Trust and in particular, whether to appoint out some or most of the assets to the beneficiaries and whether to migrate the Trust to the US. The letter advised that it was the Trustee's intention to consider all correspondence and to make a final decision on these issues at the end of July 2018. The letter also addressed the issue whether the Will and the Letter of Wishes were in conflict and took the position:

    > *"The Trustee has previously stated that it does not believe the Will and the Letter of Wishes to be in conflict. Both expressed the consistent wish that [the Wife] should enjoy the property during a lifetime, and that on death it should pass to [the Daughter]. It is true that the two documents contemplate different mechanisms for achieving that result, but the inconsistency is based on a misapprehension in the Will as to the existing state of affairs".*

18. CHW responded directly to the Trustee by letter of 20 June 2018 and took the firm position that:

    > *"Our client respectfully but strongly disagrees with the views expressed in the letter as to the true meaning and effect of Clauses 6 and 7 of the Last Will and Testament [of the Settlor].*

It would be a breach of trust in our client's view for the Trustee to ignore this clear statement of the Settlor's wishes. If the trustee has any doubt about the meaning and effect of the relevant clauses in this regard, it is the Trustee's duty to seek the Court's construction of this part of the Will. In our view, the Trustee cannot begin to exercise its fiduciary discretion in relation to the disposition of the [Property] without first satisfying itself that it understands what the Settlor wished to occur. To do otherwise would be a willful breach of trust".

19. The Trustee communicated the decision it had reached by letter dated 4 October 2018 to the attorneys for the beneficiaries. In that letter the Trustee advised:

> *"It is the view of the Trustee, taking into account the views of the Settlor, both in his Letter of Wishes and as later expressed in the Will, the views of the beneficiaries and also, the Trustee's own considerations of what is in the best interests of the beneficiaries (future and current) as a whole that [the Property] should be appointed out into a new trust on terms that provide that the property is held for [the Wife] for her lifetime and then passed to [the Daughter] and her issue."*

20. The Trustee has explained to Court the decision it has reached in relation to the Property at paragraphs 35 to 37 of the First affidavit of Nadine Francis in the following terms:

> *"35. I now turn to the issues and concerns raised by [the Wife] in the [the Wife's] Action. I immediately point out that the Directors did place weight on [the Settlor]'s wishes as revealed by the Will. Irrespective of the legal ownership of [the Property], we believe that clauses 6 and 7 reflected [the Settlor]'s wishes in respect of [the Property] not least given the language of "request" in clause 6. We also took into account the point, which [the Wife] emphasises in her Affidavit at paragraph 6, that the Settlor was likely not assisted by an attorney when he signed the Will and may not have appreciated legal distinctions or terms.*
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> *36. We certainly consider the possibility that the Settlor by requesting in the Will that the property vest in [the Wife] absolutely may have done so with the intention and desire that [the Wife] (rather than Rothbury,) should have the choice whether [the Daughter] inherit [the Property], knowing that she might not do so. We have equally taken into account that the distinction between the beneficiaries, whereby [the Wife] was only a beneficiary "for her lifetime", was dropped by the 2009 deed of addition.*
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> *37. In our view however the Settlor, both in the Letter of Wishes and in the Will, expressed the wish that [the Property] pass to [the Wife] for her lifetime and eventually pass to [the Daughter]. In our view, and bearing in mind this is a discretionary trust, we believe that the Wife should have [the Property] in her lifetime but it should pass to [the*

Daughter] upon [the Wife's] death. We believe that this accords with the Settlor's wishes and also, more fundamentally, is in the best interests of the Trust as a whole. We do not think that it is in the best interests of the Trust for [the Daughter] and her issue not to benefit at all from the Trust's principal remaining asset and instead leave open the possibility for [the Wife]'s heirs (who are not Trust beneficiaries) to have the principal benefit".

21. In the same affidavit, the Trustee has highlighted the relevance of the relationship between the Wife and the Daughter. At paragraph 32 it is said on behalf of the Trustee:

> *"…in coming to the Decision Letter, we place considerable weight on the relationship between [the Wife] and [the Daughter]. [Trustee] believes that in light of the clear animus between them, if we transferred [the Property] to [the Wife] absolutely, the property may not be passed to [the Daughter] upon her death."*

Relevant Legal Principles

22. The general principles governing the approach of the Court to an application for approval by the Court of a momentous decision by the trustees are not in dispute and are set out in the judgments of Kawaley CJ *In The Matter of the A Trust* [2018] SC (Bda) 42 Civ and Vos LJ in *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312.

23. In *Cotton* Vos LJ summarised the requirements which have to be satisfied in a case where the trustee had the power to make the decision but seek the approval of the Court because the decision is particularly momentous:

> *"12. In Public Trustee v. Cooper [2001] WTLR 901, Hart J repeated Robert Walker J's now well-known categorisation of cases in which trustees may seek the approval of the court. These proceedings fell into the second of Robert Walker J's categories (see page 923 in Cooper), namely where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them "but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action". In Cooper, Hart J said at page 925 that the duties of the court in a category 2 case depended on the circumstances of each case, but that in that case, it had to be satisfied, after a scrupulous consideration of the evidence, of three matters as follows:-*
>
> > *i) That the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;*

ii) That the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at;

iii) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring."

24. In the formulation of the general principle, Vos LJ referred to the need for caution given that one consequence of authorising the trustees to exercise the power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. However, the need for caution has to be placed in context: "*The court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason"* (Vos LJ at [12]).

25. In *In The Matter of A Trusts*, counsel (Mr Singla QC) argued that the Court should also ask the question: *"Whether it can be said that in reaching its decision to implement the proposal the trustee has taken into account irrelevant, improper or irrational factors or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached."* Kawaley CJ accepted that the additional question was part of the inquiry whether the decision would have been reached by a reasonable body of trustees. At [7-8] Kawaley CJ said:

"7. Properly analysed, there is no real distinction between the third question approved by this Court in Re ABC Trusts and the "additional" question proposed by Mr Singla QC. The latter is simply an expanded articulation of the former. The question "is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?" necessarily requires regard to whether a proper decision-making process occurred. Reasonable trustees would not take into account irrelevant, improper or irrational factors, and would only be informed by considerations which are relevant to their decision. This more fully articulated test was adopted by Blackburne J in Merchant Navy Ratings Pension Fund Trustees Ltd. -v- Chambers & Ors [2001] PLR 137 at [7]. The latter "threshold test" for approving a category 2 decision was approved by Asplin J in Pollock -v- Reed [2015] EWHC 3685 (at paragraph 129) in a passage to which Mr Singla QC referred:

> *"It is whether in reaching its decision the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached."*

8. Accordingly I accepted the submission of Mr Singla QC that this Court was required, as part of the process of deciding whether or not

the decisions would have been reached by a reasonable body of trustees, to have regard to whether or not the Trustees had taken into account irrelevant, improper or irrational factors."

26. The current legal position in relation to the approach of the Court in category 2 case, as here, is set out in *Lewin on Trusts* (919 edn, 2018) at 27-079:

> *"Application without surrendering discretion - role of court*
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> *The court's function where there is no surrender of discretion is limited. 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 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 the 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 limits of rationality and honesty; it does not withhold approval merely because it would not itself exercise the power in the way proposed."*

The attack on the "reasonableness"of the decision

25. The Trustee has decided that the Property should be appointed out into a new trust on terms that provide that it is held for the Wife for her lifetime and then passed to The Daughter and her issue. That decision is attacked by Mr Kessaram, on behalf of the Wife, in his written submissions and address to the Court. The decision is variously described as opaque, illogical, flawed, irrational and one which no reasonable trustee could have made. I turn to consider the submissions which formed the basis of the objection to the relief sought by the Trustee.

No conflict between the two wishes

26. It is argued on behalf of the Wife that the Trustee took the view that "*no conflict exists between the Settlor's two wishes*" and this perception on part of the Trustee "*constitutes the first fundamental flaw in the rationality of the Trustee's decision which seriously impugned the decision."*

29. The Court is unable to accept the factual premise of this argument. The Trustee fully appreciated the differing mechanisms deployed in the Letter of Wishes and the Will and the attendant risks. It is reasonably clear from the correspondence and the affidavit evidence that the Trustee was of the view that (i) In both the Letter of Wishes and the Will, the Settlor expressed the wish that after the death of the Wife the Property should go to the Daughter and her issue absolutely; (ii) In the Letter of Wishes, the mechanism adopted was that the Trustee should allow the Wife to occupy the Property during her life and after the death it should be

conveyed to the Daughter absolutely; (iii) Under the Will, the mechanism adopted was that the Property should be conveyed to the Wife with a request that the Wife should leave the Property to the Daughter absolutely under her will; (iv) If the Property was conveyed to the Wife in accordance with the Will, the Wife was not legally bound to leave the Property to the Daughter under her will; and (v) There was, therefore, a risk that if the Property was conveyed to the Wife in accordance with the Will, that the Daughter may never receive the Property under the Wife's will and the Property could be given to the Wife's own children from previous marriage.

30. In the letter from Conyers of June 2018, on behalf of the Trustee, to CHW, the issue of the intent of the Letter of Wishes and the Will is addressed:

> *"The Trustee has previously stated that it does not believe the Will and the Letter of Wishes to be in conflict. Both expressed the consistent wish that [the Wife] should enjoy the property during a lifetime, and that on her death passed on to [the Daughter]. It is true that the two documents contemplate different mechanisms for achieving that result, but the inconsistency is based on a misapprehension in the Will as to the existing state of affairs.*
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> *Doing its best to interpret the Settlor's actual wishes, it therefore is difficult for the Trustee to conclude that the Settlor intended to depart from the wish that [the Wife] should enjoy the property during the lifetime, and that it should pass to [the Daughter] on [the Wife]'s death."*(emphasis added).

31. The reference to "different mechanisms" clearly refers to the legal route through which the Daughter was to receive the remainder interest and the attendant risks. These risks are set out in the First affidavit of Nadine Francis dated 5 November 2018, filed on behalf of the Trustee:

> *"32. I should also point out that, in coming to the Decision Letter, we place considerable weight on the relationship between [the Wife] and [the Daughter].[The Trustee] believes that in light of the clear animus between them, if we transferred [the Property] to [the Wife] absolutely, the property may not be passed to the Daughter upon her death.*
>
> *36. We certainly consider the possibility that [the Settlor] by requesting in the will that the property vested in [the Wife] absolutely may have done so with the intention and desire that [the Wife] (rather than [the Trustee] should have the choice whether the Daughter inherit [the Property], knowing that she might not do so."*

32. The different mechanisms were expressly identified in the Memorandum of legal advice prepared by Conyers dated 13 September 2018 for the consideration of the Trustee prior to reaching the decision:

> *"15. The letter wishes dated 20 October 2008 is clear. It requests that [the Wife] have the use and income of the [the Property] during a lifetime and, after death, for it to pass to the Daughter.*
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> *16. In [the Settlor]'s Will, dated 19 April 2011, [the Settlor] … provides for the transfer of [the Property] to [the Wife] absolutely but with the "wish" that "when my wife dies property should pass to [the Daughter]". Under the Will, he thus still wanted [the Wife] to have [the Property] and, following the death, for the Daughter to have it, but the mechanism was very different. Pursuant to the Will, [the Property] would have been conveyed absolutely to [the Wife] who would in her discretion then decide whether to give effect to the wish that the Daughter possess the property after [the Wife]'s death. The principle difference, it may be thought, between the Will and the letter of wishes is that the discretion (whether to give effect to the wish that the Daughter have the property after [the Wife]'s death) would be [the Wife]'s under the Will rather than the trustees under the letter of wishes"*

33. It appears to the Court that the Trustee fully appreciated that if the Settlor's wishes had been carried out precisely as set out in the Letter of Wishes and the Will, there was no material difference in the two wishes. In both cases, the Wife would have occupation of the Property during her life and after the Wife's death the Property would have passed to the Daughter absolutely. In this sense there was no conflict between the Settlor's wishes in the two documents. The trustee also appreciated that the Letter of Wishes and the Will deployed different legal mechanisms to achieve that result and that there was a risk that if the mechanism contemplated in the Will was deployed, then despite the *wish* of the Settlor set out in clause 7 of the Will, the Daughter may never receive the Property after the Wife's death.

34. In this context it is to be noted that there is a marked difference as to the proper approach and relevance of the wishes expressed by the Settlor. The Trustee's approach is that the wish of the Settlor is a relevant factor which the Trustees should take into account along with all other relevant factors in its decision making process. The Trustee's approach is summarised in the Conyers advice dated 13 September 2018, which the Trustee says it took into account:

> *"17. In our view, the trustees should take into account all these expressions of Settlor's wishes and desires. It is correct that the Will does not expressly state that it supersedes the Letter of Wishes, but the trustee should not, in our view, take an over formalistic approach. It should take into account both documents and place as much weight, or as little, upon each document as they consider appropriate".*

35. It is contended on behalf of the Wife that the Trustee is bound to take into account the wishes of the Settlor. Furthermore, she contends that if the Trustee is going to depart from the wishes expressed by the Settlor, then the Trustee is under an obligation to explain to the court rationally why it has not followed the wishes of the Trustee. The Wife contends that it is not sufficient simply for the Trustee to

make a statement under oath that it has taken into account the wishes expressed by the Settlor, but is duty-bound to explain why it has not done so. The Wife contends that in this case the Trustee has failed to explain why it has not followed precisely the wishes of the Settlement as expressed in the Will. The complaint made is that the Trustee has not followed the precise terms of clause 6 of the Will by conveying the property absolutely to the Wife.

36. The relevance of wishes expressed by the settlor in the trustees' decision-making process was addressed by the Supreme Court in *Pitt and another v Holt and another* [2013] 2 AC 108 confirming that such wishes were a relevant consideration for the trustees to consider and take into account with other relevant considerations. However, the trustees were under no obligation to follow such wishes in preference to other relevant considerations. Furthermore, the settlor's wishes could not displace all independent judgment on the part of the trustees. Lord Walker explained the position at [66-67]:

> *"67. That is particularly true of offshore trusts. They are usually run by corporate trustees whose officers and staff (especially if they change with any frequency) may know relatively little about the settlor, and even less about the settlor's family. The settlor's wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff) the decision-making process would be open to serious question. The Barr Case (2003) Ch 409, illustrates the potential difficulties of unquestioning acceptance of the settlor's supposed wishes.*
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> *68. It is interesting, in this context, to compare the facts of some of the offshore cases with those of Turner v Turner [1984] Ch 100. That was a case in which a farmer made a discretionary settlement which he did not understand, and appointed as trustees family friends who never realised that they had any responsibility at all except to do as the settlor asked. They thought that it would be intruding into the settlor's affairs if they were to read the documents that they were asked to sign (see at pp 106-108). Anyone familiar with the duties of trustees may find this hard to contemplate (as Mervyn Davies J did, at p 109). But it may be that some offshore trustees come close to seeing their essential duty as unquestioning obedience to the settlor's wishes."*

37. In my judgment there is no obligation on trustees to explain specifically why a particular wish of the settlor was not followed by the trustees. For purposes of this application, it is sufficient for the Trustee to explain the relevant factors it took into account in coming to the decision and that the decision made by the Trustee is a reasonable one in the sense that it is a decision which could be made by a reasonable body of trustees.

38. In any event, it appears to the Court that the Trustee has in fact explained in this case why it has not followed the wish of the Settlor, in respect of the mechanism, as expressed in the Will. The Trustee appreciated that if the Property was conveyed to the Wife absolutely, in accordance with paragraph 6 of the Will,

there was a *risk* that the Wife may not, contrary to the wish expressed in paragraph 7 of the Will, leave the Property to the Daughter under her Will. The Trustee did not consider it to be fair that the Daughter and her issue or in the best interests of the Trust as a whole, that the Daughter should be exposed to that risk. This is explained by Nadine Francis on behalf of the Trustee in her Second Affidavit at paragraph 11-12:

> *"11. [The Wife] refers to paragraph 9 of an earlier affidavit in the estate litigation. We were aware that [the Wife] stated in a previous affidavit that she had at some point agreed with* [the Settlor] *that she would pass [the Property] to the Daughter upon her death. This may be the reason* [the Settlor] *decided to insert clause 6 into his Will. It is possible. I do not believe it changes the issue which we had to confront, namely whether leaving it to [the Wife]'s discretion (whether to leave [the Property] to the other principal beneficiaries in her own Will) is sensible or fair to the other beneficiaries and whether, in light of the facts at the date of our decision, it was likely to lead to the result intended by* [the Settlor].
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> *12. Further if [the Wife] intends to comply with the agreement she came to with* [the Settlor], *we do not entirely understand her objection to a trust structure which achieve the same outcome. Our concern of course is the risk that she may think better of our agreement (which may not be enforceable by the Estate or the Daughter) given a poor relationship with the Daughter and the understandable demands of her own family who could begin to consider [the Property] as their own family home"*

Trustee's view of the Wife's intention

39. The Wife argues that the second fundamental error in the exercise of the Trustee's discretion arises from its conclusion that the Wife bears animus towards the Daughter and as a result would not comply with the wishes of the Settlor expressed in the Will. She argues that the Trustee's conclusion that she bears animus towards the Daughter is based on a fundamental misconception of the facts and *"demonstrates how light the Trustee considered its duties to be in making this decision to ignore the Settlor's wishes."*

40. As noted above (paragraph 21), the Trustee took into account its view that "*in light of the clear animus between them"* if the Trustee transferred the Property to the Wife absolutely, there was a risk that the Property may not be passed to the Daughter upon her death. In this connection the relevant fact is the poor relationship between the Wife and the Daughter and not identification of the party who may well have been responsible for that poor relationship. In the submissions made on behalf of the Wife, the focus appears to be on demonstrating that the Wife was not responsible for that poor relationship.

41. In her Second Affidavit at paragraph 14, the Wife states that she did not view the Daughter's eagerness to obtain a copy of the Settlor's Will after his death as the beginning of a relationship turning sour. "*My attitude and behaviour towards [the Daughter] did not change. It was her attitude and demeanour to me that changed after* [the Settlor]*'s death".* Implicit in the statement is the acceptance that the

relationship did change. Again at paragraph 18 of the same Affidavit, the Wife states that "*the impression given in paragraph 16 of the affidavit is that I showed coldness to her following* [the Settlor]*'s death. The fact of the matter is it was other way round".* Overall the Wife's own evidence is that, leaving aside the issue of fault, the relationship between the Wife and the Daughter did indeed deteriorate.

42. The Trustee's position is that it takes no view as to who is to blame for the breakdown of the relationship. The Trustee responds to the Wife's assertion that the Trustee has formed a view that the Wife bears a degree of animus towards the Daughter in Nadine Francis' Second Affidavit at paragraph 9:

> *"… I have already explained that the trustees have taken into account, because they believe it to be true, that [the Wife] and [the Daughter] have a very poor relationship. If however [the Wife] is suggesting the trustees believe that [the Wife] is to blame, and is unreasonably hostile, I would like to correct this. The trustees take no view as to who is to blame for the breakdown in relations. We simply have taken into account the fact that there is a (very) poor relationship."*

43. The Wife also complains that if the Trustee was concerned about her relationship with the Daughter, the Trustee should have raised this issue with her. The Trustee accepts that no such issue was raised with the Wife but explains at paragraph 10:

> *"While we did consult both beneficiaries, we did not specifically ask [the Wife] how she would describe the relationship with [the Daughter]. This is in part because we knew, and did not need to know the reasons for, the relationship being a poor one. It is also in part because such a question could be construed as offensive. In any event, we did not think such a question was necessary or appropriate."*

44. In the circumstances, the Trustee's approach to the issue of poor relationship seems reasonable and appropriate. As noted above, the relevant issue is the fact of poor relationship and not the identity of the party who is responsible for that poor relationship. The relevance of poor relationship lies in the perception that it may increase the risk that the Wife may not leave the Property to the Daughter under her will.

45. The Trustee was aware that in the estate litigation the Wife had stated that she had agreed with the Settlor that she would pass the Property to the Daughter upon her death. No doubt the Wife would have confirmed her intention to the Trustee if the Trustee had made such an enquiry. However, there would still have been the risk, as noted in paragraph 12 of the Second Affidavit of Nadine Francis that she could change her mind as she was legally entitled to do. In the circumstances, it is reasonable for the Trustee to take the view that the Trustee should not take that risk which would deprive the Daughter and her issue of any benefit in relation to a major asset of the Trust. Accordingly, I do not consider that the Trustee's decision can be said to be unreasonable on the ground that it took into account the fact of the poor relationship between the Wife and the Daughter.

Trustee's failure to consider the reason for the change in the Settlor's Wishes

46. The Wife complains that the Trustee failed to consider *the reason for the change* in the Settlor's wishes from those expressed in the 2008 Letter Wishes to those expressed in the Will. She says that this was a further fundamental error. In the written Submissions filed on her behalf it is submitted at [41-42]:

> *"Although the Court declared (on technical grounds) that the forfeiture clause was of no effect, the clause nevertheless expressed what the Settlor was afraid would happen between [the Daughter] and [the Wife] after his death; and demonstrates an intention to try to prevent it. His fear was of litigious behaviour generally but specifically in relation to [the Wife]'s use and enjoyment of [the Property]. It was this fear that caused him to change his mind from giving a life interest [the Wife] with remainder to the Daughter. He recognised that a life interest in [the Wife] with the remainder interest in the Daughter would put them in a relationship which was fraught with opportunities for interference by the remainderman in the life tenant enjoyment of her interest in the property…Far from being in the best interests of the beneficiaries, it pits them against each other and condemns [the Wife] to suffer the rest of her life looking over her shoulder."*

47. The submission appears to be that at some stage the Settlor realised and feared that after his death his daughter was likely to be wholly unreasonable and litigious towards the Wife. In order to temper this anticipated unreasonable behaviour on the part of the Daughter, the Settlor decided to give the Property outright to the Wife with a legally unenforceable *wish* that the Wife pass the Property to the Daughter upon her death. Given that the decision whether the Daughter received the Property would be entirely in the gift of the Wife, the Daughter would be keen to develop a friendly and harmonious relationship with the Wife.

48. This submission was forcefully made on behalf of the Wife in Mr Kessaram's oral presentation. However, the Trustee complains, with justification, that the first time this complaint is articulated on behalf of the Wife is in Mr Kessaram's written submissions. The alleged reason for the change in the Settlor's wishes or the Trustee's failure to take that alleged reason into account has not been articulated by the Wife as part of the case in the pre-action correspondence or the affidavit evidence filed in relation to this application. Mr Martin, on behalf of the Daughter, submits that there is in fact no evidential basis for saying that the reason for change in the Settlor's wishes was to control the relationship between the Wife and the Daughter.

49. On 7 May 2018, CHW set out the Wife's position in response to the proposal made in correspondence dated 11 February 2016 by the Daughter's US attorneys. In this letter CHW in fact deal with the change in the wishes expressed in the Letter of Wishes and the Will:

> *"3. The Trustee also takes the view that the Letter of Wishes and the Will are "<u>not in conflict</u>" with respect to [the Property]. We disagree with this view. Whereas the Letter of Wishes only expresses the wish that [the Wife]*

have the use and occupation of [the Property] after the Settlor's death; with [the Daughter] becoming solely entitled after [the Wife]'s death; the Will expresses the wish that [the Property] be appointed to [the Wife] outright. There is a clear conflict.

4. The Will contains a wish that [the Wife] leave the [the Property] to [the Daughter] in her will. This is expressed as a "request" made to [the Wife]; not to the Trustee. The Trustee could have no say in what [the Wife] decides to do with the property. As far as the Trustee is concerned the Testator's wish is that [the Wife] have [the Property]; and the decision as to whether the property passes to [the Daughter] eventually was to be [the Wife]'s not the Trustees. Clearly, some thought was given by the Settlor /Testator to this matter prompting him to request that the devolution of this Trust asset occur in this way."

50. There is no suggestion in the letter of 7 May 2018 that the change in the expressed wish in the Will made by the Settlor was made for any particular reason. There is certainly no suggestion that the Settlor made this change in order to control the relationship of the Wife and the Daughter.

51. On 20 June 2018, CHW responded to a letter from Conyers, the Trustee's attorneys, dated 8 June 2018. The letter restates the Wife's position in robust terms:

> *"It would be a breach of trust in our client's view for the Trustee to ignore this clear statement of the Settlor's wishes. If the Trustee has any doubt about the meaning and effect of the relevant clauses in this regard, it is the Trustee's duty to seek the Court's construction of this part of the Will. In our view the Trustee cannot begin to exercise its budgetary discretion in relation to the disposition of the [Property] without first satisfying itself that it understands what the Settlor wished to occur. To do otherwise would be a willful breach of trust."*

52. There is no suggestion in this letter that an important consideration why the Property should be transferred absolutely to the Wife is the *Settlor's reason* for the change of wishes. There is no indication in this letter why the Settlor considered it appropriate to express his wish differently in the Will from the expression used in the Letter of Wishes.

54. On 13 September 2018, CHW wrote to Nadine Francis notifying her of the Wife's intention to commence court proceedings in Bermuda without any further delay. The basis of the Bermuda proceedings is articulated as follows:

> *"In the circumstances, we are instructed to issue proceedings against your client without further delay for the purpose of obtaining the Court's determination of the true meaning and intent of those clauses of* [the Settlor]*'s Last Will and Testament that relate to the [Property]. As you are aware, it is our client's position that the Settlor's intentions are specific and clear beyond doubt; that he intended his surviving spouse to have the property outright; and that it was his wish but her decision that the*

property be left to [the Daughter] when she died. The Trustee (on advice) disputes this interpretation of the Last Will and Testament and has expressed an intention to seek the Court's approval for some arrangement which has yet to be disclosed. It is our client's position that without a court determination of the true meaning of the Settlor's wishes as expressed in the Last Will and Testament it would be premature for the Trustee to make any decision as to the disposition of the said property."

Again there is no suggestion that the Trustee should take into account the *Settlor's reason* for the change of wishes or an indication as to what that reason might be.

55. In her First Affidavit dated 14 September 2018, the Wife states at [12]: "*It is my position that Clauses 6 and 7 of the Will have legal significance as an expression to the Trustee (the same entity appointed to be executor of the estate) of the Settlor's most recent wishes regarding the disposition of [the Property]; and that such expression of his wishes eclipses the Letter of Wishes made three years prior to the Will."* There is no indication in this affidavit of any reason which influenced the Settlor to change his wishes as expressed in the Letter of Wishes and the Will or any assertion that any such reason might be relevant to the decision-making process of the Trustee.

56. The Wife also filed a Second Affidavit in these proceedings and that affidavit is dated 11 January 2019. In that affidavit the Wife deals with the evidence set out in Nadine Francis' First Affidavit to the effect that the Trustee placed considerable weight on the poor relationship between the Wife and the Daughter. She states at [5]:

> *"As [the Trustee] admits, in coming to its decision it placed considerable weight on the relationship between [the Daughter] and I. It is clear from [the Trustee's] affidavit that the Trustee has formed a clear view as to the state of this relationship; in particular, that (inter alia) I bear a degree of animus towards [the Daughter] such that it is unlikely that I would adhere to* [the Settlor]*'s wishes to leave [the Property] to [the Daughter] in my will. It is unclear to me on what factual basis the Trustee's view of my relationship with [the Daughter] was formed. The facts are not stated in the affidavit. I can say without fear of contradiction, however, that in forming its view the Trustee has not spoken to me about my relationship with [the Daughter]."*

57. It is to be noted that in paragraph 56 above, the Wife is specifically dealing with the issue of the relevance or impact of the alleged poor relationship between herself and the Daughter upon the Trustee's decision in relation to the Property. The Wife's position appears to be that issue of her relationship with the Daughter is irrelevant to the Trustee's decision. In any event, she does not contend that the reason why the Settlor changed his wishes between the Letter of Wishes and the Will was to control the relationship between herself and the Daughter. Further, she does not suggest that that reason is a factor which the Trustee should take into account in its decision concerning the Property.

58. In the circumstances the Court is bound to conclude that there is no reliable factual evidence as to the reason why the Settlor changed his wishes between the Letter of Wishes and the Will. On balance, I accept Mr Martin's submission that there is no proper evidential basis supporting the assertion that the Settlor's reason for the change of wishes was to control the relationship between his daughter and wife. It also appears to be the case that until the filing of the written submissions dated 1 May 2019, it was not suggested on the Wife's behalf that any such reason was a factor the Trustee was bound to take into account. I accept Mr Adamson's submission that this argument has never been presented to the Trustee to consider.

59. Accordingly in my opinion, the Trustee was not bound to consider the relevance and/or impact of the Settlor's reason for the change of wishes or that any such failure on part of the Trustee affects the reasonableness of the decision. Having said that, the Trustee clearly took into account the poor relationship between the Wife and the Daughter and the attendant risk that the Wife may never pass the Property to the Daughter after her death.

Lack of consultation with the Wife

60. The Wife complains that if her relationship with the Daughter was a relevant factor for the Trustee in its decision-making, the Trustee should have consulted in relation to that issue prior to making the decision. She asserts that had she been consulted she would have advised the Trustee that (i) she could not be blamed for the poor relationship; and (ii) she intended to pass the Property to the Daughter after her death in accordance with the wish of the Settlor.

61. Trustees are under no general obligation to consult the beneficiaries prior to exercising their power to make appointments (See *Lewin on Trusts* (19th edn, 2018), 29-159, 29-099; *X v A* [2001] All ER 49).

62. Even if the Trustee had consulted the Wife it is unlikely that it may have influenced its decision in relation to the Property. In relation to the poor relationship the Trustee was not concerned with finding fault. It was the fact of poor relationship which was relevant to the Trustee's decision (paragraph 9 of Nadine Francis Second Affidavit). The Trustee knew that in earlier litigation the Wife had stated that after her death she intended to pass the Property to the Daughter. Further confirmation from the Wife would not have eliminated the Trustee's concern (See paragraph 12 of Nadine Francis Second Affidavit).

63. In the circumstances I am satisfied that the fact the Trustee did not consult the Wife prior to making the decision is not a ground on which the court should refuse to grant approval.

Lack of consultation with the Protector

64. The Wife also complains that the Trustee failed to ascertain the views of the Protector prior to making the decision which is the subject matter of this application.

65. The position of a protector in the administration of trusts is of recent origin. The precise role, rights and duties depend upon the terms of the particular trust instrument. Here the Trust Deed provides, *inter alia*, that the Protector's consent must be obtained in order to add or exclude beneficiaries and in order to add or remove trustees.

66. However, the Protector has, under the terms of the Trust Deed, no role to play in the Trustee's exercise of its discretionary power to make appointment to the existing body of beneficiaries (See clause 3 and 6). The Trustee is not required to consult the Protector in relation to any appointment of the Trust Property to the beneficiaries.

67. In the circumstances no legal criticism can be made based upon the fact that in this case the Trustee failed to consult the Protector prior to making its decision which is the subject matter of these proceedings.

Inconsistency in legal advice

68. The Wife complains that the Trustee received and relied upon inconsistent legal advice from Conyers. As is customary, the Trustee requested and received formal legal advice from Conyers, summarizing the legal principles which the Trustee should take into account, prior to making the decision. That formal advice is set out in a Memorandum from Conyers dated 13 September 2018, upon which the Trustee relied (paragraph 31 of Nadine Francis' First Affidavit). Any legal advice contained in prior correspondence has to be qualified by what is said in the formal legal advice upon which the Trustee relies. I understand that no criticism is made of the legal advice that set out in that Memorandum and in the circumstances do not consider that the Trustee's decision can be impugned on the alleged ground of inconsistent legal advice.

Conclusion

69. The Trustee has exercised its discretionary power of appointment to achieve the result that the Wife should have the Property for a lifetime but should pass to the Daughter upon the Wife's death. The Trustee made that decision for two independent reasons.

70. First, the decision accords with the Settlor's wishes. The Trustee reasonably believed that the Settlor, both in the Letter of Wishes and the Will, expressed the wish that after the death of the Wife, the Property should pass to the Daughter absolutely.

71. Second, the distribution, leaving aside the wishes of the Settlor, is in any event in the best interests of the Trust as a whole. In this regard the Trustee does not consider that it is in the best interests of the Trust for the Daughter and her issue not to benefit at all from the Trust's principal remaining asset and instead leave open the possibility for the Wife's heirs (who are not Trust beneficiaries) to have the principal benefit.

73. In the circumstances, the Court has no hesitation in concluding that the decision of the Trustee is one which a reasonable body of trustees could have made. Accordingly, I approve the decision by the Trustee set out in the letter dated 4 October 2018 to appoint the Property (or the shares in the company holding the Property) to a new trust domiciled in the United States on terms that provide that the Property is held for the Wife for a lifetime and then for the Daughter and her issue.

74. I invite counsel to draft an order for my approval and I will hear any application in relation to the issue of costs.

Dated 3 June 2019

NARINDER K HARGUN

CHIEF JUSTICE