In the matter of the Trusts (Guernsey) Law, 2007 & the AAA Children's Trust & the Trustees
Royal Court
8th January, 2014

JUDGMENT 29/2014

Application by the Trustees for the Court's guidance in their intention to exercise their powers under the [Children's] Trust to sell a property

Approved Text
08.01.2014

The judgment of the Court has been redacted to enable it to be published as the hearing was largely concerned with matters pertaining to certain minor children.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007

AND

IN THE MATTER OF THE [AAA] CHILDREN'S TRUST

AND

IN THE MATTER OF AN APPLICATION

Between:

(1) A1

(2) A2

(3) A3

Applicants

(each in their capacity as a trustee of the 'Children's Trust)

And

(1) R1

(2) ADVOCATE CHRISTOPHER BOUND

Respondents

(representing minor and unborn beneficiaries)

and

P1

Joint Protector

Hearing date: [ ] 2013

Judgment handed down: 8 January 2014

Before: Richard John Collas, Esq., Bailiff

Advocate for the Applicants:	**M C Newman**
Advocate for R1:	**J T Le Tissier**
Advocate for the minor, unborn and unascertained beneficiaries:	**C J Bound**
Advocate for P1	**J P Greenfield**

Legislation, Cases and References relied upon in this Judgment:

Public Trustee v Cooper [2001] WTLR 903
Mischca Trust and Butterfield Trust (Guernsey) Limited v Thommessen et al (Royal Court Judgment 15/2010)
Re F (Guernsey Court of Appeal, 21 June 2013)
Lewin on Trusts 18th ed. Para 29-299

Introduction

1. This is a trustees' application within the second category identified in Public Trustee v Cooper [2001] WTLR 903 to bless what is considered by the trustees to be a momentous decision involving the sale of a significant property. The application is set out in the second paragraph of an application dated 20th June 2013:

> *"that the Court direct that the trustees be permitted in exercising their powers under the "[Children's]" trust to implement and give effect to the Sale (as such term is defined in and referred to in the [supporting]… affidavit) and to take all such steps as may be required in order to carry into effect the same and/or such further or other steps as the trustees may by their professional advisors be advised to take in order to enable the same."*

2. The definition referred to is found in paragraph 19 of the first affidavit of A [lodged on behalf of the Applicants], the relevant part of which is *"the Trustees ..... believe it prudent that we obtain directions from the Court in respect of the Trustees' proposal to effect the sale of the … Property (the Sale). As to the mechanics of how the Sale is to be effected, this is still being considered by the Trustees and the Court will be updated on the Trustees' decision in due course."*

3. The application is vehemently opposed by all the beneficiaries of the Children's Trust and by one of two joint protectors. I will explain the mechanics of the transaction later in the judgment but first it is necessary to set the background and explain the key parties involved.

Background

4. The Children's Trust is governed by Jersey law but two of the three trustees of the Children's Trust are incorporated and based in Guernsey where the trust is administered, hence the Royal Court has jurisdiction to receive the application under section 4 of the Trusts (Guernsey) Law, 2007.

5. The Children's Trust was ultimately settled by the Children's late father ("the Settlor"). During his lifetime he settled 2 trusts, Trust 1 and Trust 2. During his latter months he took steps to re-organise his affairs and to leave some meticulous and detailed wishes to his trustees. In accordance with his instructions Trust 1 and Trust 2 were wound up after his death and the assets were re-vested in Trust 3 and the Children's Trust. The respective declarations of trust were declared on 6

July 2007 by the 3 trustees, A1, A2 and A3 (collectively "the Trustees"). It is the same three trustees who remain the Trustees and who have brought the present application.

6. The Settlor is survived by a widow, R1, and they have two children ("the Children"). The beneficiaries of both trusts are R1, the Children and their future issue. Both trusts are substantially in similar terms; they are discretionary trusts and, unusually, a Memorandum of Wishes has been incorporated as a Schedule to each of the Trust Deeds. The two Memoranda were finalised after the Settlor's death but it is accepted that they record wishes communicated by him during his lifetime. In accordance with his wishes, the Trust 3 is operated principally for the benefit of R1 and the Children's Trust principally for the benefit of the Children. The present application concerns only the Children's Trust.

7. There are two protectors, P1 and P2. P1 is the younger sister of the Settlor and hence the aunt of the Children. P2 was a long term business associate of the Settlor and was involved with him in the running of the Settlors' business ("the business"), as was the non corporate trustee, A3. A3 trained as a real estate lawyer and has a real estate broker licence. P2 is an English accountant who advised the Settlor in relation to his personal tax affairs and also advised the business in tax matters. Although P1 and P2 are joint protectors, there is a provision that in the event of disagreement between them, the elder of the two has a casting vote. P2 is older than P1 and consequently in the event of disagreement P2's view prevails over P1s.

8. In the present proceedings, the Trustees are represented by Advocate Mathew Newman of Ogier. R1 is represented by Advocate Le Tissier of Appleby. Advocate Bound represents the only other party to the application namely the Children together with the unborn and unascertained beneficiaries, having been duly appointed to that role by the Court. In his approach he has correctly identified that the Children's Trust is to be operated principally for the benefit of the Children and hence has focussed on their interests whilst noting that he sees no conflict between the interests of the Children and any future issue they may have or any unascertained beneficiaries. P1 was not formally convened as a party because there was no need for her to be bound by the decision but with the agreement of all parties, she was permitted to adduce evidence and make submissions which she has done through Advocate Greenfield of Carey Olsen.

9. In the present application P2 supports the Trustees' decision which is strongly opposed by all the family members namely R1, the Children and P1. The property to which the application relates which I will define as "the Property" is owned by a company ("the Company"). 49.5% of the shares in the Company are held by three nominees on behalf of each of the two children. The three nominees are P2, A3 and R1. The other 1% is held by R1 in her own right. Decisions of the three nominees can be taken by a majority. A3 and P2 have indicated that they support the sale and thus outvoted R1. Some of R1's many complaints about how the sale has been handled and how she has been treated include that A3 and P2 have not fully involved her in their discussions and deliberations [in relation to the issues arising from the shares held by the three nominees and R1 in her own right].

10. In the building in which the Property is located there are other apartments owned by third parties. The share certificates in the Company are held by the Trustees as security for secured promissory notes issued by them.

11. The bulk of the money required to purchase the Property and to carry out alterations and remedial work was advanced by the Trustees to the Company by way of secured and unsecured promissory notes. The financial structure was based on tax advice and the notes bear interest at a commercial rate but Advocate Newman informed me that there was no expectation that any interest would be paid. A total of [X] has been advanced in this way, of which [X] is unsecured. By the end of 2013, the outstanding interest will exceed [X]. In addition to servicing the loan notes, maintenance of the Property is presently costing the Children's Trust [X] per month and net of rent. Over the period 2008 to 2012 the annual cost has averaged [X].

12. There might have been an issue as to whether the loan notes were validly assigned to the Children's Trust when assets were transferred to it from Trust 1. In the first Affidavit sworn on 2 July 2013 by A, a director of the corporate Trustees A1 and A2, in support of the Application, he said *"due to an administrative error internally, the assignment of certain secured promissory notes cannot be located and this issue is presently being remedied."* He later confirmed that the issue has been remedied.

13. The operations of the Company are governed by [a formal] agreement exhibited to A's first affidavit. It was accepted that any Sale could not proceed without the consent of the Trustees. The contract of sale which has been signed with the prospective purchaser is contingent upon certain events.

14. The agreed price for the Property is [X] million offered by the prospective purchaser.

Memorandum of Wishes

15. As I have said the Memorandum of Wishes incorporating wishes indicated by the Settlor during his lifetime is incorporated as a schedule of the Children's Trust. I was urged by Counsel appearing for family members to attach greater weight to the wishes than would normally be the case in a stand alone Letter of Wishes which would not normally have been incorporated into the Trust instrument. The Memorandum does however make it clear that it *"is not intended to create any binding trust or obligation or to fetter in any way the exercise of discretions vested in the Trustees or Protectors"* (paragraph 1.1). I agree with Advocate Newman that if the Settlor had intended his wishes to be binding he would have asked that they be incorporated in the Trust Deed but nevertheless, they are an important factor to be taken into consideration.

16. The Memorandum includes some 11 pages and contains detailed provisions to be borne in mind by the Trustees and Protectors in exercising their powers. The section concerning the Property is at paragraph 6. It includes:

> *"6.1 This purchase was made for the sole purpose of [the Children] having a roof over their own heads… that is fully paid for from family resources to give them long term security.*
> *6.2 [The Settlor] wishes the Trustees to leave such funding in place until [the Children] turn 40 …, and not to call in any loans from the … Company before then unless the …Property is sold before that time (but see restrictions below)".*

In paragraph 6.3, the Settlor expressed the opinion that *"[certain events would cause the property to be unique and have a unique value]"*. In para 6.5, the Settlor stated he does not wish either of his children to dispose of their interest in the property before they attain the age of 40. In 6.5.1 he said that even after the age of 40 he does not want them to dispose of their interests as the property has been acquired *"to protect their long term interests and security … (unless there are major changes in [the] City which would cause them to move away or not to use the … Property at all)"*. The Settlor also referred to what he believed to be valuable air rights which would permit future development but I am told that it has now been established the air rights do not have value.

17. The key paragraph for the purposes of the present application is 6.5.2:

> *"6.5.2 The Settlor wishes that no sale of part of the… Property should take place before [the Children turn 40] unless there are extraordinary changes in [the City]… except for a sale of space developed with the excess Air Rights. Even if … [the Children] only use the property for a few weeks in a year, he wants them to understand that the … Property should be recognised as "a roof over their heads which is fully paid for", a situation that he never had at that stage in his life. He wants …[the Children] to appreciate that this property has been acquired for their <u>sole</u> benefit. It is <u>not</u> intended to be the family home or a family home but to be a 'roof over the children's heads' in the event of disaster …; or*

> *it can be considered as a real estate investment as it is a unique property in a unique location with priceless value. The Settlor considers it to be 'the finest jewel in the jewel box' and therefore it is only to be sold in exceptional circumstances and then at an appropriately extraordinary price such that the news will reach him even in heaven."*

18. In paragraph 6.5.4 the Settlor expressed the wish that he would want the proceeds of any sale *"to be used to purchase other homes which would be held in a specific trust for the protection of the [Children] and their children."*

19. In paragraph 6.6 he stressed that it is not to be a *"family home"* but a home for the Children where their mother could visit whenever she wishes but was not to bring any future husband or partner to stay at the Property at any time. He provided at 6.8 that after a *"Termination Event"* occurs the Children could only stay at the Property with their mother alone or if she was not available with another responsible adult such as P1 or the wives of P2 or A3.

Marketing and the decision making process

20. The family members who oppose the application place great emphasis on what they consider to be flaws in the decision making process followed by the Trustees. It is helpful to summarise the relevant chronology.

21. In paragraph 88 of A's first affidavit, he said:

> *"88 Since 2011 the Trustees, in conjunction with the Protectors have looked into a possible sale of the interest in the ... Property. In [Spring] 2012 the ... Property was marketed, but it was later withdrawn due to [P2]…, as nominee, withdrawing his consent to sell. It is my understanding that [P2] took this decision following [R1's]continued correspondence with P2 setting out her views that the… Property should not be sold."*

22. When the Property was marketed, expressions of interest were received in the region of [X] to [Y] million.

23. At the time the Property was marketed, no decision had been taken to sell it. No minute was produced to show when or for what reasons the property was marketed. Advocate Newman said the issue had been nibbling along for some time. It is unclear to me whether it was marketed at a price that was thought to represent the market value or at such an extraordinary price that if a sale was agreed the news of it would reach the Settlor in heaven but my understanding is that it was the former.

24. At a meeting of the Trustees held in Guernsey on 10th July 2012 it was decided to remarket the Property some time after Summer 2013 when it was anticipated that the Children would have settled into a new environment after moving schools. I describe the meeting in greater detail later.

25. Before the Property could be remarketed, unsolicited offers were received from two prospective purchasers, which led to a short bidding war at the end of which an offer was made of [X] million. The offer was described by Advocate Newman as the catalyst for the Application. Subsequent to the Application being tabled, a meeting of the members of the Company was convened for 29 July 2013. All members other than R1 attended and approved the sale. Subsequently, the contract for sale was signed, subject to Royal Court approval.

The Trustees' Reasons for the Sale

26. As the Advocates for the Respondent parties, including P1, pointed out, it is difficult to identify clearly the reasons relied upon by the Trustees in reaching the decision to support the sale, the factors they took into account and the factors they may have ignored. That is, in part at least, because there was not a clear cut decision to accept the proposed offer, supported by a dossier of

relevant factual information and fully recorded in a comprehensive minute of the Trustees' deliberations. Instead, information has been elicited in a number of affidavits sworn by A, six in total with the last being sworn on 30th October.

27. In A's first affidavit, at paragraphs 91 to 99 he addressed the "Considerations on a sale of the … Property" which, in summary, he described as:

    (a) The Property is an exceptional property;
    (b) The Settlor's wishes in respect of the Property are guiding, but not binding, principles;
    (c) The property market is currently very buoyant and prices may fall away, an argument that was referred to as the "… property bubble";
    (d) Planned renovations are to be carried out on a nearby property;
    (e) The proposed purchaser is exceptionally wealthy and the price exceeds the market value;
    (f) There is a risk of R1 spending significant amounts of time in the Jurisdiction D incurring tax liabilities that could place a burden on the funds of the Children's Trust; and
    (g) The financial consequences, including the concentration of trust funds in a single asset, the high costs of maintenance which cannot be sustained in the longer term and the greater flexibility the Trustees will enjoy if funds are released for other purposes.

28. At paragraphs 108 onwards of his first affidavit, A outlined what he described as "Other relevant considerations". In summary, they were

    (a) The level of family distributions from the Trust were unsustainable;
    (b) One of the conditions of the proposed sale would enable the Children to remain in the property until June 2014 when they would move schools;
    (c) [anonymised consideration/issue referred to at paragraph 34 below ("Anonymised Issue")] and
    (d) Jurisdiction D tax advice.

29. In argument, the reasons were summarised as

    (a) [Anonymised Issue];
    (b) The … property bubble;
    (c) Valuation evidence;
    (d) Concentration of risk;
    (e) Capital erosion;
    (f) R1's spending and the Children's lifestyle; and
    (g) Emotional factors.

30. It is appropriate to look at the minutes of the meeting held in Guernsey on 10th July 2012 at which a decision to sell was taken. The meeting was attended by three representatives for A1 and A2; together with A3 by telephone. Also in attendance were the two Protectors, P1 and P2; an advisor to P1; the corporate trustees' in-house legal counsel; and another representative of A1. It was a lengthy meeting that commenced at 9.15 am, adjourned for lunch at 12.30 pm, reconvened at 2.35 pm and concluded at 4.40 pm that day. The Trustees initially said they had provided full and frank disclosure of all relevant documents but they have not produced either the agenda for the meeting or any documents that might have been circulated to the participants beforehand.

31. From the documents that were disclosed, it appears that the sale of the Property was not included as a specific agenda item and it appears that no notes were circulated beforehand to explain what factors should be considered. The minutes record that the Property was considered under an item headed *"[XYZ]"* which mainly concerned the investment portfolio but concludes with the following:

> *"It was noted the Trustees had raised their concerns in respect of capital erosion and the effect the Property … had on capital. Further to this, [XYZ] had produced reports to ascertain the longevity of the trusts should the Property be sold or retained. It was clearly demonstrated that the Property is having a detrimental effect on the capital and it was forecast that at the present level of expenditure the liquid assets in the trust fund would be eroded by the time the … [Children reached] their twenties, should the property be retained. [P1's advisor] queried whether consideration had been given to renting [the Property]. It was noted that this had been considered, however, this would not produce sufficient income to cover ongoing costs. It was agreed by all parties to the meeting that the Property has to be sold."*

32. There was some further discussion after lunch under the next agenda item headed *"Budgets and Ongoing Expenditure"* and in the context of the Children moving to attend [a different] school in 2012:

> *"In addition, P1 advised R1 had informed her the Children would be attending [a different school] in 2012, not 2013 as previously anticipated. In light of this, concerns were raised in respect of selling [the Property] prior to the family moving to [the City]. P1 enquired on whether it would be possible to postpone the sale and rent out [part of the Property] with the family occupying [one of the apartments] for the time being. Further to this, A3 informed the parties that the founder of [a business] had visited [the Property] three times and had shown a keen interest in the property and that halting the sale of [the Property] could be problematic in respect of a future sale as brokers and potential bidders would be mindful in light of the buyer previously changed their mind to sell (sic). Having said this, A3 advised there would be no risk in delaying the sale for a further year as it was unlikely the value would decrease. P1 noted that it is R1's intention to stay in [the City] for two school years and thereafter, move to [another City] where the children will be schooled until 18. P1 advised the Trustees it is R1's expectation that [an] apartment be bought where they can take up residence. It was noted that the Trustees could not continue in the long term [to] pay the expenses in respect of [the Property] in light of the capital erosion. However, it was concluded that R1 should occupy the Property until June 2013, whilst the children settled into their new environment. Thereafter, the Property would be put back on the market for sale and alternative accommodation sought for the remaining time the children will be schooled in [the City]."*

33. The minutes make no reference to matters that should have been considered such as the Memorandum of Wishes or the wellbeing of the Children. There was no discussion as to the value of the Property or the level of price that would have to be offered before the Trustees could support the sale in accordance with the wishes of the Settlor. Instead, as Advocate Bound criticised, the minutes suggest that the decision was taken as if they were discussing a simple investment. There was concern about capital erosion but no discussion and no consideration of the other steps that could be taken to preserve capital, such as the sale of other assets, the disposal of other properties, reducing distributions or any other matters. As for timing, there was no consideration of the possibility of deferring the decision until the Children have attained the age of majority so that they could be involved and, indeed, there was no attempt to ascertain their present views.

The [Anonymised Issue]

34. [This section of the judgment relating to the Anonymised Issue has been deleted in its entirety]

Valuation evidence

35. The Trustees relied in court upon a report from Property Expert A who opined that the aggregate value of each of the apartments was [X] if valued together or [Y] taking into account the additional premium attributable to the apartments as representing the majority of the whole building.

36. On behalf of R1, Property Expert B opined that the aggregate value of each of the apartments was [X plus], without accounting for the additional premium value attributable to their majority share of the whole building which he suggested would be an additional amount of between 10 and 20 percent i.e. an extra [X] to [Y] million making a total value of between [X] and [Y] million.

37. Property Expert A and Property Expert B met to prepare a Joint Report but failed to agree a value. The difference between them is of course highly significant especially when addressing the question of whether the proposed price is so exceptional that the Settlor would have wished that it be considered.

38. Property Expert B was of the opinion that the apartments could be rented for [A to B] per month respectively, producing a total gross rental income of [C] per year. Renting the properties could produce a net benefit to the trust of [D] million each year. His rental figures were not accepted by the Trustees but neither were they disputed.

The Children and their Lifestyle

39. A major criticism by Advocate Bound was that the Trustees appear to have had no, or scant, regard for the wishes of the family. Advocate Bound met with the Children. He said that he would have preferred to meet with them alone but he was not permitted to do so. Their mother was present and hence he acknowledged there was a risk that the Children might have been reluctant to express their own feelings. Having said that, he found them to be intelligent as well as being advanced intellectually and mature for their age. In forming his recommendations he said that he did not attach too much weight to the meeting but nevertheless he gained a flavour of their wishes. He suggested that the Trustees should have given full and proper consideration to the possibility of limiting the extent of capital depreciation through other measures in order to enable them to defer a decision at least until the Children's majority.

40. Advocate Greenfield also stressed the importance of Advocate Bound's representations on behalf of those he represented which the Trustees had initially indicated would be important for the court to consider yet when they received his conclusions, he submitted that they preferred to devalue or ignore them.

41. Expert evidence produced for the purposes of the hearing indicated that there are other options that could be pursued involving, for example, commercial letting of all or part of the Property. The Trustees do not agree that would be a viable option but, as Advocate Bound submitted, there is nothing to show they had analysed the possibilities, as they should have done, before reaching their decision.

42. Advocate Bound pointed out that there are two other homes; one that is the principal family home and another that was a rented property. The number of properties was symptomatic of the lifestyle enjoyed by the family that was, as he described it, wildly unnecessary. The Children could enjoy a very comfortable upbringing without the excesses that the Trustees were presently supporting. The level of distributions was wholly inappropriate for children of such age. He highlighted items from the 2013 budget exhibited to the Fourth Affidavit of A, such as travel and holidays […] and an item […] for a driver and chef. The Trustees have assumed that spending will continue to grow at ½% in real terms, leading to capital erosion, without looking to see how it could reasonably be curtailed. Although there has been a reduction in distributions following the sale of the [family assets] and release of certain [travel] arrangements, there should have been an analysis to see what further reductions could be achieved before taking a decision to sell the Property.

43. Advocate Greenfield indicated that P1 fundamentally disagrees with the lifestyle that the Trustees support through the level of distributions. The Settlor was well aware that finances can go down as well as up and P1 is sure that he would have expected the Children and R1 to cut back on their lifestyle if that was necessary. There were more than sufficient funds in the two trusts to support a very comfortable lifestyle without eroding the capital.

44. Advocate Newman acknowledged that there was some leakage of money from the Children's Trust distributions to support the lifestyle of R1.

45. In my view, the financial evidence presented to the court does not allow an analysis to establish how much of the money supports R1 rather than the Children. However the level of expenditure is so high that it must be far in excess of the Children's needs and hence it may be that a substantial portion is spent on supporting R1.

46. Although R1 is a beneficiary of the Children's Trust, it was the clearly expressed wish of the Settlor that the Trust should be principally for the benefit of the Children. Paragraph 5.1 of the Memorandum of Wishes records that:

> *"It is the Settlor's wish that the income of the Trust Fund be used for [his Children's] maintenance and well-being during their infancy and childhood and until they reach an age when they have either completed their education or it is clear that they have passed the stage where they might reasonably expect to have any further formal education ("the end of the education stage"). This may include, for example, the cost of their accommodation, subsistence, clothes and staff needs, holidays (including spending money), travel, medical costs, pocket money and entertainment, schooling and other education costs and needs through university or other further education as far as they are able and wish to go. It is understood that they may have different abilities which give rise to different educational paths; thus, if one child has cost more than the other that does not mean that he wants the Trustees to equalize their distributions in money terms. Subject to this, the Settlor would like all benefit to be divided as equally as possible between [his Children]."*

47. Provision for R1 was made through the Trust 3 from which she receives [a monthly provision]. Whilst the Children are still minors and in the care of their mother, it is impossible to isolate their expenditure from hers and hence the Trustees will have to take an overall view as to what is best for the family but I was surprised at what appeared to be some complacency on their part in respect of the proportion of Children's Trust distributions that appear to be benefitting R1 rather than the Children. I was also surprised that the Trustees were not attempting to take more action to curtail R1's expenditure in order to avoid a sale of the Property at this time. When the Children attain the age of majority and are in a position to express their own views and make their own enquiries as to how the Trust has been administered, it is likely that they will want to investigate such issues and at this time it is impossible to predict what action they might seek to take if they were to form the view that the Property had had to be sold at least in part for the purpose of maintaining an extravagant lifestyle enjoyed by their mother. Yet, it is not apparent from the documents I have seen that the Trustees have done all within their power to strike the right balance between the respective needs of the Children and their mother although they have tried to encourage her to reduce her spending and she has so far failed to do so leading them to conclude that any reduction is unachievable. Yet, with effect from 2014, they say they will be distributing not more than 3% of the liquid assets each year.

Capital erosion

48. It goes without saying that for so long as the distributions from the trust exceed the income there will be erosion of the capital base of the trust. How much erosion and how long the trust is able to survive will depend upon the level of excess spending. Expert investment opinion evidence was obtained, largely at the request of R1. As the application has evolved, the opinions are less relevant than they might have been. The two opinions were prepared by Investment Expert 1 on behalf of the Trustees and by Investment Expert 2 on behalf of R1. Their evidence was summarised by Advocate Newman in paragraph 40 of the Trustees' Skeleton Argument:

> "*40.1 If the Property and current withdrawal levels are maintained, the investment portfolio (i.e. the liquid assets available to the Trust) would be exhausted within the*

medium term (14 year according to Investment Expert 1, 20 years according to Investment Expert 2). Thus, the current levels of withdrawals from the investment portfolio are unsustainable/untenable if the objective is to maintain the Property;

40.2 The performance of the investment portfolio, diversified as it is through a number of different managers and investments, is reasonable and above average on a risk adjusted basis. It has been successful in delivering the targeted return.

40.3 The …Report [by Investment Expert 1] says that without the sale of the Property, to maintain the current value of the portfolio over 10 years would require an annual rate of return of 6% and a reduction in withdrawals over 30% per annum. If there is no reduction in expenditure then a return of 9% would be required which is "exceptionally aggressive". If the Property is sold then, without expenditure reduction, the annual return rate would need to be just over 3%. The … Report [by Investment Expert 2] recommends that a significant reduction in withdrawals from the investment portfolio is required for the portfolio to remain sustainable, and a return rate of over 3.5% per annum is required to sustain annual withdrawals of [X].

40.4 Delaying the sale of the Property would produce negative results for the portfolio such that significant losses could be incurred. [Investment Expert 1] says that the loss could be up to [X] if the sale is delayed up to five years. This of course is predicted on the assumption that the property sells for [X] (net) but this is not certain and [Investment Expert 1] calls this exercise "highly hypothetical". [Investment Expert 2] says that if the Property can deliver a net rental stream of around [X] then it would be reasonable to delay a property sale until 2035.

40.5 [Investment Expert 1] adds a postscript that a diversified, possibly leveraged international property portfolio run by a leading manager would be preferable to a [X]% interest in a property in [City] representing over [X]% of the total portfolio, however iconic. Property investment can achieve returns of up to 9-10% but only with exposure of up to 20% of the portfolio in property."

49. The way that the hearing of the application progressed led to counsel questioning not the substance of the opinions but whether the Trustees have done as much as they could have done to curtail spending and hence reduce the distributions at least until the Children attain the age of majority when they will be able to be consulted and give their own uninhibited views as to their preferences for the future administration of the trust and, in particular, the future of the Property.

The Law

50. As I said at the outset of this judgment, the application before me was made under the second category of case in Public Trustee v Cooper. The Respondents considered that it could or should have been brought under the third category whereby the Trustees would have surrendered their discretion to the court but that is not how it was presented and there was insufficient evidence produced to me to enable me to consider it as a third category application if I had wanted to do so.

51. Counsel were agreed that the questions to be considered on a second category application were those identified by me in Re: Mischca Trust and Butterfield Trust (Guernsey) Limited v Thommessen et al (Royal Court Judgment 15/2010):

> *"1) Does the trustee have the power to make this "momentous" decision?*
> *2) Is the Court satisfied that the trustee formed the opinion in good faith and that it was desirable and proper for them to [make the decision]?*
> *3) Is the Court satisfied that the opinion formed by the trustee is one which a reasonable trustee in its position properly instructed could have arrived at? and*
> *4) Is the Court satisfied that the opinion arrived at by the trustee has not been vitiated by any actual or potential conflict of interests which either had or might have affected its decision?"*

52. There were submissions made at the start of the hearing as to whether the Court also had a residual discretion on the basis that this is an equitable remedy. I expressed the view that this is not so much an equitable remedy in the normal sense in which that is understood as an instance where the court is exercising a supervisory jurisdiction.

53. I do not need to summarise the submissions because, during the course of the hearing, counsel were able to obtain, and circulate, a redacted copy of the judgment of the Court of Appeal in Re F (Guernsey Court of Appeal, 21 June 2013). The role of the Court is placed beyond doubt in paragraph 11 of the judgment with which all counsel indicated that they agreed, notwithstanding the fact that the decision is in any event binding upon the Royal Court:

> *"In the second type of application, however the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision. It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a way different from that proposed by the trustees. To the extent that the court has any discretion, it is in whether or not to admit the application; if, for example, the court considers that the trustees' decision is of insufficient moment, it may refuse to entertain the application at all. Once it has decided to deal with the application, however it has no more discretion than in the making of any other declaration, and will make it once satisfied of the propriety of the proposed exercise of the power. It may nevertheless be that the court will sometimes engage in a dialogue with the trustees as a result of which the trustees' decision is modified; but, properly analysed, that is no more than a process by which the court identifies the circumstances in which it will be satisfied that the proposed exercise of the power is within the proper range of such exercises. It is not indicative that the court is exercising a discretion; and any attempt by a court to do so in circumstances where the trustees had not surrendered their discretion would infringe the general principle that a court will not enforce the exercise of a power against the wish of the trustees."*

Conclusion

54. Before addressing the four issues identified in Mischca and cited above, there is a preliminary matter raised by Advocate Le Tissier based on the fact that the Property is held outside the Children's Trust and that the Trustees' connection with the property is as a creditor under the promissory notes issued in favour of the Company. He submitted that as the Trustees are not able to sell the property, the Royal Court has no jurisdiction to bless the transaction. In my view, his submission fails because the Application seeks the Court's blessing to *"implement and give effect to the Sale"* and *"to take all such steps as may be required to carry into effect the same"*. There is no room for misunderstanding what the Trustees are proposing to do. The proposed sale cannot take place without the consent of the Trustees pursuant to the terms of the [formal] Agreement that governs the operations of the Company. The Trustees have to decide whether to give their consent and they are entitled to ask the Court to give its blessing to that decision in accordance with the second category of applications envisaged in Public Trustee v Cooper. Whilst the Application could have been drafted in different terms, the Application and the supporting documents clearly explain what is sought and there can be no confusion as to what the Trustees are proposing to do. There is no reason to decline jurisdiction.

55. Turning now to the first of the four questions identified in Mischca, there is no dispute that the proposal to take steps to effect the sale of the Property is a "momentous decision". It is a

significant asset of the Children's Trust and the importance of the decision is rendered all the more significant by the Settlor's expressed wishes that the Property be retained for the benefit of the Children to protect their long term interests and security. R1's opposition to the decision and that of P1, are additional factors that render it appropriate to seek the Court's blessing.

56. A consequence of the Court blessing the decision, if I had been minded to do so, would have been that neither the Children (nor any other beneficiary) could later challenge the decision. I accept counsel's submissions that caution should be exercised by me in deciding whether to bless the decision and that if I am left in doubt by the evidence I should withhold approval (see for example Lewin on Trusts 18th ed. Para 29-299).

57. It is accepted by all parties, and I accept, that the Trustees have the power under the trust instrument to make this momentous decision.

58. The real issue is whether the Trustees have taken into account all relevant matters, that they have taken into account no irrelevant matters and that they have not reached a decision that no reasonable body of trustees could have reached. The decision making process has been heavily criticised, and rightly criticised, by counsel for the responding parties, especially Advocates Bound and Greenfield.

59. It is impossible to pinpoint a meeting of the Trustees at which the momentous decision the Court is asked to bless was taken. Instead, what emerged during the hearing of the Application and in particular during Advocate Newman's closing submissions is that this was a rolling decision taken over a long period of time, discussed in telephone conversations mainly between A, on behalf of A1 and A2, and A3, of which no file notes were created or, if they were recorded, they were not disclosed. It was also considered, he said, in a multitude of emails exchanged between them which, again, were not produced. Such a failure of disclosure is unforgivable, especially when the [Respondents'] counsel had pressed the Applicants' Advocates on numerous occasions to ask whether there had been full disclosure.

60. The importance of full and complete disclosure in a case such as this is to enable the other parties concerned to understand what considerations were taken into account by trustees in reaching a momentous decision. Otherwise they cannot be satisfied that the trustees have properly exercised their powers. Hence, full disclosure of all relevant evidential material should have been made available to the other parties and, if that had happened, such of the material as is relevant and necessary to the Application could have been laid before the Court.

61. I agree with Advocate Bound's comment that it is surprising that professional trust administrators (who are charging substantial fees for their services) did not prepare a dossier of relevant information for consideration by the Trustees at a meeting convened for the purpose of considering this momentous decision and that they did not convene such a meeting. Had they done so, we would have known what matters were considered and, assuming that they would have produced a thorough and comprehensive minute of their deliberations, it would have been possible to review the decision for the purpose of assessing its propriety.

62. There were a number of factors for the Trustees to consider and they should have appreciated that the Court would not be able to bless the decision unless it could be satisfied that they had approached the process in a proper and satisfactory manner. Instead, it is impossible to discern what the Trustees had in their minds at the relevant time or times.

63. Significant issues for the Trustees to have considered include the wishes of the Settlor that the Property should be kept at least until [the Children turn 40] and possibly thereafter and that it should only be sold *"in exceptional circumstances and then only at an appropriately extraordinary price such that the news will reach him even in heaven".* Those wishes were not binding upon the Trustees but they should have been taken into account. It is impossible for me to decide whether they were properly considered in the course of deciding to sell, or to participate in the sale of, the

Property. It is also unclear as to what advice the Trustees had been given at that time as to the value of the Property. Instead, the impression given by the minutes of the meeting held 10th July 2012 is that the Trustees were looking upon this more as a decision to sell a trust investment, without due regard to the Settlor's wishes or of the emotional and sentimental factors.

64. The Trustees were concerned about the erosion of the capital of the Children's Trust but there is insufficient evidence to show that they properly considered any other options to reduce the level of distributions by curtailing the extraordinarily extravagant and expensive lifestyle of the Children. It is a matter of further concern that they do not appear to have properly considered what could be done to prevent or limit what they described as "leakage" of income to R1 even though the Children's Trust was primarily for the benefit of the Children and Trust 3 was primarily for R1's benefit.

65. Another area of uncertainty and lack of clarity surrounds the [Anonymised Issue]. Advocate Newman says that it was not a determinative factor but nonetheless it had a bearing on [the Trustees'] decision. It is unclear as to precisely what advice was available to the Trustees when they took the decision. For the reasons I have outlined in this judgment, the advice may have been inadequate in that the Trustees may not have been briefed on all the relevant aspects of the issue, especially in relation to enforcement proceedings by the [persons concerned with the Anonymised Issue]. In my view, a reasonable trustee would have ensured he received a more comprehensive briefing, preferably in writing, given the complexity of the issue and would not have been content to rely on oral advice in respect of a crucial aspect. It is not clear that the Trustees were properly advised before deciding [in respect of the Anonymised Issue], nor is it clear that the implications of that decision (assuming it was correctly decided) were properly considered by the Trustees when deciding to sell the Property.

66. It is also impossible to tell what account the Trustees took, at the relevant time or times, of the wishes of the Children, their mother and their aunt who [is] also one of the protectors. There is an impression given that they may have disregarded their wishes because they saw the Property principally as an investment rather than a long term home for the Children.

67. Although it is not directly relevant to the Application before me, I feel I should comment that one of the most disturbing aspects of the whole case is the extent to which the relationship between the Trustees and the beneficiaries appears to have broken down. In all trust situations, it is inevitable that trustees will from time to time have to take decisions that are opposed by beneficiaries and that friction and hostility may be present. That is undoubtedly so in the present case and I fear that the hearing of the present Application and the unsatisfactory outcome of the Application may have helped only to add to the friction and tension in the relationships. If the present situation has not already reached the point where the Trustees can no longer perform their duties in connection with the Children's Trust in a due and proper manner, the Trustees will need to work much more closely with R1 if they are to administer the Children's Trust in the best interests of the Children who are intended to be the principal beneficiaries of it.

68. In the circumstances, it was impossible for me to say that the proposed transaction should be blessed by the court. On the other hand, I could not conclude that the decision is one that no reasonable trustee could properly take. Therefore the only option was to decline to bless the transaction. That is what I indicated to the parties at the conclusion of the hearing and it remains my view.

