



A (As Trustee of the Trust) and R1, R2, R3, R4 and R5
Royal Court
22nd April 2016

JUDGMENT
25/2016

In the matter of an application by the Trustee to distribute assets in accordance with Schedule IV of the Trust Deed

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN CAMERA

**IN THE MATTER OF AN APPLICATION BY
The Trustee IN RESPECT OF The Trust**

Between:

**A
(As Trustee of the Trust)**

-and-

R1

R2

R3

R4

R5

Application heard on: 21st March 2016

Decision handed down: 22nd April 2016

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Applicant: Advocate A D Laws

Counsel for the First Respondent: Advocate A Cole

Counsel for the Second - Fifth Respondents: Advocate C Edwards

Cases and Materials referred to in Judgment:

The Trusts (Guernsey) Law, 2007, as amended, Sections 4, 14, 68, 69 and 71
Dicey, Morris and Collins: The Conflict of Laws (Fifteenth Edition) paragraph F25;
Underhill and Hayton: Law relating to Trusts and Trustees (Eighteenth Edition) paragraph 4.12

In the Matter of AAA Children’s Trust (Royal Court, No. 29 of 2014);
Re F (Civil Appeal No. 32 of 2013);
In the Matter of the Mischa Trust (Royal Court, 18th March, 2010).
Kay v HSBC International Trustee Limited and Others [2015] JCA 169;
In the Matter of the Rabaiotti Settlement [2000] JLR 173.
Cotton & Another v Brudenell-Bruce & Others [2014] EWCA Civ 1312;
Public Trustee & Another v Cooper & Others [2001] WTLR 90;
Richard and Others v MB Mackay and Others [2008] WTLR 1667;
Tamlin v Edgar [2011] EWHC 3949 (Ch).

J U D G M E N T

Introduction

1. References are to the documentation contained in two bundles: the core bundle and the authorities. The Application is found at B1. A helpful summary of the background can be found in A’s skeleton argument for the present hearing, at C2. The facts are set out in the first affidavit of the Trustee at D1. A preliminary hearing took place on 28th October, 2015 where directions were given, most importantly for the matter to be determined in camera and for the Letter of Wishes of the Settlor of 4th April 2007 to be provided to (R1). The Application is to obtain the approval of the Royal Court for a distribution of the Trust’s assets for the benefit of all five Respondents. The procedural chronology is set out at paragraph 8 of this skeleton. The approximate value of the Trust is US\$12.8 million.
2. (A) is the sole trustee of the Trust, established by the Settlor (now deceased). The Trustee, (A), wishes to distribute the assets in accordance with Schedule IV of the Trust Deed, in the proportions provided for by the Settlor in their Letter of Wishes. The relevant paragraphs in the Schedule are 2 and 3(c), found at A1, pages 33-34. The Letter of Wishes is at A2. The most relevant part reads:

“After the demise of the last one of us, we would like the Trustee to immediately distribute the remaining Trust Fund in the following percentages:

<i>To our daughter, (R2).....</i>	<i>23.5%</i>
<i>To our son, (R1).....</i>	<i>4.5%</i>
<i>To our grandson, (R3).....</i>	<i>22%</i>
<i>To our granddaughter (R4)...</i>	<i>25%</i>
<i>To our grandson (R5).....</i>	<i>25%</i>

A number of factual allegations have been made by (R1) in the course of this matter and are dealt with later on. The majority are no longer persisted with (see paragraphs 30-33 of (R2) – (R5)’s second skeleton at C7).

3. The last surviving Settlor died on 9th July, 2015, the other Settlor having died in 2008. There is an unfortunate, but by no means uncommon, family dispute between (R1) on one hand and the other beneficiaries (R2) – (R5), on the other. This was considered by the Directors of (A) at a Board Meeting on 21st October, 2015, minuted at A6. (R1)'s concerns were listed,

but (A) decided to proceed in accordance with the Letter of Wishes. This is opposed by (R1). The summary of his position is taken from his skeleton argument for the present hearing, at C6, paragraphs 32-33:

“32. If the Proposed Distribution is approved by the court, the beneficiaries of the Trust will be deprived of a valuable opportunity to challenge such a decision (if so advised) and to seek compensation for any loss which may flow from any flawed decision.

33. In the light of (R1)'s unresolved investigations together with the lack of sufficient and appropriate evidence that (A) has reached its decisions properly and in accordance with a proper decision-making process, the Court is invited to decline to approve the Proposed Distribution. In doing so the Court will not prohibit (A) from making the Proposed Distributions and indeed it remains open for the parties to agree a suitable way forward in the future.”

4. It should be noted that (R1)'s particular quarrel would appear to be with his sister (R2), who is also the Protector. There was an alleged overpayment *“in error”* to (R2) of US\$544,299 and US\$704,434.96 has been repaid, without any acceptance of a mistake, see Babbé's letter of 4th September, 2015, at page D109. This letter also sets out (A)'s core position in this case. (R2) – (R5) heartily support (A)'s Application. Their skeleton argument for the hearing, at C7, paragraph 36 concludes:

“36. (R1)'s skeleton provides no good reason for the Application to be delayed or refused. To do so would be to allow (R1) to engage in a “fishing expedition” in the hope that something will turn up to support an oral argument that the Trustee should not go ahead and distribute the assets held in the Trust in accordance with the Letter of Wishes, no grounds at all have been presented in this proceeding to legitimise this hope. The Second to Fifth Respondents respectfully repeat their request that the Application be granted.”

5. The various submissions made on behalf of the parties will be considered in due course, once the relevant and applicable legal principles have been set out. The basic statutory framework (set out in the Bundle of authorities at pages F2 and F4) comprises the Trusts (Guernsey) Law, 2007, as amended, Sections 4, 14, 68, 69 and 71. Under Section 4 the Royal Court has assumed jurisdiction by Act of Court dated 28th October, 2015 (B2). Section 69 sets out the general powers of the Court to make an order in respect of the execution, administration or enforcement of a trust, etc.; this power can be exercised on the application of a trustee for directions (Section 68); and costs may come from the trust, as the Court sees fit (Section 71). It should also be noted, at this stage, that the governing law of the Trust is that of the Commonwealth of the Bahamas (paragraph 14 of the Trust, at A1). In addition it is noteworthy that by consent (R1), has seen a copy of the Letter of Wishes (27th November, 2015) and Advocate Cole referred to it in his oral submissions. The parties are to be commended for narrowing the issues with various Consent Orders.

Applicable Legal Principles

6. The question of Bahamian Law can be dealt with by reference to Dicey, Morris and Collins, *The Conflict of Laws* (Fifteen Edition) at F25. This can be expressed with merciful simplicity. In particular foreign law must be pleaded and proved by expert evidence, the burden of

proving it lies on the party who bases his claim or defence on it; if no evidence or insufficient evidence is adduced the court (in England) applies English Law. Paragraph 9-025 summarizes the position by saying “... it is better to abandon the terminology of presumption and simply to say that where foreign law is not proved, the court applies English law”. There is no reason why these very well-established principles should not be followed here, so for “English” substitute “Guernsey”.

7. This is a case where (A) seeks the sanction of the Royal Court for a so-called “*momentous decision*”, according to the classification set out in the English case of Public Trustee & Another v Cooper & Others [2001] WTLR 90 (F18). In that case Hart J gave his Imprimatur to an unreported chambers decision of Robert Walker J in 1995. The category in question is where:

“...the issue is whether the proposed course of action is a proper exercise of the trustees’ powers where there is no real doubt as to the nature of the trustees’ powers and the trustees have decided how they want to execute them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.”

It is not a surrender of the trustees’ direction to the court; that is a category (3) case and there is a stark distinction. Here it is a category (2) case, the court is not getting the trustees’ discretion and deciding how to exercise it, but considering whether the trustees’ proposals “*were ones which they could properly be given general liberty to carry into effect*”.

8. The Court must act cautiously, there must be full disclosure on the part of the trustees, and, importantly it is not a rubber stamp exercise. See Tamlin v Edgar [2011] EWHC 3949 (Ch). Moritt C set all this out fully at paragraph 25 of his judgment in that case (F21):

“The very fact that the decision of the trust is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees. It is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose such as might engage the doctrine misleadingly called a fraud on the power. They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such”

This passage was cited with approval in the more recent case of Cotton & Another v Brudenell-Bruce & Others [2014] EWCA Civ 1312 (F16), where Vos LJ, at paragraph 84 said:

“84. The first point is this. The authorities that I have mentioned above that emphasize the need for caution in approving a trustee’s decision to undertake a momentous transaction need, I think, to be placed in context. The Court will not approve a trustee’s discretion without a proper evidential

basis for doing so. But the Court should equally not deprive a trustee of approval without good reason.”

He went on (at paragraph 86) to say further:

“86. The decision that these trustees have reached is indeed a momentous one. The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways.”

9. This decision is also useful in defining the procedural approach to applications of this type. Earlier on, at paragraph 78 of his judgment Vos LJ indicated that the procedure *“is intended to be quick and accessible”*. He did not consider that matters of fact needed to be tried with oral evidence, stating:

“I do not, however, think that such a situation would frequently arise, because the trustees are not asking the Court to find facts. They are asking the court to decide whether they have presented sufficient evidence to justify it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue.”

10. As the parties in their helpful skeleton arguments recognise, there is a Guernsey authority wholly consistent and in accord with the English decisions. In the Guernsey Court of Appeal case of Re F (no. 32 of 2013) Martin JA, at paragraph 11, pointed out that:

“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 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 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”

Accordingly the approach favoured in England is approved and applied in Guernsey by the binding authority of the Court of Appeal. It is the approach followed by Collas B in In the Matter of AAA Children's Trust (no. 29 of 2014) at F7.

11. Reference was also made to two Jersey cases, which, in the terms of the judgments given, are fully consistent with the Guernsey and English decisions just referred to. In the recent Jersey Court of Appeal case of Kay v HSBC International Trustee Limited and Others [2015] JCA 109 (F13), Bompas JA set out various elements of the test to apply in “momentous decision” applications. The test in the Public Trustee v Cooper case was approved and applied. At paragraph 17 Bompas JA said:

“We do not read the English case-law as introducing a new and additional requirement that a trustee must in all cases prove anything other than that the three-part test set out above has been satisfied. Furthermore, we consider that it is both unnecessary and undesirable to introduce a separate requirement for a trustee to prove in all cases what it has done in giving consideration to the matters under scrutiny: a decision-maker can consider matters carefully and still reach an irrational decision, and conversely an entirely rational decision can be reached on the basis of superficial thought processes.”

He added in the next paragraph:

“When the court is to give approval for a momentous decision the court needs to be satisfied as to the rationality of the decision; the lengths to which the court must go in examining the process by which the trustee arrived at the decision must depend on the particular decision”

In paragraph 19 Bompas JA stressed, as is a common thread in the cases wherever they come from, that each case will need to be decided on its own facts. However, the Court is still obliged to properly scrutinise the trustee's exercise of their power upon the evidence. *“There is a threshold that must be crossed.”*

This decision will be treated in Guernsey with the greatest of respect, as those judges making up the Jersey Court of Appeal also make up Guernsey's.

12. The next Jersey case is In the matter of the Rabaiotti 1980 Settlement [2000] JLR 173 (F14), a decision of Birt DB and Jurats. It is helpful when considering the status of a Letter of Wishes, something dealt with in detail by Advocate Cole in his oral submissions. Birt DB said, at 189:

“... The letter is of course not binding. If trustees slavishly follow a letter of wishes, their decision can be quashed on the grounds that it is not, in truth, the decision of the trustees. The trustees must make up their own minds as to how they should exercise their discretion in the best interests of one or more of the beneficiaries.”

He went on to say:

“Circumstances will, of course, vary and the weight given to the letter of wishes will vary from case to case.”

And:

“It is an informal document which the trustees are free to ignore. It is merely an expression of the settlor’s wishes.”

And also:

“Nevertheless, it may in many cases be a document which discloses the reasons for a decision and is, in almost all cases, likely to be material upon which such reasons were or might have been based, even in cases where the trustee chooses to depart from it”

13. The approach followed in Rabaiotti is the same as that set out in Underhill and Hayton: Law relating to Trusts and Trustees (Eighteenth Edition) at paragraph 4.12, reproduced at F24. Where a Letter of Wishes has been provided:

“... the trustees must be careful to provide documentation revealing that they consciously exercised an independent discretion when making decisions, naturally taking serious account of the Settlor’s wishes but appreciating that the ultimate decision was theirs ...”

The Test to apply

14. The essential test, as set down in the various decisions referred to was put simply by Bompas JA in the Kay case (supra) at paragraph 14:

“... the Court must satisfy itself (i) first, that the trustee’s decision, has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest.”

In addition the Court must not act as a rubber stamp and has to be satisfied as to the rationality of the decision. It is to be noted that, as the cases show, the Court is not putting itself in the shoes of a trustee and exercising a discretion, but deciding if the decision is one which the trustee could properly be given general liberty to carry into effect (see paragraph 7 above). In the present case it is accepted that the trustee has the requisite power and, as Advocate Cole very fairly accepted, there is no allegation of bad faith. Vos LJ’s helpful observations in the Cotton case (supra) mentioned at paragraph 8 above are also very apposite, in particular, *“But the Court should equally not deprive a trustee of approval without good reason”* and *“But the Court should not place insurmountable hurdles in the way of trustees in the position of those before the court.”*

Oral Submissions-Summary

15. It was fairly conceded that Advocate Cole for (R1) should speak last, but as it is his client’s attack on the trustee’s actions that forms the whole foundation of this case, it is convenient to set out his main arguments first. Advocate Cole and the other Advocates stated that the burden of proof lies on the trustee to justify their application and that their decision is blessed by the Court. Insufficient evidence has been adduced to grant it. The decision

therefore cannot be approved on the material put forward to the Court; there is an almost complete focus on the validity of the Letter of Wishes to the exclusion of other considerations. The trustee has blindly followed the Letter of Wishes which is not binding; the Settlor's wishes are not all that matters. Counsel referred to Re F (supra), paragraph 11 and Tamlin v Edgar (supra), particularly paragraph 25. "*The Court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such.*" The case of Richard and Others v AB Mackay and Others [2008] WTLR 1667 (F19) was also relied upon, especially Millett J's words at 5-H. These can be quoted now:

"It must be borne in mind that one consequence of authorising the trustees to exercise a 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. Accordingly, the court will act with caution in such a case when evaluating the possibility of risk, and it will need to be satisfied that the proposed transaction is not imprudent. But the appropriateness of the transaction is essentially for the trustees to decide, and different minds may have different views on what is appropriate in particular circumstances"

16. Counsel submitted that there was no real discernible evidence to set out the basis of (A)'s decision, their evidence is strikingly limited. There is also no evidence of the decision-making process. The Minute (A6) does not assist on the issues and there is no reference to documentation. (A) is not aware of the individual circumstances of the beneficiaries, or if there have been any changes. There is no evidence of their current circumstances. The Letter of Wishes was designed to achieve fairness, does it achieve that? It is for (A) to establish the basis of their decision. Counsel accepted there was neither bad faith nor any conflict of interest. The Letter of Wishes appears to be treated by the other parties as a living instrument, but it fossilised back in 2007. There is no burden of proof on (R1).

17. Advocate Laws for (A) painstakingly took the court through the factual background. Although not in any way forming the bedrock of (R1)'s oral arguments, both Advocate Laws and Advocate Edwards addressed the question of jurisdiction. This has already been referred to at paragraph 6 above and it was accepted (R1) had not put forward any expert evidence on the law of the Bahamas, although he had had several months in which to do so. The burden would lie on (R1). Advocate Laws suggested that it would be astonishing if there was any difference as the case relates to an exercise of discretion. The Royal Court not infrequently looks at trusts with foreign governing law, e.g., in the authorities the AAA case and Re F were both Jersey governed trusts. Advocate Laws distinguished the facts in this application from the very fundamental conflict situation in AAA. Here the decision is explained by the Letter of Wishes, what could be simpler? Then there is the Minute by independent directors, fully setting things out. It is rare for a trustee to be criticised for following a Letter of Wishes. Counsel dealt with the allegations made by (R1). The original ones have fallen away (see the summary in (R2) – (R5)'s skeleton at C7, paragraphs 32-34). Counsel also referred to the experts' reports on handwriting, in relation to the suggestion the Settlor's signatures on the Letter of Wishes are not genuine and contrasted what they said. Again, this did not form a plank of (R1)'s oral submissions. In summary there was here a perfectly reasonable and proper approach by A. Advocate Laws later responded to Advocate Cole's submissions by saying that (R1) has not given any information to (A) as to why the proposed distribution is not in his interests. It was always open for him to do so and he has had the time. What are the unresolved investigations that have to be made? He has given no assistance to (A). The key issue, it was suggested, is what information was available to the trustee when it made the decision.

18. Advocate Edwards followed very much the path favoured by Advocate Laws. It was not, in contrast to some of the other cases, such as AAA, a particularly difficult set of facts. All the serious allegations have been abandoned. He referred to the overpayment (see paragraph 4 above) which has been dealt with, essentially to minimise the area of conflict. It is accepted (A), the trustee bears the burden, but has satisfied it. (R1) needs to do more than put up flimsy arguments, he is simply dis-satisfied with his share. The trustee has given him every opportunity to say why he should get more (see e.g. paragraph 36 of the Trustee's first affidavit at D1 and Babbé's letter of 4th September, 2015 at page 110). The longer this case goes on, the smaller the trust fund gets. Finally, this was a careful Letter of Wishes.

Merits

19. As mentioned in the English case of Cotton (see paragraph 9 above) this is not a case where live evidence has, or in all the circumstances, needed to be taken. The procedure should be as simple as possible, particularly when seeking to preserve the trust property so far as is reasonably practicable. The nub of (R1)'s assault on the trustees now seems to be in how they exercised their undoubted power and arrived at the decision they now seek to be underwritten by the Court. A review of the documentation, particularly what can be considered as two key items, namely the Minute (A6) and Babbé's letter of 4th September, 2015 (D110) both already mentioned, shows that the trustee has considered the relevant points and done its best to address them. This is made clear by the circumstantial details set out at length in the Trustee's first affidavit at D1. There is a rational decision-making process and an explanation for the decision made. One thing stands out plainly, (R1) has not engaged with the trustee in any meaningful way whatsoever. He has had chances, but, to use a homely phrase, 'it takes two to tango' and (A) has had to perform a solo. The original serious allegations did not have any persuasive detail to back them up and have fallen away, the forgery allegation rests on what seems to be an inadequate report by a person with questionable qualifications, unlike those of the two experts produced to contradict it. That can be fairly discerned on the papers. What it boils down to is a wistful hope from (R1) that something more can be somehow conjured-up than the 4.5% he is going to get. Certainly (A) would be on unsafe ground if the Letter of Wishes had simply been blindly followed, but (R1) has not put anything of substance up to counteract it. What further investigations are merited are wholly unclear. It all amounts to assertions without substance.

20. As has been pointed out on behalf of (R2) - (R5), (R1), in his first affidavit (D2) at paragraph 12 has indicated:

"Whilst surprised at the terms of the Letter of Wishes, I did not intend to take issue with it if it was a genuine reflection of my parents' wishes. However, when I looked at the Letter of Wishes I immediately had some concerns over the signatures that were applied to it."

In the light of this some weight must be given to the suggestion made on behalf of (R2) - (R5) that in view of the now "*overwhelming*" expert evidence on the genuineness of the signatures, (R1)'s latest arguments have been put up late in the day. However, little mention of this aspect was made at the oral hearing. A problem in relation to the opposition by (R1) also lies in the short and rather general language of his written materials. In the second skeleton argument the conclusion refers to "(R1)'s *unresolved investigations*" (paragraph 33). This is a wide phrase and it is difficult to go beyond it in any tangible way and seize upon a specific abuse that can be laid at (A)'s door. It is therefore necessary to look at (A)'s decision-making process and how it is set out in the papers.

21. A good place to start is the detailed first affidavit of the Trustee (D1). It is noteworthy (and not apparently in contention) that the Trustee sought to meet (R1) and was unable to achieve this, not for want of trying (see paragraphs 16-17, 19-21 and 23). The points made by Appleby on behalf of (R1) throughout 2015 were considered, together with transcripts of evidence taken in the USA from HSBC staff and the trust records and accounts. (A)'s response was the letter sent by Babbé's on 4th September, 2015 (pages 95-96 of exhibits). This covers the conflict (R1) had raised with his sister (R2), the Protector; (R2)'s continued role as Protector; and concerns regarding the validity of the Letter of Wishes. The beneficiaries, (R1) - (R5) were given 14 days to make further representations. The purported error in over-payment to (R2) was dealt with. Most significantly the letter rejected the "unparticularised concerns" raised by (R1) as to the validity of the Letter of Wishes. (A)'s view was that they should distribute the assets in accordance with the Letter of Wishes. Babbé's letter is also referred to in the Minute of the Directors' meeting of (A) held on 21st October, 2015 (A6), which has already been referred to. A letter from Appleby was sent on 18th September, 2015 but was confidential to (A) and the trustee was enjoined not to disclose it to Mourant Ozannes, who act for (R2) - (R5). A request from (A) for further particulars has not been responded to. The decision of the Directors was to bring back the erroneous payment, adjusted upwards and:

"That no substantive documentation or information has been provided by (R1)'s Guernsey lawyers to support the allegation, that the Letter of Wishes is other than a valid document."

It was therefore resolved to distribute the assets "having full regard to the Letter of Wishes". The trustee recognised that this constituted an exercise of its discretion within the powers conferred on it and, having taken legal advice sought the approval of the court. As The Trustee put it (page 13 of his first affidavit):

"As will now be apparent, the Settlers expressed clear wishes before they died to which the Trustee is giving effect."

The documentation provided on behalf of (A), especially that examined above, shows that the decision-making process took time, gave opportunities to (R1) to make his contribution and was recorded with reasons given. The submission made on behalf of (R1) that the steps taken did not show any discernible evidence for the basis of the decision and the lack of a proper decision-making process does not hold water. In contrast (R1), based on what was put forward at the hearing, can only make a vague and unparticularised protest of unease, which seems to arise from a wish to have a larger slice of the cake than the Settlers intended.

Overall Assessment

22. It is only necessary, as all the authorities appear consistent, to refer back to the Guernsey Court of Appeal case of Re F (supra) and the exposition set out there, quoted at paragraph 10 above. This covers all the relevant considerations in an application of this type, although various other points, which may occur from time to time, are dealt with in the other decisions. Re F is mirrored in the recent helpful Jersey Court of Appeal decision in Kay (supra) and the observations of Bompas JA, quoted at paragraph 14 above. In this application (A), the trustee has the power, is acting in good faith and there is no conflict. The question for consideration, put simply in the words of Collas DB in In the Matter of the Mischa Trust (Royal Court, 18th March, 2010) (F10) is:

“Is the decision one which a reasonable trustee properly instructed could have arrived at?”

This does not, as is apparent from decisions such as Kay and Cotton (supra) require second-guessing or a line by line microanalysis; nor of course is the Court able to substitute its own decision in a so-called “*momentous case*”, which it plainly is.

23. The material produced in support of the application demonstrates that (A) did not rush the decision, sought meetings with (R1), obtained legal advice and was throughout aware of the need to exercise discretion. As a trustee, (A) should not be penalised for following the Letter of Wishes, in the absence of some tangible reason otherwise. Indeed it is hard not to feel sympathy for (A). They have been faced on one side with the Protean demands of (R1) and on the other with the legitimate wishes of (R2) - (R5), which became manifest in occasionally chest-thumping correspondence from Advocate Edwards (which he cheerfully accepted at the hearing). This entailed expense, effluxion of time and the need to come along to this Court for approval. On balance this was something of a thankless task. However, the documentation shows them acting responsibly and rationally throughout, with decisions properly recorded and reasoned. Not only is their application meritorious, but a responsible trustee could not properly have acted otherwise on the facts available to them.
24. Some reference has been made to the jurisdictional aspect (paragraph 6 above). (R1) has not, despite having plenty of time to do so, put in expert evidence on Bahamian law and the normal principle is therefore adopted. Guernsey Law is accordingly applicable.

Costs

25. (A)'s application for costs on a full indemnity basis out of the assets of the Trust, as set out at paragraph 5 of the application is granted in the terms sought.

J R Finch

Judge of the Royal Court