



In the matter of the Trusts (Guernsey) Law, 2007, and  
In the matter of an application by the Trustee of the  
LKM Discretionary Trust  
Royal Court  
20th July, 2016

JUDGMENT  
34/2016

Application by the Trustee, acting in its capacity as sole trustee of the Discretionary Trust, under sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007 ("the Trusts Law"), Rule 34 of the Royal Court Civil Rules, 2007 and the inherent jurisdiction of the Court for directions.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY  
(ORDINARY DIVISION)

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

AND IN THE MATTER OF AN APPLICATION BY THE TRUSTEE OF THE LKM  
DISCRETIONARY TRUST

Oral hearing and date of decision: 21 June 2016

Judgment handed down *in private*: 20 July 2016

*Anonymised version released on 2 August 2016*

Advocate Richard A Field for the Trustee

Advocate Alasdair M Davidson for the minor, unborn and unascertained beneficiaries

**Cases, Texts & Legislation referred to:**

The Trusts (Guernsey) Law, 2007

The Royal Court Civil Rules, 2007

*Lewin on Trusts*, 19<sup>th</sup> edition, paragraphs 27-079 to 27-082

*Public Trustee v Cooper* [2001] WLTR 901

*Kan v HSBC International Trustee Ltd* [2015] JCA 109; [2015] 1 JLR Note 31

*In re [AAA] Children's Settlement* [2015] WTLR 683

*In re Mischca Trust*, (15 September 2010)

*In re F Trust*, (10 September 2013)

*In re Savile deceased* [2015] WTLR 632

*In re a Trust, A v B1 & Ors*, Judgment 25/2016, (22 April 2016)

*Tamlin v Edgar* (2011) EWHC Civ. 3949

*Kan v HSBC International Trustee Ltd* [2015] JCA 109

*Cotton & anor v Earl of Cardigan & Ors* [2015] WTLR 39

**ANONYMISED J U D G M E N T**  
of  
**Lieutenant Bailiff Patrick John Talbot QC**

**Introduction**

1. By an application dated 25 May 2016, the Trustee, acting in its capacity as sole trustee of the [LKM] Discretionary Trust, (“the LKM Trust”), applied to the Royal Court under sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007 (“the Trusts Law”), Rule 34 of the Royal Court Civil Rules, 2007 and the inherent jurisdiction of the Court for directions relating to the LKM Trust. On 27 May 2016, the Bailiff ordered that the application and all hearings relating to it should be heard in private and that the Court file be sealed. The Bailiff also appointed Advocate Alasdair Davidson to represent the minor, unborn and unascertained beneficiaries of the LKM Trust, including the daughters, who are [minors]. Finally, the Bailiff directed that the administrative and legal fees, costs and expenses reasonably incurred by (i) the Trustee, (ii) [the Settlor] and (iii) Advocate Davidson in relation to the application and in taking any steps in respect of the relief granted on it be raised and paid out of the assets of the Main Fund of the LKM Trust (“the Main Fund”) on an indemnity basis.
2. The application came on for hearing before me in private on 21 June 2016. The material evidence on the application comprised the first affidavit of Mr AB [*on behalf of the Trustee*], sworn on [date], (“the Affidavit”). At the oral hearing, I heard submissions from Advocate Field for the Trustee and from Advocate Davidson and I also took into account the written submissions from each of them. In his helpful skeleton argument, Advocate Davidson said that he took as his primary focus the interests of [“the daughters”] as the living minor beneficiaries of the LKM Trust, but also took into account the interests of any future unborn members of the beneficial class who might come into being together with the interests of unascertained beneficiaries.
3. At the end of the oral hearing on 21 June 2016, I ordered that the Trustee be permitted in exercise of its powers under the LKM Trust to implement and give effect to its decision to make a distribution out of the assets of the LKM Trust in the sum of \$y million to be raised from the Main Fund, which forms part of the LKM Trust, for the benefit of the Settlor and to pay that sum into an account in the name of the ... Bank ... for ... pursuant to a deferred prosecution agreement (“the Deferred Prosecution Agreement”) and a settlement agreement (“the Settlement Agreement”), both agreements filed on [date] with the [foreign] Court ... and made respectively (i) between the Settlor and ... Office ... (“the Office”) and (ii) between the Settlor and .... An order to that effect was signed by me, duly stamped and issued on 22 June 2016. In this Judgment I shall refer to the payment of \$y million as “the Distribution”.
4. In this Judgment I shall give the reasons for my decision on 21 June 2016 to make an order permitting the Trustee to make the Distribution.
5. The LKM Trust was established by a Declaration of Trust dated [date] made by the Trustee (“the LKM Trust Instrument”); the Settlor of the LKM Trust was the Settlor. The proper law of the LKM Trust is that of Guernsey. The beneficiaries of the LKM Trust, upon its establishment, were the Settlor’s wife, the Settlor himself and the daughters together with any person, object or class of beneficiary who might be added by the Trustee. The Main Fund was established by a revocable instrument of appointment dated [date].
6. As at 31 March 2016, the assets of the Main Fund included cash of about €z million and also shares in two corporations which owned real estate in ... worth about \$w million and a one-half interest in a ... corporation which in turn owned property in ..., the half-interest being worth about £v million. It seems that as at that date €z million was the equivalent of approximately US\$u million.
7. Under the LKM Trust Instrument the Trustee holds the Main Fund upon trust for the Main Fund beneficiaries, including the Settlor and the daughters. Under Clause A, the Trustee has the power

to raise any assets out of the Main Fund and to pay, transfer or apply such payment to or for the benefit or advancement of any Main Fund beneficiary; the Settlor is a beneficiary of the Main Fund. Clause B provides that what is described as the Trustee's Function, broadly meaning, in my view, the Trustee's powers, of the Main Fund should be exercisable at the absolute and uncontrolled discretion of the Trustee and that the Trustee should have the same discretion in deciding whether or not to exercise its powers. By Clause C of the LKM Trust Instrument, certain provisions of the Trusts Law were dis-applied, including the provisions of Sections 23 and 29. Finally, by paragraphs D and E of Schedule F, it was provided that the Trustee, in exercising its powers under the Main Fund, is entitled to ignore entirely the interests of any other beneficiary of the Main Fund and that the Trustee should exercise its powers as it thinks expedient for the benefit of all or any of the beneficiaries of the Main Fund actually or prospectively interested under it and may exercise its powers for the benefit of any such Main Fund beneficiary generally in any manner without being obliged to consider the interests of the others and the Trustee should be under no duty to hold a balance between conflicting interests of Main Fund beneficiaries.

8. In summary, the Trustee had decided, subject to the application, to make a payment to or for the benefit of the Settlor of US\$y million to enable the Settlor to make a payment to the ... authorities referred to above, in order that the Settlor might compromise civil and criminal proceedings brought against him in [named country].... It is not, I believe, necessary for me to set out the details of those claims in the Judgment. Suffice it to say that the claims, in my judgment, raised material, troubling claims against the Settlor and others arising out of investments in ... alleged to have been sponsored by the Settlor and others, including investments in .... Investors sought damages against the defendants, including the Settlor, for all damage alleged by them to have been sustained as a result of allegedly fraudulent misrepresentations and omissions. The proceedings included a complaint by the [named authority], but the Settlor was not a respondent to that complaint.
9. The chronology and background facts material to the making of the application were set out in detail in paragraphs G to H of the Affidavit. I accepted this evidence ...
10. *[In paragraphs 10 to 22 of the full Judgment, which was delivered in private, the facts relevant to the application were set out.]*
11. The position of the Trustee was that its decision to make the Distribution had been taken in a proper and lawful manner and that it was in the best interests of the beneficiaries of both the LKM Trust, to which the application specifically relates, and the ["NOP Trust"], but that the decision was nevertheless one which might be considered as "*particularly momentous*" - see *Public Trustee v Cooper* [2001] WLTR 901, at p. 923. *[The beneficiaries under the NOP Trust include the Settlor and other beneficiaries under the LKM Trust.]* Accordingly, the Trustee decided to make the application both in order to protect its own position as Trustee of the LKM Trust and, as Mr AB put it in paragraph J of the Affidavit, to:  
    "*... avoid claims on the Trust Assets from actual or potential beneficiaries in the future.*"
12. In paragraph K of the Affidavit, Mr AB explained why the Trustee considered that the making of the Distribution was momentous. He set out the facts and matters relied upon by the Trustee for reaching that conclusion ...:  
    ...
13. The Trustee made the application to the Court seeking directions under what is known as a Category 2 type application as referred to in the judgment of Mr Justice Robert Walker, as quoted by Mr Justice Hart in the leading English case of *Public Trustee v Cooper* (*supra*). In paragraph L of the Affidavit, Mr AB said that he understood that in an application of that nature the Trustee did not surrender its discretion but requested the Court:  
    "*... [t]o bless a particular momentous decision that the Trustee has power to make and has, in principle, made.*"
14. Against that background, I turned to consider the legal basis of the application.

15. First, I was satisfied on the evidence ... that the Trustee had not surrendered to the Court its discretion to decide whether or not to make the Distribution.
16. Secondly, I accepted that, on the ... evidence ... the decision of the Trustee to make the Distribution, subject to an Order of this Court, was a momentous decision. I was satisfied on the basis of that evidence that the Trustee had fully explained its case that the decision was a momentous decision, and I agreed with the Trustee's argument that the decision was, indeed, a momentous decision for the LKM Trust. It was, in my judgment, a really important decision for the Trustee, as [sole] trustee of the LKM Trust, to take for the totality of the reasons relied upon by the Trustee in paragraph K of the Affidavit – see further, as to what type of decision might amount to a momentous decision, the judgment of George Bompas QC, JA in the recent Court of Appeal of Jersey case of *Kan v HSBC International Trustee Limited* [2015] JCA 109; [2015] 1 JLR Note 31, at [18]. [*"The Distribution represents approximately 33% of the assets of the Main Fund and approximately 65% of its liquid assets."*] In his helpful skeleton argument, Advocate Field submitted that the value of the Distribution was of real importance as was the fact that it was proposed by the Trustee to make the Distribution in order to resolve existing, and potentially very costly, litigation; otherwise, it was likely that there would be a potentially adverse, and perhaps ruinous, impact upon the trust assets of the LKM Trust and upon beneficiaries other than the Settlor, *i.e.* upon the daughters and the Settlor's wife. I agreed that these points were relevant, and persuasive, to me deciding that the decision to make the Distribution would be a momentous decision for the Trustee to take.
17. The test to be applied on a Category 2 case was clearly established under Guernsey law by the decision of the Bailiff in *In re [AAA] Children's Settlement* [2015] WTLR 683, at [50] to [52] adopting his own test in *In re Mischca Trust* (15 September 2010) and by the decision of the Court of Appeal in *In re F Trust* (10 September 2013) *per* John Martin QC, JA, at [11], where he said:
- "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. ..."*
18. I add, for the sake of completeness, that the same test was recently applied both in the English Court of Appeal in *In re Savile deceased* [2015] WTLR 632, *per* Patten LJ at [50] and [52-54], and in the very recent decision of Judge Finch in this Court in *In re a Trust, A v B1 & Ors*, Judgment 25/2016, (22 April 2016). Neither of these cases was considered by me on the oral hearing; but I consider that it may be helpful for me to mention them, as it were in parenthesis, in this Judgment.
19. In deciding to approve the Trustee's decision to make the Distribution, under the applicable test I was required to address the following questions:
- (a) Did the Trustee have the power under the LKM Trust Instrument, the Instrument of Appointment dated [date], and the Trusts Law to make the 'momentous decision' of making the Distribution?

- (b) Was I satisfied that the Trustee had formed the opinion to do so in good faith and that it was desirable and proper for it to make the decision?
- (c) Was I satisfied that the opinion formed by the Trustee was one which a reasonable trustee in its position properly instructed and informed could have arrived at?
- (d) Was I satisfied that the opinion arrived at by the Trustee had not been vitiated by any actual or potential conflict of interests which either had or might have affected its decision?

20. Further, in considering questions (b), (c) and (d), it is clear that the Court should exercise caution, and not act as a rubber stamp or take a lax approach; the Court has to consider the application with due consideration – see paragraphs 58 and 60 of the decision of the Bailiff in *In re [AAA] Children's Trust*, (supra), *Lewin on Trusts*, 19<sup>th</sup> edition, paragraphs 27-079 to 27-082, and *Tamlin v Edgar* (2011) EWHC Civ. 3949 per Sir Andrew Morritt C., at [25], where he said:

*“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 the 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. ...”*

21. More recently, in *Kan v HSBC International Trustee Ltd* (supra) at [19], George Bompas QC, JA said:

*“That is not to suggest that the court should take a lax approach, or that it should approve any trustee's applications without due consideration. There is a threshold that must be crossed: the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. ... the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed. Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the legal test itself. Furthermore, each case will need to be decided on its own facts, and the degree of detail that is required from a trustee cannot be uniform in all circumstances. ...”*

22. When reaching my decision on 21 June 2016 approving the making of the Distribution, I also took into account cases mentioned in *Lewin* at 27-081 and the first supplement to that paragraph relevant in this case both to the ‘momentous’ nature of the Trustee’s decision and to the satisfaction of the limbs of the test set out above. The following passages from the judgment of Vos LJ in *Cotton & anor v Earl of Cardigan & Ors* [2015] WTLR 39, (where the decision in question was the trustees’ decision to sell the principal mansion house, a so-called ‘prize asset’,) at [84] to [86], seemed to me to be helpful:

*“Placing caution in context*  
*84. The first point is this. The authorities ... that emphasise 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 decision without a proper*

*evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason.*

*85. I was much struck in this case that, if the appeal were allowed, the trust would be in an impossible bind. ... The effects of denying approval, if approval is truly warranted, are potentially dire.*

*86. The decision of these trustees is indeed a momentous one. The court is not a rubber stamp and must be cautious to ensure 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.”*

23. All applications by trustees like the present application are, therefore, largely fact-sensitive and it is to be stressed that the Trustee needed to satisfy me on an *evidential* basis. In this case, the evidence in the Affidavit, including the documents exhibited to it ..., was substantial. I was satisfied on the basis of that evidence that the Trustee had put before the court all relevant considerations (supported by evidence) and had explained its reasons for reaching the decision both carefully and fully.
24. I now turn to consider the separate parts of the applicable test which need to be established by the Trustee on this application.
25. First, it was established to my satisfaction that the Trustee had sufficient powers to make the Distribution under the clauses of, and paragraphs of the Schedule to, the LKM Trust Instrument, which I have mentioned in paragraph 7 of this Judgment. In my view, there was no question of the Trustee exceeding those powers in reaching its decision.
26. Secondly, I was satisfied that the Trustee had formed the opinion to make the Distribution in good faith and that it was desirable and proper for it to make the decision to do so. Both Advocate Field and Advocate Davidson submitted that I should be so satisfied, and, taking a cautious approach, I was so satisfied. The evidence in the Affidavit was thorough and extensive and showed both the full facts leading to the Trustee taking the decision on [date] to make the Distribution and the reasoning used by the Trustee in so deciding. In particular, as Advocate Davidson submitted, the minutes of the meeting of the Trustee held on [date], when the Trustee took its decision to make the Distribution, subject to the ‘blessing’ of the court, were both comprehensive and clear.
27. Thirdly, I was satisfied that the opinion formed by the Trustee was one which a reasonable trustee in its position, when properly instructed and informed, could have arrived at. I approached this question with caution, and I reached a clear conclusion on the basis of the thorough and extensive evidence, to which I have referred in the previous paragraph of this Judgment. Both Advocate Field and Advocate Davidson, again, submitted that I should be so satisfied; I was so satisfied. As Advocate Field submitted, the decision-making process followed by the Trustee was rational and evidence-based and came within the range of decisions that a reasonable trustee could have reached, given the circumstances. Advocate Davidson pointed out in his written submissions that the evidence established that “*the Trustee had considered all relevant points and considerations from the perspective of the minor beneficiaries*”, including the wishes of the Settlor’s wife, the mother of the daughters, the current domestic circumstances of the [named] family, the adverse impact of the present arrangements upon the educational development of the daughters in contrast to the standard to which they had been accustomed when living in [named place], the “leakage” of the trust fund of the LKM Trust due to deterioration of the ... house, the removal of the threat of criminal and civil proceedings which could lead to a return to normality of family life thereby enabling the daughters to return to their family home in [named place] and the likelihood that satisfying the terms of the Deferred Prosecution Agreement would enable the daughters to see their father, the Settlor, on a regular basis when he became able to travel free of the effect of the arrest warrant, with funds coming available from the LKM Trust to facilitate such travel. I confirm that I took these matters into account when reaching my conclusion on this part of the applicable test as well as the illiquidity of other available assets within either the NOP Trust or the

LKM Trust from which a payment of \$y million could be made and the absence of other sources of funds to make such a payment to the Settlor to enable him to satisfy the demands of the authorities, including the Office.

28. Finally, I was satisfied that there was no evidence that the decision of the Trustee to make the Distribution had been vitiated by any actual or potential conflict of interests which either had or might have affected its decision. Neither Advocate suggested that there was any such evidence, and, in my judgment, they were correct not to have done so.
29. Accordingly, after carefully taking into account the evidence and the submissions of Counsel, I decided to approve the Trustee's decision to make the Distribution. Indeed, in my judgment, there was no good reason for me to have deprived the Trustee of such approval.
30. An Order was made by me on 22 June 2016 giving effect to my decision, thereby allowing the Trustee to make the Distribution before [date] *[in order to comply with the terms of the Deferred Prosecution Agreement and the Settlement Agreement.]*

**PATRICK JOHN TALBOT QC**

Lieutenant Bailiff

2 August 2016 (date of the anonymised version)