



**The First Trustee and The Second Trustee v
Beneficiary 1, 2, 3 and Minor and Unborn
Beneficiaries**

Royal Court
24th February 2016

**JUDGMENT
53/2016**

Momentous decisions.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

**IN THE MATTER OF THE A, B, C, AND D TRUSTS
AND THE W, X, Y AND Z TRUSTS**

**THE FIRST TRUSTEE
and
THE SECOND TRUSTEE**

-AND-

Between

**BENEFICIARY 1
and
BENEFICIARY 2
and
BENEFICIARY 3
and
MINOR AND UNBORN BENEFICIARIES**

Applicants

Respondents

Dates of hearing: 3rd and 4th June 2015

Reasons handed down: 24th February 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

**Counsel for the Applicants: Advocate R G Shepherd
Counsel for the Adult Beneficiaries 1, 2 and 3: Advocate C J Hay
Counsel for the Minor and Unborn Beneficiaries: Advocate M J Adkins**

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
Public Trustee v Cooper [2001] WTLR 901
Re F [2013] GLR 388
Re the AAA Children's Trust (unreported, 8 January 2014)
Butterfield Trust (Guernsey) Limited v Thommessen (unreported, 18 March 2010)
Cotton v Brudenell-Bruce [2014] EWCA Civ 1312
Re the X Trust, the Y Trust and the Z Trust (unreported, 21 November 2014)
Spread Trustee Company Limited v Hutcheson [2012] 2 AC 194

Introduction

1. By an Application dated 20 May 2015, the trustees of eight Guernsey law settlements sought the Court's blessing of their momentous decisions to appoint to the Settlor of them (in the Settlor's capacity as a member of the class of beneficiaries of each) the entire capital and income of each of those trusts. Following a hearing on 3 June 2015, I delivered an oral judgment the following morning granting the relief sought by the Application. The hearing took place in private, as is usual when family trusts, especially those where there are minor beneficiaries, are involved. I indicated that I would, when time permitted, write up the full reasoning for reaching the decisions so that it would be available to the parties should any of them need to refer to it. Unfortunately, a combination of events and factors has meant that it has taken me much longer than I would have wished to complete this task, for which I apologise. In order to preserve the confidential nature of what took place, I have written these reasons in such a way that they do not identify the persons concerned and so this judgment can potentially be disseminated further.

The law

2. The Application was made pursuant to section 69 of the Trusts (Guernsey) Law, 2007 and/or the inherent jurisdiction of the Court. Section 69(1) provides that:

"On the application of any person mentioned in subsection (2), the Royal Court may –

- (a) *make an order in respect of*
 - (i) *the execution, administration or enforcement of a trust, ...*
 - (ii) *any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof, ..."*

Subsection (2)(b) gives standing to make the application to a trustee.

3. The jurisdiction invoked by the Trustee Applicants is the well-established second category of cases set out in Public Trustee v Cooper [2001] WTLR 901. This has been dealt with by the Court of Appeal in Re F [2013] GLR 388 as follows (at para. 11):

"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 different way 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 not 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 principles that a court will not enforce the exercise of a power against the wish of the trustees."

4. In Re the AAA Children's Trust (unreported, 8 January 2014), the Bailiff referred (at para. 51) to the questions the Court should consider in a category 2 application as set out in Butterfield Trust (Guernsey) Limited v Thommessen (unreported, 18 March 2010):
 - (i) Does the trustee have the power to make this "momentous" decision?
 - (ii) Is the Court satisfied that the trustee formed the opinion in good faith and that it was desirable and proper for it to make the decision?
 - (iii) 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?
 - (iv) 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?

5. Advocate Shepherd, on behalf of the Applicants, has also drawn attention to the way the courts in England and Wales have further explained the duty of the court in a category 2 application recently. In Cotton v Brudenell-Bruce [2014] EWCA Civ 1312, Vos LJ summarised the position as being that, "*after a scrupulous consideration of the evidence*", the court had to be satisfied of three matters (see para. 12):
 - "i) That the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;*
 - ii) That the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at;*
 - iii) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring."*

On the basis that the formulation adopted previously by this Court is not at variance with this summary, I am satisfied that it remains appropriate to approach this type of case in the manner

directed by the Court of Appeal and as applied by the Bailiff. Through asking and answering the four questions, the Court can reach a decision as to whether to bless a trustee's momentous decision.

6. I do, however, note and adopt the additional guidance offered by Vos LJ in the *Cotton* case:

“84. *The authorities that I have mentioned ... 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. ...*

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.”*

In my opinion, these passages offer sound guidance that can sensibly be applied by this Court. Realism must, of course, play its part in the Court's consideration of what a trustee has decided.

Evidence

7. The evidence in support of the Application is contained in an Affidavit of an Authorised Signatory of the First Trustee sworn on 20 May 2015 and an Affidavit of a director of the Second Trustee also sworn on the same day. It was apparent from these Affidavits that the two Trustees had been co-ordinating their responses to the request from the Settlor to distribute the assets of the four trusts of which each was the trustee and that extensive preparation had been made to supply the respective decision-makers with a wealth of information to take into account at meetings that had been convened sequentially on 14 May 2015. The importance of providing this amount of material to the decision-makers was specifically to address the criticisms made at para. 61 of *Re the AAA Children's Trust (supra)*.
8. Some of the background is set out in a previous decision in respect of three of the trusts (*Re the X Trust, the Y Trust and the Z Trust* (unreported, 21 November 2014)). The Court granted an application by one of the beneficiaries of those trusts pursuant to section 57 of the 2007 Law for the variations of the respective trust instruments described in that decision.
9. Each of the A, B, C and D Trusts was settled in 1985. They are discretionary trusts. The class of beneficiaries was broadly similar in respect of each trust. The First Trustee was appointed to the trusteeship of each of these trusts in 1987. The Settlor provided to the First Trustee letters of wishes. During the Settlor's lifetime, the Settlor wished to be regarded as the principal beneficiary. The importance of the Settlor's family being able to continue to prosper was highlighted.
10. In late 2014, the Settlor informed the First Trustee that the Settlor was minded to request that the whole of the trust fund of each trust be distributed to the Settlor. This was a step that had been under consideration for some years. The assets in question principally comprise shares in a holding company. The value of those shares is very significant. Between them, the four trusts also hold what might be described, at least in comparative terms, as a modest amount of cash.

11. The First Trustee initiated steps to prepare itself in anticipation of such a formal request being made to it by the Settlor. It took tax advice from English Leading Counsel. Through its own solicitors and Advocates, it communicated with the solicitors and Advocates engaged by the adult beneficiaries of the trusts. The advantages and disadvantages of the proposed distribution to the Settlor of the entirety of each trust were explained to them and discussed by them. Each beneficiary indicated support for the proposed transaction distributing the trust funds to the Settlor.
12. Earlier this year, the written consent of the protector of these trusts was given for various steps prior to making this Application to be undertaken. The First Trustee executed agreements in March 2015 with a Guernsey-based company within the group of which it is part exercising the power conferred by clause 26(2) in each of the trust instruments enabling the trustee to move the administration and management of each trust to Guernsey. In April 2015, the proper law of all four of the trusts was changed from England and Wales to Guernsey. Also in April 2015, Deeds of Exclusion were executed narrowing the class of beneficiaries for each of the trusts so that it became limited to the Settlor, the Settlor's spouse, the Settlor's two children and those children's issue.
13. Each of the W, X, Y and Z Trusts was also settled in 1985. Two of the trusts are discretionary trusts. The other two trusts are interest in possession trusts (the terms of which were described in the November 2014 judgment, where it was explained that these were accumulation and maintenance trusts, which benefited from a particular tax treatment up until 2006). The Second Trustee was appointed to the trusteeship of each of the discretionary trusts in 1996 (although another group company had been so appointed in 1987) and to each of the interest in possession trusts in 1989. The Settlor provided to the Second Trustee letters of wishes. The importance of the Settlor's family being able to continue to prosper was highlighted. In respect of the W Trust, the terms were a mirror to the letters of wishes in respect of the A, B, C and D Trusts. In respect of the two interest in possession trusts, the Settlor wished the Settlor's child who was the Applicant (and any issue) in the previous case to be treated as the principal beneficiary. In respect of the other discretionary trust, the Settlor wished the Settlor's other child (and any issue) to be treated as the principal beneficiary.
14. In late 2014, the Settlor similarly informed the Second Trustee that the Settlor was minded to request that the whole of the trust fund of each trust be distributed to the Settlor because it was again a step that had been under consideration for some years. The assets in question principally comprise shares in a holding company. The value of those shares is very substantial. In addition, the two interest in possession trusts hold other assets that are quite substantial if they were to be viewed in isolation, which include the value of loans made for the benefit of the Settlor's children, which have largely been done by way of deeply discounted bonds.
15. In anticipation of the Settlor formalising the distribution request, the Second Trustee took the same steps as the First Trustee. Indeed, the actions of the two Trustees have been coordinated throughout the process leading to the hearing.
16. Earlier this year, the written consent of the protector of the W Trust was given for those changes, where applicable, to be undertaken similar to those taken in respect of the trusts where the First Trustee is the trustee preparatory to making this Application. The proper law of the trust was changed from England and Wales to Guernsey in February 2015. In April 2015, an irrevocable Deed of Exclusion was executed narrowing the class of beneficiaries for the trust so that it became limited to the Settlor, the Settlor's spouse, the Settlor's two children and those children's issue. As a result of the Court's Order of November 2014, the class of beneficiaries of the X Trust had similarly been limited to the same people and, as a result of that Order and steps taken by the First Trustee in April 2015, the classes of beneficiaries of the two interest in

possession trusts has ended up being broadly comparable, albeit that they do not include the Settlor's spouse.

17. Those attending the meetings held sequentially on 14 May 2015 were provided with dossiers of documents. Quite understandably, there has been a considerable degree of overlap in what was provided to both the First Trustee and the Second Trustee and, insofar as I can, I will refer to content without repeating myself.
18. The first item was a letter of advice from Advocate Matthew Guthrie dated 11 May 2015 providing a summary of the terms of each trust. He referred in particular to clause 4(1) of the six discretionary trusts, which provides in each case that:

“THE Trustees shall stand possessed of the Trust Fund and the income thereof upon such trusts in favour or for the benefit of all or such one or more to the exclusion of the others or other of the Appointed Class at such age or time or respective ages or times in such shares if more than one and with and subject to such powers and provisions for their respective maintenance education advancement or benefit as the Trustees (being at least two in number or a corporate trustee) shall at their absolute discretion at any time or times during the Trust Period by any deed or deeds revocable or irrevocable appoint (regard being had to the law relating to remoteness)”.

In respect of the two interest in possession trusts, he referred in particular to clause 10, as varied by the November 2014 decision, which provides in both cases that:

“NOTWITHSTANDING and in derogation of the trusts aforesaid the Trustees may subject as hereinafter provided by any deed or deeds revocable or irrevocable executed before the end of the Trust Period in their absolute discretion appoint such new or other trusts powers and provisions in respect of the whole or any part or parts of the Trust Fund or the income thereof (including protective trusts and discretionary trusts and powers exercisable by the Trustees or any other person or persons and trusts and powers for the accumulation of income during the Trust Period) for the benefit of all or any one or more exclusively of the others or other of the Appointed Class as the Trustees shall with due regard being had to the law relating to remoteness and with the written consent of the Protector determine PROVIDED ALWAYS that

(1) No exercise of the foregoing power shall invalidate any prior payment or application of the capital or income of the Trust Fund or affect any part thereof to which any person would apart from such power previously have become absolutely and indefeasibly entitled”.

Advocate Guthrie further pointed out that the Settlor was included within the Appointed Class of each trust meaning that the trustee had power, subject to obtaining the written consent of the protector each time, to distribute the whole of the capital of the trust fund to the Settlor. In relation to the two interest in possession trusts, it was further noted that such an appointment would defeat the Settlor's child's life interest in the respective trusts funds.

19. Advocate Guthrie further advised both Trustees of their duties:
 - (a) To act responsibly and in good faith – which requires the Trustee to act reasonably and after having given genuine consideration to the exercise of the power of appointment;

- (b) To take only relevant matters into account – which requires the Trustee to inform itself, before taking the decision, of matters which are material to the decision (including taking advice from appropriate professionals and experts);
- (c) To act impartially – albeit given the width of the power of appointment, this would not preclude the Trustee from favouring one beneficiary over another when exercising the power of appointment; and
- (d) Not to act for an ulterior purpose – which requires the Trustee not to exercise the power of appointment for a purpose or with an intention other than to benefit members of the “Appointed Class” in each case.

He also suggested that each Trustee might note that:

- (i) it is entitled to take serious account of the historic letters of wishes for the Trusts as a relevant and important factor when exercising its discretion but that the Trustee must not follow those letters of wishes without forming its own independent opinion;
- (ii) it is also entitled to take into account the Settlor’s request and the supporting correspondence provided by Macfarlanes LLP setting out the UK tax considerations in making such a distribution;
- (iii) it should take account of the wishes expressed by the adult beneficiaries and their respective financial needs as the Trustee would understand them following its discussions with each of them;
- (iv) given the value of the trust funds, it should carefully consider the tax implications of making a distribution of the whole of the trust funds to the Settlor and could rely on the tax commentary provided by Berwin Leighton Paisner LLP in forming its own opinion of the advantages and disadvantages from a tax perspective of making such a distribution; and
- (v) whilst the tax implications were a very important factor to take into account, it was not the only issue to which the Trustee must address its mind. Ultimately, the Trustee had to consider whether each requested distribution to the Settlor was a proper exercise of its powers and should appreciate that such an appointment would bring to an end very valuable trusts, with the consequence that the assets comprised in each would no longer be available to benefit other beneficiaries.

20. The second item in each dossier was a set of the Settlor’s letters of wishes, to which I have previously referred.

21. The third item in each dossier was a letter to Macfarlanes. In the case of the A, B, C and D Trusts (and it was anticipated also in respect of the W Trust), the letter came from Berwin Leighton Paisner and was dated 8 January 2015. In the case of the other three Trusts, collectively described as the Children’s Trusts, the letter was from Mourant Ozannes and dated 9 January 2015. Both letters were, however, in broadly similar terms. They sought input from Macfarlanes, on behalf of the Settlor and the adult beneficiaries, in relation to the tax and other advantages and disadvantages for the beneficiaries. The Mourant Ozannes letter further asked Macfarlanes to address specific issues in relation to the two interest in possession trusts, seeking an explanation of the rationale for distributing the liquid assets held in them to the Settlor and

the tax consequences thereof and also in respect of why the Settlor considered the assets held in the Children's Trusts should no longer be earmarked for the Settlor's children and the issue of those children.

22. The fourth item in each dossier was the response received from Macfarlanes, in both cases dated 23 January 2015. Those letters of advice first set out in detail an assessment of why it is now felt that the Settlor is not domiciled in the United Kingdom and how that has been dealt with in correspondence with HMRC. They explained that there would be significant income tax and capital gains advantages and no disadvantages to distributing the whole of each trust fund to the Settlor. There would also be inheritance tax advantages. The increased tax exposure resulting from delaying distributions following the 2015 ten year anniversary charge was regarded as being significant. Because of the different consequences in respect of the two interest in possession trusts, the response to Mourant Ozannes explained in addition where the inheritance tax liabilities would potentially fall in different scenarios. Macfarlanes noted that the unwinding of the trusts offered quite substantial savings in respect of maintaining the structure created by the trusts. In relation to the question whether substantially the same advantages could be achieved by a different approach, these letters explain that the inheritance tax advantages capable of being secured if, as it was understood to be the case, the Settlor is non-UK domiciled can only be achieved through unwinding the trusts. Similarly, only a distribution of the whole of each trust fund and the winding up of the trusts would achieve the income tax advantages described. In respect of the additional questions posed relating to the interest in possession trusts, Macfarlanes noted that there is no similar window of opportunity for distributing the liquid assets as applies to the shares held. Despite that, the rationale for the Settlor requesting distribution of the entirety of these two trusts relates to the significant income tax and capital gains tax advantages, together with the potential inheritance tax advantages gained by a distribution to the Settlor without liability to UK tax which in turn can be used to provide benefits to the Settlor's children and their issue for their long-term benefit.
23. The fifth item in each dossier is a letter dated 24 April 2015 sent by Berwin Leighton Paisner to both Trustees, which contains advice relating to the domicile status of the Settlor. That advice notes that ascertaining a person's domicile is always a highly fact-sensitive exercise. It refers to the facts provided and concludes that the Settlor has, in their view, acquired a domicile of choice away from the United Kingdom.
24. The sixth item in each dossier is a letter dated 13 May 2015 sent by Berwin Leighton Paisner to both Trustees, which contains advice about the UK tax implications that would flow from a decision to distribute the whole of the assets of the trusts. For income tax and capital gains tax, the whole of the accumulated income and realised and unrealised gains could be "*washed out*" of the trusts, free of tax. The "*opportunity to create clean capital*" was described as "*a rare and significant one which holds considerable tax advantages*". In respect of inheritance tax, the position was more uncertain because of there being no guarantee that the Settlor is not domiciled in the United Kingdom, but if the Settlor were determined to be non-UK domiciled, the entire value of the non-UK assets of the trusts would be outside the scope of inheritance tax. There were more factors to take into consideration, including the impact and incidence of business property relief, which made the decision to distribute the whole of each trust more finely balanced. In relation to timing, a distribution in the second quarter after the 10-year charge would have the potential to save expense, but nothing on timing should be regarded as determinative, although a distribution sooner rather than later would be preferable. As regards the two interest in possession trusts, certain risks associated with inheritance tax exposure were set out and it was suggested the Trustees needed to balance the significant income and capital gains tax advantages with those potential disadvantages. The letter concluded that:

"From a tax perspective, a distribution of a substantial part is justified by income tax and CGT benefits.

A decision to distribute the whole of the Trusts is more finely balanced. However, taking into account the likely IHT benefits, and ancillary issues, we consider that from a tax perspective, deciding to make the distribution requested would be within the range of decisions that a reasonable trustee would make.

In addition we take the view that it is not necessary to wait until the final determination of [the Settlor's] domicile, to take this decision."

25. The seventh item in each dossier is a set of notes relating to meetings that representatives of both Trustees jointly held in turn on 26 March 2015 with each of the adult beneficiaries, ie, the First to Third Respondents. The notes show that the Trustees went to considerable effort to explain the Settlor's request and the consequences of the Trustees reaching decisions to make the distributions sought. Each of the Respondents was asked to reflect on those discussions held and to write to the Trustees in due course. The letters each of them sent, all dated 13 May 2015, form item 8 in each dossier. Those letters supported the Settlor's request, the Respondents believing the proposal to distribute the assets and to wind up the Trusts as being beneficial to the family.
26. The ninth item in each dossier contains cashflow forecasts for the envisaged needs of the Settlor's two children for a period of five years.
27. The tenth item in each dossier is a letter dated 30 April 2015 from Advocate Adkins to the Trustees' Advocates explaining the steps he had undertaken to understand the nature and effect of what was proposed and to indicate that, if the Trustees proceeded to distribute all or part of the Trusts to the Settlor, he did "*not at this stage see any reason why [he] would need to oppose such an application on behalf of the minor and unborn beneficiaries*".
28. The eleventh item in each dossier is a note of a meeting held on 1 May 2015 using Skype involving representatives of both Trustees and the Settlor, at which the Trustees' Advocates were also in attendance. Following this meeting, the Settlor then wrote to both Trustees on 13 May 2015. A copy of that letter is the item 12 in each dossier. That letter contains the following passages:

"I would like to confirm that I am confident that there will be significant advantages if all of the assets of the trusts are distributed to me outright. The historic tax advantages of the ... Trusts are no longer relevant and I have been advised that the ... Trusts are now positively disadvantageous from a UK tax perspective. In light of my view that I am no longer domiciled in the UK, retaining the trusts means that my family are indirectly suffering unnecessary continuing exposure to UK inheritance tax. As I confirmed when we spoke on 1 May, it is my firm intention to remain in [the country where I reside] and I have no plans to return to the UK or to move elsewhere in the future. ...

Maintaining the trusts incurs substantial expenses in terms of legal and administrative fees and also adds a layer of complexity to my affairs which I no longer desire. I would like to simplify my estate and the funds to be left to my family."

29. The thirteenth item in each dossier is an e-mail from Macfarlanes dated 13 May 2015 setting out some details about a claim pending against a number of corporate entities plus the Settlor personally. The inclusion of the Settlor is believed to be tactical because the lawyers suggested that there was no cause of action against the Settlor and, if the matter were to escalate from the letter of claim to court proceedings, an application to have the claim struck out as disclosing no cause of action would be made.

30. The fourteenth and final item in each dossier is a set of the most recent financial statements that had been prepared in relation to the Trusts, ie, those of the A, B, C and D Trusts are in the dossier considered by the First Trustee and those of the W, X, Y and Z Trusts are in the dossier considered by the Second Trustee.
31. The first of the meetings on 14 May 2015 was that of the Second Trustee. Minutes of that meeting are exhibited to the Affidavit of the director of the Second Trustee. Those minutes set out in even greater detail than I have in this judgment the considerations derived from the material contained in the dossier that the Board of the Second Trustee had to consider. The Affidavit evidence also explains that the Board resolution that it would be appropriate in principle, subject to the approval of this Court, to appoint the whole of the income and capital of the W, X, Y and Z Trusts to the Settlor was taken unanimously. In reaching those decisions, the Board needed to consider whether it was in principle minded to make an appointment to the Settlor from any of those four Trusts and, if so, whether the Board should agree to make an appointment from all or only some of them and, in each case, whether the appointment should be of the whole or just part of the respective trust funds.
32. It was noted in the Affidavit that two of the Trusts were discretionary and so subject to an inheritance tax charge every 10 years because the Settlor had been domiciled in the United Kingdom at the time both were settled. If business property relief were to cease to apply to the shares held within those trusts, both trusts would be subject to a 6% inheritance tax charge every 10 years, which would be a significant tax liability, even with a minority discount being applied. The Board recognised that the income tax and capital gains tax benefits associated with an appointment to the Settlor were very significant, as set out by Berwin Leighton Paisner. As a result, the director suggests that the decision in respect of the two discretionary trusts “*was not a difficult decision to reach*”.
33. The director also noted that the Board found the decisions in relation to the two interest in possession trusts (ie, two of the so-called Children’s Trusts) had been more difficult. The tax advice from Berwin Leighton Paisner clearly sets out the differences between the tax treatment of these trusts and the other trusts. Because there is no exit charge accruing on a quarterly basis, there was less urgency for a decision to be made at the same time. However, it was recognised that there were still significant potential income tax and capital gains tax advantages (and significant inheritance tax benefits) in deciding to make a distribution from both of the trusts to the Settlor. The Board of the Second Trustee was alive to the fact that these two Trusts were the only ones that held significant assets other than the shares in the holding company. The Board was conscious that these Trusts (along with the third of the so-called Children’s Trusts) had originally and for a long time thereafter been earmarked for the Settlor’s children and that the Settlor had only recently been re-admitted to the class of beneficiaries. In that regard, the Board took into account that this step had required Protector consent, where the Protector of both of those Trusts is a company controlled by the Settlor’s children. The Board appreciated that, if the Second Trustee wished to make the appointments from these two Trusts, as requested by the Settlor, the consent of the Protector would still need to be obtained.
34. The director further deposes to the Board’s awareness that the Settlor’s children had benefited from both of these Trusts, albeit that funds had been provided by way of loans or deeply discounted bonds rather than by outright distributions because of the differing tax implications and that, if the appointment of all the assets were made to the Settlor, neither of the children would be able to look to the Second Trustee for ongoing financial support. The Board understood from the material in the dossier that this consequence had been raised with both of the children and that each had had discussions with the Settlor about their anticipated financial needs for the next five years and that both had offered their support to the proposal in the light of everything they knew about these consequences.

35. Because the director had known the Settlor's family for around 20 years and had met with the Settlor many times over those years, the director offered the view that the family appeared to be a "*close knit family*". Given that lengthy relationship with the beneficiaries of the Trusts, the director had no hesitation in believing the Settlor's confirmation that the Settlor will continue to support those two children, and the families of those two children in the years ahead. Further, the director suggested the Board felt able to regard the support offered to the proposal by the children themselves as meaning that the Settlor's children had taken into account the best interests of their own children, both those already alive and any that might be born in the future.
36. Having given the proposal much consideration, the Board resolved that it was appropriate in principle to appoint all the trust funds of the two interest in possession trusts to the Settlor.
37. The second of the two meetings on 14 May 2015 was that of the First Trustee. Minutes of that meeting are exhibited to the Affidavit of the Authorised Signatory of the First Trustee. Those minutes similarly set out in even greater detail than I have in this judgment the considerations derived from the material contained in the dossier that the fiduciary board of directors of the First Trustee had to consider. The Affidavit evidence explains that the fiduciary board resolved unanimously that it would be appropriate in principle, subject to the approval of this Court, to appoint the whole of the income and capital of the A, B, C and D Trusts to the Settlor. It was considered that it had been made abundantly clear in the advice received from Mourant Ozannes that these appointments were within the Trustee's powers and that the tax advice set out by Berwin Leighton Paisner detailed the potential tax advantages and disadvantages of such a decision. The fiduciary board took into account that each appointment was consistent with the Settlor's letters of wishes; that no appointments had been made to the adult beneficiaries since the four Trusts had been established, from which it could be inferred that none of them has needed to rely on those Trusts; that all three of the adult beneficiaries supported the proposed appointments; that none of the appointments was opposed by Advocate Adkins on behalf of the minor and unborn beneficiaries; and that an appointment was potentially very advantageous from a UK tax perspective as confirmed by the advice given by Berwin Leighton Paisner and discussions held with Counsel.

Discussion

38. It is apparent that each of the individual decisions both of these Trustees was called upon to make is a momentous decision. The assets in question are substantial and the issue to be considered was whether to appoint the entirety of each trust fund to the Settlor. There arguably can be no more momentous decision than to wind up a trust.
39. Each of the trust instruments contains a wide overriding power of appointment, including the power for the Trustee to appoint the trust fund to one or more of the beneficiaries as they see fit in the absolute discretion of the Trustee. The Settlor was within the class of beneficiaries in relation to all eight of the Trusts. I was satisfied, therefore, that both the First Trustee in respect of the A, B, C and D Trusts and the Second Trustee in respect of the W, X, Y and Z Trusts have the powers under the respective trust instruments to make the momentous decisions reached on 14 May 2015.
40. There has been no suggestion that either of the Trustees was not acting in good faith. Indeed, from my review of the evidence adduced and, in particular, what was provided to the two Trustees in their respective dossiers and the discussions that are recorded in the Affidavit evidence, that each of the Trustees has approached the decision-making process carefully and cautiously. Both have taken appropriate advice and have properly considered how to respond to the advice taken. As it was put in the Settlor's letter to the Trustees dated 13 May 2015, "*It*

has been quite a journey!”, which supports my conclusion that the opinion of each Trustee in respect of each momentous decision it took was formed in good faith.

41. I took into consideration the comprehensive dossiers of materials that had been prepared to assist both Trustees. It was, in my view, sensible for the meeting of the Second Trustee on 14 May 2015 to precede that of the First Trustee. The Second Trustee, on any assessment, had the harder task because of the two interest in possession trusts. The material shows that the Trustees had been cooperating in their approach to the Settlor’s request for appointments to be made from all of the Trusts. Had the Second Trustee reached different decisions than it did, those decisions may have had an impact on the decisions facing the First Trustee. The sequence of the meetings was, therefore, logical.
42. I was satisfied that the decision-making process in respect of the two discretionary trusts of which the Second Trustee was the trustee demonstrated that the opinions formed by the Second Trustee to make the appointments requested were decisions that a reasonable trustee in its position properly instructed could have arrived at. The approach taken by the Second Trustee followed the advice tendered to it. I do not regard it as posing any problem that there was no reference in that advice, or in the minutes of the Second Trustee’s meeting, to the obligation in section 22(1) of the 2007 Law for a trustee to act en bon père de famille. As is clear from *Spread Trustee Company Limited v Hutcheson* [2012] 2 AC 194 (at para. 20), “*the duty is to act as a reasonable and prudent trustee would act, that is with reasonable care and skill*”. Where, as here, the trustee is a professional, this means with the particular care and skill expected of a professional trustee. A trustee will act in all the circumstances to protect and advance the beneficiaries’ interests. The minutes of the meeting (as supplemented by the Affidavit evidence) explain what was taken into account. I was prepared to overlook that there are minor slips in what is recited in these minutes because, in my opinion, they do not affect the substance of what was being considered and the decision-making process that followed. For example, in para. 4.5 of the minutes, reference is made to the letter of 8 January 2015 sent by Berwin Leighton Paisner to Macfarlanes, which was a step taken in respect of the A, B, C and D Trusts. That paragraph also correctly refers to the letter of 9 January 2015 sent to Macfarlanes by Mourant Ozannes in similar terms but in respect of the W, X, Y and Z Trusts. The same wording has been used in the minutes of the First Trustee (at para. 3.5) and it looks to me as though some cutting and pasting has been utilised without appropriate deletions being made to reflect accurately in each passage in the minutes what took place for the Trusts in question. In the context of the coordinated efforts of both Trustees and their advisers and the fact that I suspect the Settlor and the Settlor’s family understandably regarded the exercise in which everyone was involved collectively, rather than it being a set of individual decisions, I do not regard this type of slip as indicating that the Second Trustee took into account something that it should not have.
43. I was similarly satisfied that the decision-making process in respect of the two interest in possession trusts demonstrated that the opinions formed by the Second Trustee to make the appointments requested were decisions that a reasonable trustee in its position properly instructed could have arrived at. Indeed, because these decisions were more difficult, the evidence shows that the Second Trustee tested the advice given to it before accepting that it was appropriate to accede to the Settlor’s request (with paragraphs 9.7 and 9.8 of the minutes, in particular, explaining what was considered). The Second Trustee took into account that the assets in these two trusts extended beyond the holding company shares and so represented the most likely source of funds to be gifted to the Settlor’s children in the future. As such, the “*washing out*” of the income and gains described in the tax advice would be most beneficial in relation to those assets. Accordingly, the income tax and capital gains tax advantages associated with that outcome justified the distribution of the entirety of the two trust funds. I take the view that this is evidence from which I can properly accept that the Second Trustee has approached the momentous decisions it has made in a proper manner.

44. In reaching that conclusion, I have also borne in mind the submissions of Advocate Hay on behalf of the adult beneficiaries and of Advocate Adkins on behalf of the minor and unborn beneficiaries (both in respect of the two interest in possession trusts and generally). The support of the Settlor's children can, in my view, be extrapolated to amount to strong support for each appointment on behalf of the minor and unborn beneficiaries in respect of each of the appointments to be considered by each Trustee. I consider that the Second Trustee could reasonably take into account that the consent of the Protector of each interest in possession trust was still needed. Accordingly, were the Settlor's children to have any change of heart, they would be in a position to protect their own interests or the interests of their children in that capacity. As Advocate Adkins further noted, the benefits of protecting the scale of the family's wealth is of more significance to future generations than it is to the Settlor's children. He had not been able to offer the same level of analysis as the children had about future financial needs, but had seen nothing to lead him to believe that the proposed appointments would not be for the benefit of future generations. His assessment from his discussions with the Settlor's children was that they enjoy a close and supportive family environment, that they understand the value of money and intend to instil the same values in their children, all of which mitigates potential risks associated with the trust assets being held otherwise than on trust. He concluded that there were no existing risks. His overall conclusion was that supporting the Application represented the best chance of unknown members of the class of beneficiaries having the prospect of obtaining some benefit in the future. This was because the increased overall value of the assets flowing from the expected tax mitigation could have a material impact on the number of future beneficiaries over however many generations who might be able to benefit. In any event, the likelihood is that family members will continue to take advice on wealth planning, which also serves to minimise any risks inherent in the Trustees agreeing to the appointments sought by the Settlor.
45. I have also borne in mind that the approach of the Second Trustee appears to have been to reach a decision on both Trusts together rather than separately. Such an approach is consistent with the manner in which the advice was tendered to it and is as described in the Affidavit evidence. In the absence of any party appearing to oppose the Application, I have asked myself whether there is anything out of the ordinary that leads me to conclude that what has happened takes one or both of those decisions outside the applicable test. Bearing in mind the further guidance offered by *Cotton v Brudenell-Bruce* (*supra*), I am satisfied that both decisions fall squarely within the test. In particular, there is, in my view, no good reason to deprive the Second Trustee of approval of both of these decisions. It would amount to no more than idle speculation for me to do so and that is certainly not the function of this Court. Further, I reminded myself that I am not considering whether I would have reached a different decision, but simply considering whether to make a declaration that the exercise of the power by the Trustee is lawful. As I have said, the Second Trustee has proceeded carefully and cautiously and I find that its approach of dealing with these two decisions within one process is quite understandable.
46. Turning to the decisions of the First Trustee, I was also satisfied that the decision-making process in respect of the four discretionary trusts of which the First Trustee was the trustee demonstrated that the opinions formed by the First Trustee to make the appointments requested were decisions that a reasonable trustee in its position properly instructed could have arrived at. My reasoning was the same as in respect of the two other discretionary trusts under consideration. The First Trustee similarly proceeded carefully and cautiously on the basis of the detailed advice taken. I took the view that each of the decisions reached by it was within the range of responses open to it.
47. In respect of both the First Trustee and the Second Trustee, there was no suggestion that either had been acting under any conflict of interest. Accordingly, nothing of that nature vitiated any of the opinions each reached. Indeed, I recognised that the decisions taken would result in both

Trustees no longer being able to earn the fees to which they would otherwise have been entitled to charge, which was a further indicator of the objective approach they had taken.

48. In summary, therefore, I reached the conclusion from my review of the evidence put before me and the submissions of the parties' Advocates that each of the resolutions of the respective Trustees on 14 May 2015 fell within the proper ambit of the powers conferred on them, that each had acted honestly and was unaffected by any actual or potential conflict of interest, and that in reaching all four of the momentous decisions taken by it, each Trustee had properly taken into account all relevant matters and had not taken into account any irrelevant matter and, in doing so, had not reached a decision that no reasonable trustee could have reached. Accordingly, I granted the relief sought by each in accordance with the Application dated 20 May 2015.

Costs

49. Paragraph 10 of the Application sought an order that the parties' costs be paid from the assets of the Trusts on an indemnity basis. None of the Respondents opposed the making of what is the usual order in these circumstances. The only gloss I added was that I understood that the liquid assets of some of the eight Trusts were likely to be insufficient to satisfy the parties' costs if it were done in equal proportions across the eight Trusts, so the parties were to have the discretion to agree how to allocate the costs burdens between the Trusts once the total amount payable became known.