

[2019]GRC017

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

Between:

X TRUSTEES LIMITED

Applicant

-and-

Y TRUST COMPANY LIMITED

**First
Respondent**

-and-

BENEFICIARY E

**Second
Respondent**

Hearing and decision date: 20th July 2018

Reasons handed down: 5th June 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for Applicant: Advocate G S Ferguson

The Respondents did not appear and were not represented

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007

The Royal Court Civil Rules, 2007

The Swiss Code of Obligations

In the matter of the D Retirement Benefit Trust 2011 JLR 672

In the matter of the K Trust [2015] GLR 433

Letterstedt v Broers (1883) LR 9 App Cas 371

Lewin on Trusts (19th ed.)

Introduction

1. By an amended Application dated 11 July 2018, the Applicant, to which I will refer as X Trustees Limited, sought an order that it be granted leave pursuant to section 69 of the Trusts (Guernsey) Law, 2007 to have standing so as then to proceed to seek orders appointing it as trustee of two Guernsey law trusts in place of the First Respondent, to which I will refer as Y Trust Company Limited, which would be removed as a trustee of each Trust, along with consequential orders relating to the trust property of each Trust and costs orders depriving the First Respondent of its indemnity. Relief was granted by me at a hearing that took place on

20 July 2018. I indicated that I would, in due course, elaborate on the outline of the reasons I gave at the time for granting the Application. This judgment now sets out those reasons, although it has taken significantly longer than I anticipated for me to do so, for which I apologise.

Procedural history

2. The original Application, dated 20 June 2018, was first before the Court on 22 June 2018 because, as a first step, it sought leave to serve the First Respondent out of the jurisdiction pursuant to rule 8 of the Royal Court Civil Rules, 2007. The evidence in support of that application explained that the First Respondent was a Swiss corporate entity. Accordingly, leave was granted to convene the First Respondent to a hearing on 6 July 2018 by delivering or posting the documents relating to the Application to its registered address.
3. On 6 July 2018, the First Respondent did not appear. I was, though, satisfied from the Affidavit of service that the terms of the order granting leave to serve out of the jurisdiction had been complied with and that the Application could proceed to be heard in the absence of the First Respondent. As will become apparent, it had not been envisaged that the First Respondent would attend. However, in the absence of anyone appearing in response to the Application, I invited the Applicant, who was represented by Advocate Ferguson, to consider whether it would be appropriate to convene one of the adult beneficiaries of one of the Trusts in a representative capacity where the evidence showed that the class of beneficiaries included minors. (Had the trustee appeared, depending upon the position it adopted, I may well have been satisfied that it could properly represent all non-adult beneficiaries without the need to convene anyone else.) As a result, by an application dated 9 July 2018, which I determined on the papers on 11 July 2018, I ordered that one of the beneficiaries of that Trust, and to whom I will refer as Beneficiary E, be joined to the Application as the Second Respondent.
4. At the adjourned hearing on 20 July 2018, the First Respondent was still not present and the Second Respondent had indicated support on behalf of those whom the Second Respondent represented for the granting of the amended Application. I was satisfied in the circumstances that I could proceed to hear Advocate Ferguson present that amended Application in the absence of any of the other parties. He did so by elaborating on the Skeleton Argument he had prepared dated 4 July 2018 and on which I have drawn heavily when preparing these reasons.

Facts

5. The evidence in support of the relief sought by the Applicant was principally contained in the an Affidavit of one of its directors, sworn on 20 June 2018, along with two Affidavits from a lawyer in Switzerland, setting out some issues of Swiss law that assisted in understanding the position of the First Respondent and confirming that service had been effected on the First Respondent. Those Affidavits were sworn on 20 June and 4 July 2018 respectively. There was also a short Affidavit of Alexandra Lyne sworn on 18 July 2018 through which she exhibited a further note dated 9 July 2018 from the Swiss lawyer and the comments of Beneficiary E, made by e-mail on 12 July 2018.
6. Each of the two Trusts was settled by a declaration of trust dated 31 October 2002 made by the Applicant. The terms of the two Trusts are similar and the two settlors are brothers. The beneficiaries are all members of the settlors' families. None of the beneficiaries is resident in Guernsey. They are both discretionary trusts and the proper law of each is expressed in clause 2 of the respective trust instrument to be Guernsey law.

7. The Applicant was the Original Trustee of each Trust. However, following tax advice having been taken, the Applicant retired as trustee and was replaced by the First Respondent, as set out in deeds of appointment, retirement and indemnity dated 17 December 2015.
8. Clause 17 of each trust deed deals with the power of appointment of new or additional trustees. There is a hierarchical approach as to who has the power of appointment, as set out in sub-clause (1):

“If any trustee hereof whether original additional or substituted shall die or being a corporation shall be dissolved or shall give notice of his desire to withdraw and be discharged from the trusts hereof under the provisions of sub-clause (2) of this Clause or shall refuse or become unfit to act then the Protector or if there is then no Protector then the surviving or continuing trustees or if there be none the trustee or trustees desiring to be discharged and failing this the personal representatives of the last surviving individual trustee may (and in the case where there is only a sole trustee in office shall) by deed appoint one or more other persons or corporations (whether resident in the Island of Guernsey or not) to be a trustee or trustees hereof in place of the trustee or trustees so deceased dissolved desiring to withdraw and be discharged refusing or becoming unfit to act.”

Sub-clause (3) provides that a sole trustee is permitted to resign upon the appointment or a new trustee or trustees, with sub-clause (4) indicating that the requirement to appoint a new trustee or trustees where a sole trustee gives notice of its desire to retire falls to the persons listed in sub-clause (1). Sub-clause (5) relates to the same persons having power to appoint a new or additional trustee or trustees.

9. The power of appointment of the Protector of each Trust was given to the Original Trustee or, if no such appointment were made, to any new trustee. The Applicant did not appoint anyone to the office of Protector. It did not appear that the First Respondent had done so either. Accordingly, neither Trust had had a Protector at any time since it was declared.
10. The Application had been precipitated by contact from a representative of the Family Office acting on behalf of the families of the two settlors of the Trusts being made with the Applicant on 14 May 2018. That representative explained that the First Respondent had become incapacitated as a result of the en bloc resignations of its entire board of directors.
11. More detail about what had happened is set out in the First Affidavit of the Swiss lawyer. On 1 June 2018, he undertook a search of the Online Swiss Commercial Register to ascertain the status of the First Respondent. He confirmed that the First Respondent is a limited company registered in Switzerland with a registered office in Zurich. As at that date, it did not have any directors because the last remaining director had resigned with effect from 25 April 2018. He further confirmed that no liquidator had been appointed. The lawyer also, on instruction, hand-delivered a letter on the same day to the First Respondent’s registered office. The content of that letter invited the First Respondent to appoint the Applicant as trustee of each Trust and simultaneously to resign as trustee of both Trusts. The lawyer attended at the registered office at approximately 4 pm where he saw the First Respondent’s logo displayed. He gained entry to the reception area and spoke to a person there, a receptionist for the building’s operators, who confirmed that the First Respondent was using space in the building, that it was its registered office but that no one was there and no one had been there for some time. The receptionist was authorised to take delivery of correspondence for the First Respondent and so the lawyer handed over the envelope containing the letter, with the receptionist confirming receipt. The lawyer also posted a further copy of the letter to the registered office of the First Respondent and, using online tracking, confirmed that it had been recorded as having been delivered by the postal service on the morning of 4 June 2018.

12. The Swiss lawyer's First Affidavit also sets out the consequences, as a matter of Swiss law, of the position in which the First Respondent found itself. A limited company is not able to operate without directors unless a custodian (*Sachwalter* in German) is appointed (referring to art. 731b of the Swiss Code of Obligations). Because no liquidator had been appointed, the First Respondent was unable to exercise any powers or undertake any tasks. Where a company is unable to act as a result of not having any director, any shareholder, creditor or the commercial registry has the right to request the court to appoint a custodian, but that right is limited to any such person and does not extend to any others. Where such a request is filed, the court typically sets a deadline to restore the status of the company, which would often be between 40 and 50 days, although it would be permissible for it to appoint a custodian without doing so or to move directly to the immediate liquidation of the company, but that step would not be taken if a less stringent alternative were considered to be available. If a custodian were to be appointed, the court would set out the mandate for such a person, which might or might not extend to exercising the power to appoint a new trustee. Similarly, if there were a liquidator appointed, the usual tasks of establishing liquidation accounts, identifying creditors and distributing assets as appropriate would fall to be undertaken and may take at least 18 months, and may or may not encompass exercising powers of appointment vested in the company.
13. This explanation of Swiss law had previously been relayed to the director of the Applicant by the representative of the Family Office, who had visited Zurich himself and witnessed the absence of anyone capable of acting on behalf of the First Respondent. The representative had explained that the resignation of all the directors appeared to have followed from the arrest of the principal person involved with the First Respondent. As a result of all his enquiries, the Family Office representative, acting on behalf of all the beneficiaries of both Trusts, had asked the Applicant whether it would be willing to resume being trustee of both Trusts if the Court were minded to order the removal of the First Respondent. The director's Affidavit confirmed that the Applicant was willing to do so in accordance with its standard terms and conditions, a copy of which he exhibited.
14. The Second Affidavit of the Swiss lawyer sets out the steps taken to effect service out of the jurisdiction on the First Respondent. He attended at the registered office at approximately 5.20 pm on 22 June 2018 and handed the documents to the same receptionist who had taken the letter on behalf of the First Respondent on 1 June 2018, again indicating that there was authority to do so and signing for its receipt. He also posted a copy of the documents to the First Respondent's registered office on 22 June 2018, but these were returned to him by the postal service on 29 June 2018 with a note stating that the addressee could not be found at the address. The lawyer spoke with someone who employed the receptionist to whom the documents had been handed and was told that, as from 25 June 2018, they were no longer in charge of taking delivery of the First Respondent's post. Subsequently, on 3 July 2018, the lawyer performed a further search of the Online Swiss Commercial Register, which still showed that the registered office remained the same and that the First Respondent had no current directors and no liquidator had been appointed.
15. The note of the Swiss lawyer dated 9 July 2018 explained that the names of the shareholders of stock companies such as the First Respondent are not on record with the commercial registry or in the public domain. There is likely to be an internal register of the names and addresses of the shareholders, but it cannot ordinarily be accessed by the public or interested third parties. He indicated that the best information he could obtain is that the person who is believed to be the principal of the First Respondent and who had been arrested owns or controls the First Respondent. Being a Swiss stock company, art. 698 para. 2 lit. 2 of the Code of Obligations provides that the power of appointment of directors vests in the shareholders, although the court also has power to do so, as he had previously set out. He

further explained that the principal is believed to remain in custody and that the last of the directors to resign had also recently been taken into custody.

Standing

16. The first question I had to determine was whether I would give leave to the Applicant to bring this Application. Section 69(2) of the 2007 Law lists those who are automatically given standing to bring applications pursuant to section 69(1). They include a trustee, a settlor and a beneficiary. However, the Applicant fell within none of the permitted types of applicant and so para. (g), under which “*with leave of the Royal Court, any other person*” can apply, was relied on by Advocate Ferguson.
17. In the absence of any previous decision on the issue, Advocate Ferguson submitted that guidance could be taken from the Royal Court of Jersey’s explanation about how the guiding principle when exercising a power similar to that found in section 69 of the 2007 Law is “*the welfare of the beneficiaries and the competent administration of the trust in their favour*” (*In the matter of the D Retirement Benefit Trust* 2011 JLR 672, at para. 44). Consequently, he suggested that the position of the Applicant as the former trustee of both Trusts and the request that had been made to it on behalf of all the adult beneficiaries of both Trusts demonstrated that those beneficiaries considered that the Applicant was the most suitable person to make the Application and to seek the relief that the beneficiaries wished to obtain.
18. I was persuaded that this was an appropriate case in which to give leave pursuant to section 69(2)(g) of the 2007 Law permitting the Applicant to bring this Application. I recognised that it would have been a simple matter for one or more of the beneficiaries to have applied to remove the First Respondent as trustee and replace it with the Applicant and that such an application could have been pursued as of right under para. (d). However, for reasons of their own, none of the beneficiaries chose to be the person applying and preferred, it seemed to me, to avoid being identified as the person bringing the application to remove the existing trustee of each Trust. I can understand why a beneficiary of a trust might be reticent about being so identified. Frequently, a removal application would take place in public, although any judgment might, like these reasons, be anonymised to the extent necessary to preserve the privacy of those concerned. Avoiding the possibility of a beneficiary’s identity becoming known seemed to me to be a good enough reason to accept that I should not decline to afford the Applicant standing on this basis.
19. One way of viewing the Applicant, therefore, was as a form of agent for one or more of the beneficiaries. Another way of looking at it would be to extend, in circumstances such as these, the category of those who can properly bring such a removal application to those who are former trustees of the trust in question, and who are in a special position of knowledge about the trust affairs, provided, perhaps, that the time since retiring as trustee is not particularly long. In the instant case, a further way of looking at the Applicant was as the regulated entity who was prepared to be appointed as the replacement trustee in a situation where the Trusts could not actively be administered because of the status of the existing trustee. Whichever way the Applicant was viewed, in my opinion, someone like the Applicant had demonstrated a sufficient nexus to the Trusts and the affairs that needed to be administered under each Trust for the Court to be satisfied that it was an appropriate person to bring the Application. That said, in the absence of being satisfied of any sufficient nexus to one of the categories of person with automatic standing, I might have been more inclined to reject the standing of the Applicant, especially where the Application could be brought by someone with automatic standing. Because I was satisfied that the Applicant had

demonstrated that level of sufficient nexus with the matters in issue under the Application, I granted the leave sought affording it standing.

Removal of trustee

20. Advocate Ferguson drew attention to the provisions in the 2007 Law that establish that a trustee may be removed by an order of this Court. Section 69(1)(a)(ii) enables the Court to make an order in respect of “*a trustee, including an order as to ... the removal of a trustee (if, for example, he refuses or is unfit to act, or he is incapable of acting or is bankrupt, or his property becomes liable to arrest, saisie, or similar process of law)*”. Section 18(3) provides that “*A trustee with power to appoint a new or additional trustee who fails to exercise the power may be removed from office by the Royal Court.*” Further, section 18(1)(c)(iv) provides that in a situation where “*the person with power to make [the appointment of a new or additional trustee] is not capable of exercising that power*”, a new or additional trustee may be appointed by the Court.
21. Relying on the statement of the position set out by the Swiss lawyer relating to the current status of the First Respondent, Advocate Ferguson stressed that the beneficiaries had legitimate concerns about the capacity of the First Respondent to function as trustee of each Trust. The directors had resigned leaving the trustee without any officer capable even of responding to correspondence. These steps appeared to flow from the fact that the principal of the First Respondent was facing a criminal investigation and was being held in custody. The remaining directors had resigned without first giving any thought to their responsibilities as fiduciaries in relation to the two Trusts. This was a situation not of the beneficiaries’ own making. The power in clause 17 of the two trust instruments could not be used because the First Respondent was incapable of taking a decision to appoint any new trustee or even to indicate that it would resign. There had been no response to the letter delivered by the Swiss lawyer on 1 June 2018. This was indicative of there being no one at all within the First Respondent able to make any response at all to communications from, or on behalf of, any of the beneficiaries. The administration of the two Trusts was effectively paralysed.
22. Although the case concerned the removal of a protector, Advocate Ferguson referred to the principles set out in *In the matter of the K Trust* [2015] GLR 433. As explained in that case, (at para. 37), the principles are effectively equally applicable because the jurisdiction to remove an officer associated with a trust flows from the fiduciary nature of the office. Accordingly, what Lord Blackburn had set out in *Letterstedt v Broers* (1883) LR 9 App Cas 371 (at pages 386, 387 and 389), still explain the starting point for the approach to be taken:

“... if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity or deciding this, if they ever arise, do so without getting reported. ...

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case. ...

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.”

23. Advocate Ferguson also referred to the summary given at para. 13-064 of *Lewin on Trusts* (19th ed.):

“The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.”

24. I decided that the first consideration had to be why the First Respondent remained in office and had not retired voluntarily. I accepted that the power to appoint someone else in its place contained in clause 17 of each trust instrument could not be exercised where no Protector had been appointed and the First Respondent had no directors. Had there been someone capable of taking a decision on behalf of the First Respondent to resign and appoint a new trustee, that would have been the obvious course to follow, as indicated in *Letterstedt v Broers*. Moreover, if the First Respondent had even responded positively to the invitation to resign made in the letter delivered on 1 June 2018 indicating that it was not minded to resign and appoint a replacement trustee, that may have provided clearer grounds for the beneficiaries losing trust and confidence in the trustee being able to approach its duties with their welfare in mind. As a result, it meant that the mechanism for which each trust instrument provided could not be used.
25. In the light of the explanation of the Swiss law position about the status of the First Respondent, I was satisfied that this was a situation in which the trust instruments provided for the First Respondent to appoint a replacement trustee but that it was incapable of doing so. I took into account that the identity of the shareholders, who had the primary power to appoint any new director to the board of the First Respondent, could not readily be ascertained. In those circumstances, I was not persuaded that pursuing whatever avenue might have been open to the shareholders to act so as to return the status of the First Respondent to one capable of reaching decisions as trustee of each Trust was a viable one. I further took into account that it was more likely than not that any steps that could be taken to identify the shareholders would only show that the majority of the shares were held by the person who had been arrested and who was believed still to be in custody. That position was again hardly satisfactory because the First Respondent would be unable, within any realistic timeframe, to reach an outcome appropriate for the beneficiaries. For however long it took, the First Respondent would, adopting Advocate Ferguson’s terminology, be rudderless, and that was not an acceptable position to allow to be continued.
26. Being satisfied that the directors of the First Respondent had resigned without giving any thought to the need for the First Respondent to be able to function properly as the trustee of these Trusts, I was satisfied that, until the First Respondent could resume the competent administration of the Trusts, each would effectively be paralysed. Further, there would be no human who could have regard to the welfare of the beneficiaries or comply with the duties owed by a trustee. I made a finding that the First Respondent, being a trustee with power to

appoint a new or additional trustee, had failed to exercise that power, as set out in section 18(3) of the 2007 Law. This was an omission that I considered endangered the trust property because no one was giving any thought to it at all. However, this was not the only basis on which I considered that there existed grounds to order the First Respondent's removal. As set out in section 69(1)(a)(ii), if a trustee is unfit to act or incapable of acting, this is a basis on which the trustee's removal can be ordered. The language may be more in line with the trustee being a natural person but, in my judgment, it can be read consistently with the purpose underlying it in relation to a legal entity as well. Incapacity for a human would potentially follow from, for example, the trustee being found to be incapable of managing his or her own financial affairs as a result of a curatelle application, although there are now other means by which such an outcome can be achieved. In relation to a corporate entity such as the First Respondent, the absence of capacity arises by virtue of it not having any directors. Where the absence of directors is not something that can easily be rectified, as I found, then I took the view that I could treat the First Respondent as if it lacked capacity on the basis of there being no human who can reach any decision appropriate to the situation in which the First Respondent found itself. Alternatively, in the round, I would have found that the First Respondent has shown itself, through the actions of its directors resigning without addressing the ongoing need for someone to perform the functions of trustee of these Trusts, as demonstrating that it was unfit to continue in office. Consequently, there was a basis within section 69 on which to grant the application that the First Respondent be removed as trustee.

27. Having reached these conclusions under the provisions of the 2007 Law, I did not need to consider whether any other jurisdiction for removal applied. I did not, therefore, have to decide whether there had been any positive act of misconduct on the part of the First Respondent. Further, I did not need to consider whether there had been any hostility or mistrust that had led to a breakdown in relations that had had a seriously detrimental effect on the execution of the trusts and was likely to continue to do so. The problem was more about the inability of the First Respondent to take any action at all and the likelihood that there was no immediate prospect of that situation being resolved. In effect, there was no longer any relationship existing capable of breaking down.
28. For these reasons, I was satisfied that the order to remove the First Respondent as trustee of each of the Trusts could properly be made.

Appointment of trustee

29. The power for the Court to appoint a new trustee is found in sections 18(1)(c)(iv) and 69(1)(a)(ii) of the 2007 Law. These powers are, of course, recognised to be wide, but I took the view that their exercise should similarly take into account the general guiding principle of taking decisions in the light of the welfare of the beneficiaries and the competent administration of the trust in their favour. Although section 17(2) provides that a trust does not fail on the ground that there is no trustee, I accepted that, where no other person is in a position to make an appointment, the Court should fill that vacancy so that the Trusts can once again be administered.
30. Advocate Ferguson suggested that the Applicant was the most appropriate person to be appointed as trustee of each Trust for a number of reasons. First, the Applicant had the support of the beneficiaries of the Trusts concerned. The Applicant was willing to be appointed and had the useful benefit of being familiar with the Trusts because it had only comparatively recently retired as trustee and so could potentially take steps in the absence of the provision of information by the First Respondent more readily than would be the case if a person without that familiarity were to be considered for appointment. The evidence also demonstrated that it retained a good working relationship with the Family Office operating on behalf of the beneficiaries. Finally, being located and regulated in the Island, the Applicant

was well-suited to assuming the role of trustee of both Trusts. In all the circumstances, appointing the Applicant would be the most cost-effective and expedient option and so for the benefit of the beneficiaries.

31. I was satisfied that the combination of all these reasons provided a sound basis on which to agree that the Applicant be appointed as replacement trustee. Indeed, in the absence of any alternative proposal, I regarded the choice made by, or on behalf of, the beneficiaries as being a particularly significant factor in reaching that decision because it demonstrated what they considered was in their own best interests.

Ancillary orders

32. The Application also sought orders for the immediate delivery up of the property of each Trust to the Applicant by the First Respondent. By virtue of section 20(4)(a) of the 2007 Law, a trustee ceases to be a trustee immediately on his removal from office by the Court. Section 20(5) provides that a person who ceases to be a trustee under that section “*shall do everything necessary to vest the trust property in the new or continuing trustees*”. As a consequence, there is an obligation on the First Respondent to act in this way, even without any order of the Court.
33. Section 43 of the 2007 Law makes further provision in relation to when a trustee is removed. There is an obligation, subject to the possibility that the outgoing trustee may require to be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before surrendering the trust property, for the outgoing trustee to surrender the trust property held by or vested in that trustee or otherwise under the trustee’s control.
34. In light of these provisions, I indicated that I was content to make orders in the form sought by the Applicant, believing that it might be of assistance in a situation where the First Respondent had not appeared and some form of enforcement action by the Applicant as the new trustee might need to be taken, or something formal provided, for example, to those administering any trust property, but that the terms of the orders made needed to incorporate express reference to the entitlement given by section 43 to the outgoing (or removed) trustee to require reasonable security. Advocate Ferguson indicated that he was content with such an approach.

Costs

35. The final order sought by the Application was that the First Respondent should pay the costs of the Application without recourse to or indemnity from any of the assets of either Trust. In support of that element of the Application, Advocate Ferguson relied upon the content of para. 27-191 of *Lewin on Trusts*:

“... In a case where a claim for removal of trustees forms part of the relief sought by a breach of trust action, the position as to costs will be governed by the general principles applicable to breach of trust actions. If a trustee is removed on the ground of misconduct, even if some of the charges of misconduct are rejected, the trustee who is removed will normally be ordered to pay the costs of the successful applicant as well as his own costs, though the Court will consider whether the costs of discrete issues on which the trustee was successful should be treated differently. If a trustee is removed on the ground of conflict of interest and duty, the court might normally be expected to make an order for costs against the trustee, though might allow the trustee his costs in special circumstances, for example where the conflict is expressly authorised by the terms of the trust, but the court nonetheless considers that the trustee should be removed. If a trustee is removed on other grounds, the trustee is at

less risk of being ordered to pay the applicant's costs, and will obtain an order for costs from the trust fund if he acted reasonably in defending the claim for removal."

36. In the unusual circumstances of this case, I decided that it was appropriate to make an order that the First Respondent pay the Applicant's costs of the Application, even though the paralysis in the First Respondent might mean that little would be gained by this, especially as it was unknown whether the First Respondent had any assets against which such an order could be enforced. However, I reached that decision on the basis that it was the omission of the First Respondent to deal with its retirement as trustee of each Trust properly that had led to the Application needing to be made. Although I had found that this equated to a form of incapacity, it could also have been viewed as the First Respondent being unfit to continue in office or even that its omission to exercise its powers under the trust instruments was a form of misconduct deserving of sanction. Further, although the Application had not been resisted by the First Respondent and had proceeded in its absence, these proceedings could have been avoided if proper thought had been given to the adverse consequences to the Trusts of the directors resigning without first divesting the First Respondent of the trusteeships. As such, it did not strike me that this was a case in which each trust fund should bear the costs involved, although that might end up being the default position. The situation was not of the making of the beneficiaries and so they should not, if that position could be reached, find the trust funds diminished as a result of the unsatisfactory position in which the First Respondent had been left.
37. I decided that this was closer to the position where a trustee has been pursued for breach of trust and where costs will normally follow the event. Further, having regard to rule 83 of the 2007 Rules and the wide discretion available in respect of costs ordered by this Court, I made the costs payable by the First Respondent on the indemnity basis as the way matters had been dealt with were, in my view, unreasonable conduct on its behalf. I also added that the First Respondent was precluded, without first obtaining leave through a further order of the Court, from having any recourse to any of the assets of either Trust.

Conclusion

38. For all these reasons, I granted the majority of the relief sought in the Application. In particular, having decided that the Applicant had a sufficient connection to the subject-matter of the Application to be afforded standing to bring it, I decided that the First Respondent needed to be removed as trustee of each Trust in accordance with the terms of the 2007 Law and be replaced with the Applicant. Consequential upon those decisions, steps would need to be taken to vest in the new trustee the trust property and, because of the unsatisfactory position in which a corporate trustee had been left by its directors, I was satisfied that an order that the First Respondent pay the Applicant's costs on the indemnity basis was warranted.