IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF A TRUST

AND IN THE MATTER OF SECTION 48 OF THE TRUSTS LAW (2017 REVISION)
AND IN THE MATTER OF GCR ORDER 85 RULE 7

IN CAMERA (REDACTED FOR PUBLICATION)

Appearances:

	Mrs Shân Warnock-Smith QC of counsel and Mr Nick Dunne and Ms Lucy Diggle of Walkers on behalf of the Plaintiff ("the Trustee")
	Mr Jonathan Adkin QC of counsel and Mr Robert Lindley and Mr Erik Bodden of Conyers Dill & Pearman on behalf of the 1st and 3rd Defendants ("D1/D3")
	Mr Adam Tolley QC of counsel and Mr Christopher Young of Forbes Hare on behalf of the 2nd Defendant ("D2")
Before:	**The Hon. Justice Kawaley**
Heard:	**10, 12 December 2018**
Draft Judgment: Circulated	**14 January 2019**
Judgment: Delivered	**17 January 2019**

GRAND COURT - CAYMAN ISLANDS -

HEADNOTE

Discretionary trust-application by trustee for directions-approval of momentous decision-final distribution proposal-whether trustee's approach rational-adequacy of reasons

JUDGMENT

Introductory

1. On October 9, 2017, the Trustee filed an Originating Summons seeking either (a) the Court's authorization for a proposed distribution of the Trust assets (the "Final Distribution Proposal"), or (b) the Court's directions as to how the trust fund should otherwise be administered. The Trust was settled with a view to providing what was hoped would be a more efficient way of distributing the Settlor's assets after his death than a potentially contested administration of his estate. The Settlor was the father of the three Defendants who are the principal beneficiaries and before his death expressed the wish that the trust fund be divided equally between his children. The trust fund primarily comprised real estate assets.

2. On November 24, 2017, following an *inter partes* hearing, I made an Anonymisation Order in respect of the present proceedings without any dissent. The pre-trial directions were formally agreed on January 18, 2018 and incorporated in an Order of that date (filed on February 5, 2018). There the consensus ended. At the final hearing of the Originating Summons the authorisation sought by the Trustee was supported by D1/D3 and opposed by D2, reflecting a parting of the ways between the siblings which preceded the commencement of the present action.

3. The Court's approval is sought to bless a momentous decision which is by common accord within the power of the Trustee to make. The present case is accordingly a "*Category 2*" *Public Trustee-v-Cooper* [2001] W.T.L.R. 901 case. The question is whether the proposed distribution plan is one which a reasonable trustee might decide to implement. D2 accordingly assumed a heavy burden in seeking to persuade the Court that the Final Distribution Proposal was in whole or in part an irrational one.

4. By the end of the hearing I was all but convinced that the Trustee's application ought properly to be granted in substantial terms. Nonetheless, I was keen to avoid summarily making a legally correct decision in a manner which undermined the Settlor's apparent goal of avoiding the sort of conflict between his three children which unfortunately arose. At the heart of D2's case was the complaint that the Trustee had throughout the consultative process which preceded the present application favoured the views of his sisters and failed to fairly evaluate his own representations on their merits. It was important for the Court to avoid being seen to be adopting what D2 might perceive as a knee-jerk response of deferring to the Trustee's position.

Governing legal principles

5. The 'Skeleton Argument of the Plaintiff' primarily relied upon the following passage in '*Lewin on Trusts*' 19th edition (at paragraph 27-079):

> *"The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustee's powers is lawful*

and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

6. D1/D3's counsel also rightly submitted that the critical legal question was whether "*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*": *Cotton-v-Earl of Cardigan* [2014] EWCA Civ 1312 (per Vos LJ, at paragraph 12(ii)). D2's counsel very properly did not dissent from these well settled judicial views. I am accordingly guided by these principles which I consider accurately define the overriding legal test.

7. Counsel's legal submissions also elucidated the subsidiary principles as to how the Court's jurisdiction should be exercised from case to case. In oral argument Mrs Warnock-Smith QC commended to the Court the following passages from my own judgment in *Re XYZ Trusts* [2017] SC (Bda) 111 Civ (12 December 2017):

> "*23. Controversy centred on the application of the principles governing the Court's approach to whether or not to 'bless' the Trustees' decision, not the content of those principles. This was by common accord a Category 2 case following the classification established in Public Trustee-v- Cooper [2001] WTLR 901; a momentous decision which the Trustees were empowered to make but did not wish to implement without the Court's confirmation that it did not entail an improper exercise of the relevant power. Hart J framed the governing principles governing the approach to the evidence in such a case as follows in concluding that objections to the Court conferring its blessing had not been made out in that case in the following way:*
>
> > *'The evidence relied on does not, however, in my judgment, succeed in establishing the case that there was no material on which the Provident Settlement trustees could reach their conclusion or that that conclusion was manifestly unreasonable.'*
>
> *24. Other subsidiary principles were relied upon in seeking to persuade the Court to withhold its approval. Mr Marshall relied heavily upon the following observations of Vos LJ in Cotton and Another-v-Brudenell-Bruce, Earl of Cardigan [2014] EWCA Civ 1312:*

'61...In order to succeed in such an application, the trustees must, as Sir Andrew Morritt made clear in Tamlin v. Edgar supra, put the court in possession of all relevant facts so that it may be satisfied that the decision of the trustees is proper and for the benefit of the beneficiaries. Moreover, it must be demonstrated that the exercise of their discretion is untainted by any collateral purpose. This process could be seen as one of "disclosure", but I would prefer to regard it as an evidential exercise. The trustees have the burden of proof and must, therefore, give the court all the information and disclosure that it requires to be satisfied that approval can be granted. If they fail to do so, they will not obtain the approval they seek. But the court may, in such a case, send the trustees away to produce more evidence. Whilst the process is not inquisitorial, it is part of the inherent jurisdiction of the court to supervise trustees.'

25. Mr Ham QC in reply emphasised the following sentence in the same passage:

'The court would be unwilling, I think, to countenance the refusal to approve a proper, and momentous, transaction on some technical ground based upon an incidental failure to produce adequate material to the court.'

26. In my judgment, it was important to remember that what quality of evidence is required to be placed before the Court depends on the circumstances of the particular case and the nature of the facts in controversy. In Public Trustee-v-Cooper [2001] WTLR 901, Hart J stated (at page 12):

'What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case.'"

8. In my judgment the quoted principles apply to the present case. So do the following passages referred to by Mr Adkin QC in the course of his oral submissions. In *Cotton-v-Earl of Cardigan* [2014] EWCA Civ 1312,Vos LJ opined as follows:

"*Placing caution in context*

84. *The first point is this. The authorities that I have mentioned above 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 by the prospect that, if the appeal were allowed, the trust would be in an impossible bind. Ms Reed made it clear*

that the trustees could not possibly prudently go ahead with the sale to Mr A having been denied the court's approval. The trustees might in theory apply to the court again on new evidence, but more likely, they would be thrown into an open marketing campaign, against the advice of GVA, which they could ill-afford, and which would, very possibly, lose the specially interested purchasers who have done so much work to put their bids together. Moreover, the trust has no money. It has defaulted in repaying the bank, and has to expend large sums on insurance and upkeep. The bank will, in all probability, enforce the security it holds against three of the smaller properties on the estate. The effects of denying approval, if approval is truly warranted, are potentially dire.

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.*

87. *Finally, in this context, the fact that the beneficiary is in a weaker position than he would be, after full disclosure and cross-examination at a trial of an action to challenge the trustees' actions, cannot, by itself, mean that the court should withhold consent. It is true that court approval will prevent a later challenge. But if the court is given sufficient and appropriate material on which to act, it should not withhold consent just in case something better might in the future turn up.*"

9. Mr Tolley QC referred the Court to various judicial statements emphasising the importance of trustees seeking the Court's blessing making full and frank disclosure to the Court. In *Al-Ibraheem –v- Bank of Butterfield International (Cayman) Limited* [2000] CILR 507 where this Court recognised the Category 2 blessing jurisdiction, Smellie CJ opined (at page 517):

> "*I am quite prepared to accept that such a distinct class of cases is to be recognized. That does not, however, establish, to my mind, any justification for a proposition that the obligation of the trustee, even in such a case, to make full and frank disclosure by giving the court all information relevant to the exercise of the court's discretion to give its blessing to the trustee's proposed conduct is in any way diminished.*"

10. In *Tamlin-v-Edgar* [2011] EWHC 3949 (Ch), Chancellor Sir Andrew Morritt said of the trustee's duty in a Category 2 case:

> "*25 ... 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. <u>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 the 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</u>...." [Emphasis added]

11. This passage was expressly approved by the Court of Appeal (Patten LJ) in *Re the Estate of Sir James William Savile (deceased)* [2015] WTLR 635 (at paragraph [55]). Patten LJ most pertinently observed (at paragraph [54]) that "*the level of information required will obviously vary according to the nature of the decision under review*". Mr Tolley QC submitted that the cogency of the evidence should be at the highest level when a final decision was being approved. I accept this submission as sound in general terms. But common sense requires regard to be had not just to the nature of the decision in its widest canvass, but also to the particular aspect of the decision or issue to which the evidence said to be insufficient relates. Some aspects of the decision will necessarily be more significant than others, and it is difficult to see why a trustee should be expected to expend time and costs on building a cogent evidential case on peripheral matters of marginal relevance to the principal limbs of the decision.

12. Subject to this *caveat*, I am also guided by the submissions of D2's counsel as to the approach which the Court should adopt to the evidence on the present application.

The Trust

<u>Key provisions of Trust Deed</u>

13. The Trust was settled on May 14, 2007. It was an irrevocable discretionary trust clause 5 of which conferred the following main powers of appointment:

> "*(a) The Trustee shall stand possessed of the Trust fund and the income thereof UPON TRUST and with full power from time to time and at any time before the Vesting Date by resolution:*
>
> *(i) to appoint pay or apply the whole or any part of the Trust fund and the income thereof; and*
>
> *(ii) to create any provisions and in particular discretionary trusts, dispositive or administrative powers exercisable by any person*
>
> *for the advancement maintenance education or benefit of all or such one or*

more to the exclusion of the other of the Beneficiaries and in such proportions or manner and upon such other terms and conditions as the Trustee shall in its absolute and uncontrolled discretion deem appropriate…"

14. Mrs Warnock-Smith QC also referred to the supplementary power conferred by clause 15:

> "*The Trustee may appropriate any part of the Trust Fund in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of the share of any person in the Trust Fund as the Trustee may deem just and reasonable without the necessity of obtaining the consent of any person.*"

15. It is important to keep these broad discretionary powers clearly in view. Because although the Trustee clearly regarded it as desirable to consult with the beneficiaries to ascertain their wishes and seek their agreement to the proposed plan of distribution (as trustees of discretionary trusts generally do), they were under no strict legal obligation to do so.

16. The Trustee's counsel also referred to clause 27 of the Trust Deed, which she described as a "*well drawn anti-Bartlett provision*". This clause firstly empowered the Trustee to hold any shares in any company forming part of the Trust Fund (the "Company"). It then provides with some specificity that the Trustee "shall" leave administration of the business of the Company to the directors, and, *inter alia*, is entitled to assume due administration, is not required to request information about the management of the Company and is not liable for failing to investigate or verify information unless the Trustee has actual knowledge that it is unreliable.

The Trust Fund

17. The Trust Fund initially comprised £100. However, on June 21, 2007, the Trustee declared that it held One Ordinary Share in Top-Co. Top-Co, a BVI company, was the ultimate holding company. Hold-Co was an intermediate holding company. Top-Co and Hold-Co both held some cash, but Hold-Co controlled various underlying companies which held the various pieces of real estate which collectively constituted the most valuable assets in the Trust Fund.

18. The Trust and corporate structure was helpfully visually described in a chart which was attached to the Skeleton Argument of the Plaintiff.

The Settlor's wishes

19. The Trustee prepared a Confidential Memorandum dated September 4, 2007 which recorded the Settlor's wishes; paragraph 1 was headed "***Non binding nature of this Memorandum***". Paragraph 2.2 records what the Trustee's counsel described as a "*less boilerplate*" reason for the Trust: "*a desire to avoid the delay, and hardship brought*

about by lengthy probate procedures". Clause 3 ("***The Settlor's Suggestions***") recorded the following key wish:

> "*In the event that* [D3] *is appointed as a beneficiary of the Trust, the Trustee would consider upon the death of the Settlor holding and distributing the Trust Fund as both to income and capital for the benefit of such of the settlor's children...(collectively the 'Children' and individually a 'Child') who shall survive him and if more than one in equal shares absolutely...*"

20. The Settlor's wishes were quite simple; that after his death the Trust Fund should be entirely distributed and divided amongst his children in equal shares.

The Final Distribution Proposal

<u>Overview</u>

21. The Trustee's approach to the Final Distribution Proposal had two main phases to it:

(a) determining the Value of the Trust by reference to:

(i) the funds in Top-Co (less the Trustee's fees and expenses);

(ii) rent due from D1/D3 in respect of Flat H, a flat occupied by them at various times;

(iii) the Valuation Price or NAV of assets transferred to the Beneficiaries directly;

(iv) any equalizing payments required in respect of prior unequal distributions; and

(b) dividing the Value of the Trust into three.

22. These broad principles were not (and could not sensibly be) the subject of controversy. Implicit in the distribution scheme was the notion that the funds in Top-Co would include the proceeds of any outstanding assets sales and dividends from the liquidation of any underlying companies.

<u>The Trustees' controversial proposals</u>

23. Not ignoring D2's complaints about certain aspects of the valuation methodology and his concerns about proper accounting in relation to the distribution process, the aspects of the Final Distribution Proposal which are in most serious controversy may be summarised as follows:

(a) **Flat 9**: the Trustee proposes to transfer this property to D1, who would prefer to have Hold-Co transferred to her rather than the property itself. D2 wishes to acquire Hold-Co (with this property) in consideration for his paying an open market value price;

(b) **301/305 (head lease)**: the Trustee proposed that Jay-Co would surrender the head lease to X, a company owned by the Settlor's estate. D1/D3 agreed. D2 wanted to acquire the property and pay the Trust £10,000 for the assignment of the lease;

(c) **Flat H**: the Trustee proposed to transfer the shareholding in Jan-Co to D1. D1/D3 agreed. D2 proposed the property be sold on the open market and that credit to be given for benefits received by D1 in relation to the property should be greater than the Trustee proposed;

(d) **83-84**: the Trustee proposed that a 69.5% shareholder in Q-Co should be transferred to D1. D1/D3 agreed. D2 proposed that he should purchase the Q-Co shareholding for a higher price;

(e) **Hold-Co**: the Trustee proposes to liquidate this company. D1/D3 propose that it be transferred to D1. D2 wishes the shares to be transferred to him;

(f) **Jay-Co**: the Trustee proposes to liquidate this company. D1/D3 agree. D2 wishes the shares to be transferred to him.

24. Although it appears that the Trustee has in all cases except (a) and (e) adopted proposals which are *ad idem* with D1's wishes, the position cannot be fairly understood without reference to the 2014 Agreement. The fact that the Beneficiaries were agreed four years ago and have since parted ways creates an immediate impression that the disagreements are emotionally driven rather than grounded in principle.

25. The First Affirmation made in support of the Trustee's application describes (at paragraph 27) a meeting on September 1, 2014 at which D1 produced a letter of the same date signed by the three Beneficiaries (the "2014 Agreement"). It then proceeds to describe how, after an early 2016 dispute between the Beneficiaries, D2's attorneys wrote to Walkers to advise the Trustee that D2 no longer wished to be bound by the 2014 Agreement. At a January 2, 2017 meeting, D 2 indicated that he would only agree to all assets being sold on the open market. After considerable toing and froing, which included D2 asking the Trustee to supply certain corporate accounts, Walkers set out the Final Distribution Proposal in a letter dated July 14, 2017.

26. This prompted a counter-proposal from D2 which most significantly proposed that:

(a) 2A, the head lease of 8-10 and the Flat H property would be sold on the open market and the cash proceeds distributed; and

(b) he would acquire Hold-Co and pay for the underlying properties.

27. The Trustee took the position that the Final Distribution Proposal was reasonable and sought approval for it. According to the First Affirmation made of behalf of the Trustee:

> *"175. It is the Trustee's position that the Final Distribution Proposal is reasonable and in the best interest of the Beneficiaries because it appears to the Trustee that the Beneficiaries are using the dispute over Trust assets for leverage in a greater dispute over the Estate of the Settlor. Considering the discussion with the Settlor in September 2007 (as described in the Trustee Memorandum), it was clear that the Settlor wished to protect the Trust Assets for the benefit of the Beneficiaries. While the Trust Assets remain in the Trust, they are providing a platform for dispute between the Beneficiaries and unnecessary legal fees are being incurred by the Trustee which ultimately is contrary to the purpose for which the…Trust was established. It is for this reason that the Trustee has decided to apply to this Honourable Court for its opinion, advice or direction on the Final Distribution Proposal as set out above."*

<u>The 2014 Agreement</u>

28. The 2014 Agreement was by common accord not a legally binding one. Nonetheless it contemplated the following distribution of assets:

(a) **Flat 2802**: to be transferred to D1 (since sold);

(b) **Flat H** : to be transferred to D1;

(c) **Flat 9**: to be transferred to D1;

(d) **83/84**: to be transferred to D1;

(e) **8-10 (head lease)**: to be transferred to D2 (open market sale now agreed);

(f) **Ground Floor and Basement A House**: to be transferred to D2 (since sold);

(g) **301/305**: to be transferred to D2.

29. The Final Distribution Proposal may be viewed as adopting the following stance in respect of the disputed assets subject to the 2014 Agreement which were not subsequently consensually sold or agreed to be sold:

> (a) **2014 Agreement in substance confirmed**: in relation to (i) Flat H, (ii) Flat 9; (iii) 83/84; and

(b) **2014 Agreement modified**: in relation to 301/305, not by transferring it to D2 but by transferring it to X Co for distribution as part of the Settlor's estate.

30. For these broad comparative purposes, I do not consider it necessary to distinguish between the transfer of an asset directly or indirectly through a transfer of the property-owning vehicle's shares; I focus merely on the 'big ticket items' still in dispute. Nor do I take into account for these purposes changes in detail, such as those confirmed by the Trustee in the Third Affirmation (paragraph 10).

How the ground has shifted since the 2014 Agreement

31. In summary, D2's position has changed most significantly. In January 2016 he proposed that all assets should be sold. Of the seven assets dealt with by the 2014 Agreement, three were in fact sold on a consensual basis. As regards the remaining four, the Trustee proposes to maintain the 2014 Agreement status quo as regards three assets which it was originally agreed should go to D1 and to transfer the fourth to the Settlor's estate rather than to transfer it to D2, who was at that point contending it should be sold.

32. After the Final Distribution Proposal was notified to the Beneficiaries, D2 maintained his opposition to Flat H being transferred to D1, and now proposed that in the other two instances (Flat 9 and 83/84), the assets should be transferred to him instead (via the shares in Hold-Co). His position on the head lease in relation to 301-305 reverted to the 2014 Agreement position. Was it reasonable for the Trustee not to engage with this part of his counter-offer? Although D2 obviously did not present his case in this narrow way, to my mind the most immediately obvious high point of his objections was the potential argument that it was not reasonable for the Trustee to refuse to contemplate this particular limb of his August 2017 counter-offer. If the predominant approach was (in the absence of agreement) to substantially revert to the 2014 Agreement dispensation, and accepting that this was a commercial property to which little obvious sentimental value was attached, why could D2's offer to purchase the 301-305 head lease not be accepted?

33. Two main responses were advanced in oral argument to this question which I raised in general terms. Mrs Warnock-Smith QC submitted that the Trustee was entitled to draw a line under the consultation process and that the way in which D2 had shifted his position made it impossible to rely upon any proposal he agreed to as reflecting a firm position. Mr Adkin QC submitted that this position was reasonable for the Trustee to adopt because D2's counter-offer was explicitly made on a 'package' basis and various other aspects of the proposed package could reasonably be rejected. Neither of these submissions was at first blush, to my mind, entirely satisfactory; but neither were the explanations entirely unsatisfactory. It seemed clear that D2 was adopting a strident and apparently inflexible position in correspondence. It was not obvious that he had been given an opportunity to 'barter' in the legal correspondence after August 2017. It was only explicitly indicated that D2 would welcome any response to his counter-offer (which was silkily refined in the course of argument by Mr Tolley QC) at trial. It is accordingly necessary to analyse the objections to the Final Distribution Proposal in more detail.

D2's submissions in opposition to the Final Distribution Proposal

<u>**Overview**</u>

34. D2 summarised his position in his Skeleton argument on behalf of the Second Defendant as follows:

> "*(1) The Trustee has failed, without providing any reasons, to give any consideration to a distribution proposal which* [D2] *made in August 2017, which remains open for acceptance and which would, if implemented, result in materially higher returns for the Beneficiaries.*
>
> *(2) Despite* [D2]*'s best efforts prior to and during the course of these proceedings, and which have resulted in more than £10m of net rental profits which would not otherwise have been included in the distribution, there are still serious deficiencies in the available evidence as to the identification and extent of the Trust Assets.*
>
> *(3) The Trustee's approach to valuation of the Trust Assets gives rise to a real risk of undervaluation on disposal (notwithstanding that the Trustee has very recently accepted one of* [D2]*'s legitimate concerns as to the appropriate methodology for such valuation).*
>
> *(4) The reasons given by the Trustee for the Final Distribution Proposal are unsound:*
>
> > *(a) it contends that it wishes to avoid dispute, but its approach has had and will continue to have the opposite effect; and*
> >
> > (b) *it contends that it wishes to achieve an equitable outcome, but its approach unduly favours* [D1] *without any good reason.*"

35. A preliminary response to the above summary points is as follows:

> (1) the first point fails to put the Trustee's non-response in context. The Settlor died in 2012. The Trustee sought and obtained the 2014 Agreement. In January 2016 D2 resiled from the 2014 Agreement and proposed that all assets be sold. The Trustee was unable to achieve consensus and formulated the Final Distribution Proposal in July 2017. This was to a material extent congruent with the 2014 Agreement. D2's counter-offer was not only significantly different from his initial proposals but was also even more far removed from the 2014 Agreement position;

(2) the second point implies that the precise nature and extent of the assets is relevant to the approval the Trustee seeks and that there has been uncertainty about what the relevant assets are. At first blush it was difficult to see how the precise extent of the assets is relevant to the approval sought in relation to a broad distribution approach. It was also difficult to identify any relevant or serious dispute;

(3) the third point acknowledges that the Trustee has taken representations made by D2 on board. It implies that the Court's approval jurisdiction entitles the Court to decide between competing valuation approaches. In fact the Court can only override the trustee's chosen approach if it is irrational;

(4) the fourth point at first blush seems a weak one and the implication that the Trustee has been contributing to the sibling conflict appears inconsistent with a straightforward preliminary assessment of the evidence. The suggestion that the Trustee has been unduly favouring D1 without any good reason ignores the fact that (a) the Final Distribution Proposal largely reflects what D2 had himself initially (in 2014) agreed, and (b) the joint position of D1 and D3 reflect the views of the majority of the Beneficiaries.

Failure to consider D2's better proposal

36. D2's first point was in legal terms more correctly distilled as follows:

> "*18. In the shortest summary,* [D2]*'s case is that the Trustee has acted irrationally by taking no account of his counter-proposal which would, if implemented, generate significantly more money for the Beneficiaries, and which has been rejected without any or any apparent consideration by the Trustee and without the assistance of any reasons.*"

37. It is submitted, supported by D2's First Affidavit (paragraphs 112-115, 148) that his offer would have, based on 2016 valuations, generated an increased return of £769,625 comprising:

(a) £174,625 more for 83/84;

(b) £545,000 more for Flat 9;

(c) £50,000 and the premium for 301/305.

38. The Court is now assisted by the reasons provided by the Trustee through evidence and submissions as to why the counter-offer has been rebuffed. It is permissible for the Court to take into account reasons for a decision advanced for the first time in the course

of a blessing application: *Re AAA Children's Trust* [2015] WTLR 683, (Royal Court of Guernsey), Collas J, at paragraph [26]. It is firstly important to acknowledge that the Trustee did not consider it necessary to explain through direct evidence why the counter-offer was rejected or, as D2 frames it, ignored. I accept the submissions of Mr Tolley QC in this regard. D2 complained about the absence of any explanation in his First Affirmation affirmed on June 15, 2018 (paragraph 117), inferring from this silence that his proposal had not been considered at all. The Fourth Affirmation on behalf of the Trustee (the first by way of reply) did not directly deal with this specific complaint. There was instead the following general 'traverse':

> "*24. After reviewing the Beneficiaries' Evidence and the further correspondence received from the Beneficiaries' respective attorneys, the Trustee does not consider it necessary to amend the Final Distribution Proposal as set out at paragraph 12 of my Third Affirmation…*"

39. In the Skeleton Argument of the Plaintiff it was submitted that:

> "*41. It is of course impossible to predict with complete certainty what might result from any particular course of action in relation to the properties: it may result in a better outcome for the overall value of the Trust, but equally may result in a worse one. The Trustee has endeavoured to adopt a pragmatic view, taking account of the disparate views of the Beneficiaries and considers that there to be merit in the adage that a bird in the hand is worth two in the bush. It is respectfully submitted that there is nothing unreasonable or improper in that approach.*"

40. The most cogent of the Trustee's reasons for rejecting the counter-offer which emerged from oral argument are the following:

    (a) the negotiation process had been going on for long enough and a line had at some point to be drawn in the sand ("*a bird in the hand*");

    (b) the proposed transfers to Beneficiaries will be based on independent market value appraisals and the liquidation process would identify all relevant value in any event;

    (c) the Trustee is entitled to take into account the wishes of the Beneficiaries and is not required to exclusively focus on maximizing monetary returns.

41. It is important to look at the counter-offer in its proper context, however. This provides valuable insights into why the Trustee at the time might reasonably have considered the counter-proposal could at that juncture be ignored. The most important links in the chain of correspondence, for present purposes, were the following:

(a) Walkers' July 14, 2017 letter concluded as follows:

"*36. Please let us have your in-principle agreement to the proposal set out above by close of business 31 July 2017 (Hong Kong time). If no in-principle agreement can be achieved, the Trustee will proceed to make an application to Grand Court for Cayman islands for directions without further notice*";

(b) Marriott Harrison's letter of July 21, 2017 on behalf of D1/D3 raised various points of detail and identified aspects of the Final Distribution Proposal which D1 wished to be modified;

(c) Walkers' July 27, 2017 response agreed with some comments and answered some queries. The request to clarify the scope of the proposed Court application was ignored;

(d) Marriott Harrison sent a further letter raising further points and seeking a response to the unanswered query about the court application;

(e) Rowel Genn (on behalf of D2) wrote two letters to Walkers on July 31, 2017, the deadline for reaching an agreement on the July 14, 2017 Final Distribution Proposal to avoid a Court application. The first letter responded to an earlier July 11, 2017 Walkers' letter and demanded information about underlying companies. The second letter did respond to the Final Distribution Proposal and substantively concluded as follows:

"*31. We acknowledge the efforts that have been made to produce a proposal which will be in the best interests of the Beneficiaries. Our client's preference is, as we have said, to avoid dispute as far as possible. There are, however, a number of legitimate and substantial points of concern which require to be addressed by the Trustee. We believe that such points ought reasonably to be capable of being sensibly addressed without your client proceeding directly to make an application to the Court.*";

(f) Marriott Harrison by letter dated August 3, 2017 to Walkers advised their "*clients' position is that the terms of the Final Proposal as varied are broadly acceptable*", expressed further technical (e.g. tax) concerns and sought confirmation that the Court application would be made "*forthwith*";

(g) on August 17, 2017, Rowel Genn wrote to Walkers disagreeing with an immediate application to Court and indicating that such application could be by consent if the counter-offer, which included the Trustee providing an "*account as to the dealings with the assets of the Trust since January 2008*", was accepted;

(h) on August 26, 2017, Walkers wrote a letter (referenced in their October 3, 2017 letter) to Rowel Genn indicating that in light of the disharmony and failure to agree the Trustee considered it appropriate to apply to Court for directions;

(i) a telephone conference with Walkers on August 29, 2017 is mentioned in Rowel Genn's letter dated September 4, 2017 to Walkers which demands that D2 be notified of any third party offers for properties;

(j) by letters dated September 18 and 28, 2017, Rowel Genn requested a response to their August 17, 2017 counter-offer;

(k) by letter dated October 3, 2017, Walkers requested Rowel Genn to nominate Cayman counsel to accept service of the application the Trustee was about to make.

42. Mr Adkin QC pointed out in argument that D2's proposal was advanced as a package. This made it impossible, he argued, to look at the posited financial gains in isolation from other parts of the package which might add costs (such as the full forensic account D2 clearly had in mind). He also cast doubt on the suggestion that this proposal had clear financial advantages over that of the Trustee on a detailed analysis of the facts. Mrs Warnock-Smith QC pointed out that this was yet another iteration of D2's position, modifying yet again the position he took in January 2016 and the position he took in making representations.

43. In short, the correspondence suggests that the Trustee decided universal agreement amongst the Beneficiaries was impossible and that Court approval should be sought for the Final Distribution Proposal without engaging with D2's counter-offer. The critical question is whether, in all the circumstances, this was an irrational stance to adopt.

<u>Insufficient evidence about Trust Assets</u>

44. D2 complains about his unsatisfactory attempts to obtain information about the Trust Assets (First Affidavit, paragraphs 16-111,150-159, Second Affidavit, paragraphs 9-28, 32-38). The following portion of his Skeleton Argument best captures the essence of the submission that is made:

> "*34. It has throughout been* [D2]*'s case that, in order to implement an equitable distribution of the Trust assets, one must first know, with as much precision as possible, what those assets comprise and what benefits have been derived by any of the Beneficiaries (with or without the Trustee's consent) from the Trust Assets up to the point at which the Court makes any decision. It is fair to say that the Trustee's difficulty in dealing with this part of* [D2]*'s case has arisen to a large extent from its adoption over many years of a 'hand's-off' approach to the management of the Trust, and with the consequence that it has been more or less reliant on* [D1] *to provide it with the necessary information in response to* [D2]'s requests."

45. It is readily apparent that D2's real gripe is the suspicion that a proper accounting of the value of the underlying assets controlled by companies which D1 controls, and in particular any benefits she has personally derived, should take place. Mrs Warnock-Smith QC made it clear in oral argument that the Court is not being asked at this stage to bless any specific distributions in quantum terms. In reality, the Trustee's decision as to the outline valuation approach and the definitively clear and simple apportionment approach was not in controversy. This was the first limb of the approval application. The second limb was, to put it crudely, "who gets what" it being agreed that equality in value terms is the governing apportionment criterion. The proposal was to transfer properties or shares in property holding companies to D1 and/or X Co (the Settlor's estate). The actual valuation of the properties and accounting for rents and other benefits received has yet to be finalised and the Court is not being asked to approve any valuations or distribution amounts. Mr Tolley QC acknowledged in the course of argument that the force of this limb of his complaints was materially diminished if it was possible for D2 to raise what amounted to accounting concerns at a future date.

46. That said it was clear from the correspondence that the Trustee did continue to produce financial accounting material for D2 while declining to engage with the counter-offer. For instance, 45 sets of financial statements were supplied under cover of Walkers' letter of October 26, 2017 and further documents were supplied under cover of letters dated, *inter alia*, February 14, 2018, February 28, 2018, April 23, 2018, September 21, 2018 and October 19, 2018.

47. I should add that D2 is clearly also exercised over his removal as a director of three companies, purportedly for failing to meet KYC requirements. His counsel sensibly accepted that this dispute could not be resolved on the present application, summarising D2's position on this dispute in an Annex to his Skeleton Argument. Further, the suggestion that the Trustee had failed to make information about the Trust available to D2 as a beneficiary lacked substance in light of the fact that in the overwhelming majority of instances, D2 was a director of the underlying companies entitled to access books and records in that capacity. The contention that the liquidation process (as regards the English companies to be liquidated) would be less than independent was clearly entirely speculative as well as a premature complaint.

48. This segment of D2's Skeleton concludes (paragraphs 49-51) with complaints which do not in terms amount to complaints about insufficient information at all. It is submitted that the Trustee has unreasonably (a) accepted D1's position on whether or not a particular shareholding is for the benefit of D1 or that of the Trust, and (b) dealt with the computation of how much credit should be given for the use of Flat H by D1/D3. There is a weak suggestion that more information is required about what period of occupation credit will be given for during what is essentially an agreed window in time.

49. In short, the Final Distribution Proposal contemplates the framework for valuing and apportioning the Trust Assets with the actual valuation being carried out as a separate exercise, to a large extent within a liquidation process for the majority of the underlying companies. The critical question is whether the reasonableness of this approach, which does not require the Court to scrutinize the accuracy of asset valuations yet to be carried out, can be determined based on the evidence presently before this Court.

Unsatisfactory approach to valuation of Trust Assets

50. D2's complaints about the specific valuation approach may conveniently be divided into the following categories:

    (a) complaints about the valuation approach with respect to properties to be transferred to D1, and concerns that she would be involved as controller of the property-owning companies to determine the net asset values of those companies. It was belatedly conceded (Fifth Affirmation on behalf of the Trustee, paragraphs 16-17), that independent persons should calculate the NAV;

    (b) complaints about the failure to identify or instruct valuation experts and/or investigate the affairs of three companies whose shares will be transferred to D1, and the inability of D2 to later challenge any valuation;

    (c) concerns about instructions to Taylor & Wessing in relation to tax advice;

    (d) renewed complaints about properties being sold or transferred to D1 on terms that are less favourable than D2's counter-offer and because a sale on the open market would yield more than a transfer to D1 at a price based on a valuation.

51. The complaint about the need for an independent valuation has now been conceded to be a valid one. The concession indicates that the Trustee does not ignore D2 altogether; the lateness of the concession might be said to support his perception that in general terms his views have not been given due weight. The application is made on the basis that valuations will be carried out in the future. Approval is not sought for the detailed workings of the valuation process such as the selection of valuers, matters which are far from momentous. It is clear that the Trustee will continue to consider the tax implications of the Final Distribution Proposal and so the fact that no response has been given to D2's complaints on this issue is hardly an omission which sets off alarm bells.

52. As far as transferring properties on less preferential terms than D2 proposed is concerned, it seems to me on reflection that little weight can be given to the offer to make a 'premium' payment for another reason which may not have been canvassed in argument. If one beneficiary can elect to pay over the odds to acquire a specific property another beneficiary wishes to receive at market value, surely that other beneficiary can elect to decline to receive the proposed incentive. D2 was in this respect attempting to 'pull himself up by his own bootstraps' by offering to make the admittedly modest premium payment of £40,000. As noted above, it was far from clear on the documents that the financial gains D2 posited would be made if his proposals were accepted would in actuality be achieved. D2 was unable to demonstrate any obviously material financial disadvantage to private transfers over open market sales, and essentially posited possible disadvantages which the Trustee countered with possible advantages.

53. The critical question again is whether or not a reasonable trustee would proceed in the manner proposed by the Trustee in relation to a proposal which is far more nuanced than the raw commercial task of obtaining the best market value for a single asset.

Unsound reasons for the Final Distribution Proposal

54. D2's arguments on this issue were summarised in the following submission:

> "*71. The key point about the provision by the Trustee to the Court of the reasons for the taking of its momentous decision is that the Court can thereby scrutinize the reasoning and determine whether the Trustee has acted rationally (and honestly), and in particular whether it has failed to take into account a material factor or taken into account an immaterial factor. Where, as here, the reasons given are not only demonstrably unsound but also lack any contemporaneous record, it is submitted that the Court should be sceptical as to the contention that a proposal should receive its blessing.*"

55. While contemporaneous record of a momentous decision may be desirable, *Re AAA Children's Trust* [2015] WTLR 683 also confirms that reasons can be elicited from evidence and submissions. Mrs Warnock-Smith QC explained that the Trustee's relevant employees at the time the Final Distribution Proposal was finalised were no longer there. Be that as it may, the suggestion that the posited reasons are "*demonstrably unsound*" was on close analysis a grossly overstated submission.

56. It is true that the Beneficiaries united to deny that they are using their dispute to gain a strategic advantage in their father's probate proceedings. This denial is unsurprising and not entirely conclusive. Assuming that the Trustee is wholly wrong on this narrow point, it is in any event subsidiary to the most important reason of all. The dispute is protracting the final administration of the Trust and wasting costs, not to mention thwarting the wishes of the Settlor. Other subsidiary reasons were artfully doubted by D2 in argument, but in my judgment they were not effectively undermined.

57. One complaint deserves special mention; the critique of the justification that the Final Distribution Proposal will achieve equality. It is argued (Skeleton Argument, paragraph 74(2)(4)) that the "*implementation of the Final Distribution Proposal would prefer* [D1]'s *interests to* [D2]*'s, and so would not achieve equality*". In my judgment there is on the face of it an appearance of inequality to the extent that D1's wishes as regards receiving actual properties are broadly accepted and D2's wholly ignored, even as regards the remaining property which he would have received under the 2014 Agreement.

58. There is a real tension between the Trustee's argument that pure commercial concerns can by adjusted to take into account Beneficiary wishes (in the property transfer context) and the fact that D2's admittedly shifting wishes are entirely ignored. The Trustee's justifications cannot be dismissed out of hand, but bear careful scrutiny. Will D2 change his position? Was his counter-offer a package? It very arguably was, based on the correspondence. It was only at the present hearing that D2's counsel confirmed

that it was not.

59. The critical question of course is whether the Final Distribution Proposal as a whole or any part of it reflects a decision which no reasonable Trustee would take.

<u>D2's 'fall-back" submissions at the hearing</u>

60. If the aggressive stance of D2's solicitors prior to the hearing earned their client the moniker "no more Mr. Nice Guy", D2's leading counsel at the hearing conjured up the image of D2 as the "most reasonable man in the world". Pivotally, he submitted that D2's counter-offer was not a package and invited the Court to consider alternatives to D2's primary position that approval should be withheld altogether. Mr Tolley QC invited the Court to consider the following outcomes:

(a) any blessing should be limited to principles. The Trustee should be sent away to think again; or

(b) the Court could make recommendations such as transferring property to D2; and/or

(c) the Court should retain control and amend the draft Order to give liberty to apply to all parties.

Findings should the Court approve the Trustee's decision to implement the Final distribution Proposal?

<u>Failure to consider D2's better proposal</u>

61. I find that that the Trustee did fail to consider D2's proposal without at the time giving any express reason for so doing. It was or ought to have been obvious to D2 (from the legal correspondence) that the main reasons for this approach was that the Trustee had decided that consultations had to be brought to an end and that the Final Distribution Proposal should be placed before this Court for approval as soon as possible. Those consultations had been on foot for almost 5 years. They produced the 2014 Agreement which D2 resiled from in January 2016. There was no basis for believing that complete agreement could ever be achieved. The Trustee was entitled to at least fear that any proposal which D2 made was likely to be as ephemeral as a fabled Cheshire cat. The Final Distribution Proposal was substantially supported by two of the three Beneficiaries. It retained many features of the proposal to which D2 had initially agreed. In these circumstances, it was far from obvious and not even strongly arguable that D2's proposal, to which it was obvious D1/D3 would not consent, was a better proposal in global terms.

62. As the Trustee conceded that it was possible that D2's latest pre-application proposal could be advantageous in purely financial terms, it is not necessary for me to decide the merits of that issue. Nor do I find it necessary to decide whether Mr Adkin QC was right to contend that D2's computations were based on "dodgy mathematics". The

premium payment offered was clearly a potential benefit to the other two Beneficiaries at D2's own expense, but it did not lie in D2's mouth to complain about their refusing to accept a financial benefit which would not accrue to all three Beneficiaries. What I do decide however is that the Trustee was entitled to assume that the counter-offer was advanced as a package. This assumption was justified by a straightforward reading of the August 17, 2017 counter-offer letter and the subsequent correspondence from D2's solicitors. Only at the hearing did D2 make it clear that his position was a more flexible one.

63. The approach adopted by the Trustee to D2's August 17, 2017 counter-offer clearly fell within the range of responses which a reasonable trustee would decide to pursue in the circumstances. I reject the complaint that the non-response was irrational.

<u>Insufficient evidence about Trust Assets</u>

64. As noted above, the critical question is can the reasonableness of the Final Distribution Proposal, which does not require the Court to scrutinize the accuracy of asset valuations yet to be carried out, be determined based on the evidence presently before this Court? The short answer to this question is a resounding yes.

65. For the purposes of the present application, the Trust and Company Structure chart sufficiently identifies the assets to which the Final Distribution Proposal relates. The information deficiency complained of did not relate to what assets fell to be distributed but whether or not the distributable income attributable to the identifiable assets will be fairly and fully computed. The high point of this part of D2's submission was the apparently unchallenged assertion that his harrying of the Trustee for accounts identified rental income of £7 million disclosed for the first time in spreadsheets served under cover of an October 28, 2018 letter. However, the amount of rental income generated by the property-owning companies has no meaningful connection to the identification of the assets involved in the present application. The Trustee primarily seeks the following relief, namely an Order that:

> "*1. The Plaintiff be authorised to adopt and implement the Final distribution Proposal as described in the Fifth Affirmation* [on behalf of the Trustee] *made on 23 November 2018.*"

66. The Final Distribution Proposal seeks approval for (a) the basis on which the Value of the Trust is to be calculated and (b) the distribution and apportionment principles. Thus both limbs do admittedly engage D2's concerns about the valuation of the underlying assets to some extent but that extent relates to future computations rather than past ones. The first limb of the proposal is described in paragraph 34 of the Skeleton Argument of the Plaintiff as follows:

> "*34. The first step in the proposed distribution process is to calculate the value of the Trust Assets as follows:*

> (a) *Funds in* [Top-Co]*;*
>
> (b) *Less the Trustee's fees, including professional fees;*
>
> (c) *Plus an amount equal to the rent due from* [D1] *and* [D3] *for the* [Flat H] *property;*
>
> (d) *Plus the Valuation Price or NAV for the assets to be transferred to the Beneficiaries directly;*
>
> (e) *Plus any advancements and/or distributions made save for those that there were made to all Beneficiaries in equal shares.*"

67. Implicitly, valuing the Trust Assets will require an accurate accounting of rental income received in respect of properties which will be or have been sold and which are held by companies being liquidated as well as in relation to properties being transferred to Beneficiaries directly. It is not necessary for the Trustee to quantify such rental income in order to obtain this Court's approval for the proposed valuation approach.

68. According to the Skeleton Argument of the Plaintiff (paragraph 35), each Beneficiary will then receive one third of the Value of the Trust "*with credit given for*" :

> "
>
> (a) *the Valuation Price of any property or NAV of any company which has been (or will be) directly transferred to them*;
>
> (b) *any advancement and/or distributions already made*; and
>
> (c) *in the case of* [D1] *and* [D3], *the amount of rental income due from them for the* [Flat H] *property calculated from 31 January 2012.*"

69. Again, the credit to be given under (a) and (c) assumes an accurate accounting of any relevant rental income. However, there can be no sensible suggestion that the Court requires to know what the quantum of such rental income is.

70. The Trustee is not seeking the Court's approval for a valuation; rather, approval is being sought to carry out a valuation process and implement a distribution scheme. D2's complaint that the Trustee has failed to adduce sufficient information about the assets involved in the Final Distribution Proposal is accordingly rejected.

71. For the avoidance of doubt to the extent that D2 further contends that approval should be withheld because the Trustee has improperly dealt with the question of who beneficially owns 69% of Q-Co and because it is unclear precisely how much credit will be given for occupation of Flat H, I reject those further submissions. I am unable to find that the approach adopted or contemplated to be adopted is irrational.

Unsatisfactory approach to valuation of Trust Assets

72. In my judgment it is impossible to conclude that the approach to valuing the Trust Assets is one which no reasonable trustee would have adopted. The criticisms are in general terms unsupportable on prematurity grounds. The mechanics of the valuation process is not cast in stone and the proposal necessarily requires the Trustee to be given the flexibility to make adjustments here and there based on evolving facts and advice as the implementation process unfolds.

Unsound reasons for the Final Distribution Proposal

73. I summarily reject the submission that no sound reasons were advanced for the Final Distribution Proposal overall. The reasons were clearly and convincing articulated in the evidence and submissions advanced by the Trustee and supported by D1/D3 on the hearing of the present approval application.

74. I have already found that a reasonable trustee could have rejected D2's counter-offer, on the basis that the counter-offer was apparently advanced as part of a comprehensive package. The difficult question is whether, in light of the softening of D2's position at the hearing and the unambiguous indication by Mr Tolley QC that his client would consider any reasonable accommodations which were offered, the Proposal should be approved as it stood at the commencement of the hearing.

75. The critical question here becomes would a reasonable Trustee in the light of this position fail to further consider the possibility of agreeing to transfer at least one property to D2, to give effect to his wishes in a manner which was consistent with fairness and, perhaps more importantly, the appearance of fairness. Of the three properties which were agreed in 2014 to be transferred to D2, two were sold with his agreement and one remains: 301/305. The Final Distribution Proposal contemplated that this would be transferred to a company held by the Settlor's estate, effectively to all three Beneficiaries. D2 wishes to acquire the head lease for £10,000. In my judgment reasonable trustees would at this juncture at least reconsider this part of the counter-offer, although I am unable to conclude that after such reconsideration the only rational decision would be to accept the counter-offer.

76. This conclusion is supported by the desire of D1/D3, which the Trustee had some sympathy with, to accommodate D1's desire to have the shares of the company holding Flat 9 transferred to her instead of the property itself. In light of the submissions made by Mr Adkin QC in the course of the hearing, in my judgment reasonable trustees would at least further consider this aspect of the Final Distribution Proposal. The Trustee has justified the decision to transfer properties to D1 rather than selling them on the open market to a material extent on the grounds that the wishes of the Beneficiaries may properly be taken into account.

77. If D2 is no longer seeking to insist on radical changes to the Distribution Proposal as initially implied by what was advanced as a non-negotiable package, his wish to, *inter alia*, receive the head lease he originally agreed to accept (assuming the latest iteration of his position to be a firm one) cannot rationally be dismissed out of hand.

Summary of findings

78. The Final Distribution Proposal is approved, but I recommend that the Trustee reconsiders the wishes of D2 to have 301-305 transferred to him and the wishes of D1/D3 to have Flat 9 indirectly transferred to her. The Trustee is at liberty to implement the Final Distribution Proposal as initially placed before the Court or modified in light of further brief and focussed consultations on those two limbs of the Final Distribution Proposal.

Conclusion

79. I grant an Order substantially in terms of the draft submitted by the Trustee save that paragraph 1 should be amended to add a proviso to the effect that the Trustee is at liberty to amend those parts of the Final Distribution Proposal which the Court recommended should be reconsidered. I shall hear counsel, if required, on any issues arising from the present Judgment.

POSTSCRIPT

80. It is to be hoped that following a hearing which has focussed on the rationality of the Trustee's conduct, the Beneficiaries will realise that letting go of their past grievances and healing the familial wounds is the only rational thing for them to do.

GRAND COURT - CAYMAN ISLANDS -

HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT