



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 40

IN THE MATTER OF THE W TRUST

REASONS FOR DECISION

(In Chambers)

Application for blessing of Trustee's decision

Hearing Date	3 and April 2025
Date of Decision (circulated)	11 April 2025
Date of Decision (formally handed down)	2 June 2025

Appearances: *Elspeth Talbot Rice KC and Keith Robinson of Carey Olsen Bermuda Limited for the Trustee*

Edward Cumming KC and Jonathan O'Mahoney (Conyers Dill & Pearman Ltd) for the 3rd Defendant

Lilla Zuill (Cox Hallett Wilkinson Ltd) for the 2nd and 4th Defendants

Non-appearance

5th Defendant (notified and served but does not wish to participate in the proceedings)

REASONS of Martin, J

Introduction

1. This is an application by the Trustee of the W Trust (also referred to in this Decision as “the Trust”) for the Court’s blessing of the Trustee’s decision not to proceed to make any further distributions of assets held by the Trust to the beneficiaries pending the outcome of certain tax enquiries that have been opened by an onshore tax authority (the “Tax Authority”) into the history of the financial affairs of the Trust and its beneficiaries.
2. The background facts are set out in the summary below. The Court has previously granted a confidentiality order to protect the privacy of the financial affairs of the Trust and its beneficiaries. This Decision therefore refers to the parties otherwise than by name and only gives a general description¹ of the essential background facts to aid an understanding of how the Court has approached the issues.

Summary and Disposition

3. The Court has considered the Trustee’s application as well as various objections pressed against it on behalf of the Third Defendant (“D3”) and has concluded that, in the particular circumstances of the case, it is appropriate to grant the relief sought by the Trustee, albeit in a slightly modified form. The reasons for the Court’s decision are set out below.

Background

4. The W Trust is a discretionary Settlement that was established more than 25 years ago. The Second (“D2”) Third (“D3”) Fourth (“D4”) and Fifth (“D5”) Defendants are beneficiaries of the Trust.
5. The Trust is governed by a foreign law, but because the Trustee is a licensed Bermuda trust company, the Bermuda Court has jurisdiction to entertain the application by the Trustee by virtue of section 9 (2) of the Trusts (Special Provisions) Act 1989. Strictly, the Trustee’s application is governed by the foreign governing law not Bermuda Law, but there is no material difference between the two systems of law for the purposes of this application.
6. The Trustee entered into a settlement agreement (the “Settlement Agreement”) with the Tax Authority the effect of which was to settle certain potential tax liabilities of the beneficiaries.

¹ Detailed references to the evidential materials filed in support of the parties’ respective positions that would normally be included in the Decision have been omitted for this reason.

7. The Trust is a discretionary trust under which the beneficiaries may be considered from time to time for distributions of money or property held by the Trust for their benefit, but none of the beneficiaries has a vested legal right or entitlement under the terms of the Trust to demand or require the Trustee to make a distribution to them. However, the effect of the Settlement Agreement was that, for the purposes of the application of the particular tax laws, the Trustee accepted that the beneficiaries would be treated as being entitled to an equal share of the assets held by the Trust.
8. Some years later, the Trustee decided to exercise its powers under the Trust to make substantial distributions of the assets to the beneficiaries (the “Principal Distributions”), with a view to “unwinding” the Trust. Several distributions of money and property were made to D2, D3, D4 and D5 which were intended to achieve an equal distribution of value of the assets to each of them reflecting the terms of the Settlement Agreement. This was carefully arranged in order to ensure that the beneficiaries were not inadvertently exposed to the risk that the Tax Authority would claim that the terms of the distributions were inconsistent with the Settlement Agreement and thereby trigger additional assessments to tax. Certain assets in the Trust were not distributed but were retained pending further consideration as to how best to arrange for their distribution, the timing and the terms on which these assets would be appointed out of the Trust (the “remaining assets”). There is a dispute over whether there was a firm decision by the Trustee to distribute the remaining assets, but on the evidence it is clear that there has not yet been a decision taken by the Trustee to distribute the remaining assets.
9. When the Principal Distributions were made, they were disclosed by the beneficiaries as required by the relevant tax laws, and the Tax Authority opened enquiries into the background to the Principal Distributions to each of D2, D3, D4 and D5 shortly thereafter.
10. *[The content of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
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12. *[The content of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
13. Specialist tax lawyers retained by the Trustee reported to the Trustee that on another matter the Tax Authority indicated unofficially and informally that its firm view was

that in order to comply with the terms of the Settlement Agreement any further distributions would have to be made (i) in equal amounts and (ii) at the same time. The specialist tax lawyers have advised the Trustee that this is not correct in their view, but that there is a clear risk that if the Trustee proceeds to make an unequal distribution or to make distributions otherwise than at the same time, the beneficiaries will be at risk of further tax assessments on the liabilities that were covered by the Settlement Agreement. They also advised that even if the Tax Authority does not make such claims against the beneficiaries, the Trustee of the W Trust could still be exposed to a claim from the Tax Authority.

14. The consensus reached between the legal team advising the Trustee on tax matters was that the Tax Authority's claims were bad ones which should not be brought either against the beneficiaries for assessments of additional taxes, or against the Trustee. However, the experience of leading tax counsel was that the possibility of the Tax Authority making these claims could not be ruled out and, notwithstanding leading tax counsel's views on its lack of merit, it could not be said that the Tax Authority's potential claim would "inevitably fail".
15. The trust law advice given to the Trustee by leading counsel was that the potential for (i) additional tax claims being made as a result of unequal or non-simultaneous distributions and (ii) a claim against the Trustee in relation to the W Trust were matters relevant for the Trustee to take into account when considering whether to make any further distributions to the beneficiaries and if so when and in what amounts. The Trustee was advised that it was also relevant to take into account that the amount of the claim (if made) would be such as to extinguish the value of the assets which remain in the Trust by a very large margin, leaving a very substantial shortfall.
16. At about the same time, the Trustee had also received a claim from the former Protector of the Trust seeking compensation for the value of his services, which would have had a very material impact on the cash position of the Trust.
17. In the light of these two events, and acting upon the advice it had received, the Trustee decided not to consider taking any steps to make any further distributions until the Protector's claim had been settled and until the Tax Authority's enquiries into the tax affairs of the beneficiaries had been resolved or closed.
18. D3 is terminally ill. D3 has for some time been requesting the Trustee to proceed with further distributions as soon as possible so that D3 can make arrangements in a tax efficient manner to make provision for D3's children, who (D3 says) might not otherwise be able to benefit under the Trust. D3 says that the reality is that the Trustee must make equal distributions in conformity with the Settlement Agreement, which D3 says amounts to an effective entitlement to D3 to receive an equal share of the

remaining assets. D3 says there is no requirement for all distributions to be made at the same time, and given the circumstances has been pressing the Trustee to proceed to make a distribution of a quarter of the value of the assets to D3 without delay.

19. More recently, the Protector's claim has been settled, and D3 has also now satisfied the enquiries made by the Tax Authority into D3's tax affairs [*The content of the rest of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.*]
20. D3 says that there are no longer any obstacles to the Trustee to proceed to make the distribution of the rest of the assets, or at least a distribution to D3 of one quarter of the value of the assets. D3 has requested that the Trustee use the available liquid assets to meet that request, and deal with the other beneficiaries out of the remaining cash and illiquid assets in due course.
21. [*The content of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.*]
22. D5 has also now satisfied the enquiries made by the Tax Authority into D5's tax affairs on similar terms to D3 and has requested the Trustee to proceed to make the distribution requested by D3.
23. D2 and D4 have not resolved the enquiries made by the Tax Authority into their tax affairs, and they take a different view as to the appropriate steps to be taken. D2 is not opposed to an ultimate distribution but says that this should occur after all the enquiries have been resolved. D4 takes a similar position. They support the Trustee's cautious approach in not taking any step which might afford the Tax Authority the opportunity to make a claim against any of the beneficiaries for assessments of tax or to expose the Trustee to a claim.

The Trustee's decision

24. The Trustee has come to the court for a blessing of its decision not to make any further distributions of the Trust assets until after the conclusion of all the Tax Authority's enquiries. This includes not making an interim distribution to D3 alone.
25. The reasons for making the decision in these terms are in summary:
 - (i) even though the Tax Authority has closed its enquiries into the tax affairs of D3 and D5, there is still a potential risk that the Tax Authority could make additional assessments to tax against the beneficiaries and/or bring a claim against the Trustee ;

- (ii) even if the Tax Authority's claims are not good in law, there remains the practical risk that the Tax Authority might make them in any event, and the beneficiaries and the Trustee may be motivated to settle them, notwithstanding the absence of any merit;
 - (iii) even though the advice of leading specialist tax counsel is that the claims are not good ones, the advice (at this stage) is that it cannot be said that they will inevitably fail.
26. The Trustee has received written confirmation of the advice of leading trust counsel and leading tax counsel that these are matters relevant to be taken into account by the Trustee. The Trustee has been advised that the decision remains the Trustee's to take alone in the light of these factors, along with the other relevant issues which include the interests of the Trust as a whole and the different attitude of the beneficiaries to the question of distribution.
27. The basis of the court's jurisdiction to bless a decision of a trustee is well settled and familiar. It is rooted in the explanation of the principles set out in **Public Trustee v Cooper**², a decision of Hart J encapsulating an earlier unreported decision of Robert Walker J (as he then was). The Bermuda courts have approved and applied these principles in numerous cases including **Re A Trusts**³. There is no dispute between the parties as to the relevant principles to be applied.
28. The essence of the court's function on a blessing application is to ascertain that (a) the decision (or action) the Trustee has decided to take is lawful (b) the decision or action to be taken is within the Trustee's lawful powers (c) the decision reflects the Trustee's genuinely held view, and that view is one which a reasonable trustee could properly take and (d) the decision is not tainted by a conflict of interest which disqualifies the trustee from taking the decision.
29. Provided these criteria are met the court does not interfere with or refuse to give the blessing even if it is a decision that the court might not itself take⁴. The court undertakes a limited review and is primarily concerned with ensuring that the trustee has not taken into account matters which are not relevant, or left out of account matters which are relevant, or has come to a conclusion which is irrational or one that no reasonable trustee, properly directed, could have arrived at⁵.

² [2001] WTLR 901

³ [2018] SC (Bda) 42 Civ (17 May 2018) at [17] per Kawaley CJ.

⁴ **Re Manisty's Settlement** [1974] Ch 17, 25 per Templeman J (as he then was); **Pitt v Holt** [2013] 2 AC 108 at [73] per Lord Walker JSC.

⁵ **Re P Trusts** [2023] SC (Bda) 31 Civ (20 April 2023) at 26 per Hargun CJ: "*The central question under this jurisdiction is for the court to consider and determine whether the decision made by the trustee is within the range of possible decisions which a reasonable and prudent trustee could have made. The court is considering the question whether the decision of the trustee passes the test of rationality.*"

D3's grounds for opposing the blessing

30. D3 has been frustrated by the Trustee's apparent delays in proceeding with the "unwinding" of the W Trust that had been initiated, but which had been interrupted by the events described above. D3 has expressed concerns that the Trustee is not giving appropriate weight to the concerns that D3 has raised and is deferring to the wishes of other beneficiaries and has been making excuses for the delay based on unjustified concerns over the potential exposure to the risks associated with the outstanding tax enquiries.
31. The Court should say at this stage that these concerns are based on supposition and speculation, rather than specific evidence, perhaps driven by the natural anxiety that D3 has about being able to make arrangements in light of D3's terminal illness, and the pressure of time passing. These concerns have naturally led to tension and mounting frustration that has been evident in the correspondence.
32. D3 opposes the Trustee's application. There are several reasons given for taking this position which are considered below, but the purpose of opposing the Trustee's application is to ensure that in the future there is no obstacle to challenging the Trustee's decision⁶. This is because once the court has given its blessing to it, a trustee's decision is not liable to be challenged afterwards, and so the court is enjoined to proceed with caution before granting a blessing, which is given without a full trial of the underlying issues or cross-examination of witnesses⁷.
33. It is relevant to note that the broad exoneration provisions contained in the Trust Deed would require any future challenge to allege and prove that the Trustee had acted knowingly in breach of trust in reaching its decision⁸. No such allegation is made on the hearing of this application, and it is difficult to imagine the circumstances in which such a claim could ever in fact be made. This observation is made by way of comment on D3's stated motives for opposing the application. The Court emphasises that this feature has not played any part in the Court's application of the **Public Trustee v Cooper** principles.
34. D3 opposes the application on the following primary grounds⁹:
- (a) The Trustee's decision is not momentous so the court should not bless it, or alternatively that the decision is not of such a type as the court should bless or approve.

⁶ Paragraph 4 of D3's written submissions.

⁷ **Cotton v Earl of Cardigan** [2014] EWCA Civ 1312 at 78 "*The procedure is intended to be quick and accessible*" per Vos LJ.

⁸ Clause 17.1 of the Trust Deed.

⁹ The Court has not recited each independent point made in D3's extensive and comprehensive submissions but has confined the analysis to those points on which the application turns.

- (b) The Trustee's decision is a fetter on the Trustee's ongoing duty to keep an open mind on whether or not to make a distribution and on what terms, and to give ongoing consideration to the possibility of making distributions as circumstances change, in particular as the risk of a claim by the Tax Authority diminishes. Therefore, the court should not bless the decision.
- (c) The Trustee's decision is not rational in two respects: (i) it is said that the Trustee has taken an irrational view of the legal risks posed by the Tax Authority's enquiries, or alternatively, in taking the view it has, the Trustee has taken irrelevant factors into account; and (ii) the decision not to make a distribution to D3 unless equal distributions can be made to the other beneficiaries at the same time is irrational and not based on legal principle.
- (d) The Trustee has not managed the conflict of interest between serving the best interests of the beneficiaries exclusively and protecting its own interest against a potential claim by the Tax Authority.
- (e) *[The content of this sub-paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
- (f) The process of decision-making was insufficiently clear and the reasons for the Trustee's decision were inadequately explained.
- (g) The Trustee has not given proper consideration to other alternatives to enable a distribution to be made to D3 separately from the cash assets, or alternatively, has not given proper consideration to all aspects of D3's position.

35. The Court will deal with each of these main points in turn.

Is the Trustee's decision "momentous"?

36. The court will normally only entertain applications to bless or approve decisions that are momentous in the life of the particular trust¹⁰. These types of decisions often involve situations which are obviously pivotal such as, for example, a decision to distribute all or a substantial part of the trust, or to re-arrange the beneficial interests, or to restructure the trust to benefit different branches of a family for succeeding generations of the original class of beneficiaries or involving the disposal of assets of substantial value.

37. These examples show the wide breadth of matters which may justify a Trustee in coming to the court for blessing. But the court's supervisory jurisdiction over trustees does not always require the blessing to involve a decision of such magnitude, provided that it is a significant decision in the life of the Trust, measured against the

¹⁰ Category 2 of the classes of case described in **Public Trustee v Cooper**: see various examples given in *Lewin on Trusts* (20 edn) paragraph 39-093.

impact it will have on the interests (and lives) of the beneficiaries for whom the Trust was established to benefit. The courts have held that an ‘ordinary’ decision may become a ‘momentous’ one where it is likely to be the source of acrimony amongst the members of the beneficial class¹¹.

38. The Court had some initial hesitation in accepting that the Trustee’s decision *not* to do something could be described as momentous, since nothing has in fact happened. However, the circumstances which have given rise to this application do, in my view, afford justification for treating the Trustee’s decision as “momentous”. These features include (i) the fact that D3 is terminally ill and the impact of the delay in proceeding with any further distributions that will be caused by the Trustee’s decision is very significant to D3 (ii) the dissent and strained relations between the beneficiaries that the Trustee’s decision has given rise to has turned the decision into a much more highly charged emotional situation for the beneficiaries than an ordinary administrative decision and (iii) the ultimate intention to “unwind” the Trust would otherwise have been momentous, and so an undefined and unquantified delay in proceeding with further distributions is no less momentous, particularly when viewed from D3’s perspective.
39. The Court is responsible for the supervision of trusts and when a trustee seeks the Court’s assistance, the Court will not turn the trustee away without good reason¹².
40. This Court is therefore satisfied in this case that the Trustee’s decision is of a type and character which it is appropriate to give its blessing, provided that the elements required by **Public Trustee v Cooper** are also demonstrated to the Court’s satisfaction.

Does the Trustee’s decision amount to a fetter on the Trustee’s duty to give ongoing consideration to making further distributions?

41. This point arises out of the way the Trustee has expressed its decision. On behalf of D3 Mr Cumming KC has made a number of forensic criticisms of the terms of the Trustee’s decision to the effect (it was submitted) that it was not clear what the Trustee’s actual decision was, when it was taken and by whom and on what information, and where the actual decision was recorded.
42. Most of these criticisms are in my judgment unfair. It is clear that the expression of the Trustee’s decision not to make further distributions until the Tax Authority’s

¹¹ See **Hawksford Jersey Ltd v A and others** [2018] JCR 17 at paragraphs 41-2 per Sir Michael Birt C.

¹² See **Cotton v Earl of Cardigan** (supra) at paragraphs 84-6: “*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....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.*” These principles were approved by Hargun CJ in **R Trust** [2019] SC (Bda) 36 Civ (3 June 2019).

enquires into all of the beneficiaries' affairs have been concluded was (i) in response to D3's ongoing pressure to make further distributions (at least to D3) and (ii) was intended to indicate that the decision not to proceed was not a decision to delay further distributions indefinitely, but to give a context in which the Trustee's decision could be understood. This is evident from the correspondence in which the Trustee expressed its decision variously as "*for the time being*", "*presently*" and "*in the current circumstances*".

43. The Court agrees that while a trustee's administrative decision not to take a step need not justify a written resolution, in this case it would have been preferable if the terms of the Trustee's decision had been recorded in a formal resolution, especially in light of the fact that it was to be the subject of a court application for blessing. However, nothing turns on that.

44. The Trustee has made it clear in submissions to the Court and by the various expressions in the correspondence that (a) the decision is for the time being and (b) it will be reviewed on an ongoing basis as circumstances admit a reconsideration of the risks associated with the ongoing Tax Authority enquiries, particularly as those risks are seen to diminish.

45. Therefore, the Court rejects the submissions made on behalf of D3 that the Trustee's decision was "*forward facing*" or amounted to a fetter on its duty to keep an open mind on an ongoing reconsideration of the position as circumstances change.

Is the basis of the Trustee's decision based on an irrational assessment of the risks posed by the Tax Authority's remaining open enquiries?

46. This was the main ground on which the legitimacy of the Trustee's decision was attacked. It was submitted on D3's behalf that the Trustee's decision is irrational in the sense that no reasonable trustee could reach that decision in the light of the settlements made by the Tax Authority with D3 and D5.

47. Mr Cumming KC says on behalf of D3 that there is now absolutely no risk that the Tax Authority will either make an assessment or make a claim against the Trustee. The reasons for taking such a confident position are:

- a. *[The content of this sub-paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
- b. *[The content of this sub-paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*

- c. *[The content of this sub-paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
- d. Viewed in the light of these facts, Mr Cumming KC argued that the risks of the Tax Authority are so remote as to be “fanciful”, in the sense that such a claim would not be reasonably arguable¹³. He urged that no reasonable trustee would take the risk of such a claim into account when determining whether to make further distributions.
- e. Even if the Trustee has concerns about making distributions to D2 and D4 (whose open tax enquiries have not yet been concluded) there is no principled reason offered as to why a distribution cannot be made to D3 alone without waiting for the other enquiries to be concluded because the Tax Authority has recognised in writing that any future distributions to D3 will be treated in the same manner as the Principal Distribution made to D3 and in accordance with the terms of the Settlement Agreement.

48. In response to these points, Ms Talbot Rice KC submitted on behalf of the Trustee that the conclusion of the tax enquiries with D3 and D5 does not rule out the possibility of a claim being raised against either D2 or D4 or remove the risk of a claim being made against the Trustee, even though these signs are encouraging. Further, she submitted that it is not known exactly what type of claim the Tax Authority might bring.

49. Moreover, leading tax counsel has advised the Trustee that it cannot be said that the Tax Authority’s claims will inevitably fail, so Ms Talbot Rice KC submitted that the estimation of the risks associated with making a further distribution in the light of these factors must be assessed by the exercise of the Trustee’s judgment alone. If a claim could properly be made, then it does not matter that it may ultimately be defeated, because the claim is not ‘fanciful’ within the meaning of the **Concord Trust**¹⁴ decision relied upon by D3.

50. Ms Talbot Rice KC submitted that these remaining potential risks are plainly matters which the Trustee is entitled to take into account when considering whether, when and on what terms to proceed to make further distributions to the beneficiaries.

51. *[The content of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only].*

¹³ Reliance was placed on **Concord Trust v the Law Debenture Trust Corp Plc** [2005] 1 WLR 1591 at [34] which was also relied upon in connection with the indemnity point which is considered below.

¹⁴ (Supra)

52. In relation to the making of distributions otherwise than in equal shares and at the same time, Ms Talbot Rice KC maintained that the Trustee was advised that the Tax Authority is likely to view such a step as being in breach of the Settlement Agreement. Right or wrong as a matter of law, Ms Talbot Rice KC said that the Trustee does not need to take the risk.
53. The Court's analysis of the arguments on the 'rationality' point (which includes taking into account irrelevant factors) is that once it is accepted that the Trustee has taken advice from its legal advisers, especially when those advisers are leading specialists in both tax and trust law, it is difficult to see how it can be argued that the Trustee is not acting rationally or reasonably in acting upon that advice. The Court cannot second guess the correctness of that advice and should not be invited to do so on an application such as this.
54. In addition, the advice was not that the Trustee should or must take a particular course but that the Trustee is entitled to take both the legal risks and the practical risks into account in making its decision. Legal advice is (obviously) not confined to advice on the strict application of the law but extends to practical risks and strategic considerations. These factors are therefore not irrelevant to the Trustee's decision, and it is a matter exclusively for the Trustee to ascribe the weight and importance to those risks that it deems appropriate.
55. In relation to the risk of additional assessments to tax against the beneficiaries, the fact that the Tax Authority may hold a mistaken view as to the need for contemporaneous and equal distributions does not mean that the Trustee should not take that mistaken view into account when assessing both the legal and practical risks to which the beneficiaries are exposed. The Trustee is not acting irrationally or unreasonably in so doing.
56. Similarly, in my judgment there is no sound basis for criticising the Trustee's decision as being irrational or that the Trustee was taking an irrelevant consideration into account when the Trustee's advisers have expressed the view that a claim against the Trustee would not be demurrable. In leading counsel's view there is a risk (albeit as yet unquantifiable) of potential liability because it cannot be said that the claim will inevitably fail. Moreover, the claim has not yet been articulated and so the Trustee cannot be sure the precise form that the claim might take.
57. The Court therefore rejects the argument advanced on behalf of D3 that the Trustee's decision was either irrational or that the Trustee took into account factors which were not relevant to its decision.
58. For completeness, the Court also rejects the submission that the explanation of the Trustee's decision was (i) not clear or (ii) not supported by sufficient evidence. The

evidential materials show that the Trustee's decision-making process was iterative and evolved as circumstances developed and to which the Trustee reacted, with the benefit of ongoing advice. The Trustee's conclusion was clearly explained and there was sufficient evidence to support it within the parameters explained in the case law referred to¹⁵.

Has the Trustee managed the alleged conflict of interest appropriately?

59. The primary allegation is that the Trustee has taken into account the potential exposure it has to a claim in priority to its duty to serve the interests of the beneficiaries. This point arises because the Trustee raised as an additional reason for delaying consideration of further distributions the Trustee's potential exposure to a claim that would far exceed the value of the remaining assets held by the Trustee. The Trustee said that while it may be unlikely, the total potential exposure to a claim would be vast, and that it would be appropriate to retain the whole of the remaining Trust assets pending the outcome of all the tax enquiries.
60. Mr Cumming KC argued on behalf of D3 that the proper approach for the Trustee to take was to retain only so much of the Trust assets as would be necessary to meet the costs of defending the unmeritorious claim. Reliance was placed on the dictum of Lord Scott in **Concord Trust v The Law Debenture Trust Corp Plc**¹⁶ at paragraph 34 where he said:

"The critical issue is whether the Trustee is at risk not simply of incurring liability in costs but also of a liability to Elektrim in damages for loss cause by giving an invalid notice. It is or should be common ground that the Trustee cannot reasonably insist on an indemnity to cover the latter risk unless the risk is more than a merely fanciful one."

61. Much argument was devoted to analysing the meaning of 'fanciful' for the purposes of deciding whether this meant that there was to be no risk at all that the claim might succeed or whether the claim must be reasonably arguable before it justifies retaining the whole of the Trust fund against the potential exposure¹⁷. In this case the Court considers that the Trustee was entitled to assess the risk as not being merely fanciful on the basis that (i) leading tax counsel has expressed the view that it could not be said that the claim would inevitably fail, thereby importing some (albeit unquantifiable) risk of potential liability (ii) the litigation risks included the risk of

¹⁵ See **Kan v HSBC International Trustee Limited** [2015] JCA 109 at paragraph 19 per Bompas JA and **Cotton v Earl of Cardigan** (supra).

¹⁶ (Supra).

¹⁷ See the conflict in the judicial statements on this point in **Perez v Equiom Trust Corporation (UK) Limited** [2022] EWHC 2996 (Ch) at para 129-137 and **White Willow (Trustees) Limited v Trilogy Management Limited** [2022] JRC 120. Although it is not necessary to decide this for the purposes of the decision in this case, for the reasons given, the Court would have preferred the statement of principle in **Perez** following **Concord**. In this case, for the reasons given above, the risk of a potential claim that it cannot be said will inevitably fail falls within the test in **Concord** and **Perez**.

settlement for reasons other than the merits of the claim (i.e. the time and resources expended in defending the claim might outweigh the costs of successful defence and the toll taken on the beneficiaries by the delay and uncertainty). The fact that the opinion was not a fully developed advice on the merits does not deprive the Trustee of the ability to rely upon it as a rational and reasonable trustee. Nor can it be said that this was a failure in the quality of the advice because no one can predict exactly how the claim will be put until it is in fact made.

62. As to the alleged giving of priority to the Trustee's interests ahead of the interests of the beneficiaries, the short answer is (i) in a discretionary trust the beneficiaries have no vested entitlement to the assets and (ii) the interests in the Trust assets are held subject to the Trustee's right of indemnity.
63. The Court's conclusion on this point is that the Trustee has managed the conflict appropriately in balancing the Trustee's right to an indemnity out of the Trust assets against the existence of a potential (and not fanciful) risk of a claim being made against the Trustee which has the possibility of extinguishing the assets of the Trust.
64. In this respect all trustees have the same inherent "conflict" where a claim is threatened. In my view it is strictly not a conflict of interest where the beneficiaries' interests are subject to the priority rights of the Trustee to a lien or charge over the whole the Trust fund in respect of liabilities incurred by the Trustee in the performance of their duties or the exercise of their powers and discretions as Trustee¹⁸.
65. A subsidiary claim was made that there was a conflict of interest in the perpetuation of the Trust fund so that the Trustee could continue to earn fee revenue. This was not a serious claim, which was made apparent by the relatively small level of fees charged by the Trustee for administering the Trust. The amount of the fees and expenses incurred in obtaining advice to discharge the Trustee's duties properly puts the modest amount of fees charged by the Trustee into perspective.
66. Therefore, the Court rejects the criticisms made against the Trustee's management of the alleged conflicts of interest and finds that there is no conflict of interest that would disqualify the Trustee from making the decision that it seeks to have blessed by the Court.

Has the Trustee given full and frank disclosure of all relevant matters?

67. It was alleged that the Trustee had failed to give full and frank disclosure of all matters relevant to the making of the decision on the application for blessing. This general allegation took four different forms.

¹⁸Explained in *Lewin on Trusts* (19 Ed) 21-044.

68. *[The content of this paragraph contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]*
69. Second, it was said that the Trustees had not disclosed all of the correspondence between the advisers, to a similar purpose.
70. Third, it was said that the Letter of Wishes had not been disclosed, which was a relevant and material factor to be taken into account when the Trustee was making its decision.
71. The general point was also made that the Trustee had principally relied upon the evidence of its legal advisers to provide most of the evidence to explain the Trustee's decision, but that there was little direct evidence from the Trustee as to its decision making process and this was criticised as being an insufficient basis for the Court to assess and review the decision-making process of the Trustee.
72. Taking each point in turn, there is no merit in the first point. As Ms Talbot Rice KC said, the Trustee is a professional trustee and acts for numerous trusts. *[The content of this sentence contains confidential information which it is not appropriate to publish. The content has been removed and appears in a confidential schedule which is available to the parties and their legal counsel only.]* It is not in breach of its duties to the beneficiaries of the W Trust in so doing, much in the same way that a director serving on the boards of different companies must keep the information obtained in each capacity confidential from the others.
73. The allegation that relevant correspondence has not been disclosed is a speculative claim, and there is no evidence to suggest that there is relevant material which has been withheld from the Court.
74. The Court asked about the relevance of the Letter of Wishes but accepted Ms Talbot Rice KC's explanation that the Letter of Wishes might only become relevant on an application for a blessing to make the distributions. The Court is satisfied that the relevant information has been supplied to the Court for the purpose of entertaining the present application.
75. Finally, the Court is satisfied from the detailed correspondence setting out the reasons behind the Trustee's decision which was sent over a lengthy period directly from the Trustee to the beneficiaries in conjunction with the correspondence sent by those acting on the Trustee's behalf that there is more than sufficient evidence upon which

the Court can assess the reasons for the Trustee's decision and the need for the application to the Court for a blessing of its decision¹⁹.

Has the Trustee given appropriate consideration to alternatives?

76. This complaint can be addressed briefly. The summary of the points considered by the Trustee given above and the correspondence between the Trustee and the parties' respective advisers shows in my view that there are limited options available to the Trustee. This is because of the genuine concern that a non-equal and non-simultaneous distribution will prompt a negative reaction from the Tax Authority. This is a concern that the Trustee's advisers say must be taken seriously and at face value. Therefore, any loans or gifts or other arrangements are likely to carry unquantifiable risks to a challenge by the Tax Authority.
77. Ultimately it is a matter for the Trustee to determine what other steps are appropriate (if any) and neither the beneficiaries nor the Court are in a position to second-guess the Trustee's judgment on its approach.

Other matters

78. For completeness, the Court records that there were two other themes of complaint that were referred to in the context of the decision-making process the Trustee has undertaken. These complaints have already been addressed in part, but it is appropriate to comment briefly on two specific criticisms that have been made.
79. It was said that the Trustee had shown undue deference to the wishes of D2 in reaching its decision, but the Court is satisfied on the evidence that there is no substance to this complaint. However, it is clear from the Trustee's affidavit that the Trustee has (a) taken into account the views of all beneficiaries and (b) has not simply given way to D2's wishes.
80. It was also said that the fact that the Trustee's counsel had expressed the view that the Trust was not "fit for purpose" had not been taken into account sufficiently by the Trustee in evaluating its decision. The Court is satisfied on the evidence that this point is in reality a side issue that arose from a misunderstanding of the context in which this expression was used by leading counsel at an earlier stage of the Trustee's deliberations and was directed at a different issue (i.e. the interpretation of the Trust Deed) which does not arise on this application.

Conclusions

81. In the light of the Court's findings above, notwithstanding the persuasive presentation of the objections urged on behalf of D3 by Mr Cumming KC, the Court has concluded that it is appropriate to grant the blessing to the Trustee in respect of its decision not to make any further distributions to the beneficiaries "for the time being". To this extent

¹⁹ See **Kan v HSBC International Trustee Limited** (supra).

the Court modifies the terms of the relief sought in the Originating Summons to make it clear that the Trustee is required (as it has indicated by counsel that it will) to continue to assess the risks associated with making further distributions to the beneficiaries in the light of changing or developing circumstances and any material changes in the perceived risks.

82. The Court emphasises that it is for the Trustee alone to make the decision whether or not to make further distributions, when and on what terms, taking into account the legal and strategic advice from its lawyers. The Trustee is in the unenviable position of making difficult, finely balanced and sometimes agonising decisions. It is for the Court to support the Trustee in the dispassionate and independent performance of those duties, tempered by such compassion as may be possible in the circumstances.
83. Counsel is to prepare the appropriate Order reflecting the terms of the Court's blessing as modified in paragraph 80 above. The Court will hear the parties on costs if so desired.

Dated this 11th April 2025



THE HON. MR. ANDREW MARTIN

PUISNE JUDGE