IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 57 of 2022 (IKJ)

IN THE MATTER OF PROCEEDINGS UNDER SECTION 48 OF THE TRUSTS ACT (2021 REVISION)

AND

IN THE MATTER OF THE X TRUST AND THE Y TRUST

BETWEEN:

A Limited

(in its capacity as trustee of the X Trust and the Y Trust)

Plaintiff

- and –

B

Defendant

IN CAMERA

Appearances: Mrs. Elspeth Talbot Rice KC instructed by Ms. Jessica Williams, Mr. Charles Moore and Ms. Moesha Ramsay-Howell of Harneys for the Plaintiff (the "Trustee")

Ms. Shân Warnock-Smith KC instructed by Mr. Andrew Peedom and Ms. Sally Peedom of Collas Crill for the Defendant

Before: The Hon. Justice Kawaley

Date of Decision: 7 November 2022

Draft Reasons circulated: 24 November 2022

Reasons Delivered: 29 November 2022

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Trusts- administration of trusts having regard to the possibility of third-party proprietary claims against trust assets-implications of proceeding without notice to potential claimant-payment of trustee's fees and expenses-potential conflict of interest-liquidation of trust assets-rationality of proposed transaction-rationality of declining to further consider late modification to original proposal suggested by beneficiaries -section 48 Trusts Act (2021 Revision)

Introduction and summary

1. By an Originating Summons dated 1 June 2022, the Trustee sought an Order that:

> "*1. It be permitted to retain its fees and expenses previously paid; to pay its incurred but unpaid expenses; and to pay its future fees, including its annual fixed fees and any special fees as defined in the evidence in support of this Originating Summons, and expenses, including its reasonable legal expenses, incurred or to be incurred in its capacity as trustee of the X Trust and the Y Trust.*
>
> *2.It be permitted to* [liquidate the two assets] *referred to in the Trustee's evidence in support of this Originating Summons by way of realisation of Trust assets, inter alia to pay the said unpaid fees and expenses and the future fees and expenses.*
>
> *3. The Trustee be indemnified out of the assets of the X Trust and the Y Trust in respect of its costs of the Originating Summons.*"

2. The Trustee is the trustee of two trusts settled by the Settlor and governed by Cayman Islands law. The Defendant, a child of the Settlor, was appointed to represent all beneficiaries of both Trusts pursuant to GCR O. 15 r.13. The Defendant agreed in principle that the Trustee was

entitled to be remunerated out of the assets of the Trusts but objected to the proposed liquidation of two specific assets held by the X Trust on the grounds that:

> (a) the difference between the ultimate realizable of the assets it was proposed to liquidate and the current value was too great a loss for the Trusts to justifiably suffer in the circumstances without pursuing other more commercially favourable alternatives (principally a short-term loan secured by the Trust assets it was proposed to liquidate and a sale of other more illiquid assets held by the Y Trust); and
>
> (b) the funds liquidating two assets immediately would generate far in excess of the Trustee's current or foreseeable fees, particularly since the beneficiaries were contemplating removing and replacing the Trustee.

3. The Trustee's response to these points was essentially that a loan was merely a short-term solution carrying borrowing costs which would be lost if no other assets were liquidated and the said assets would have to be surrendered in any event to repay the loan. The beneficiaries had not over several months demonstrated any serious intention of selling the alternate assets. It was further argued that the proposed alternative asset sale was a commercially uncertain option which lay primarily within the remit of the beneficiaries to actualize. As the Trustee's evidence made plain, it was not in fact intended to liquidate both assets immediately in any event. Leave was sought at this stage in respect of both assets to avoid the need for a subsequent application in the future; only the lower value asset would be liquidated immediately.

4. On balance, I considered it was desirable to allow the parties a short period of further time to at least seek to agree on the best way forward with a view to both preserving the value of the Trusts' assets and preserving the stability of the administration of the Trusts at a time when (with third party proprietary claims looming and an eminently reputable Trustee at the helm) a precautionary approach favouring stability was in my judgment clearly required. The Defendant's counsel invited the Court to adjourn the Trustee's application generally to allow the terms of a potential loan to be worked out, in light of the admitted lateness of the hour when the only tangible alternate proposal was communicated to the Trustee. The Trustee's counsel opposed this course, but submitted that if the Court was minded to adjourn in order to afford the Defendant a chance to perfect the loan proposal, it should sought do so on very strict terms.

5. The unusual interposition of the shadowy spectre of a potential third-party proprietary claimant into the traditional trustee/beneficiary matrix in my judgment justified the Court modifying, to a marginal extent, the traditional *Public Trustee-v-Cooper* category 2 approach. Rather than simply analysing the rationality of the transaction proposed by the Trustee when the application was made, I focussed on the rationality of the somewhat *ad hoc* decision not to further consider an alternate proposal (only advanced in tangible terms on the eve of the hearing) and also taking into account the Trustee's potential conflict of interest. Accordingly, on 7 November 2022 I ordered, *inter alia*, that:

   (a) the Trustee was entitled to retain its paid fees and expenses and pay its fees and expenses both unpaid and imminently due from "*the assets of the Trusts…on the footing that there are no third-party proprietary claims to any of the assets of the X Trust or the Y Trust*";

   (b) the "*Plaintiff and the Defendant be indemnified out of the assets of the X Trust and the Y Trust in respect of their costs of and occasioned by this claim on the footing that there are no third party proprietary claims to any of the assets of the X Trust or the Y Trust.*

6. These are the reasons for that decision.

Governing legal principles

7. I was assisted by counsel's clear and cogent summary of the governing legal principles which informed the broad approach to be taken to the present application, set out in their respective Skeleton Arguments.

The Court's jurisdiction

8. There was no legal controversy in this regard, so it suffices for present purposes to set out here what I regarded as the most pertinent legal statements of principle, giving more attention to those issues which do not appear to have been previously addressed by this Court than matters which are now trite law.

9. Firstly, what jurisdiction was the Court exercising? The Trusts Act (2021 Revision) furnishes a straightforward statutory answer to that question:

> "**Application to the Court for advice and directions**
>
> *48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards the person's own responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application:*
>
> *Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."*

10. As regards how this jurisdiction should be exercised based on relevant case law, the Defendant's counsel submitted most pertinently as follows:

> "*26. The Defendant accepts that this is an application which falls within what is described as a 'category 2' Public Trustee v Cooper*[1] *application with which the Court is very familiar. As the Grand Court has held previously on many occasions, where Court sanction is required for what is considered to be a 'particularly momentous' decision, the questions for the Court will normally be as follows:*
>
> *(i) Does the trustee have power to enter into the proposed transactions?*

[1] [2001] WTLR 901.

(ii) Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the best interests of the trust and its beneficiaries?

(iii) Is the Court satisfied that this is a view that [a] *reasonable trustee could properly have arrived at?*

(iv) Has the trustee any conflict of interest, and if so, does the Court consider that the conflict prevents it from approving the trustee's decision?

(see AA v BB and Colin Shaw (as Amicus Curiae)[2])

27. The Defendant respectfully submits that criterion (i) is satisfied. The Trustee has correctly acknowledged that the proceedings have been commenced as a result of the potential conflict of interest. Consequently, the remaining criteria which require the Court's consideration in particular are criteria (ii) and (iii) identified at paragraph 26 above.

28. In AA v BB, the Grand Court held that in considering criterion (iii) above, the Court's function is to apply the 'rationality standard', and cited with approval the description afforded to that standard in Lewin on Trusts[3], as follows:

'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 trustees' 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. 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.*

[2] FSD Cause No. 137 of 2019 (ASCJ), Judgment dated 14 February 2020 (unreported), Anthony Smellie CJ.
[3] 20th ed (Sweet & Maxwell: London, 2020), paragraphs 39-095 & 39-096.

*The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the Court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed).' (**our emphasis**)*"

11. The standard *Public Trustee-v-Cooper* Category 2 question of whether reasonable trustees would honestly form the view that the proposed transaction was in the best interests of the beneficiaries fell to be considered in an atypical context arising from:

(a) the potential conflict due to the fact that the transaction involved liquidating assets to settle the Trustee's own fees and expenses, incurred and to be incurred; and

(b) the need to consider the interests of potential third-party proprietary claimants against the Trust assets.

12. While this Court has considered applications for 'blessings' of many 'momentous decisions' in the trust context, none appear to have concerned the consideration of balancing the right of a trustee to remuneration with the rights of both beneficiaries and potential third-party proprietary claimants not participating in the application. As regards the overarching principle, it was submitted in the Trustee's Skeleton Argument:

"*21. Since receiving notice of the claims pending against [the Settlor], the Plaintiff has proceeded in accordance with the warning given by the Privy Council in Guardian Trust and Executors Company of New Zealand v Public Trustee of New Zealand [1942] AC 115 ("Guardian Trust") at p. 127 (per Lord Romer):*

'[…] if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.'

Such being regarded as settled principle in Cayman: Re Saad Investments Co Ltd [2019 2 CILR 828] at [37] (Smellie CJ). The Guardian Trust principle also forms part of the law of Jersey (see the Jersey Court of Appeal in Sinel Trust v Rothfield Investments [2003] JCA 048 at [28] (Southwell JA), it being described as 'trite law' by the Deputy Bailiff in Re BNP Paribas [2010] JRC 199 at [19]), Guernsey[4], Canada[5], and England[6].

22. The Guardian Trust principle is triggered by notice of a potential claim which is reasonably arguable: see Sinel at [29] and BNP Paribas at [21]. The learned editors of Lewin on Trusts opine that for trustees to deem a claim as being not reasonably arguable would require the claim to be 'almost indisputably a bad one'[7]".

13. The *Guardian Trust* principle is that a trustee will be liable for dealing with assets contrary to the interests of actual or potential proprietary claimants who subsequently establish their interest in the relevant fund. The principle explains why an application to Court to bless the proposed dealings with the disputed assets is required, not how any such application should be adjudicated.

14. More significant to the latter question was guidance as to when it was permissible for a trustee to make payments out of a fund having notice of potentially valid third-party claims to it. No authorities directly concerning the payment of a trustee's fees in the face of a potential third-party claim to the trust assets were cited. However, the Trustee's counsel relied upon relevant authorities dealing with the same broad question of principle, often in factual matrices which to my mind were (at first blush) less favourable to authorising the distributions than the facts of the present case. However, the most powerful submission advanced in a case concerning authorising the payment of fees to the administrators of a fund subject to potential third-party proprietary claim was the following:

"*24. It is in these circumstances of uncertainty as to whether the Trusts' funds are held on the terms of the Trusts or on constructive trust for third party claimants that the*

[4] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd*, Court of Appeal 4/2014, Judgment dated 29 October 2014 (unreported).
[5] *Yanke v Fenske* [1959] SJ No 86 (Sask CA).
[6] *Lewin on Trusts*, 20th edition, paragraph 24-030.
[7] 20th edition, paragraph 24-031.

Plaintiff seeks the Court's sanction to pay the costs and expenses of administering the funds.

25. The Court has jurisdiction to permit such payments to be made despite the possibility of third party proprietary claims, as the cases set out below show. Such jurisdiction is founded in practicality: a trust fund needs to be administered for the benefit of whoever turns out to be the beneficial owner of it. Where it is being administered by professionals, they need to be paid. They should therefore be allowed to pay the trust's costs and expenses out of the fund in the ordinary way because their administration of the fund redounds to the benefit of the beneficiaries of the fund, whoever those beneficiaries turn out to be. This was recognised by Sir Andrew Morritt in Re MK Airlines Ltd [2014] BCC 87 (ChD) in which he said:

'*the Liquidators cannot be made to work for nothing. The delay and extra expense involved in removing these liquidators and appointing the Official Receiver is likely to involve substantial delay and extra expense to all creditors. Authorising some payment so as to ensure the prompt completion of the liquidation appears to me to be the lesser of two evils.'*" [Emphasis added]

15. Mrs Talbot Rice KC fortified and qualified this practicality point in oral argument by referring the Court to the following reasoning of David Richards J (as he then was) in *In re MF Global UK Ltd (No 3)* [2013] 1 WLR 3874 at 3881:

"*26 The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so. A well-established example of the exercise of the jurisdiction in this respect is the making of Re Benjamin orders. In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in Re Green's Will Trust [1985] 3 All ER 455 at 462, a Re Benjamin order does not vary or destroy*

> *beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them.*
>
> *27 In Re Benjamin [1902] 1 Ch 723, the trustees were given liberty to distribute the testator's residuary estate on the basis that one of his sons, who had disappeared, had pre-deceased the testator and would on that basis not be entitled to share in the residuary estate. In Re Gess [1942] Ch 37, a similar order was made as regards any creditors in Poland of the deceased. Because of the war, it was impossible to advertise in Poland for claims. Moreton J acknowledged that it would be an extension of the decision in Re Benjamin to apply it to creditors, rather than beneficiaries, but it 'would only be following the principle of that decision'. The basis for such orders was 'evidence of the practical impossibility of proof of the fact or event sought to be established'. In Re Green's Will Trusts, a similar order was made as regards the son of the testatrix who had gone missing during a war-time bombing raid and had subsequently been certified by the Air Ministry as presumed dead. Nourse J said at page 462:*
>
> *'I do not think that the question whether such an order should be made depends on whether or not there will be administrative inconveniences caused by the trustees retaining the fund. I think it depends on whether in all the circumstances the trustees ought to be allowed to distribute and the beneficiaries to enjoy their apparent interests now rather than later.'"*[Emphasis added]

16. This passage illustrates the application of the same supervisory jurisdiction invoked in the present case in a different but nonetheless analogous context, with the court having primary regard to primarily what was "*just and expedient*". It is true that the courts have developed a principle that persons administering a disputed fund can continue to do so until the dispute is resolved to meet quintessentially practical concerns. But this does not mean that the merits assessments which the Court must carry out in relation to specific directions applications are entirely driven by administrative convenience. If there is any overarching legal policy imperative, in my judgment it must be that the relevant fund should continue to be administered in a way which involves the

least possible prejudice to all interested parties, including the actual or contingent rights of the third-party proprietary claimant.

17. The present application did not go so far as to require the Court to approve the making of beneficial distributions on a hypothetical basis. To that extent the facts of the present case fitted well within the parameters of ensuring the continued due administration of trust assets in the face of a potential third-party proprietary claim. Approving the payment of reasonable administrative fees and expenses out of disputed trust assets was clearly a far more conservative and precautionary judicial step than allowing discretionary distributions to be made. However, that did not absolve the Court of the duty to ensure that the payment mechanism itself (where a trustee's fees and expenses cannot simply be paid out of cash in the bank) had only a proportionate impact on the net value of the trust fund.

18. More factually analogous (and indirectly relevant to the Trustee's costs application herein) were the cases where the legal fees of disputed beneficiaries were authorised to be paid out of the fund in relation to which rival beneficial entitlements were asserted. In *Finers-v- Miro* [1990] 1 WLR 35 (CA), for instance[8], Balcombe LJ held:

> "*In my judgment the court undoubtedly has jurisdiction to authorise payment out by a trustee who, as in this case, prima facie holds his assets on trust for a named person absolutely, although with the possibility that there may be other persons interested in those assets. The court may authorise the release of some part of those assets to the named beneficiary, even in the absence of the other potential claimants. […] [H]ere the evidence disclosed that the defendant had a pressing need for money to put his lawyers in funds particularly in the United States, and it would be quite wrong that he should be driven out of court by the absence of funds to enable him to instruct lawyers.*"

19. Again, the costs sought by the Defendant here were more anodyne in that the Defendant was joined in the present proceedings specifically to represent beneficiaries' interests in an application designed ultimately to preserve the stability of the administration of the Trusts for the benefit of whomever was ultimately vindicated as the true beneficiaries. The Trustee's counsel also aptly

[8] *United Mizrahi Bank Ltd-v- Doherty* [1997] 1 WLR 435 was also cited.

relied upon three judgments of the former Chief Justice, the third of which I found to be most pertinent:

> "*30. In Cayman, the Court's jurisdiction to sanction payments out of a fund which could be subject to a proprietary claim is settled law: in Re Saad Investments Co Ltd [2019 2 CILR 828] joint liquidators sought the Court's sanction to make various distributions from a fund over which a third party had asserted a proprietary interest in a separate claim. Smellie CJ said at [44]:*
>
> *'Moreover, it must now be regarded as settled principle that the Court can sanction the payment out of funds which are the subject of a proprietary claim which claim, if eventually proven, would mean that the funds were held on trust for the claimant. Whether or not the Court should do so depends upon the particular requirements of justice in the circumstances of the case. See, for examples of the application of this principle, Finers v Miro [1991] 1 WLR 35 CA) and In Re MF Global UK Ltd [2013] 1 WLR 3874.'*
>
> *31. In his subsequent decision in Re Saad Investments Co Ltd (FSD, unreported, 1 October 2019), Smellie CJ acknowledged (at [51]) the liquidators' concerns about Guardian Trust liability and, referring to both Finers and MF Global, said at [79]:*
>
> *'I accept that it is in principle well-established, that a court may authorise a trustee or insolvency officeholder to make a distribution out of a fund, notwithstanding that a third party has an unresolved proprietary claim against that fund.'*
>
> *And at [86]:*
>
> *'I accept that the Court has the inherent jurisdiction to make such an order. As further noted in paragraph 30 of Re MF Global (No 3) (above) and Lewin on*
> *Trusts, 19th ed. (2015), paragraph 26-033:*
>
> *It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant.* ***But the court has jurisdiction to permit or direct a trustee to distribute***

> ***notwithstanding the existence of claims or potential claims from third parties***. *[…]' (emphasis original)*
>
> *32. In Re Onetradex Ltd (FSD, 1 October 2020, unreported), Smellie CJ granted the joint provisional liquidators permission to pay their past, incurred and future costs from the company's funds despite those funds being subject to third-party proprietary claims, on the basis of In re Benjamin, Finers , MF Global and Re Saad Investments Co Ltd. At paragraph [22], the Chief Justice said:*
>
> *'In the course of arguments today, it came to be accepted between the parties, (and notwithstanding the Ad Hoc Committee's initial objections) that the Reserve could be applied to cover the JPLs' reasonable costs and expenses of the provisional liquidation, as well as the earlier costs and expenses of the Controllership, as well as any future costs of the provisional liquidation, on the basis of the Berkeley Applegate principle, as that principle was applied recently by this court in Re Caledonian Securities Limited (in off. Liq). That, in part, will therefore be the effect of the order made today.'…*"

20. In *One Tradex Ltd*, Anthony Smellie CJ (in footnote 6) expanded upon his brief reference to *Re Caledonian Securities Limited (in off. Liq)*[2016 (1) CILR 309] in the body of his judgment by describing it as a case:

> "*where it was held (following also the earlier decision of this court in **AHAB-v- Saad Invs. Co. Ltd** 2010(1) 553) that the Court has an inherent jurisdiction to order liquidators' fees and expenses to be paid from trust property held by a company in liquidation provided that such fees and expenses were reasonably incurred in returning the trust property to those beneficially entitled to it. This recognizes the principle stated by Deputy Judge Edward Nugee in **Berkeley Applegate** (at p.50) that '…the court has a discretion to require as a condition of giving effect to (the) equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property'.*"

21. Looking at these judicial statements as a whole, it is noteworthy that then Chief Justice Smellie explicitly viewed a trustee administering contested trust funds and a liquidator administering

funds which either belonged to the company or were held in trust for the benefit of third-parties as parallel but analogous legal spheres: *Re Saad Investments Co Ltd*, FSD 15 of 2010 (ASCJ), Judgment dated 1 October 2019 (at paragraph 79). I accordingly drew from these *dicta* strong indirect support for the following proposition. Essentially for reasons of both pragmatism and principle, a trustee holding assets for named beneficiaries which are subject to potential third-party proprietary claims, and invoking this Court's supervisory jurisdiction under section 48 of the Trusts Act, will generally be entitled to payment of its reasonable fees and expenses out of the relevant fund in relation to:

(a) work done in accordance with the terms of the trust instrument before notice was received of the third-party claims; and

(b) work done (and to be done) to administer the trust assets after receiving notice of the potential third-party proprietary claim in accordance with the best interests of whomever may ultimately be confirmed to be the true beneficiaries of the express or constructive trust.

Findings: the merits of the application

22. The Trustee's application as originally filed was entirely rational and afforded no basis for second-guessing their business judgment. Their fees and expenses had been unpaid for some time, there were no cash assets available out of which to indemnify themselves and the beneficiaries had failed to formulate any concrete alternatives to the Trustee's proposed realisation of the most liquid Trust assets. The law clearly supported the proposition that the mere fact that notice had been received of a possible third-party proprietary claim to the Trust assets was no impediment to their pursuing the proposed transaction on notice solely to the known beneficiaries. It was fairly submitted:

"*35. The order sought in this case is restricted to trust costs and expenses and is therefore narrower than in some of the cases set out above. Furthermore,*

> *a. No third party has in fact made any claim to the assets of the Trusts…The possibility of a third party proprietary tracing claim to Trust assets is therefore merely a possibility rather than a certainty or even a likelihood (unlike, e.g., in Re Saad and Re Onetradex).*
>
> *b. The Plaintiff is not asking for permission to make any distribution to beneficiaries from the Trusts' funds (unlike in all the cases other than Re Onetradex above); it is only asking permission to pay the fees and expenses necessary for the continued administration of the Trusts…*
> *49. It is therefore the Plaintiff's position that the Court can and should sanction the Plaintiff's proposed course of action and grant the relief sought by the Originating Summons and further order that the recipients of the permitted payments of the Trustees' costs and expenses should be protected from future proprietary claims.*"

23. There was no dispute about the Trustee's entitlement to take such steps as might reasonably be required to meet its outstanding fees and expenses and those which would soon fall due. Controversy merely centred on whether or not liquidating two of the most liquid assets at a substantial discount was the best available commercial delivery mechanism. It was also common ground that notice need not be given to the potential third party claimant. This consensus appeared to me to be justified by the fact that the Trustee's right to be indemnified was incontrovertible. However, I considered that the lack of notice required the Court to adopt a somewhat heightened level of scrutiny when assessing the impact the proposed asset liquidation would have on the net value of the disputed fund.

24. The central rationale for liquidating assets at a substantial discount to their face value was that no alternative ways to meet Trust expenses could be found and that, although the beneficiaries had been afforded a reasonable time to come up with substantive alternative proposals, no concrete proposals had been made.

25. The pivotal question which arose at the hearing was whether or not the Trustee had, as it contended, exhausted all reasonable attempts to consider the Defendant's alternative proposal? This question arose in circumstances where:

(a) the looming spectre of the Trustee being removed appeared to me to have poisoned the air somewhat, creating a risk that the stability of the Trusts might be undermined contrary to the best interests of the beneficiaries, whoever they might ultimately turn out to be;

(b) the Defendant had belatedly raised a tangible alternative proposal which would potentially be more commercially favourable to the Trusts and beneficial to whomever was interested in the Trust assets. This alternative proposal was one which the Trustee had not been able to calmly consider before the eve of the hearing;

(c) it was self-evident that taking out a loan to pay and/or secure Trust administration expenses only made commercial sense (as an alternative to the Trustee's proposed asset sales) if alternative assets could be sold far closer to market value over the course of any loan term in order to repay the loan;

(d) there was an obvious conflict of interest between the Trustee's entirely legitimate interest in having its admittedly outstanding fees and expenses promptly paid, and its immediate future fees and expenses promptly secured, on the one hand, and carrying out an extended exploration of the viability of the Defendant's alternative options in an iteration formulated shortly before the long-scheduled hearing;

(e) the Trustee's clear and concise proposal necessarily involved liquidating assets for significantly less than their face value. The Defendant's undeniably more uncertain proposal would, however, at worst entail a less than 10% further loss in addition the loss which would inevitably result from the Trustee's proposal;

(f) because the present application was being made without notice to a potential third-party proprietary claimant, the Court was in my judgment required to analyse the rationality of the Trustee's contention more broadly than within the narrow parameters of the way in which the alternative proposals had been belated advanced in the narrow context of communications as between the Trustee and the Defendant (as representative of all known beneficiaries). The existence of potential third-party claimants not before the Court in my judgment justified a precautionary approach

consistent with seeking to ensure the preservation of the fund to the greatest extent possible. This superimposed a further layer of analysis on top of the standard rationality test applicable to the more standard Category 2 *Public Trustee-v-Cooper* applications.

26. Applying this somewhat modified rationality test to the circumstances which appertained at the time of the hearing, I concluded that a reasonable trustee would wish to:

(1) afford the Defendant a further short opportunity to concretise a viable loan offer on terms which would raise funds to pay the Trustee's fees and expenses and to enable a sale of alternative assets to be carried out over a period of time on terms that resulted in less diminution to the value of the Trust fund;

(2) pursue further without prejudice negotiations with a view to achieving consensus as to best way forward in somewhat difficult times; and

(3) forego seeking formal approval at this stage for liquidating more assets than were needed to cover its past due fees and expenses and such fees as might become due in the near future.

27. Ms Warnock-Smith KC sought an adjournment of up to three months to enable alternative options to be pursued. Ms Talbot Rice KC's primary position was that it was too late for any alternatives to the Trustee's proposals to be considered at all. Sensing the direction of the wind, despite her remote participation, the Trustee's counsel's fall-back submission was that if the loan route was to be approved by the Court, an unless order should be made requiring the Defendant to procure the loan monies within 14 or 28 days, subject of course to all relevant compliance requirements being met. In the event, I found that was just and convenient to grant an Order affording 63 days for a loan to be finalised and only expressly approving liquidation of the smaller of the two assets that the Trustee proposed should be liquidated. Unless the sum I determined appropriate to secure payment of the Trustee's fees was paid by January 9, 2023, the Trustee would be able to liquidate the lesser of the two assets its application contemplated which would be sold to meet these expenses.

28. Implicit in these directions were the following assumptions:

(a) the beneficiaries were likely to act in accordance with (rather than contrary to) their own commercial interests and would only cause the proposed loan to be consummated if they were genuinely committed to liquidating the alternative asset pool and convinced that this could be done on commercially beneficial terms;

(b) the Trustee and the Defendant would continue to negotiate with a view to maximising the prospects of the best possible commercial outcome for the Trusts; and

(c) if it became apparent to the Trustee based on material new developments arising between the hearing date and 9 January 2023 that the loan option was not viable even though it was available, the Trustee could seek further directions from the Court under section 48 of the Trusts Act and/or the inherent jurisdiction of the Court.

29. At the end of the hearing there was no dispute that the Defendant should have its costs out of the Trust assets for its participation in an application which was indispensable to the administration of the Trusts, including the interests of the potential third party claimant.

Conclusion

30. For these reasons, on 7 November 2022, I granted the directions sought by the Trustee modified so as to permit further exploration of the alternative proposals belatedly advanced in more tangible form by the Defendant shortly before the hearing.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT