Neutral Citation Number:
[2019] EWHC 2323 (CH)

Case No: HC-2017-002797

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Property Trusts and Probate List
IN PRIVATE

Rolls Building, 7 Fetter Lane,
London, EC4A 1NL

Date: 17/07/2019

Before :

MASTER PRICE

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Between :

AB	Claimant
- and -	
(1) CD (2) EF (3) GD (4) HD (5) ID (6) JD (7) KD (8) LM (9) NM	Defendant

- -

- -

Richard Wilson QC (instructed by **Bryan Cave Leighton Paisner LLP**) for the Claimant
Emily Campbell (instructed by **Kuit Steinart Levy**) for **Defendants 1-3**
Defendants 4, 5, 6, and 7 did not appear.
Defendants 8 and 9 appeared in person.

Hearing dates: 30 and 31 May 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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1. The claimant is the trustee of two trusts, namely the Will Trust and the Grandchildren's Trust. These were established by the first defendant's parents and the grandchildren in question are the fourth to ninth defendants. The fourth to seventh defendants are the first defendant's children; the eighth and ninth defendants are children of the first defendant's deceased sister and her husband. The third defendant is the first defendant's wife; the second defendant is a trustee of the Grandchildren's trust with the claimant and the first defendant. The claimant, the first defendant and the third defendant are the trustees of the Will Trust.

2. The claimant seeks the court's directions in relation to the winding up of the Grandchildren's Trust and a discretionary fund which is part of the Will Trust.

3. There is now much common ground as to how this should be achieved but the trustees are still divided as to the division of the discretionary fund in the Will Trust and in particular whether certain funds, called the M Funds, are to be included in a division of the discretionary fund, and to what extent the trustees should override a letter of wishes in respect of those funds in an attempt to achieve a more equal division of funds between the two branches of the family. In order to understand all this it is necessary to look at the trust instruments and the history of the family so as to understand the differences that have emerged and why matters have ended up in litigation. As to that I should mention at the outset that I declined to permit cross-examination and have proceeded on the basis that this is essentially non-hostile litigation in which there are differences of perspective, of approach and values between the trustees, but in adjudicating on this and in deciding the right way forward it is not necessary to make detailed findings of fact. The first defendant's good faith is not in issue in the sense that no dishonesty is alleged, and the accusations at their highest are of personal hostility in regard to the eighth and ninth defendants and their family.

4. In addition to the Will Trust and the Grandchildren's Trust there was a discretionary trust established by the first defendant's parents on 7 March 2000 for the benefit of the first and third defendants and all the grandchildren, whose sole asset was a property in Gloucestershire which has been sold. On sale it realised £440,000 which is now called the M Fund. There was a letter of wishes in relation to that trust which reads as follows:

> "To the trustees of the [...] discretionary trust.
>
> 1. Overall Aims.
>
> Our basic thinking in creating the discretionary trust is for tax planning purposes so that we can make a gift of our house in [Gloucestershire] for inheritance tax purposes.

> During [the first defendant's] lifetime we would like you to hold the house for [his] primary use. If the house is sold within his lifetime we would like you to hold the proceeds for [him] absolutely.
>
> In the event of [the first defendant's] death, we would like the house to be principally held for the benefit of [his] wife and children."

5. In fact, for reasons of administrative convenience it was decided to appoint the M Fund to the discretionary fund of the Will Trust so that those funds now stand on the terms of the Will Trust which are subject to a power of appointment in favour of discretionary beneficiaries including the Settlor's widow (now deceased), together with the Settlor's children and later issue. Subject to that overriding power of appointment, the trust is for the Settlor's widow for life and thereafter on discretionary trusts of income and subject thereto with a residuary gift by which the fund is split as to one third to the first defendant or the third defendant by substitution and two thirds to all the grandchildren. There is a letter of wishes also in relation to the Will Trust and this reads, so far as relevant, as follows:

> "4. Provision for my children and grandchildren.
>
> 4.1 In the event of [my wife's] death or of her predeceasing me, [the first defendant] or [his] widow and my grandchildren are the main residuary beneficiaries.
>
> 4.2 I would like the trustees to give the sum of £20,000 free of tax to the first wife of my son [the first defendant].
>
> 4.3 Subject to this gift I would like the residue to be split into three parts so that one third is given to my son [the first defendant] and two thirds is given to my grandchildren equally per capita.
>
> 4.4 If [the first defendant] predeceases me I would like his share to go in the first instance to his second wife. If she too predeceases me I would like his share to accrue to the grandchildren's shares.
>
> 4.5 If any of my grandchildren predecease me, leaving children, I would like those children to take the share their parent would have taken.
>
> 4.6 I would like my trustees to consider using their clause 8 power of appointment to hold the grandchildren's share in the most tax efficient administratively convenient way. For example, the trustees may decide to hold the grandchildren's shares on accumulation and maintenance trust to delay their right to income until 25.
>
> 5. Coordination Between Trustees.

> I should like you to liaise closely with the trustees of my grandchildren's settlement to ensure that the most appropriate overall provision is made for [my wife], my son and grandchildren."

6. The letter of wishes largely reflects the residuary disposition in the will.

7. The Grandchildren's Trust is an accumulation and maintenance trust with powers of advancement for all the grandchildren up to the age of 25 when each grandchild becomes entitled to income but not capital from the trust fund. The letter's wishes in relation to the trust fund reads as follows:

> "Overall Aims.
>
> Our basic thinking in creating the Grandchildren's Trust is to pass the benefit of our life assurance policies to our grandchildren.
>
> As far as practicably possible we would like you to treat all our grandchildren equally."

8. Three of the first defendant's children, (that is the fourth to sixth defendants) have each received their shares but the seventh defendant and the eighth and ninth defendants have not. In fact, it seems that the eighth and ninth defendants were not aware of their interest in the Grandchildren's Trust until 2013 and were not aware of their interest in the Will Trust until February 2017.

9. As I have indicated there is now a large measure of agreement in relation to the winding up of the Grandchildren's Trust and the Will Trust discretionary funds on the basis of equality between the six grandchildren, but that has only emerged in the course of this claim and it is a result to which the first defendant, and it would seem also the second and third defendants, have been set against for some time. The position of the second and third defendants is that they have filed evidence that they support the position taken by the first defendant and one infers that the initiative in this respect was taken by the first defendant. It is clear from his correspondence that he wanted to exclude the eighth and ninth defendants in favour of his own children in relation to both the Will Trust and Grandchildren's Trust. The reasons for this appear to be essentially emotional, that involved a desire to punish the eighth and ninth defendant in relation to their conduct towards their grandmother, while she was alive. The estrangement between the two branches of the family goes back to the eighth and ninth defendant's mother's tragic early death and the breakdown of the relationship with her husband who is of course the father of the eighth and ninth defendants. It is in my view impossible and unnecessary for present purposes to seek to analyse any of this or to attribute blame for it. Counsel for the first defendant says that the stance of the first defendant was based on moral grounds in relation to the eighth and ninth defendants' behaviour once they had become adult. The first defendant has in his view attempted to fulfil what he perceived to be his late parents' wishes but in my judgment this may fail to appreciate the difficult conflict of emotional loyalties that the eighth and ninth defendants faced. More important in my view are the purposes of the trusts and the original letters of wishes. The trusts were established to provide in part for the grandchildren financially and in my view to seek to pass over any

entitlement in the way the first defendant has sought to do in the past was not consistent with his duties as a fiduciary. I was referred to *Lewin on Trust* in the 19th edition at para 29-151 which summarised the duties as follows:

1. A duty to act responsibly and in good faith
2. A duty to take only relevant matters into account
3. A duty to act impartially, and
4. A duty not to act for an ulterior purpose."

10. In my view the first defendant's previous stance, and by adoption the position of the other trustees apart from the claimant, failed to take into account all relevant matters so as to fail in impartiality and to amount to a purpose outside the range of permissible actions. In particular the attempt to negotiate a settlement by way of pay off in respect to these beneficiaries cannot in my view be reconciled with these principles or with their elaboration in the case law. I was referred to *re. Hayes Settlement* [1982] 1 WLR 202 at 209 Megarry V-C said this.

> "Whereas a person who is not in a fiduciary position is free to exercise the power in any way he wishes, unhampered by any fiduciary duties, a trustee to whom such a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must "take such a survey of the range of objects or possible beneficiaries..." as will enable him to carry out his fiduciary duty. He must find out "the permissible area of selection and consider responsible in individual cases whether a contemplated beneficiary was within the power and whether in relation to other possible claimants a particular ground was appropriate"; in *re. Baden No. 1* [1971] AC: 424, 449, 457 per Lord Wilberforce."

11. In these circumstances the claimant has been placed in a position where he cannot accede to the wishes of the other trustees and retire where he perceives there is an intended breach of trust which he would facilitate as this might expose him to a potential claim in that respect: see *Lewin on Trust* 19th edition para 14-064.

12. He has offered to retire in favour of a new professional trustee but that has not been taken up. He obviously would be content to retire if the court directs him to accede to the other trustees' wishes or if authorised by the court but would prefer that his solution as to the winding up of the trusts and the issues which have arisen should be adopted and in effect imposed on the opposing trustees. Once the way forward has been decided upon then it is obviously necessary for the claimant to retire given the circumstances and the Will Trust will continue in relation to appointments which were made on revocable trusts of two properties in favour of the first and third defendant and his children which are described as released funds. These are properties which were appointed from the Will Trust in 2001 and 2002. I shall refer later to these appointments in relation to an examination of the claimant's proposals. it is not

suggested that these appointments should be revoked, but the claimant argues that the fact of these appointments and the values involved should be taken into account when deciding on further distributions and in particular the appointment of the M Fund.

13. Before turning to this it is appropriate to deal with the question whether in the circumstances the court should interfere in quite the way the claimant proposes.

14. The first, second and third defendants, who I will refer to as the defending trustees, rely in particular on *Lewin* (op.cit) at para 29-071:

> "Deadlock.
>
> Where the affairs of the trust are deadlocked in any particular respect the court has jurisdiction to resolve the deadlock. There is no deadlock merely because the trustees if required to be unanimous cannot agree on the exercise of a power or if they can act by a majority are evenly divided: power in such a case remains unexercised. Where however they have a duty to act but there is more than one way in which it can be fulfilled, such as the duty to invest the trust fund or where they have two alternative powers without a duty, such as the power to sell an asset the power to retain it, then in the absence of unanimity or the requisite majority the court may interfere. Deadlock is a good reason for the trustees to surrender their discretion to the court but it may be that even in the absence of a surrender the court can direct deadlocked trustees to exercise a power in a given way.
>
> Note: 214 to that paragraph refers to *Garnham v PC [2012] JRC 050* at paras 83-84 but goes on "sed quaere in view of the general rule that the court does not dictate to trustees how to exercise their powers… there are other ways of breaking deadlocks, such as the removal of some trustees or the appointment of new ones."

15. The decision in the *Garnham* case is a decision of the Royal Court of Jersey. The question was whether a disputed debt said to be owed to an estate should be collected by the executors or assigned to the residual legatee to investigate it and collect it. The bailiff of Jersey said this at paragraph 83:

> "In those circumstances it is the court that must break the deadlock by directing the executors to follow whichever course the court thinks is preferable in the interests of the beneficiaries of the estate. We should add that in this context the expressions legatees and beneficiaries may be used interchangeably."

16. He went on at paragraph 87 (3):

> "We accept that where executors of trustees unanimously exercise their discretion not to exercise a permissive power the court cannot interfere save on the very limited grounds

described earlier. But that is not what has occurred here. The executors have not decided not to exercise their power. they are divided and have reached no decision."

17. He held further that the lack of unanimity did not amount to a decision that the power should not be exercised and that the court in the exercise of its supervisory jurisdiction in the best interests of the beneficiaries should interfere so as to override a dissenting trustee.

18. The claimant also relies particularly on *Klug v Klug* [1918] 2 Ch.67 where the court was asked to intervene as trustees did not agree to the exercise of a power of advancement to enable the testator's daughter to pay legacy tax on her inheritance, because the testator's widow had taken against her daughter's husband whom she had married without approval. The court held that where trustees have honestly exercised their discretion a court will only interfere in special circumstances but the widow's reasons meant she had not exercised her discretion at all. It should be noted that in both these cases the court was asked to approve a particular step rather than to exercise a discretion itself.

19. In contrast to the earlier paragraph in Lewin at 29-71 and these two cases, are paragraphs 29-128 and 29-129 in Lewin which read as follows:

"If the trustees fail in their duty by simply not considering an exercise of the power at all and so leave it unexercised the court can direct them to do so. That will be the usual remedy where there is no reason to doubt that the trustees will give consideration if ordered to do so, for instance where the failure is a result, say, of a misapprehension. Where the trustees' default is more serious, for instance, where there is a deliberate and conscious failure to consider an exercisable power and the court is unable to discern any genuine repentance on the part of the trustees, the court may order the more draconian remedy of a removal of the trustees under the court's inherent jurisdiction and the appointment of new trustees in their place. It has been suggested that removal of trustees is, apart from an order to consider an exercise of the power, the only remedy available to the court and the court cannot itself intervene in the exercise of a power unless the discretion has been surrendered to the court. But that overlooks older authorities in which the court has intervened in the exercise of mere powers to which attention has more recently been drawn, and it appears that other remedies may be available to the court as where the court exercises a trust power, for instance the appointment of a substitute to consider an exercise of a power or an order actually exercising a power after the court has itself considered what should be done. Even so the traditional remedies are adequate to cover most cases and we consider that the court would in the absence of exceptional circumstances be very reluctant to exercise a power which had not been considered properly by the trustees, particularly where the duty of

> consideration was a continuing one so that the procedure would be costly and cumbersome."
>
> 29-129 The court will not take the exercise of a discretionary power out of the hands of trustees who are willing to exercise it properly. The general principle of non-intervention is discussed below."

20. The discretion in this case has not been surrendered to the court. It is fair to say that the first defendant's repentance in regard to his express position against the eighth and ninth defendant appears somewhat reluctant. So far as necessary the claimant also relies on special circumstances which require the court to grasp the nettle. Everyone is agreed that the trust should be wound up as far as possible and a division is agreed in principle. The failure to surrender discretion is perhaps a factor to be taken into account. In that connection I was referred to *Public Trustees v Cooper* [2001] WTLR901. In relation to a third category of cases identified by Hart J in that case he said this:

> "(3) The third category is that of surrender of discretion properly so called. The court will only accept a surrender of discretion for a good reason. the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest."

Hart J went on to refer to the fact that adversarial argument might occur or some solution might emerge by agreement or submission in this category of case.

21. The defending trustees have now stated that as a last resort they would surrender discretion but only "if the court would in principle accept one and would otherwise wish to remove the trustees or adopt the claimant's proposal".

22. The defending trustees submit that they should be directed to decide on such guidance as the court thinks appropriate since it is not argued that they be removed and they have now shown a better appreciation of their duties. In these circumstances they submit the appropriate course is to direct them to make a decision on the basis of the appropriate considerations, by way as it were, of a form of judicial review as appears to be suggested in the paragraphs from Lewin which I have just quoted.

23. Before reaching a conclusion, I turn next to the substance of what the claimant proposes. This appears in his third witness statement at para 9 as follows:

> "9. In order to understand what is at stake for the beneficiaries it is helpful to set out, for illustrative purposes, what the result would be of a division based on: (a) the Will Trust's assets at the time of [the Settlor's] death (applying the above percentage); (b) the Will Trust's assets as at today's value (applying the above percentages); (c) [the first defendant's] proposal set out in Kuit's letter of 27 June 2017 [his] most

recent proposal set out in [his witness statement]: and (e) my own conclusion as to what the appropriate split should be:

(a) On the basis of the net value of assets (as stated in the accounts) as at the date of [the Settlor's] death - £1,800,303 – the division would be: (i) £1,404,236 (for [the first defendant] and his family); and (ii) £396,067 (for [the eighth and ninth defendants]).

(b) If the current value of the assets [...] is applied, but not taking into account the M Fund, the division (at least in terms of gross value) would be in the order of: (i) £3,003,000 (for [the first defendant] and his family); and (ii) £847,000 (for [the eighth and ninth defendants]). This is based on a (conservative) value of £3.5 million for [the properties] and liquid funds of £350,000 (this derives from the figures set out at paragraph 20 of [the first defendant's witness statement] i.e. £790,000 less £440,000 in respect of the M Fund). If the M Fund were included, the division would be: (i) £3,347,200 (for [the first defendant] and his family); and (ii) £943,000 (for [the eighth and ninth defendants).

(c) [The first defendant's proposal (contained in Kuit's letter of 27 June 2017) was premised upon the fund treated as being available for distribution being limited to £360,000. On that basis, the division would be: (i) £1,720,303 - £4,210,000 (for [the first defendant] and his family) (depending on whether the assets are valued at death and on whether the M Fund is included); and (ii) £80,000 (for [the eighth and ninth defendants).

(d) [The first defendant's most recent proposal (paragraph 84 of [his witness statement]) is premised upon the fund treated as being available for distribution being limited to £490,000. On that basis the division would be: (i) £1,692,503 - £4,182,200 (for [the first defendant] and his family) (depending on whether the assets are valued at death and on whether the M Fund is included); and (ii) £107,800 (for [the eighth and ninth defendants]).

(e) My own conclusion is that the value of the M Fund (represented by liquid capital) should be included within the fund available for distribution. On that basis the division would be: (i) £1,360,303 - £3,850,000 (for [the first defendant] and his family) (depending on whether the assets are valued at death and on whether the M Fund is included): and (ii) £173,000 (for [the eighth and ninth defendants]).

24. This is opposed by the defending trustees and in particular reliance is placed on the letter of wishes in respect of the particular trust fund from which the M funds come

and the fact of the appointment of these funds for administrative convenience only to the Will Trust.

25. According to the first defendant one of the properties was in fact purchased jointly in the mid-1970s with his father and was always intended for the first defendant's benefit, although no documentation has been produced to substantiate his outright ownership of the property. Similarly, the first defendant says that the other property was deliberately appointed to his side of the family to the exclusion of the eighth and ninth defendants. As a result it was always the case that there was to be differential treatment, although the disparity and the need for the trustees to consider adequate allocation to the eighth and ninth defendants was pointed out at the time by legal advisers and the suggestion that this may have been in some way motivated by a professional negligence claim against that firm on the part of the first defendant seems to me unworthy.

26. Looking at matters disinterestedly and dispassionately the claimant has, in my view, the better of the argument, that is to say that the disparity in treatment calls for adjustment so as to move closer to the original letter of wishes and that therefore some account needs to be taken of the availability of the M Fund.

Having said that, it seems to me that it is wrong in principle to impose the claimant's solution and there may be a range of possible solutions apart from the claimant's proposal. In the first instance it seems to me therefore that the way forward is for me to direct the trustees to reconsider matters with a view to reaching a decision by way of compromise between them and if they are unable to do so then the court should in my view require that it makes a decision for the trustees after hearing argument directed specifically to that purpose. In my view this approach best meets the requirements of the authorities which I have quoted and which are summarised in Lewin at para 29-128. I am conscious, as will the trustees be, that further hearings will involve extra costs and therefore an accommodation between the divergent views would be beneficial on that score alone.

27. In order to deal with handing down this judgment and consequential matters, clerks to counsel should attend before me on a pre-booked application without notice at 2pm when I am available. It may be appropriate for there to be a delay following receipt of this judgment in draft so that the trustees can reconvene in the light of the views which I have expressed before any further hearing, so that any further hearing can proceed, if needs be, in the way I have decided in the absence of agreement between the trustees.