2DS 2021/03

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
STAFF OF GOVERNMENT (APPEAL DIVISION)

Between:

ANNALUISA PESENTI MAZZOLENI
and
SUMMERHILL TRUST COMPANY (ISLE OF MAN) LIMITED

Judgment of
and His Honour Deemster Bailhache
and His Honour Deemster Corlett

delivered on the 19th day of July 2021

INTRODUCTION

1. This appeal concerns the decision of the Respondent trustee [the 'Trustee'] not to appoint a protector to a Manx trust. It raises questions of construction and the power of the court to review decisions of trustees and potentially to give directions to a trustee. In the court below (Deemster Christie), the decision on construction was that the power in Clause 6 of the Fourth Schedule to the relevant trust deed was a mere power and not an imperative power and that it was inappropriate for the court to grant any of the relief which the Appellant had sought. In summary, that relief was a declaration that the decision of the Respondent not to appoint a protector was void and should be set aside and that the Trustee's power under Clause 6 of the Fourth Schedule should be exercised as soon as reasonably practicable. Judgment was handed down on 30 December 2020 and the Appeal Notice filed on 9 February 2021. The appeal was heard on 15 June 2021.

THE FACTS

2. Many of the facts are undisputed. Where they are in dispute, that will appear obvious from this judgment.

3. Mrs Rosalia Radici Pesenti ['Mrs Pesenti'] was an Italian citizen who was born in 1909 and died in 2007. It appears that she was resident in Monaco for a number of years up to her death. She and her husband Carlo had four children – Giampiero Pesenti, who died in 2019, the Appellant Annaluisa Pesenti Mazzoleni, Camilla Pesenti and Paola Pesenti. No disrespect is intended when referring to them in this judgment by their Christian names. Carlo Junior Pesenti is the son of Giampiero.

4. On the death of her husband in 1984, Mrs Pesenti inherited indirect control of an Italian cement company known as Italcementi SpA ['ITC'] through another company known as Italmobiliare SpA ['ITM']. In 1994, by a series of trust deeds respectively, she established four settlements in the Isle of Man known as the RR1, RR2, RR3 and RR4 Trusts [together the 'Four Trusts'], each of which was for the benefit of one of her children and his/her heirs; and because neither Camilla nor Paola had children, the issue and remoter issue of Giampiero and Annaluisa were and are also beneficiaries of the RR3 and RR4 Trusts. Mrs Pesenti settled assets upon the Four Trusts in largely equal shares. The Appellant was the principal beneficiary of the RR2 Trust and Camilla the principal beneficiary of the RR3 Trust. However, this appeal is concerned solely with the RR2 Trust [the 'Trust'] and with the trust deed pursuant to which it was created on 8 June 1994 [the 'Trust Deed'].

5. The original trustees of the Four Trusts were Dr Pierfranco Riva ['Dr Riva'], Mr Marco Piccinini ['Mr Piccinini'] and Coutts & Co (Isle of Man) Limited ['Coutts']. Mr Luigi Aldrighetti was appointed the protector of all Four Trusts in June 1994, days after the making of the Trust Deed, but he died in 1998 and was succeeded by Mr Italo Lucchini ['Mr Lucchini'] in the same year.

6. In 2005 Coutts resigned as trustee of the Four Trusts and its successor resigned and was replaced by the Respondent in 2009.

7. Mr Lucchini resigned as protector of the Four Trusts on 27 October 2017. He had nominated Mr Luca Minoli ['Mr Minoli'] as his successor, but Mr Minoli declined each of the offices. Dr Riva and Mr Piccinini resigned as trustees of the Four Trusts on 13 December 2017. The result is that the Respondent has been the sole trustee of the Trust since that date, and there has been no protector in respect of the Trust since Mr Lucchini's resignation in 2017.

8. Before turning to the Trust Deed itself, it is right that we record our understanding of the structures through which the Trust assets are held. The Four Trusts own 25% each of the issued shares in Fiparin NV, a company established in the Netherlands Antilles '[Fiparin']. Fiparin is the holding company for Efiparind Holding BV, a company established in the Netherlands, which itself owns 99.995% of a limited partnership, Efiparind BV & Cie SCPA ['SCPA'] which, through some other intermediate companies, has a controlling interest in ITM which is listed on the Milan stock exchange. The remaining 0.005% interest in SCPA is owned by Efiparind BV, which is the managing partner of SCPA. When Mrs Pesenti first established this structure, the shares in Efiparind BV were owned as to 28.075% by Giampiero and 23.975% by each of the Appellant, Camilla and Paola, subject to Mrs Pesenti's usufruct. The Italian lawyer for the Appellant and Camilla in relation to the ongoing litigation in Italy (see below) asserts in his witness statement in these proceedings that Mrs Pesenti awarded Giampiero a dominant position within Efiparind BV so that he would have positive control over any meeting of shareholders for as long as he managed to obtain the consent of one of his three sisters; and he would have negative control in the sense that important decisions required a qualified majority that could not be achieved without his consent – a quorum of 75% was required for amendments to the Articles of Association, any transfer to a third party of the shares held by one of the shareholders in Efiparind BV and any proposal of the board of directors to transfer to third parties a shareholding held by Efiparind BV

in other companies. This arrangement is said to have been made to accord with family tradition, Giampiero having taken over the effective management of the group after the death of his father.

9. On 17 May 2004 Paola gifted the bare ownership of all but one of her shares to Giampiero; and on 22 March 2006 she waived her right of retainer on such shares. It is said that as from that moment Giampiero owned 2,081 of the 4,000 shares in Efiparind BV, a majority of 52%. Between 2004 and 2016 other transfers of the Efiparind BV shares took place between members of the Pesenti family. As a consequence, the Giampiero branch of the family continue to hold between them 52% of the shares; the Appellant and her family own just short of 48%, Camilla having a single share. Whether all those share transfers took place in accordance with the Articles of Association of Efiparind BV is beyond the scope of these proceedings.

10. In 2015/2016 ITM transferred its shareholding in ITC to a German company, HeidelbergCement AG, in consideration of payment of a price of €1.67 billion. The Appellant and Camilla have complained that they knew nothing of this proposed sale. Even though the Pesenti family retains its control over ITM, the Appellant asserts that the latter now has a quite different focus, turning itself from the holding company through which the family controlled and led ITC into an investment company with the asserted mission of managing a portfolio of shareholdings in a variety of sectors.

OTHER PROCEEDINGS

11. There have been two sets of proceedings elsewhere which we mention in passing. The Appellant and Camilla have commenced proceedings in Milan [the 'Italian Proceedings'] against a number of family members, and also against Mr Piccinini, Dr Riva, Mr Lucchini and the Respondent; and finally against Efiparind BV, Efiparind Holding BV, SCPA and Fiparin. The purpose of these proceedings has been described by Mr Guiseppe Curto, the lawyer for the Appellant and Camilla in the Italian Proceedings, as claiming damages for failure to take into consideration the rights of the Italian plaintiffs as heirs to Mrs Pesenti's succession, to which claim is coupled what is described as an invalidity claim under which the whole structure established by Mrs Pesenti is attacked.

12. The Italian Proceedings are being defended; all but Sebastiano Mazzoleni, son of the Appellant, have entered defences in which they asserts that the claims should be rejected as inadmissible and groundless in both fact and law.

13. The Respondent took out a Beddoe application before the High Court seeking directions as to whether it should defend the Italian Proceedings. We have seen the Beddoe decisions but no reasoned judgment. However, it is apparent that permission to defend those proceedings was granted. The defence filed by the Respondent in Milan was that:

> (1) as a preliminary issue, the court lacked jurisdiction and should therefore dismiss the claims as a point of procedure; alternatively, the court lacked jurisdiction to hear the claims for damages made against the Respondent, Dr Riva and Mr Piccinini with those claims being dismissed;
>
> (2) in the alternative as a procedural matter, to declare the Italian writ null and void pursuant to Article 164 of the Civil Procedure Code on a number of grounds; and
>
> (3) in the alternative on the merits, to declare that Dr Riva and Mr Piccinini lack *locus standi* as defendants; and the remaining claims be dismissed on the basis that they are statute barred and/or inadmissible and/or unfounded.

We have been informed since the hearing before us that the Italian Proceedings have moved forward to the evidence phase (the court having rejected all objections to jurisdiction) and thus the Italian Proceedings are continuing towards trial.

14. It appears there have also been some proceedings in the Netherlands whereby the Appellant, Camilla and the Appellant's son Sebastiano have raised governance issues in relation to Efiparind BV as minority shareholders. In these proceedings, the minority shareholders had requested the Enterprise Chamber of the Amsterdam Court of Appeal to order an inquiry into the management and the affairs at Efiparind BV and, by way of immediate relief for the duration of the proceedings, to appoint a third party as a director of that company with a deciding vote. The evidence before us has been unclear as to the current status of those proceedings, but it does not appear that the Respondent was a party to them.

THE TRUST DEED AND LETTER OF WISHES

15. The Trust was constituted by payment of £100 by Mrs Pesenti to the original trustees. The beneficiaries were expressed to be the Appellant and her issue born before the Perpetuity Date, together with two charities, namely the International Committee of the Red Cross and Caritas Internationale. The dispositive provisions required the trustees to hold the Trust Fund and its income on discretionary trusts for all or such one or more exclusively of the others or other of the Beneficiaries with wide powers of appointment of the Trust Fund or part of it for their advancement or benefit at the absolute discretion of the trustees. There is, however, one unusual dispositive provision which appears at Clause 3(vi) and is in these terms:

> *"Notwithstanding and in priority to the foregoing if after the death of the Settlor a descendant of hers ("the Claimant") claims that he or she has been deprived of his or her forced heirship rights arising under the applicable forced heirship law on the death of the Settlor by the creation of this Settlement or the making of any additions hereto such rights not having been validly renounced by the Claimant or effectively defeated by any action of another descendant of the Settlor through whom the Claimant derives his or her forced heirship rights the Trustees shall have power after such enquiry as they deem appropriate as to the basis of such claim (such enquiry to include if the Trustees shall think fit the taking of the Opinion of Counsel qualified in the relevant jurisdiction or the obtaining of the decision of any appropriate Court) to pay or transfer to the Claimant such sum or property as he or she shall in the Trustees' view be entitled to under the aforesaid forced heirship law."*

16. By Clause 1(vii) the protector was defined as such person as the Settlor may by deed executed contemporaneously with the settlement or at any time after it appoint, and his successors from time to time appointed in accordance with the provisions of the

Fourth Schedule. The relevant provisions of the Fourth Schedule are as follows:

"THE FOURTH SCHEDULE above referred to:

THE PROTECTOR

1. THE protector shall by written instrument delivered at any time before the Perpetuity Date to the Trustees nominate its own successor to act as protector upon its ceasing for any reason to hold office as protector and each such instrument shall nominate one or more alternative successors and an alternative successor shall take office as protector only if the successors named before it failed to qualify in accordance with the following provisions of this Schedule.

2. THE protector may be a natural person or a corporation and may be related in any manner to any Beneficiary but no person shall qualify or be effectively appointed as protector:

(a) if it is a Trustee or
(b) if it is domiciled resident or ordinarily resident in the jurisdiction the Courts of which are for the time being the forum for the administration of this Settlement or
(c) if it shall be the subject of any circumstance that would result in its removal from office pursuant to paragraph 4 of this Schedule or
(d) if within sixty days after the date on which the protector nominating it ceased to hold office it shall fail to notify the Trustees in writing that it has accepted the appointment or
(e) if within the same period it shall fail to deliver to the Trustees an instrument in writing nominating its successor.

3. WHETHER stated to be revocable or irrevocable the nomination by a protector of its successors may be revoked at any time (during his lifetime in the case of a natural person) by written instrument delivered to the Trustees provided that such instrument shall nominate another successor or successors.

4. THE protector shall immediately cease to hold office as such if

(a) it resigns its office by written notice to the Trustees
(b) [as a natural person if the protector dies or becomes bankrupt or loses capacity]
(c) the protector being a natural person he shall attain the age of 75 years;
(d) [as a corporation, if the protector is dissolved or goes into liquidation/winding up]
(e) the Trustees shall declare in writing that in their opinion the protector has acted under compulsion or duress of any Government (de jure or de facto) or any Governmental Agency in the exercise or purported exercise of his functions hereunder.

But under no circumstances shall the Trustees have any liability for anything done or omitted to be done in ignorance that a protector has ceased to hold office and under no circumstances shall the Trustees have any liability for making a declaration pursuant to sub-paragraph (e) of this paragraph in good faith notwithstanding the fact that it may subsequently appear that there were no grounds or insufficient grounds for such declaration.

5. [there is no Clause 5]

6. IF at any time there is no protector in office the Trustees may by Deed appoint a protector.

7. WHILST there is no protector in office, the powers of the protector shall vest in the Trustees."

17. The references in the Trust Deed to protector powers appear to relate solely to the following:

(1) the prior written consent of the protector is needed before the trustees can exercise their powers to include or exclude beneficiaries in or from the beneficial class (Clause 4(i));

(2) the protector has the power to appoint new trustees at any time; and may change the proper law of the Trust and declare the jurisdiction which is to become the forum for the administration of the Trust (Clause 8);

(3) the power of the trustees to charge fees is subject to any agreement from time to time made between the trustee and the protector (Clause 9);

(4) the power of appointing new or additional trustees is exercisable by the protector, or if no protector is able and willing to act, by the trustees (Clause 11(i)); the protector may at any time, without assigning any reason therefor, by deed remove any trustee and appoint any other person to be a trustee in the place of the removed trustee. This power overrides any other powers contained in the Trust Deed (Clause 11(ix));

(5) the power in the trustees to deal in the shares of any Scheduled Companies (as defined in the Trust Deed) is subject to the consent of the protector (Clause 14); and

(6) there is express provision that notwithstanding any rule of equity or law to the contrary, no Beneficiary shall be entitled to the production or inspection of any accounts, but nonetheless the trustees shall at the expense of the Trust Fund provide a certified copy of such accounts to the protector (Clause 2 of the Third Schedule).

18. Mrs Pesenti, the Settlor, gave a Letter of Wishes to the original trustees on 4 August 1994. In that letter she made it plain that the Trust was first and foremost for the benefit of the Appellant, and only after her death for the benefit of her children and, after their

death, for the benefit of their descendants. She made it clear that the entire income of the Trust should be accumulated save to the extent that the Appellant requested it should be dispersed. Her wishes substantially requested the trustees to apply a *per stirpes* approach to the division of income amongst the Appellant's children and remoter issue after the Appellant's death.

19. Mrs Pesenti made some express wishes clear in relation to Clause 3(vi) of the Trust which is set out above – if there were a claim that the Trust was in conflict with mandatory inheritance laws, the trustees were requested to use the powers granted to them to meet those requests if deemed to have been brought in good faith and for cause or which might seriously endanger the continuation of the Trust or the interests of the other Beneficiaries. The Letter of Wishes also contains the following paragraphs:

> *"11. The Protector*
>
> *Please take note of the fact that I have appointed a protector and that the latter has been granted powers that I could have reserved to myself had I been younger, in order to ensure that my wishes concerning the future of the Trust Foundation are fulfilled.*
>
> *12. Further letters*
>
> *I may write further letters of wishes to you in the future and, should the latter be the case, this letter shall have to be read subject to any future wish that I may make.*
>
> *After my death, please consider, as if they came from me, the letters of wishes which Annaluisa may send to you or, after her death, that the eldest Beneficiary of each of Annaluisa's branch of descendants may send to you and, in this case, such letters should only be considered in connection with the 'share' or 'sub-share' of the person having sent said letter.*
>
> *13. Confidentiality*
>
> *I would like this document only to be made available to Annaluisa and, after her death, to the Beneficiaries belonging to the eldest generation of each of Annaluisa's branch of descendants, except for the case in which you may take cognisance of the fact that this document may thus be used for purposes against the interest of other Beneficiaries".*

REQUESTS FOR THE APPOINTMENT OF A NEW PROTECTOR

20. We set out at paragraph 7 above the circumstances which led to the Trust having no protector with effect from October 2017. On 26 May 2018 the Appellant wrote to the Respondent saying that she did so in the place of the Settlor and in accordance with her mother's Letter of Wishes. The Appellant made it plain that in her view it was appropriate for the Trust to have a protector. Her mother had appointed a protector within days of settling the Trust and she felt confident that it was her mother's intention that there should always be a protector. The Appellant nominated two possible candidates (with whom she was "*comfortable*") for that appointment, both of whom had assisted her and Camilla in various business dealings in the past. If the Respondent did not consider either candidate appropriate then it should inform the Appellant so that she could send a further letter of wishes. On 12 June 2018 she received the response that the Respondent was not minded to appoint a protector to replace Mr Lucchini, but would discuss the matter with her further when they next met.

21. Both the Appellant and Camilla, as beneficiaries of the Trust and RR3 settlements respectively, subsequently sought advice from Messrs Appleby who wrote to Messrs Cains, Advocates for the Respondent, on 6 September 2018. In their letter Appleby suggested that the Respondent was acting partially in the Italian Proceedings because, instead of seeking independent legal advice, it had appointed Mr Minoli as its Italian lawyer, the Attorney who had historically represented and continued to represent the parties on the other side of the Italian Proceedings. It was said that in view of the clear position of conflict in which the Respondent found itself, the Appellant and Camilla considered it was essential that a protector should be appointed to ensure that their interests were not prejudiced. The letter concludes with the suggestion of a meeting at which a discussion could take place with a view to the issue being resolved. By their letter of 26 October 2018 Messrs Cains took issue with a number of statements made by Appleby – they denied they had not taken independent legal advice, they did not accept the allegations made against Mr Minoli, the Trustee's long standing Italian lawyer, and they did not accept that the Respondent was in a position of conflict. The letter indicated that the Respondent was not minded to appoint a protector at that time, but would continue to keep this under review. On 30 November 2018 all the adult beneficiaries of the Trust (and a minor beneficiary represented by his parents) wrote to the Trustee supporting the request of the Appellant that a protector be appointed, endorsing the suitability of the Appellant's two candidates for the role. There was a further exchange of correspondence before Messrs Cains wrote on 29 January 2019 to summarise the Respondent's position, namely that the Respondent would not appoint a protector at that time but would keep the decision under review. Although they said the Respondent was not obliged to give reasons for its decision, the reasons in outline were then given:

> (1) the Trustee did not consider there was any need to appoint a protector for either trust at that time. The only substantive reason which had been advanced by the Appellant and her sister had been to ensure the provision of financial information, but as that was being provided anyway, it was unnecessary to appoint a protector to the Trust and the RR3 Settlement;
>
> (2) furthermore, the Four Trusts were involved in acrimonious litigation in Italy which had caused conflict within the family and the Respondent did not wish to take any unnecessary steps which might add to those hostilities;
>
> (3) all the Trusts settled by Mrs Pesenti (which we take to mean the Four Trusts) had considerable inter-relationships of trust assets and in some cases of beneficiaries. Those inter-relationships required some unity of decision-making across the trust structures. With that in mind it would not be desirable for the RR2 and RR3 settlements to have protectors, or different protectors to the other trusts, without good reason; and

(4) the Trustee considered that it was essential that any individual considered for the role of protector should be impartial and independent in relation both to the family and the Italian Proceedings in order to avoid any further aggravation within the family. The Trustee had to deal fairly with all of the beneficiaries. Given the hostile litigation, it was difficult to conceive of an individual who might be regarded by all of Mrs Pesenti's descendants as impartial and independent. The letter confirms that the Respondent would give full transparency as to the assets of the RR2 and RR3 settlements and would give full details of the trust accounts going forward.

22. The reasons summarised in that letter were essentially the same reasons as were advanced before Deemster Christie below and before us. Although they were stated as being non-exhaustive, no other substantial reasons for the decision not to appoint a protector have been provided to us and indeed Ms Bermingham confirmed on behalf of the Trustee in answer to a direct question from this court that the Respondent relied on the letter of 29 January 2019 and there were no other reasons.

THE DECISION BELOW

23. Deemster Christie identified two broad issues for the court. The first related to the construction of the Trust Deed, namely whether Clause 6 of the Fourth Schedule is mandatory as the Appellant claimed, or whether it was a mere power, as the Trustee contended. If the latter, the second issue was whether the court should nonetheless direct the Trustee to appoint a protector of the Trust or alternatively direct it to reconsider its decision. He noted that the Appellant had set out in some detail her concerns about the management of ITM and what she saw as excessive and influential control over that management by Giampiero and Carlo Junior, including the arrangements for their own remuneration. The Deemster correctly identified that he was unable to resolve those issues in the context of the matters before him. He also noted the Trustee's contention that it had no power, either as trustee of the Trust or as acting in concert with itself as trustee of the Four Trusts, over the management of ITM. The Trustee asserted that control rested with Efiparind BV, as managing partner of SCPA and its shareholders. Thus the Trustee contended that it did not control the payment of dividends by ITM nor the remuneration of ITM executives.

24. On the matter of construction the Deemster referred to a number of recent Supreme Court authorities – *Wood v Capita Insurance Services Limited* [2017] AC 1173, *Buckinghamshire v Barnardo's* [2019] ICR 495 (in both cases referring to dicta of Lord Hodge JSC) and *Marley v Rawlings* [2015] AC 129, a case concerning the interpretation of a will where the leading judgment was given by Lord Neuberger of Abbotsbury PSC (with whom Lords Clarke of Stone-cum-Ebony, Sumption, Hodge and Carnwath of Notting Hill JJSC agreed) who at paragraphs 19 and 20 said this:

> *"19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,*
>
> *(a) in the light of*
>
> > *(i) the natural and ordinary meaning of those words,*
> > *(ii) the overall purpose of the document,*
> > *(iii) any other provisions of the document,*
> > *(iv) the facts known or assume by the parties at the time that the document was executed, and;*
> > *(v) common sense, but*
>
> *(b) ignoring subjective evidence of any party's intentions ……*
>
> *20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffman said in Kirin-Amgen Inc v Hoechst Marion Roussel Limited [2005] 1 All ER 667, paragraph 64,*
>
> > *"No one has ever made an acontextual statement. There is always some context to any utterance, however meagre".*
>
> *To the same effect, Sir Thomas Bingham MR said in Arbuthnott v Fagan [1995] CLC 1396, 1400 that:*
>
> > *"courts will never construe words in a vacuum"."*

25. This court applies these principles of construction in the present case. As the Deemster noted, Lord Clarke JSC (with whom Lords Phillips of Worth Matravers PSC, Mance, Kerr of Tonaghmore and Wilson of Culworth JJSC agreed) said in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 14:

> *"The court must ascertain what a reasonable person, that is, a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the contracting parties to have meant by the language used."*

26. As can be seen, the transposition of rules of construction from a contract to a trust (or indeed to a will, as in the case of *Marley*) requires the court to identify the intention of the parties by interpreting the words used in their documentary, factual and commercial context. That obviously means that the reasonable person, construing the words used, has regard to the fact that they are used in a Trust Deed and not a contract – among other things, the reasonable person would impute to any professional draftsman of a Trust Deed knowledge of previous decisions of the courts when construing other trust documents involving the same or similar language.

27. Having noted the various principles, Deemster Christie resolved that the words of Clause 6 of the Fourth Schedule were clear and unambiguous. He thought that it was inconceivable that a professional draftsman (the Trust Deed was drafted by Messrs Lovell White Durrant in London) would not understand the distinction between the use of the words "*may*" and "*must*". It would have been easy to impose on the trustees an imperative power to appoint a protector where there was none in office, but such language had not been

included. The Deemster then looked beyond the language actually used to consider the context in which the Trust Deed was made. He considered that there was nothing in the overall context which suggested that the role of the protector was intended to be self-generating in all circumstances and it was wrong to make the assumption that the Trust Deed envisaged there would be a protector at all times.

28. The Deemster then turned to the decision which the Trustee had made not to appoint a protector for the time being but keep the matter under review. Having set out the submissions made by the Appellant and the Respondent, he rejected any express or implied suggestion that there had been any wrongful motivation and/or self-interest on the part of various individuals, including Dr Riva, Messrs Piccinini, Lucchini and Minoli, Giampiero and Carlo Junior. None of these gentlemen were parties to the proceedings and he found, correctly, that it would be wrong to make any findings as to their motivation or conduct. The Deemster then rejected the criticisms of the Trustee made by the Appellant that the Trustee had dragged its feet, and had not properly considered the wishes expressed by the Appellant, or had failed properly to consider the decision which it was required to make. His conclusion was that the Trustee had displayed a conscientious and proper approach to the decision-making exercise which it was its duty to perform. The Deemster rejected the proposition that there was any burden on the Trustee to establish that its decision was not influenced by any conflict of interest on its part and he considered that, leaving aside cases of bad faith, the court would only be justified in making a mandatory order against a trustee if there was only one possible proper course of action.

29. Approaching the matter in this way, he considered the reasons relied upon by the Trustee both in its minutes of meetings and in the letter of 29 January 2019 and concluded that all those reasons were relevant reasons and accordingly he should not direct the Trustee either to exercise the Clause 6 power to appoint a protector or to reconsider the decision which had already been taken.

DISCUSSION

30. Essentially, the argument before us covered the same ground as was argued before Deemster Christie, this court being reminded by Ms Bermingham of Rule 14.14(2) of the Rules of the High Court that the appeal was a review and not a rehearing.

31. Before we turn directly to what in our judgment are the salient points on this appeal, we mention two points briefly covered in the judgment below. The first is the question whether the judgment of the Supreme Court in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 forms part of the law of the Isle of Man. This was said to be relevant in the court below because, at paragraph 73 of his (the leading) judgment, Lord Walker of Gestingthorpe JSC said that it was necessary for the court to identify a breach of duty on the part of the trustees before it could intervene to set aside the exercise of a discretionary power. As Deemster Christie noted correctly at paragraph 118 of his judgment, the issue was irrelevant to the application before him because it was accepted that the court had jurisdiction to intervene if a breach of duty had occurred because the Trustee gave reasons for its decision which could not be supported on one ground or another – see for example *In re Beloved Wilkes's Charity* (1851) 42 ER 330.

32. The second point touched upon briefly in argument was the relevance of the decision in *Public Trustee v Cooper* [1999] 12 WLUK 603, [2001] WTLR 901. In that case the court had been asked by trustees for a declaration that they could properly accept an offer for shares in a brewery company held by them on the trusts of the settlement in question. Hart J considered the court's jurisdiction to bless a "*momentous decision*" where there had been no surrender of the trustee's discretion, as is the case here, asking himself if he was satisfied about three matters:

> *"First that the Provident Settlement trustees have in fact formed the opinion that special circumstances exist which render it desirable that they accept the bid …*
>
> *Secondly, was the opinion which the Provident Trustees formed one at which a reasonable body of trustees properly instructed as to the meaning of the clause could properly have arrived?*
>
> *Thirdly, was the opinion at which that body had arrived vitiated by any conflict of interest …?"*

33. The Deemster took the view that the Respondent was not in fact asking the court to bless its decision, from which it followed that *Cooper* could be distinguished. We agree that there was no momentous decision here which the court had been asked to bless. However, if the Deemster was implying that as a result potential conflicts of interest could be disregarded, we respectfully do not agree. As we will come on to discuss, conflicts of interest are in our judgment very relevant in the present case to its ultimate disposition. The burden of establishing such a conflict lies on the person who asserts it (in this case the Appellant) but once it is established the court must take account of it in the usual way in deciding the issue before it.

• *Construction*

34. It was contended by the Appellant that the Deemster did not refer to a number of cases cited by the Appellant in argument before him, particularly those cases dealing with the situation where a power was expressed in discretionary terms but had nonetheless been held to be imperative. The Appellant also contended that when categorising the trustees' power to appoint a protector under Clause 6 of Schedule 4, it was wrong to see the issue as a binary choice between a discretionary mere power and a wholly obligatory trust power. The alternative argument advanced by the Appellant was that this was a blended power, situated between the two extremes. To say that it was merely a discretionary power was to ignore its context.

35. Although we have not been addressed at great length on the cases on which the Appellant relied, we think we should tackle them briefly.

36. The first was *Mortimer v Watts* (1852) 51 ER 421. The issue concerned the construction of the power given to the trustees to renew a leasehold interest which they had acquired under the will of the testator who, after making provision for his wife during her lifetime, had bequeathed his real and personal estate, other than his leaseholds, to trustees on trusts for his children and their issue. His leasehold interests he bequeathed to trustees with this language:

"And upon trust, if they, the trustees or trustee for the time being, shall think it proper or advantageous, as to any of the said tenements, hereditaments or premises, which are customarily or may be renewed, that the said trustees or trustee for the time being shall or lawfully may endeavour to effect renewals of the subsisting leases of the said tenements, hereditaments and premises, or any of them, upon such terms as they shall think proper, so that the said premises may, during the continuance of the trusts of this my will, so far as the circumstances of the case will admit, be respectively held for three lives, for a long term determinable on three lives or for twenty-one years absolute, or according to the usual terms of renewal."

37. The court was asked by the trustees for directions as to whether they were bound to renew the leasehold interests, or any and which of them, supposing them to be able to obtain renewals on terms not disadvantageous to the testator's estate, or whether they had an absolute discretion to exercise as to whether any such renewals took place. The court found that the power in question was an imperative power to renew the leasehold interests if the trustees considered it was proper or advantageous to do so.

38. We do not think this case is particularly helpful. The decision was one of construction of the language we have quoted and was to the effect that it was compulsory for the trustees to renew those interests if it was proper to do so. It seems to us that that is a natural construction of the clause in question – "*if they … shall think it proper or advantageous … shall or lawfully may endeavour to effect renewals … upon such terms as they shall think proper*". The lessors to them of the leasehold interests could obviously not be forced to grant renewals, but, subject to the terms being advantageous, there was an obligation on the trustees as lessees to renew. The obligation was to effect renewals and the words "*or lawfully may*" in context covered the situation that renewal was possible on advantageous terms – thus it was not open to the trustees not to endeavour to obtain renewals upon terms which might prove advantageous.

39. The second case referred to was *Nickisson v Cockill* (1863) 46 ER 778. In that case, the testator had made a general devise and bequest of all his real and personal estate to trustees who had power to grant leases on such terms as they should think advantageous and proper, with power also if they should "*consider it advisable, but not otherwise*" to sell the real estate or any part thereof by public or private sale in such manner, at such time or times and for such prices as they should think proper. The question arose as to whether, the proceeds of sale of parts of the testator's real estate having proved insufficient to pay all the legacies other than the charitable legacies, the trustees ought to "*have considered it advisable*" to sell the real estate under their power to do so, however discretionary in its form, for the purposes of paying the general legacies. The Vice-Chancellor had considered that the power in its expression was clearly discretionary and that he could not require the trustees to exercise it for the purposes of the will. On appeal, Lord Westbury LC differed from that conclusion and held that it was the duty of the trustees to exercise such power as far as it was requisite for the payment of all the relevant legacies. In reaching that conclusion, it is plain that the Lord Chancellor took the view that he did on the application of the language of the will having regard to the context of the estate as a whole, and that, if the position were to be that the personal estate was insufficient for the objects intended by the testator to be benefitted, the trustees were under an obligation not to defeat the testator's intention by refusing to exercise their power of sale.

40. The court in that case thus construed the will as a whole. The case is helpful to that extent in confirming that a trust deed needs to be construed as a whole in its contextual background, as the more recent cases have demonstrated.

41. The third case was *Tempest v Lord Camoys* (1882) 21 ChD 571. In that case the court was asked to order the trustees to exercise the power to lease a mansion house and the furniture therein for a period not exceeding 21 years. At first instance, Chitty J held that it had no authority to control or direct the trustees to exercise the power which they had. On appeal, the Court of Appeal made clear that where a testator had given a pure discretion to trustees as to the exercise of the power, the court does not enforce the exercise of that power against the wish of the trustees, but it does prevent them from exercising it improperly. As Lord Jessell MR (with whom Brett and Cotton LJJ agreed) said at 578:

"The Court says that the power, if exercised at all, is to be properly exercised … But in all cases where there is a trust or duty coupled with the power the Court will then compel the trustees to carry it out in a proper manner and within a reasonable time …"

42. Once again there is nothing in the language in the decision which contradicts the more modern authorities, nor is it entirely clear that this was a construction case as such. The court seems to have proceeded on the assumption that there was a difference between an imperative power and a power which required the trustees to take appropriate steps to ascertain whether the freehold interest could be let advantageously, but they retained a complete discretion as to whether the terms were appropriately advantageous.

43. Before us, Mr Davies for the Appellant focussed his fire on the proposition that this was a blended power, a matter which he said the Deemster did not consider. Merely describing it as a discretionary power was ignoring its context. The argument for finding this to be a blended power really involved these propositions:

(1) the Trust Deed made provision for the appointment of a protector, and within five days of making settlement, the Settlor herself had appointed a protector;

(2) the arrangements under the Trust Deed by which a protector was to take office involved back-up arrangements for who would be appointed protector after the current protector left office. There would always be two persons in the wings waiting to take over and, in those circumstances, that revealed a clear intention on the part of the Settlor that there should always be a protector;

(3) although the provisions of Clause 7 of the Fourth Schedule were to the effect that the powers of the protector would vest in the trustees when there was no protector in office, it was clear from other provisions in the Fourth Schedule that this was intended only as a temporary matter – under Clause 2 of the Fourth Schedule a person was disqualified from being appointed as protector if he were a trustee or if he was domiciled, resident or ordinarily resident in the jurisdiction the courts of which were at the relevant time the forum for the administration of the settlement. Here, there was now a sole trustee, a Manx corporation, and the Isle of Man was the forum for the administration of the settlement; and

(4) it was appropriate to look at the powers of the protector in this connection; in particular, the power to reach agreement with the trustees as to the trustees' fees was not one which the trustees could sensibly exercise as protector because they could not be expected to negotiate fees with themselves; and the power in the protector to dismiss the trustees was likewise not a power which the trustees could be expected to exercise. Thus, it was submitted that it was only a short term expedient for the trustees to exercise the protector powers.

44. For these reasons the Appellant contended that the power to appoint a new protector was a blended power where the analysis of Lord Wilberforce in *McPhail v Doulton* [1971] AC 424 at 449F – H is particularly in point:

> *"Differences there certainly are between trust (trust powers) and powers, but as regards validity, should they be so great as that in one case complete, or practically complete, ascertainment is needed, but not in the other? Such distinction as there is would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as, in the case of the power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to inquire into before he can properly execute his trust. The difference may be one of degree rather than of principle: in the well-known words of Sir George Farwell, Farwell on Powers, 3rd ed. (1916), p.10, trusts and powers are often blended and the mixture may vary in its ingredients."*

45. In that case the House of Lords was considering the nature of the power in the context of assessing whether there was certainty as to the objects of the trust, but in our judgment the language used is of general application in the construction and application of non-imperative powers. The fact that there is a mere power does not carry any necessary implication that there is no need for a trustee to consider its exercise. All depends on context.

46. The Respondent accepted that in principle the distinction between a mere power and a trust power was not binary. In our judgment, however, in using the expression "*blended power*" there is a risk of confusing two separate concepts. The first is one of construction as to whether a power is an imperative trust power or a mere power given to trustees. The second is the consideration of the factors which trustees of a mere power should take into account when considering the exercise of that power.

47. In our judgment the Deemster was correct to find that this was not an imperative power. The words used were indeed unambiguous – "*IF at any time there is no protector in office the trustees may by Deed appoint a protector*" (our emphasis added). As a matter of language, "*may*" does not and cannot mean "*must*". Accordingly, there is no doubt in our minds that the power contained in Clause 6 of the Fourth Schedule to the Trust Deed is a discretionary power.

48. However, as with all discretions which are capable of being reviewed by a court, it is essential that the decision-maker takes into account all relevant considerations and excludes from account all irrelevant considerations – and also, of course, that the decision-maker should reach a conclusion which is not so unreasonable that no reasonable decision-maker in his position could have reached it. We will come on to review shortly the factors which the Trustee ought to have taken into account in deciding whether or not to appoint a protector, and it will be clear that the features which the Appellant identified as reasons why the power should be construed as a blended power are relevant to the context in which the Trustee had to consider the request.

• *Review of Reasons*

49. The first reason provided by the Trustee was that there was no need to appoint a protector because the Appellant and her sister were being provided with financial information in any event. We note that the Deemster did not address this in terms when considering the reasons actually given in the minutes and correspondence.

50. In our judgment this reason does not stand up to analysis for two reasons. First, there is all the difference in the world between being provided with financial information at the discretion of the Trustee and having an entitlement to financial information which enables the person so entitled to press for clarification or further information as the case may be. It is the difference between a supplicant and a person entitled – using other language, the Trustee may decide to give financial information to the Appellant, but it must give such financial information to the protector. It should not be forgotten that the protector not only has the ability to apply to court for an order directing the trustees to do that which the Trust Deed requires them to do, but also the protector has the wherewithal to compel the trustees directly to perform their functions in that respect, because he has the power of dismissal.

51. Secondly, obtaining financial information is not the only function of the protector. In that context, as noted by Deemster Corlett in *IFG International Trust Company Ltd v French* 2012 MLR 637, the precise role assigned to a protector under the trust instrument is of particular significance. In the present case, those different functions have been fully set out at paragraph 17 above. Indeed, in any case where protector powers come to be considered, the precise role of the protector is obviously an essential starting point. It is also helpful to have regard to the comments of this court (differently constituted) in *Rawcliffe v Steele* 1993-95 MLR 426 (cited at paragraph [93] of the judgment below) where at 510 (lines 5 – 21) it was said by Deemster Hegarty:

> *"It seems to me that it would be wrong entirely to neglect the terminology involved. The words "protector" seems to me to connote a role for the person holding that position even before one considers the detailed provisions relating to it. A "protector" is, presumably, someone who "protects". But what is he to protect? He is not a protector of any specific individual or interest. At recital (b), he is referred to as "Protector of the trusts created by this declaration of trust"; and at cl. 1(b) he is referred to as "Protector of the settlement". It is, therefore, the settlement that he is obliged to protect. I interpret this as indicating that his essential role is to ensure that both the letter and the spirit of the settlement are complied with. For example, it might be difficult in practice for the court to ensure that the trustees of settlements would carry out a proper enquiry of the kind contemplated by Lord Wilberforce [in McPhail] before exercising their powers. A protector with a power to give or withhold his consent to the exercise of such powers could much more readily ensure that they had done so."*

52. In our judgment the powers conferred on the protector in the instant case have been so conferred with a view to ensuring the proper exercise of the powers of the trustees. They are fiduciary powers which must be exercised bona fide for the purpose for which they were conferred, and in accordance with their terms. In *Rawcliffe*, Deemster Smith made the observation at 529 (lines 6 – 19) that the role of the protector was to assist in the administration of the trust, and to express to the trustees the settlor's wishes as to how the trust is operated.

53. It was said, in our judgment rightly, that the protector would owe a fiduciary duty to the beneficiaries as to how his powers should be exercised. Those comments, of course, need to be considered in the light of particular protector powers concerned in that trust because it is a question of construction of the particular trust deed as to whether or not a particular power of a protector is fiduciary or personal.

54. We note that in the Jersey case of re Bird Charitable Trusts [2008 JLR 1], the Royal Court found a convenient summary of the position in *Underhill andHayton Law of Trusts and Trustees*, 17th ed., at 43 – 44; the relevant paragraphs from the 19th ed. provide as follows:

> "*1.82 In determining the scope of duties affecting particular powers of a protector a court will need to consider the settlor's purposes in conferring particular powers on the protector so that, ideally, the purposes should be properly documented, eg in a letter of wishes or a specific protector's memorandum. The court also needs to consider the terms of any exemption or other clause in the trust instrument that in any way relates to the protector's position. Indeed, a court may well take the view that if the protector is an unpaid friend or relative of the settlor then there may be no duties in relation to some protector's powers (eg of appointment of capital or of consenting or not to a trustee's proposed appointment of capital), but that in relation to other powers, eg to remove the trustee and appoint a new trustee, the extent of the fiduciary duty is to act in good faith in the best interests of the beneficiaries, while if the protector is a paid professional then he is subject to the full fiduciary responsibilities applicable to trustees extending to the duty to consider the exercise of powers from time to time, but, like trustees, he can be expressly exempted from liability for breach of a fiduciary or equitable duty if a clause so provides, so long as the breach does not involve recklessness or dishonesty.*
>
> *1.83 Exceptionally, where the first protector office-holder is the settlor with a selfish interest to promote in respect of a particular trust asset it will be possible to hold that some of his powers are personal, as also is likely where the first protector is a beneficiary with selfish interests that the settlor must have taken into account. Alternatively, if a power be fiduciary, the court may hold that there is a necessarily implied authorisation of a conflict of interest which allows the beneficiary, after due consideration of other beneficiaries' interests, to exercise the power despite personal benefit accruing therefrom.*
>
> *1.84 Normally where the settlor or a beneficiary is a protector the powers of such protector that affect the investment and managerial role of the trustee will be presumed fiduciary so far as concerns the exercise of a power of removal and appointment of trustees and the exercise of a power to direct investments to be made by the trustees, because those powers will be presumed to be exercisable to promote the interests of the beneficiaries as a whole. In respect of the trustees' role as discretionary distributors of income or capital to beneficiaries it seems that there is good scope for argument that the protector's power to withhold consent to propose distributions or to direct distributions is a personal power, especially in the case of a settlor who is the protector."*

55. We endorse these general observations as relevant to the considerations which the court needs to have in mind when considering issues around the appointment or dismissal of protectors and the exercise of protector powers.

56. The Trustee appeared to have considered the need for the appointment of a protector solely in the context of the provision of financial information to beneficiaries on the basis that was the reason advanced by the Appellant and her sister Camilla. In approaching the matter in that way, the Trustee was in error. The power to appoint a new protector was a fiduciary power which had to be exercised in the interests of all of the beneficiaries and while the reasons advanced by the Appellant were relevant for the Trustee to consider, it was for the Trustee to review the possible exercise of the power on a wider basis. It should therefore have considered all the various protector powers as contained in the Trust Deed as to whether it was necessary or desirable that its powers to appoint a new protector should be exercised. In that context, the so-called blended approach, which has been discussed above, would also have been a relevant consideration.

57. The second reason for its decision advanced by the Trustee was that all Four Trusts were involved in very acrimonious litigation in the Italian Proceedings, which has caused considerable conflict within the family, and the Trustee did not wish to take any unnecessary steps which might add to those hostilities. In context, the reason given can only mean that the Trustee took into account the wider interests of the whole family, including the branches of the family other than that of the Appellant and her issue. Avoiding taking steps which might add to hostilities within the family would be a proper consideration for the Trustee if "*family*" meant only the Appellant and her issue. If, however, it meant it would be in the interests of the wider family and not in the interests of the Appellant and her issue to avoid such hostilities, the Trustee would be taking into account the interests of those who were not beneficiaries in deciding whether or not to exercise the fiduciary power to appoint a new protector.

58. It seems to us likely that the commencement of the litigation in Italy has indeed resulted in acrimony. That would not be entirely surprising. It is in the interests of the Appellant and her issue that the litigation is satisfactorily resolved whether that occurs by judicial decision or by settlement. We consider this reason given by Messrs Cains, which follows the Trustee's board minute of 25 January 2019, as leaving behind a lurking question as to whether "*family*" included all branches. On balance, we consider that it probably did, but it would be surprising to conclude that it was a good enough reason to justify not appointing a protector in the light of the acrimony which the Italian Proceedings might have been expected to engender in any event.

59. We turn now to the third reason given by Messrs Cains which was that all Four Trusts had considerable inter-relationship of trust assets and in some cases of beneficiaries, which inter-relationships required unity of decision-making across the trust structures. It was

said on behalf of the Trustee that it would be undesirable for the RR2 and RR3 settlements to have protectors (or different protectors) to the other Trusts without good reason. The Trustee's minute of 25 January 2019 is in similar terms.

60. In our judgment this reason, like the first reason given, does not stand up to analysis. It is of course true that the Four Trusts have inter-relationships of trust assets, as the structure of those assets set out at paragraph 8 above makes plain. That does mean, necessarily, that it will be in the interests of the beneficiaries of each trust that a satisfactory *modus operandi* is in place to ensure that the inter-relationships work for the benefit of that particular trust. But what if they do not? The present case is one where all the adult beneficiaries of the Trust support the attack which the Appellant has made on the structure as a whole. One could reasonably anticipate that the minor and unborn beneficiaries would probably take the same view as their parents or grandparents. That unity amongst the adult beneficiaries is the clearest indication that the inter-relationships are not perceived to be working as far as the Trust is concerned, a conclusion which the Trustee ought to recognise. When it comes to taking any particular decision, the Trustee naturally has to have regard to the interests of the beneficiaries, and only the beneficiaries, in respect of that decision. The validity of the decision will stand or fall by the rationale which leads to it being taken. If unity of itself was the rationale for a particular decision, then one would expect that sooner or later there would come a time when the decision taken would favour the beneficiaries of other trusts but not the beneficiaries of the Trust. For the reasons we go on to consider shortly, that position might well have arrived already here. For the moment, however, dealing with the matter only as one of theory, it seems to us impossible to say that unity of decision-making across the Four Trust structure is necessarily in the interests of the beneficiaries of the Trust. We have reached a similar conclusion in relation to the issue as to whether the Trust should have the same protector as the other Trusts. For the same reasons as are the conclusion of our analysis below in respect of the fourth reason given by the Trustee for its decision, we take the view that it is not necessarily appropriate or desirable at the present time that the Trust should have the same protector as the other Trusts.

61. The fourth reason given by the Trustee perhaps puts the other reasons into direct focus. Ms Bermingham accepted in oral argument that "*family*" here extended to the wider family. In other words, it is being suggested that the protector of the Trust should be impartial and independent in relation to litigation between the Appellant and other members of her family when the Appellant is a beneficiary of the Trust but the other members of the family are not. It could not be clearer that by giving this reason the Trustee has acknowledged that it is taking into account the interests of people who are not beneficiaries of this Trust for the purposes of exercising, or not exercising, its fiduciary power to appoint a protector.

62. It is said that it is difficult to conceive of an individual who might be regarded by all of Mrs Pesenti's descendants as impartial and independent in the context of a potential appointment as protector. Again that emphasises that the Trustee has fallen into error. The protector should not be impartial in relation to the hostile litigation of the Italian Proceedings. The protector should be supportive of the interests of the beneficiaries of the Trust in those proceedings. Whether that necessarily involves support for the Appellant in those proceedings is a different question, and one to which we now turn.

63. The approach which ought to be taken by the Trustee to the Italian Proceedings is, or ought to be, governed by a number of considerations:

(1) as Trustee it clearly has a duty to defend the Trust against unwarranted attack save insofar as the Trust Deed provides otherwise;

(2) the Trust Deed does in fact provide otherwise at Clause 3(vi). Furthermore, the provisions in Clause 3(vi) are amplified by the wishes expressed to the trustees by Mrs Pesenti in her Letter of Wishes. In our judgment it can be conclusively inferred from the Trust Deed and the Letter of Wishes that Mrs Pesenti recognised, when making the Four Trusts in 1994, that circumstances might change after her death. She knew that there was at least the potential for a forced heirship claim given her Italian nationality. She might well have been hopeful that this could be avoided; nonetheless, the terms in which the Trust Deed and the Letter of Wishes are expressed make it clear that there was anticipated the possibility that these structures would have to be set aside or in any event modified if such a claim were made. The strongest indications are given to the trustees that they should approach the possibility of such claims in a constructive manner and one assumes that one of the major purposes for that would have been to avoid disharmony in the wider family, the very outcome which has now come to pass;

(3) in deciding on the approach to the Italian Proceedings, the Trustee should have recognised that in circumstances where all the adult beneficiaries of the Trust were supportive of the commencement of those proceedings, the interests of the Trust might well lie in supporting the Appellant in those proceedings. Of course, in so doing the Trustee would have the difficulty that as Trustee of the RR1 and RR4 Trusts – the adult beneficiaries of those Trusts might be adamant that the Appellant's attack should be resisted at all costs. If nothing else demonstrates the potential conflict of interest which the Trustee had and has, that does. An independent protector of the Trust – perhaps also protector of the RR3 Trust in the light of the joint attack in the Italian Proceedings by the Appellant and Camilla – would be able to ensure that the Trustee addressed that potential conflict appropriately, particularly so having regard to Clause 3(vi) of the Trust Deed and the Letter of Wishes. In her closing submissions to us, Ms Bermingham made the assertion that the assets of the Trust could not be unlocked to achieve value given the structure which has been put in place. We would be very surprised if that was so, although of course the multi-jurisdictional entities involved require us to acknowledge that the laws of many different countries and/or territories might be relevant before one could reach a firm conclusion on that point. Nonetheless, if there were anything in the argument that the assets of the settlement cannot be unlocked to achieve value, the necessary consequence in theory is that, without the acquiescence of Giampiero's branch, who have no status in relation to the Trust and are not beneficiaries of it, the beneficiaries of the Trust can get no benefit. Such a theoretical position is so antithetical to the nature of a Trust that we do not consider it to be a likely outcome; and

(4) in the circumstances, whilst the position is undoubtedly difficult for the Trustee, doing nothing as regards the appointment of a protector for the Trust in circumstances where one branch of the family is in complete control of the family assets, is not being impartial between the various Trusts and beneficiaries, but is in fact being partial to the branch in control of the structure. Both parties agree that on the review of the Trustee's decision not to appoint a protector at the present time, the court can

direct the Trustee to reconsider if it thinks that irrelevant considerations have been taken into account or relevant considerations have not. We are in no doubt that this is the position here. For the reasons we have given, our analysis of the Trustee's reasons for the decision it has taken shows that at least three of them were irrelevant and the remaining one is at best doubtful. In addition, although the power to appoint a protector is not an imperative power, the Trustee should have taken into account the inbuilt preference within the Trust Deed for a protector to be appointed; it should have appreciated the expressed intention in the Trust Deed that whilst it has the power to appoint a protector, it is not qualified to be a protector notwithstanding that, until a new protector is appointed, it is to exercise temporarily the protector powers; that the Trust Deed itself precludes the protector from being resident in the jurisdiction which is the forum for the administration of the Trust, from which it follows that the exercise of protector powers would be expected to take place in a jurisdiction other than the Isle of Man; and that there was a direct conflict of interest, not only in relation to the conduct of the Italian Proceedings but also in relation to the necessary dealings which the protector is expected under the Trust Deed to have with the trustees.

64. In the context of this Trust, the proper way to construe the blended powers argument is to acknowledge that while the power to appoint a new protector is not an imperative power, there should nonetheless be a substantial and proper reason for not appointing a protector if that is the issue in question. This is particularly so given that all the adult beneficiaries of the Trust consider that a protector should be appointed.

65. For all these reasons, in our judgment the decision of the Trustee not to appoint a protector cannot stand and we direct it to reconsider. We have deliberately gone into some detail as to our own reasoning in this area in order that the Trustee may take guidance from the court's views in considering again not only whether, but if so whom, to appoint as protector, because undoubtedly its decision, if unacceptable to the adult beneficiaries of the Trust, is likely to lead to a further application to the court for a review of its decision. If that should come around again, it seems to us that consideration will then need to be given to whether the court should make a more direct order for the appointment of a protector, if that should in effect be the issue. As we have stated, the office of protector is frequently a fiduciary office; and in the present case we have no doubt that the power of appointment in the trustees is a fiduciary power and indeed that the powers conferred on the protector are fiduciary powers to be exercised in the interests of the Trust's beneficiaries as a whole.

66. We conclude with the observation that the Italian Proceedings may be anticipated to be long running. We feel constrained to say that the Trustee, properly performing its duties having regard to Clause 3(vi) of the Trust Deed, presumably replicated in the other three trusts, should take active steps to bring the warring parties to the table, not just to avoid continuing family disharmony, but to ensure that, in the future, each branch of the family has the proper enjoyment of its share of the overall family assets, even if that involves some restructuring of the present arrangements. Necessarily, such steps require the Trustee to recognise its inherent conflict of interest as trustee of the Four Trusts, but the terms of the Trusts and the Letter of Wishes – indeed probably the other Letters of Wishes as well, though we have not seen them – emphasise the obligation at least to attempt them.

CONCLUSION

67. We allow the Appellant's appeal and quash the order of Deemster Christie which was plainly wrong. The Respondent must reconsider its decision not to appoint a protector.

68. Any ancillary applications by any party are to be filed and served within 14 days from the handing down of this judgment together with concise written submissions in support, and any concise written submissions by the responding party are to be filed and served within 14 days thereafter. The court will determine any such applications on the basis of such written submissions without a further hearing.

69. Our provisional view as to the costs of the appeal (without the benefit of any submissions) is that both parties' reasonable costs should be paid out of the Trust, on the indemnity basis, pursuant to section 53(1) High Court Act 1991 and Rules 11.3(1), 11.4, 11.43 and 14.13(2)(e) of the Rules of the High Court of Justice 2009.