

EXHIBIT 104

[2006 JLR 562]

IN THE MATTER OF THE B TRUST**IN THE MATTER OF THE REPRESENTATION OF MOURANT & COMPANY TRUSTEES LIMITED**

ROYAL COURT (Bailhache, Bailiff and Jurats Le Breton and Allo): December 8th, 2006

Trusts variation enforcement of foreign financial provision comity and interests of beneficiaries may require Jersey court to give effect to variation of trust ordered in foreign matrimonial proceedings under Trusts (Jersey) Law 1984, art. 51, court to act in best interests of all beneficiaries

Trusts variation enforcement of foreign financial provision English order varying Jersey trust not inconsistent with Jersey law and unenforceable under Trusts (Jersey) Law 1984, art. 9(4), as amended, if trust is post-nuptial settlement under English law but not under Jersey law Jersey court giving directions under art. 51 as to enforcement of order applies Jersey trusts law not Matrimonial Causes (Jersey) Law 1949

Â Â Â The trustee of a Jersey trust applied for directions as to how to respond to a judgment of the English High Court varying the trust.

Â Â Â In matrimonial proceedings in England, the High Court sought to make financial provision for the wife by varying a Jersey trust of which the husband and his family were beneficiaries. Applying principles of English law, the court found the trust to be a post-nuptial settlement and purported to vary it under the Matrimonial Causes Act 1973, s.24. The court ordered that Â£1.5m. of the Â£5.3m. trust fund should be transferred to a sub-trust in which the wife would have a life interest.

Â Â Â The trustee brought the present proceedings under the Trusts (Jersey) Law 1984, art. 51, seeking directions as to how it should respond to the English order. As it had submitted to the jurisdiction of the High Court, enforcement of the order would probably have been uncontroversial prior to the coming into force of the Trusts (Amendment No. 4) (Jersey) Law 2006. The husband claimed, however, that in light of the amendment Law the order could not be enforced. Article 9(4) of the Trusts (Jersey) Law 1984, as amended, provided that "no foreign judgement with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law" and

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para. (1) provided *inter alia* that questions concerning the administration and variation of a Jersey trust should be determined in accordance with Jersey law.

Â Â Â The husband submitted that (a) as the trust was not a post-nuptial settlement under Jersey law, the English order could not be enforced under art. 9 of the Trusts (Jersey) Law 1984, as amended, because it was inconsistent with Jersey law; and (b) in addition, the power to give effect to the English order as a matter of judicial comity had been removed by art. 9.

Â Â Â **Held**, ruling as follows:

Â Â Â (1) The English order would be recognized and given substantial effect (subject to certain qualifications), so as to vary the trust by creating a sub-trust for the benefit of the wife, because it would be fair to do so as a matter of comity. The order sought to do justice between the husband and wife on divorce, the trustee had submitted to the jurisdiction of the English High Court and the other parties had been heard. Whereas the English court would have been concerned solely with making a fair division of assets between the husband and wife, the Royal Court's primary consideration, when exercising its supervisory jurisdiction under the Trusts (Jersey) Law 1984, art. 51, was to act in the best interests of all the beneficiaries (para. 19; para. 25).

Â Â Â (2) The English order was not inconsistent with Jersey law and therefore unenforceable under the

amended art. 9(4) of the Trusts (Jersey) Law 1984. The order was based on the correct assumption that, for the purposes of English law, the trust was a post-nuptial settlement that could be varied under the Matrimonial Causes Act 1973, s.24. It was irrelevant that the trust was not a post-nuptial settlement under Jersey law and thus could not have been varied under the Matrimonial Causes (Jersey) Law 1949, art. 27. The present court was not exercising its power under the 1949 Law to vary the trust. It was instead exercising its supervisory jurisdiction under art. 51 of the Trusts Law to give a direction concerning the administration of the trust, in particular whether, and if so to what extent, to give effect to the English order. The amended art. 9 of the Trusts Law did not operate so as to protect trust assets to the extent that a manipulative spouse could evade the enforcement of a judgment in matrimonial proceedings intended to do justice between him and his wife (para. 13; para. 15).

Â Â Â (3) Furthermore, the court's power to give effect to the English order as a matter of judicial comity had not been removed by the amended art. 9 of the Trusts Law. Comity was a fundamental principle that enabled the courts of one country to show respect to the courts of another and avoided conflicting judgments being given in different jurisdictions. Article 9 did not contain the very clear and express words that would have been required to persuade the court that the legislature had intended to deprive it of the flexibility to do justice on the basis of comity (paras. 16-18).

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Â Â Â (4) Although, in the present case, substantial effect would be given to the English order as a matter of comity, it would be desirable if English courts felt able in future to exercise judicial restraint before purporting to vary Jersey trusts. Time and expense could be saved if, having calculated an award on the basis of the totality of the parties' matrimonial assets, an English court were to refrain from invoking its power under the Matrimonial Causes Act 1973, s.24 to vary a Jersey trust. It should instead request the Royal Court to be auxiliary to it, as for example in insolvency cases. The trustee or a party to the English proceedings should be directed to apply to the Royal Court for assistance in implementing the English order. This would be a more seemly and appropriate approach, and more likely to avoid the delivery of inconsistent judgments (paras. 30-32).

Cases cited:

- (1) Â Â Â *Abidin Daver, The*, [1984] A.C. 398; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339; (1984), 128 Sol. Jo. 99, *dictum* of Lord Diplock considered.
- (2) Â Â Â *Brooks v. Brooks*, [1996] A.C. 375; [1995] 3 All E.R. 257; [1995] 2 FLR 13, considered.
- (3) Â Â Â *Fountain Trust, In re*, 2005 JLR 359, applied.
- (4) Â Â Â *H Trust, In re*, 2006 JLR 280, applied.
- (5) Â Â Â *J v. M*, 2002 JLR 330, referred to.
- (6) Â Â Â *Lane v. Lane (née Coverdale)*, 1985 JLR 48, referred to.
- (7) Â Â Â *Rabaiotti 1989 Settlement, In re*, 2000 JLR 173, applied.

Legislation construed:

Matrimonial Causes (Jersey) Law 1949 (Revised Edition, ch.12.650, 2006 ed.), art. 27(1): "Where a decree of divorce . . . has been made, the court may . . . vary . . . any . . . post-nuptial settlement . . ."

Trusts (Jersey) Law 1984 (Revised Edition, ch.13.875), art. 9, as substituted by the Trusts (Amendment No. 4) (Jersey) Law 2006, art. 2: The relevant terms of this article are set out at para. 5.

art. 51: "(1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.

Â Â Â (2) The court may, if it thinks fit"

(a) Â Â Â make an order concerning"

(i) Â Â Â the execution or the administration of any trust . . ."

Matrimonial Causes Act 1973 (c.18), s.24(1)(c): The relevant terms of this paragraph are set out at para. 7.

M.H. Temple for the trustee;

D.J. Petit for the wife;

J.P. Michel for the minor and unborn beneficiaries;

S.A. Franckel for the husband and other beneficiaries.

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1 Â **BAILHACHE, BAILIFF:** This is an application by Mourant & Co. Trustees Ltd. for directions in relation to the administration of the B Trust following an order of the Family Division of the High Court in England dated February 6th, 2006 (the English order) in matrimonial proceedings between J (the wife) and S (the

husbandâ€œ). The trustee had submitted to the jurisdiction of the English court and this application might have been straightforward but for the coming into force of the Trusts (Amendment No. 4) (Jersey) Law 2006 (â€œthe Trusts Law amendmentâ€œ). The Trusts Law amendment was registered in this court on October 20th, 2006 and came into force at midnight on October 26th. Entirely fortuitously, this application came on for hearing on October 27th. Mr. Franckel appeared for the husband and for certain other family members, namely, all the adult beneficiaries of the trust other than the wife. We refer to him for convenience as â€œcounsel for the husband.â€œ

2Â Â The B Trust was established by a deed of settlement dated December 8th, 1988 and was made between E, the settlor, a cousin of the husband, and Granby Trustees Ltd. At that time, the settlor was domiciled in Jersey but he put no significant assets into the trust. On November 27th, 2003, Granby Trustees Ltd. retired from the office of trustee in favour of Mourant & Co. Trustees Ltd. (â€œthe trusteeâ€œ). The principal beneficiaries of the trust are the issue and remoter issue of W, the husbandâ€™s mother, and the spouses and widows and widowers of those issue and remoter issue. For practical purposes, the beneficiaries comprise two branches of the B family, namely, that of the husband and that of his brother N. The trust fund consists of the issued share capital of a Jersey company which in turn holds, *inter alia*, real property in England. The B Trust is a Jersey trust, the proper law of which is Jersey law.

3Â Â The trustee was joined as a party to the matrimonial proceedings in England and, having sought the directions of this court, submitted to the jurisdiction and gave evidence before the English court while maintaining a neutral stance as between the husband and the wife. The English court found that the B Trust was a post-nuptial settlement and liable to be varied in accordance with provisions of the English statute. Its order purported to vary the trusts of the B Trust in the following manner:

- Â Â Â (i) The sum of Â£1,500,000 should be settled into a sub-trust of the trust together with interest on that sum running from February 6th, 2006 to the date on which the sub-trust is established;
- Â Â Â (ii) [the wife] should have a life interest in the funds comprised in the sub-trust;
- Â Â Â (iii) the sub-trust should include a power of advancement of capital in favour of [the wife];
- Â Â Â (iv) [the wife] should be entitled to nominate the trustee of the sub-trust;

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- Â Â Â (v) following the death of [the wife] the funds comprised in the sub-trust should revert to the trust;
- Â Â Â (vi) the trustees of the sub-trust should make available to the trustees of the trustâ€œ

- (a)Â Â Â any annual accounts of the sub-trust (provided that a copy of such accounts is requested by the trustees of the settlement within a reasonable period after the expiry of the accounting period to which they relate); and
- (b)Â Â Â any document disclosing the exercise of the power of advancement in relation to the whole or any part of the capital of the sub-trust fund.â€œ

4Â Â The trustee now seeks directions from this court as to how it should respond to the English order. The representation was served upon the adult beneficiaries of the trust, who are all represented by counsel, and upon Advocate Michel as guardian *ad litem* of the minor and unascertained beneficiaries. Prior to the coming into force of the Trusts Law amendment, the matter might well have been regarded as relatively uncontroversial. The trustee had submitted to the jurisdiction of the English court and had been heard in the English matrimonial proceedings. As Birt, Deputy Bailiff stated in *In re H Trust* (4) (2006 JLR 280, at para. 16):

â€œ. . . [T]he significant factor, from the point of view of whether the trustee should submit to the jurisdiction of the overseas court, is that it will remain a matter of discretion for this court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits.â€œ

5Â Â The Trusts Law amendment has, however, introduced new provisions which affect the relevant rules of private international law. It substitutes a new art. 9 of the Trusts (Jersey) Law 1984, the relevant parts of which are in the following terms:

â€œ9 Extent of application of law of Jersey to creation, etc of a trust

- (1)Â Â Â Subject to paragraph (3), any question concerningâ€œ
 - (a)Â Â Â the validity or interpretation of a trust;
 - (b)Â Â Â the validity or effect of any transfer or other disposition of property to a trust;
 - (c)Â Â Â the capacity of a settlor;
 - (d)Â Â Â the administration of the trust, whether the administration be conducted in

Jersey or elsewhere, including

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questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal; or

- (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers,

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

...

(3) The law of Jersey relating to

...

(b) conflicts of law, [*sic*]

shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

(4) No foreign judgement with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law. [*sic*]

...

(6) In this Article

“foreign” refers to any jurisdiction other than Jersey;

...

(7) Despite Article 59, this Article applies to trusts whenever constituted or created.

6 Mr. Temple for the trustee contended that the court should give effect to the English order. This was opposed by counsel for the husband. First, he submitted that the effect of art. 9 was to render the English order unenforceable on the basis that the finding that the B Trust was a post-nuptial settlement was inconsistent with Jersey law. Secondly, he submitted that the jurisdiction to enforce a foreign judgment on the basis of comity had been removed on a proper interpretation of art. 9(4).

7 We take first the issue relating to post-nuptial settlements. Section 24(1)(c) of the Matrimonial Causes Act 1973 empowers an English court to make

an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial

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or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage . . .

8 We can find no discussion in the judgment of Bennett, J. as to the rationale for the finding that the B Trust was a post-nuptial settlement. It seems to have been assumed and, we have no doubt, correctly assumed as a matter of English law that the B Trust was a post-nuptial settlement. On that basis, the court exercised the statutory power conferred by s.24(1)(c) of the 1973 Act and made the English order.

9 Counsel for the husband submitted that, while no issue was taken as to the finding that the B Trust was a post-nuptial settlement in accordance with English law, it was not a post-nuptial settlement under Jersey law. Counsel referred to a judgment of this court in *J v. M* (5), where the court had to construe the meaning of the phrase “post-nuptial settlement” under art. 27 of the Matrimonial Causes (Jersey) Law 1949, as amended. The court there considered the terms of s.24 of the Matrimonial Causes Act 1973 and cited an extract from the speech of Lord Nicholls of Birkenhead in *Brooks v. Brooks* (2), which includes the following passage ([1995] 2 FLR at 19):

“Beyond this the authorities have consistently given a wide meaning to settlement in this context, and they have spelled out no precise limitations. This seems right, because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in the fundamentally changed situation, it is desirable that the court should have power to

alter the terms of the settlement. The purpose of the section is to give the court this power. This object does not dictate that "settlement" should be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope. The continuing use of the archaic expressions "ante-nuptial" and "post-nuptial" does not point in the opposite direction. These expressions are apt to embrace all settlements in respect of the particular marriage, whether made before or after the marriage.

This court found that the corresponding provision in the Jersey statute, which referred to a settlement between the parties to the marriage could not be so widely construed and that the power to vary settlements under the terms of art. 27 of the Matrimonial Causes Law had been more narrowly drawn than the equivalent provision in the English statute. The court continued (2002 JLR 330, at paras. 13-14):

Even if we were wrong in that conclusion, we would also find, for the second reason advanced by counsel for the trustee, that the X

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Trust was not a post-nuptial settlement. A post-nuptial settlement must, of necessity, have some nuptial quality about it. It must be referable in some way to the marriage in question. This may often be easier to sense than to describe. But it is clear that if a settlement is to be construed as a post-nuptial settlement, it must confer benefits upon its beneficiaries *qua* husband or wife. Counsel for the wife argued that X knew that the marriage existed, and that the husband and the children of the marriage were beneficiaries of the trust. It followed, he submitted, that there was a nuptial quality to the trust. We cannot accept that submission. It would be tantamount to accepting that almost every discretionary trust was *ipso facto* a post-nuptial settlement. A settlement takes its colour from all the circumstances surrounding its creation. We have no doubt that X intended to benefit his family, not in any nuptial capacity, but as blood relatives.

In our judgment, the X Trust is not a post-nuptial settlement within the meaning of art. 27 of the Matrimonial Causes (Jersey) Law 1949 and, accordingly, we have no power to vary or modify any of its trusts.

It is unnecessary, for reasons which will appear, for us to make a finding in this respect, but we incline to the view that counsel for the husband is right in submitting that the B Trust is not a post-nuptial settlement under Jersey law.

Mr. Franckel submitted that in such circumstances we had no power to give effect to the English order. He contended that the substituted art. 9 of the 1984 Law was intended to protect Jersey trusts from attack from foreign courts. The English order was founded upon the power conferred by s.24 of the 1973 Act to vary a post-nuptial settlement. But art. 9(1) of the 1984 Law now provided that

... any question concerning

...

(e) the existence and extent of powers . . . including powers of variation . . .

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

If one applied Jersey law to the question whether the B Trust was a post-nuptial settlement capable of variation, the answer would be in the negative. For good measure, counsel contended that art. 9(4) delivered the *coup de grace*. That paragraph provides that "no foreign judgement [*sic*] with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to

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conflicts of law [*sic*]. The English order was based, counsel submitted, on a finding that the B Trust was a post-nuptial settlement which was inconsistent with this article and therefore unenforceable.

Counsel for the husband was asked what consequences would flow if his submissions were to be accepted by the court. Counsel very candidly stated that, notwithstanding the fact that the trustee had submitted to the jurisdiction and that all relevant parties had been heard before the High Court, the wife would have to return to the English court to report that effect could not be given to the English order. The wife would accordingly have to seek her just portion from alternative assets of the husband. If such alternative assets were not available, the award to the wife would have to be reduced. If the purpose of the amended art. 9 really is to protect trust assets to the extent that a manipulative spouse can evade the enforcement of a carefully considered judgment designed to do justice between husband and wife on divorce, that would seem to us to be a very unhappy state of affairs. But, fortunately, we do not consider it to be the effect of these statutory provisions nor, we trust, do we believe it to have been the intention of the legislature.

14. Mr. Temple for the trustee submitted that, as the settlor of the B Trust was domiciled in Jersey at the time when the settlement was made, art. 9(3) meant that questions relating to the exercise of the trustee's powers of administration and appointment pursuant to sub-paras. (d) and (e) of art. 9(1) would be governed by Jersey law. This is probably correct, although we do not find it necessary to construe this rather obscure provision for the purposes of this judgment. We agree that in the context of the provisions of the B Trust it is clear that all these matters are to be governed by Jersey law.

15. The application of Jersey law by this court to issues relating to the variation of a trust and the appointment out of moneys to a sub-trust brings us to art. 9(4). Contrary to the submission of counsel for the husband, we do not think that the application of English law by the English court to the question whether the B Trust was a post-nuptial settlement renders the English order unenforceable. We reach that conclusion for the following reason. We find it to be altogether unsurprising that the English court should have applied English law in the exercise of a statutory jurisdiction conferred in matrimonial proceedings to vary the terms of a trust in order to do justice between the parties. Nothing in the law of Jersey could oust such a jurisdiction, which is in conformity with the Hague Convention on the Law Applicable to Trusts and on their Recognition; and we take judicial notice of the fact that the Hague Convention has been extended to Jersey. This court is, however, not exercising a matrimonial jurisdiction under art. 27 of the Matrimonial Causes Law. We are not concerned with the question whether or not the B

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Trust is a post-nuptial settlement. We are not even being asked to vary the trusts of the B Trust. We are exercising a jurisdiction under art. 51 of the 1984 Law to give directions to a trustee which has sought the assistance of the court. We also have an inherent jurisdiction over trusts as a court applying principles of *comity* but we do not need to draw from that reservoir. It is immaterial that the English court applied English law in matrimonial proceedings before it in order to arrive at what it considered to be a just conclusion. Our function is different; it is to decide whether, and if so to what extent, to give effect to the conclusions at which the English court arrived. In doing so, and in exercising our jurisdiction to give directions under art. 51, we will naturally apply the law of Jersey. It is equally immaterial that the B trust may not be a post-nuptial settlement capable of variation under the Matrimonial Causes Law. We accordingly reject the first submission of counsel for the husband.

16. We turn to the second submission of Mr. Franckel, namely, that the jurisdiction to enforce a foreign judgment on the basis of comity has been removed on a proper interpretation of art. 9(4). This is a bold submission. Comity is one of those principles of private international law which enable the courts of one country to show respect to the courts of another, each court exercising its own jurisdiction in its proper sphere. Comity helps to avoid the delivery of conflicting judgments in different countries. At its simplest, comity is good manners. As no less a judge than Lord Diplock put it (admittedly in a slightly different context) in *The Abidin Daver* (1) ([1984] 1 All E.R. at 476): "Judicial chauvinism has been replaced by judicial comity. It would be surprising if the legislature had sought to remove such a fundamental principle, and by a side wind at that."

17. Counsel for the husband conceded that the amended art. 9(3) of the Law was less than completely clear. It provides that

"the law of Jersey relating to

. . .

(b) conflicts of law [sic] shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey."

This seems rather circular because the rules set out in para. (1) must themselves be conflicts rules. Counsel submitted, however, that the effect was to oust the application of the doctrine of comity because comity was itself a rule relating to the conflict of laws. Counsel submitted that reading para. (3) with para. (4), which rendered a foreign judgment unenforceable to the extent that it was inconsistent with art. 9, ruled out the possibility that it was open to this court to apply the doctrine of comity in giving effect to the English order.

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18. We find both these paragraphs of the amended art. 9 rather obscure, but we do not need to decipher their meaning. We are quite clear what they do not mean and that they do not exclude the application of the doctrine of comity. It would, in our judgment, take very clear and express words to persuade us that the legislature intended to deprive this court of the flexibility to do justice in a wide range of cases on the basis of a principle of almost universal applicability. We accordingly reject the second submission of counsel for the husband.

19. We turn therefore to the exercise of our jurisdiction under art. 51 of the Trusts Law. In deciding how to exercise that jurisdiction we must have regard to the interests of *all* the beneficiaries of the trust. As Birt, Deputy Bailiff explained in *In re H Trust* (4) (2006 JLR 280, at para. 14):

14 In this respect, it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has, therefore, a very different focus from the Family Division.

The submissions on behalf of the trustee made it clear that the trust fund was regarded as notionally held in equal parts for the two branches of the family. The trustee could not, of course, fetter its discretion, but in principle it would be unlikely to exercise its discretionary powers to the advantage of one branch of the family rather than the other. It seems equally clear that Bennett, J. in the Family Division was aware of the practical realities.

20 The evidence showed that the total value of the B Trust was in the region of £5.3m. The cash element of that value is £2,628,168. Notionally dividing the value of the trust fund by two, one arrives at £2.65m. for each of the branches of the family. The creation of a sub-trust in favour of the wife in the sum of £1.5m. would clearly not prejudice the interests of N and his branch of the family.

21 So far as the interests of the minor and unborn beneficiaries are concerned, they are represented, as we have stated, by Advocate Michel as guardian *ad litem*. Mr. Michel was appointed by order of this court of July 21st, 2006. The minor beneficiaries are not of an age where consultation with them would be appropriate. Mr. Michel would have opposed any suggestion that a sum greater than £1.5m. should be made available

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for the wife's proposed sub-trust. He did not, however, oppose the suggestion that effect should be given to the order of the High Court.

22 The husband has one adult child from his first marriage and the husband and wife together have one surviving daughter who is also an adult. Their interests were represented by counsel for the husband. One other matter was raised for consideration which is particularly material to them and that is the extent of the power of the sub-trustee to advance capital. The order of Bennett, J. was that after the death of the wife the capital of the sub-trust should be returned to the B Trust. As to the power of advancement, the judge stated:

At the end of this hearing the husband will have retained all his interests in [another family trust] and in the three companies. None of his free capital will be taken for the wife (I shall come to [the marital home] in due course). None of his income will be at risk from the wife because there is to be a clean break. And, in my judgment what is also very significant, he will remain a beneficiary under the B Trust and thus can ask the trustees to exercise the power of advancement in his favour. By contrast, after decree absolute the wife cannot. True it is that the husband is unlikely to ask the trustees and/or the trustees are unlikely to exercise it if the tax consequences are prohibitive. But why should not the wife be in the same position vis-à-vis the trustees of the sub-trust as the husband is vis-à-vis the trustees of the B Trust and [the other family trust]? Why should not the wife, who suffers from a troublesome back as a result of the accident, to which I have referred, be in a position to ask her trustees to advance a sum or sums of capital to pay for medical fees were she to have to undergo expensive surgery in the future or to ask for an advance for a presently unforeseen crisis or calamity? Moreover, I am confident that the wife is likely to be very circumspect about asking for capital, given the prohibitive tax consequences of a distribution. She told me in evidence that she wanted the option of asking the trustees to advance capital but her doing so was likely to be a remote possibility.

Finally on this topic, I take notice of Mr. Scott's submission that the wife must agree to a life interest under a sub-trust only because of the prohibitive cost of a distribution to her by way of a lump sum order. The power of advancement will go some way in recognizing that it is impractical for her to ask the court to exercise its full powers of financial provision. Accordingly, for these reasons, there will be a power of advancement written into the sub-trust.

23 Counsel for the husband submitted that the power to advance capital to the wife ought to be specifically limited to a need to meet medical fees and/or to meet some presently unforeseen crisis or calamity. Counsel

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submitted that that was what was intended by Bennett, J. and furthermore that the B Trust was established to meet the needs of future generations. That purpose would be potentially undermined by an unlimited power to advance capital.

24 Mr. Petit for the wife contended that the power to advance capital should be unfettered. Mr. Temple for the

trustee concurred with counsel for the wife. He regarded the judge's comments in relation to medical fees or some crisis as being merely indicative of the kind of circumstances in which the power to advance capital might be exercised. Furthermore, counsel submitted, the power to advance capital would be a fiduciary power. The trustee of the sub-trust would be aware of the contingent interest in the capital of the sub-trust of the beneficiaries of the B Trust and would have to take those interests into account in any exercise of the power of advancement. We accept the submissions of counsel for the wife and counsel for the trustee, and agree that the power to advance capital should be unfettered.

25Â Â Having disposed of all the issues raised by way of objection by those opposed to giving effect to the judgment of the English court, we turn to the application of the trustee for directions. In the exercise of our discretion, we see no reason why, in the interests of comity, substantial effect should not be given to the judgment of Bennett, J. The trustee submitted to the jurisdiction and all other parties were heard before the English court or have had the opportunity to address submissions to this court. It is fair to give substantial effect to the English order. We accordingly authorize and direct the trustee to execute the deed of addition and appointment annexed to its representation subject only to the following qualifications.

26Â Â First, the following recital shall be substituted for the draft recitals G and H:

“On application by the trustees to the Royal Court for directions pursuant to arts. 51 and 53 of the Trusts (Jersey) Law 1984 the court has authorized and directed the trustees to exercise the power of addition and the power of appointment in respect of the appointed fund in the manner set out below so as to give substantial effect to the court order.”

27Â Â Secondly, we do not think it is in the interests of either the wife or the beneficiaries as a whole that there should be a different trustee of the sub-trust, nor that the power of appointing new trustees of the sub-trust should be vested in the wife. We appreciate that the question of whether there should be a different trustee of the sub-trust was argued before Bennett, J. and that he reached the conclusion that such a different trustee should be appointed. That conclusion was reached on the basis that

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“in the light of the very close involvement that the husband and N have had in the past with Mourants in the running of [the Jersey company], I have no doubt that in respect of the sub-trust's investments and/or in connection with the request by the wife to the trustees of the sub-trust to exercise the power of advancement, Mourants would consult the husband and N who would then have the opportunity to be obstructive.”

28Â Â We do not think that these concerns, which may well be concerns of the wife, are well founded. The trustee is a professional trustee subject to the regulation of the Jersey Financial Services Commission and to the Codes of Practice issued by the Commission. It is clear that the sub-trust is to be established to provide an income for the wife. We have no doubt that the trustee would conduct itself properly in the interests of the wife and would not be influenced in any way by its continuing (but separate) relationship with the husband and N. On the other hand, if, to take an extreme example, the wife were to request a capital advance of £500,000 so that she could make a donation to the local dogs' home, we would expect the trustee to consider such a request carefully in the light of the reversionary interest of the beneficiaries of the B Trust. Such an eventuality (even if only remotely possible) is one reason why we think that the potentially conflicting interests of the wife and the beneficiaries of the B Trust can be best resolved by having the same trustee of both the main trust and the sub-trust, and by vesting the power of appointment of a new trustee of the sub-trust in the trustee itself.

29Â Â For all these reasons, we do not think it right to give effect to that part of the judgment of Bennett, J. We propose therefore to modify further the terms of the draft deed of addition and appointment as follows. Recitals C and F shall be deleted. Paragraph 3.4, the words “the trustees” were replaced by references to “the appointee” and as in references to “in para. 3.5.1, para. 3.5.2, para. 3.7 and the Second Schedule shall all be deleted; and the paragraphs of the recitals and of the operative part of the deed re-lettered and re-numbered respectively.

Postscript

30Â Â Much time and expense has been consumed in considering the interrelationship between the purported variation of the B Trust pursuant to English statutory powers on the one hand, and the recently enacted provisions of the Trusts (Amendment No. 4) (Jersey) Law 2006 on the other. In the event, we have found ourselves able to deal with the matter on the basis of judicial comity. With some diffidence, we express the hope, however, that English courts might in future exercise judicial restraint before asserting a jurisdiction pursuant to s.24 of the Matrimonial Causes Act 1973 to vary a Jersey trust. This court has shown

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itself sensitive (long before the enactment of the Trusts Law amendment) to perceived interference with its jurisdiction to supervise Jersey trusts. Such sensitivities were expressed in *Lane v. Lane (nÃ©e Coverdale)* (6), *In re Rabaiotti 1989 Settlement* (7), and *In re Fountain Trust* (3), to name but a few of the cases in which these considerations have arisen. In *In re Rabaiotti 1989 Settlement*, Birt, Deputy Bailiff stated (2000 JLR at 194):

“The court regards it as unlikely that an English court would so exceed the normal bounds of comity as to purport to vary a settlement governed by Jersey . . . law, administered in Jersey by Jersey trustees, and which had no connection with England save that some of the beneficiaries resided there.”

In *In re Fountain Trust*, Bailhache, Bailiff added (2005 JLR 359, at para. 27):

“We agree with counsel that as a general rule . . . it would be an exorbitant exercise of jurisdiction for a foreign court to purport either to vary the terms of a Jersey settlement or to declare such a settlement to be a sham.”

The jealousy with which the court guards its supervisory jurisdiction over Jersey trusts does not mean that it is insouciant of the reasoned decisions of other courts exercising a matrimonial jurisdiction. As Birt, Deputy Bailiff stated in *In re H Trust* (4) (2006 JLR 280, at para. 16):

“The observations which we have made do not lead to the conclusion that this court will ignore a decision of the Family Division or other overseas court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases, the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this court making an order which achieves the result contemplated by the order of the Family Division. Indeed, this court has made such orders in the past and will no doubt do so again in the future.”

It would, in our view, avoid sterile argument and expense to the parties if the English courts were, in cases involving a Jersey trust, having calculated their award on the basis of the totality of the assets available to the parties, to exercise judicial restraint and to refrain from invoking their jurisdiction under the Matrimonial Causes Act to vary the trust. Instead, they could request this court to be auxiliary to them. Such an approach is adopted by courts exercising jurisdiction in relation to insolvency and in other areas of law too. It is true that such jurisdiction to seek assistance from a foreign court may usually have its basis in statute. Nonetheless, we can see no reason why the trustee, or one or more of the parties before the English court as the case might be, should not be directed to make the

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appropriate application to this court for assistance in the implementation of the English court’s order. It appears to us that this would be a more seemly and appropriate approach to matters where the courts of two civilized and friendly countries have concurrent interests. It would, furthermore, be more likely to avoid the risk of the delivery of inconsistent judgments.

Order accordingly.

EXHIBIT 105

[2006 JLR 280]

IN THE MATTER OF THE H TRUST

X TRUST COMPANY LIMITED v. RW and SIX OTHERS

ROYAL COURT (Birt, Deputy Bailiff and Jurats Tibbo and Le Cornu): April 12th, 2006

Trusts' powers and duties of trustees' submission to foreign court' not generally in interests of all beneficiaries for trustee to submit to foreign court in matrimonial proceedings of beneficiaries' if does so, order of foreign court automatically enforceable without consideration by Jersey court' if does not, foreign order not binding in Jersey but not ignored by Jersey court considering interests of beneficiaries' comity and interests of beneficiaries may often require court to give effect to it

Â Â Â A trustee applied for directions concerning matrimonial proceedings in England between two of the beneficiaries of a Jersey trust.

Â Â Â The first respondent (the husband) and the second respondent (the wife) were beneficiaries of a trust governed by Jersey law. The trust held their matrimonial assets, worth approximately Â£2.6m., which had been used solely for their benefit. The other beneficiaries were the husband's children, their spouses and his grandchildren. The wife instituted divorce proceedings in the Family Division of the English High Court in 2005, having been married to the husband since 1983. The trustee decided not to submit to the jurisdiction of the English court in those proceedings. It did, however, provide the wife with financial information concerning the trust.

Â Â Â The trustee also refused to agree to provide the funds to implement a settlement proposed by the husband, which the wife did not in fact accept, on the grounds that it did not take account of the limited trust funds nor the interests of the other beneficiaries.

Â Â Â The trustee sought the court's approval, *inter alia*, of its decision not to submit to the jurisdiction of the English High Court.

Â Â Â **Held**, approving the trustee's decision not to submit to the jurisdiction of the English court:

Â Â Â (1) The court approved the trustee's decision not to submit to the jurisdiction of the English High Court. It would not generally be in the interests of the beneficiaries of a Jersey trust for the trustee to submit to the jurisdiction of a foreign court in matrimonial proceedings in which one or both spouses were beneficiaries under the trust. If it were to do so,

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a variation of the trust ordered by the foreign court, which might not be in the interests of the beneficiaries, would be enforceable in Jersey without being reconsidered by this court. In making that order, the foreign court would have been concerned primarily with a fair division of the matrimonial assets and not with the interests of the beneficiaries of the trust. On the other hand, if the trustee were not to submit to the jurisdiction, any order made would not be enforceable and, on a subsequent application to the supervisory jurisdiction of this court to give effect to the variation ordered, the court would therefore have discretion to act in the best interests of the beneficiaries. The foreign court's order would not, however, be ignored as it would have been intended to effect a fair outcome between the spouses after full investigation. It would often be in the interests of comity and the beneficiaries for this court to make an order which would achieve the variation of a trust ordered by a foreign court. In certain circumstances, it might be desirable for a trustee to appear in foreign matrimonial proceedings, *e.g.* if the trust assets were located in that jurisdiction so that any variation could be enforced there (paras. 12-16).

Â Â Â (2) Even though it had not submitted to the English court's jurisdiction in the matrimonial proceedings, it was nevertheless important that the trustee should provide the husband and wife with the fullest financial information concerning the trust, as it had in fact done, so that any settlement or order made in those

proceedings would be based on the true financial position (para. 17).

Â Â Â (3) Further, the trust assets constituted almost all of the matrimonial assets available for division between the husband and wife after their long marriage and it would therefore seem appropriate for the trustee to agree to any reasonable arrangement which they might reach. It would not be in the interests of the husband and wife nor the other beneficiaries for the limited trust assets to be spent on litigation (para. 20).

G. Robinson for the representor;

J. Michel for the second respondent;

The first, third, fourth, fifth and sixth respondents were not represented;

The seventh respondent appeared in person.

1Â Â **BIRT, DEPUTY BAILIFF:** This is an application for directions by X Trust Co. Ltd., as trustee of a settlement known as the H Trust. We gave our decision last week and now give brief reasons.

The background

2Â Â The H Trust was established by deed, dated May 8th, 1992, between S Holdings SA, as settlor, and Q Trustees (Channel Islands) Ltd., as original trustee. The trustee was appointed in place of the original trustee on February 14th, 1997.

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3Â Â The trust is a discretionary trust. The present beneficiaries are the first respondent (â€œthe husbandâ€œ), the second respondent (â€œthe wifeâ€œ), the third and fourth respondents (who are the two adult children of the husband from his previous marriage), the fifth and sixth respondents (who are the spouses of the third and fourth respondents), and the three existing grandchildren of the husband. Any future issue of the husband would also be beneficiaries.

4Â Â The assets of the trust (held through various companies) comprise essentially an investment portfolio, land in Canada, a villa in Portugal (although there is a question as to whether this is an asset of the trust) and two flats in Scarborough. The trustee estimates the overall value of the trust as being in the region of Â£2.6m., although the wife contends that the various pieces of real property may be worth more than is estimated by the trustee.

5Â Â The husband and the wife were married in 1983 but the wife has now instituted divorce proceedings in the Family Division of the English High Court. In March 2005, she obtained a freezing injunction from the High Court in respect of the husbandâ€™s assets and, by Order of Justice dated March 29th, 2005, a freezing injunction was granted by this court in respect of the assets of the trust. Certain variations have taken place since then in order to allow the trust to continue to fund the maintenance of the husband and the wife.

6Â Â The trust was originally expressed to be governed by the law of England, whose courts were given non-exclusive jurisdiction. On November 25th, 2005, the trustee exercised the powers conferred by cl. 8.2 and 9.1 respectively of the trust deed in order to change the proper law of the trust to that of Jersey, to confer exclusive jurisdiction over all matters and disputes arising out of the trust or the trust deed on the courts of Jersey, and to make certain other amendments to the trust deed.

7Â Â On January 20th, 2006, the wife obtained an order from the High Court joining the trustee to the English proceedings and a further order restraining the trustee from executing, if it had not already done so, a deed of variation changing the proper law of the trust; taking any further steps in relation to the same, if such deed had been executed; or taking any steps to remove the wife as a beneficiary of the trust. Those injunctions were confirmed on February 10th, when the trustee did not appear.

8Â Â On January 16th, 2006, the husbandâ€™s English solicitors sent a proposal to settle the matter to the wifeâ€™s English solicitors. They sent a copy of the letter to the trustee and asked whether it would be prepared to provide funds to implement the proposal in the event that it was acceptable to the wife. On January 20th, the trustee replied with a detailed

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letter but essentially it stated that it would not be willing to agree to the proposal as it failed to take account of the limited assets in the trust and of the need to have regard to the interests of those beneficiaries other than the husband and the wife.

9Â Â On January 27th, 2006, the trustee issued a representation seeking directions from this court. Following an interim hearing on February 9th, the matter came on for hearing last Friday. The three matters upon which the trustee sought the approval of the court were:

Â Â Â (i) its decision to change the proper law and jurisdiction clauses of the trust deed;

Â Â Â (ii) its decision not to submit to the jurisdiction of the English High Court; and

Â Â Â (iii) the stance which it had adopted in relation to the requests made to it by the husband and the wife.

We will take each of these in turn.

(i) The change in proper law

10Â Â The trustee has taken its decision in relation to this matter. It has executed a deed changing the proper law from English law to Jersey law and conferring exclusive jurisdiction upon the courts of Jersey. Although the wife has expressed certain reservations about the decision, there is currently no challenge to its validity. In the circumstances, we do not see any need for directions from this court. The trustee has made its decision and has acted upon it. There the matter rests. In the circumstances, we decline to make any order in relation to this part of the trustee's application.

(ii) Submission to the jurisdiction of the English court

11Â Â This part of the application is rather different. The trustee seeks approval of its decision not to submit to the jurisdiction of the English court. That is a continuing and significant matter such that it is reasonable to seek the approval of the court.

12Â Â Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this court against the proposition that any order of the Family

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Division relating to the trust should be enforced without reconsideration of the merits of such order.

13Â Â Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this court would have complete discretion as to the course it should take.

14Â Â In this respect, it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has, therefore, a very different focus from the Family Division.

15Â Â It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases, *e.g.* where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee or this court.

16Â Â The observations which we have made do not lead to the conclusion that this court will ignore a decision of the Family Division or other overseas court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases, the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this court making an order which achieves the result contemplated by the order of the Family Division. Indeed, this court has made such orders in the past and will no doubt do so again in the future. But the

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significant factor, from the point of view of whether the trustee should submit to the jurisdiction of the overseas

court, is that it will remain a matter of discretion for this court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits. For these reasons, we approve of the trustee's decision not to submit to the jurisdiction of the Family Division in this case.

17 We should add that a decision that the trustee should not submit to the jurisdiction is separate from the question of provision of information. It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position. It is our understanding that the wife has received the necessary information but if this understanding is incorrect and further information is requested, the trustee should make the fullest information available to both parties and, through them, to the Family Division should this become necessary.

(iii) Approving the stance to date of the trustee

18 Thirdly, the trustee seeks the court's approval of the stance which has been adopted by the trustee in relation to the requests made to it by the husband and the wife. This is far too vague and the court is not willing to give such open-ended approval. The only specific matter to which we were referred in this context was the offer made by the husband's solicitors in their letter of January 16th, 2006, which the trustee refused to support. But that offer was never accepted by the wife and is accordingly academic. In the circumstances, it is not appropriate to seek the court's direction. If and when the parties reach agreement, the court would be willing at that stage to consider any application for directions in respect of any decision by the trustee to agree to or reject such agreement. Accordingly, we make no order on this third aspect of the application.

Postscript

19 The court would like to take this opportunity of emphasizing some of the remarks which it made during the course of the hearing. On the evidence before the court, the trust fund appears to comprise almost the entirety of the assets available to provide in future for the husband and the wife. The marriage has been a long one and the assets were contributed to the trust by the husband during the course of the marriage. The trustee has used the trust fund to maintain the husband and the wife at a high standard of living in recent years, as a result of which the capital appears

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to have been somewhat depleted. No payments have been made to or for the benefit of any of the other beneficiaries.

20 The marriage has now come to an end and clearly the wife has to be provided for as well as the husband, albeit that it would seem that both will have to live at a reduced standard as compared with the somewhat unrealistic level which has been provided in the past. The wife remains a beneficiary at present, by reason of her status as a spouse, and even following decree absolute it would be open to the trustee to appoint her as an additional beneficiary. In the circumstances, it would seem, on the face of it, entirely appropriate that the trustee should agree to assist in giving effect to any reasonable arrangement reached by the parties in relation to their financial affairs. The funds in this case are limited and it cannot be in the interests of the husband or the wife (as beneficiaries) or the trust fund (and the other beneficiaries) for these limited funds to be spent on litigating this matter (whether before the Family Division or this court). We hope very much that the trustee, the husband and the wife will all give due consideration to this aspect of the matter.

Order accordingly.

EXHIBIT 106

[2008 JLR Note 27]

IN THE MATTER OF THE TURINO CONSOLIDATED LIMITED RETIREMENT TRUST

MOURANT AND COMPANY RETIREMENT TRUSTEES LIMITED v. JG and HK

ROYAL COURT (Birt, Deputy Bailiff and Jurats Allo and Newcombe): June 20th, 2008

Trustsâ€”variationâ€”variation by foreign court

Â Â Â The respondents were the beneficiaries of a fixed Jersey trust, the sole asset of which was their matrimonial home in the Netherlands. Under the terms of the trust, the assets had originally been allocated as to 83.33% to the first respondent (the husband) and the remaining 16.67% to the second respondent (the wife). The respondents had, however, sent a signed â€œletter of wishesâ€” to the trustee directing that the assets should be held for them equally.

Â Â Â In divorce proceedings, a Dutch court ruled that, on the basis of the letter of wishes, the respondents had equal interests in the trust. In 2005, that court accepted the wifeâ€™s valuation of the matrimonial home and ordered that it should be offered for sale to her at that price and thereafter to be sold on the open market. The trustee applied for directions in the light of the letter of wishes and the order of the Dutch court. The husband submitted that the Royal Court could not vary the trust so as to give effect to the Dutch courtâ€™s purported variation of the trust and the proceeds of the sale of the property should therefore be divided according to the terms of the trust, *i.e.* 83.33% to himself and 16.67% to his wife. He was also concerned that the property had been undervalued but the wife had refused the trusteeâ€™s requests for a revaluation.

Â Â Â **Held:** (1) The trustee should first discover whether there were any steps it could take to have the property revalued and sold at its current market value. If so, it could then seek further directions of this court as to whether it should proceed to do so. If not, it would be proper to sell the property to the wife at the valuation already obtained, as this appeared to be the best price possible in the circumstances. Trustees were required to act impartially in the best interests of all the beneficiaries of a trust. When selling real property, trustees were ordinarily required to sell the property for the best possible price, *i.e.* the current market value, whether the sale was to a beneficiary or a stranger to the trust.

Â Â Â (2) The Dutch court had not purported to vary the terms of the trust. The respondentsâ€™ direction to the trustee to hold the assets for them equally had been effective and had itself varied the trust. If all the beneficiaries of a trust were in existence, had been ascertained and were of full age, they could require trustees to terminate a trust (see art. 43(3) of the Law) or to vary the terms of a trust (Matthews & Sowden, *The Jersey Law of Trusts*, 3rd ed., para. 13.6, at 162 (1993)). The document signed by both the beneficiaries directing the trustee to vary the trust was an effective direction, even if it was described as a â€œletter of wishes.â€”

Â Â Â (3) The Royal Court had no power to vary a fixed trust of its own volition and its general supervisory power under art. 51 of the Trusts (Jersey) Law 1984 did not confer a power to vary the terms of a trust (save in the limited administrative respect mentioned in the article itself). The court could only vary a fixed trust to a limited extent under art. 47, by approving on behalf of minors and unascertained beneficiaries a variation which was agreed by all the adult beneficiaries. Furthermore, the court could not enforce or give effect to a judgment of a foreign court purporting to vary a fixed trust but could only give effect to it to the extent that the trustees had a discretionary power under the trust to act in a manner that would achieve that objective.