Neutral Citation Number: [2020] EWHC 767 (Ch)

Case No: PT-2018-000499

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, EC4A 1NL

Date: 03/04/2020

Before:

MRS JUSTICE FALK

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Between:

(1) DAVID ALAN CALDICOTT
(2) SIAN CALDICOTT
(3) DAVID ALEXANDER CALDICOTT **Claimants**

- and –

(1) PAMELA YVONNE RICHARDS
(2) LOUISE ANNE WALKER **Defendants**

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Edward Sawyer (instructed by **Placidi & Co**) for the **Claimants**
Thomas Dumont QC (instructed by **Hunters Law LLP**) for the **Defendants**

Hearing dates: 10, 11 & 13 March 2020

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Approved Judgment

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

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MRS JUSTICE FALK

Mrs Justice Falk:

Introduction

1. This dispute relates to a discretionary trust (the "Trust") established under the will of Yvonne Caldicott, who died in November 2012. The first claimant, David Caldicott, and the first defendant, now called Pamela Pearson, are Yvonne's children. The second claimant, Sian Caldicott, is David Caldicott's wife, and the third claimant, David Alexander Caldicott, is their adult son. I will refer to the claimants as Mr Caldicott, Mrs Caldicott and David Alexander (to distinguish him from his father, and without intending any disrespect). The discretionary beneficiaries of the Trust comprise a closed class consisting of the three claimants and Mrs Pearson. There are currently two trustees, Mrs Pearson and the second defendant Louise Walker, a partner at Hunters Law LLP ("Hunters"), the solicitors for the defendants.

2. The main asset of Yvonne's residuary estate was an interest in a holiday park on the Isle of Sheppey (the "Holiday Park"). The direct ownership of the Holiday Park is split between two companies, Isle of Sheppey Holiday Village Limited ("IoSHV") and Wyvern Securities Limited ("Wyvern"), which rent out chalets at the park. At her death Yvonne owned 100% of the shares in Wyvern comprising 100 ordinary shares and 900 preference shares. Wyvern in turn owned 95.8% of the shares in IoSHV. Yvonne also owned 0.2% of IoSHV directly. Mrs Pearson had been a director since 1994, alongside Yvonne. Mrs Pearson's husband was appointed as a second director shortly following Yvonne's death.

3. Under Yvonne's will her residuary estate was split equally between Mrs Pearson and the Trust, and reflecting this each acquired a 50% interest in Wyvern. The dispute arises out of the sale by the Trust of a 15% holding in Wyvern to Mrs Pearson for £204,660 (the "Share Sale"), which resulted in Mrs Pearson holding a 65% interest in Wyvern and the Trust owning 35%. The claimants seek to set aside the transaction as a self-dealing purchase on the basis that fully informed consent was not obtained, and also seek removal of the defendants as trustees.

Background

4. The Holiday Park has been in the family since the 1950s. It formed part of a family business that grew over time to include six holiday camps together with other activities, including property development. Mr Caldicott worked in the business with his father. Mrs Pearson was a solicitor by profession, although she was involved in the family business in a company secretarial role. The business collapsed in circumstances which led to Mrs Pearson losing her home as a result of security granted to lenders. Mr Caldicott also became bankrupt in the early 1980s. The Holiday Park is the only asset of the business that remains in family ownership.

5. The will establishing the Trust was made on 28 February 2012, shortly before Mr Caldicott was declared bankrupt for a second time on 13 March 2012. It replaced an earlier will under which Yvonne had divided her residuary estate equally between her two children. Yvonne left no letter of wishes, but a draft letter of wishes produced for signature by Mrs Pearson in 2013 and addressed to the trustees of the Trust (intended for use in the event of her death) records what her mother had discussed with her, namely that Mr Caldicott should be treated as the primary beneficiary during his

lifetime, and in the event of his death the Trust should be held for the benefit of David Alexander for his lifetime and, on his death, should pass to his children in equal shares.

6. Both Mrs Pearson and Mr Caldicott were appointed as executors and trustees, but Mr Caldicott renounced his executorship and disclaimed the trusteeship on 4 January 2013. Mrs Pearson became the sole executor but appointed Mrs Walker as a co-trustee of the Trust on 19 April 2013. Mrs Pearson had been a partner in the private client department at Hunters (a role from which she had retired before 2012), and had previously worked closely with Mrs Walker, who was initially a junior colleague of hers.

7. Following a number of discussions between Mrs Pearson and Mr Caldicott the Share Sale took place in May 2013, using the probate valuation. The undisputed aim of the transaction was to put the Trust in sufficient funds to enable it to lend £200,000 to Mrs Caldicott for the purposes of a new business venture which she would undertake with Mr Caldicott following his discharge from bankruptcy. The loan was interest-free and repayable on demand. It remains outstanding.

8. The defendants appreciated the potential application of the self-dealing rule and sought to obtain the claimants' consent to the transaction pursuant to "disclosure letters" which were sent to each claimant and were countersigned at a meeting at Hunters' offices on 10 May 2013. However, the claimants say that there were material non-disclosures, particularly in relation to an understanding that the trustees would have an option to buy the shares back from Mrs Pearson. Mrs Pearson says there was an "informal" option, but that it was time limited to two years, rather than being exercisable whenever the loan was repaid. The claimants say that they understood that the trustees would have the benefit of an open ended option.

The witness evidence

9. I heard oral evidence from Mr and Mrs Caldicott and from both defendants. Although it had been envisaged that David Alexander would also give oral evidence, this proved not to be possible for reasons that were explained to the court, and his witness statement was admitted as hearsay evidence.

Mr Caldicott

10. On the whole I did not find Mr Caldicott to be a satisfactory witness. Although it is understandable that there would be gaps in his recollection of particular events, I had particular concerns about some aspects and I found some of his evidence to be unreliable, generally preferring the evidence of Mrs Pearson in respect of those matters. I deal with specific points below but, in particular, I did not accept his portrayal of the events leading up to Yvonne's new will being made in February 2012, his evidence relating to the renunciation and disclaimer of his executor and trustee roles, or his evidence relating to the "package" that he claimed his sister had agreed shortly after Yvonne's death. Other evidence, for example about a suggestion that inheritance tax should have been paid in instalments, about his sister's assistance to his family, and about his lack of knowledge about the Trust, was in my view somewhat disingenuous. I also do not accept his evidence that he left entirely to the

defendants the description to his wife and son of the Share Sale and related arrangements of which the Share Sale formed part.

Mrs Caldicott

11. Much of Mrs Caldicott's evidence was of fairly limited assistance because key areas of dispute related to matters discussed between Mr Caldicott and Mrs Pearson. However, it was clear that there were discussions between Mr and Mrs Caldicott about the terms of the Share Sale and proposed loan, and that Mrs Caldicott was keen to obtain the loan. The extent to which those discussions covered the details of the option was a matter of some significance, and I deal with that below.

12. It was clear that the relationship between Mrs Caldicott and Mrs Pearson has not been a good one. Mrs Caldicott was perfectly open about that, but it was not to her credit that her evidence was embellished by a description of an incident that occurred at the time of Yvonne's death, which appeared to have very little, if any, relevance and to have been included in an attempt to portray Mrs Pearson in a negative manner. The attempt did not succeed.

13. Mrs Caldicott was also in my view less than fully open in relation to a conversation she had with her son at the time of the meeting that led to the disclosure letters being signed.

David Alexander

14. David Alexander's evidence needs to be treated with some care, because he was not available for cross-examination. His witness statement indicates, and it is not in dispute, that he lives with dyspraxia and can struggle to understand complex language. So far as necessary to my decision, I consider his evidence below.

Mrs Pearson

15. Overall I found Mrs Pearson to be a credible witness, who gave her evidence in a straightforward manner. In general terms, her descriptions of meetings and discussions with her brother were more consistent with contemporaneous documentary evidence and with inherent probabilities than those of her brother. This is subject to a specific issue in relation to the option arrangement, discussed further below, where I was not sufficiently persuaded that Mrs Pearson's own recollection of events was entirely accurate.

Mrs Walker

16. Mrs Walker's recollection of specific events was generally too limited to be of material assistance. The court was, however, significantly assisted by the near contemporaneous attendance notes that Mrs Walker had prepared of meetings and calls, and in one case by her ability to help the court understand her handwritten notes of a meeting that formed the basis of the typed attendance note.

The facts in dispute

17. This section of my judgment (paragraphs [17] to [77]) addresses the key areas of factual dispute, broadly in chronological order. My consideration of the legal issues follows from paragraph [78].

18. The first area relates to the circumstances surrounding the making of Yvonne's new will. I have no doubt that, contrary to his portrayal of the position in cross-examination, Mr Caldicott was the prime mover. He had been bankrupt before and so was familiar with what bankruptcy involved. He is an experienced businessman and had originally qualified as a chartered accountant. He was taking professional advice and was made bankrupt on his own petition.

19. I accept Mrs Pearson's evidence that Mr Caldicott had contacted her in early 2012 to explain that he was on the verge of being made bankrupt, and that his advisers had for a long time advised him to ask his mother to change her will so that his share of the estate went into a trust with the aim of putting the funds beyond his creditors' reach. She asked him whether he meant a discretionary trust and he confirmed that. He also told Mrs Pearson that he had told his mother that he was about to be made bankrupt and asked Mrs Pearson to speak to her about changing her will, which Mrs Pearson agreed to do. Mrs Pearson did what she was asked. Yvonne initially refused to change the will but subsequently changed her mind after further discussions with Mrs Pearson, in which Mrs Pearson explained that Mr Caldicott's share of the estate would go to his creditors if Yvonne died while he was bankrupt.

20. At the time Mrs Walker was on maternity leave, so Mrs Pearson drafted a will using a precedent she obtained from her old secretary at Hunters. I accept Mrs Pearson's evidence that she was included within the class beneficiaries at the suggestion of Yvonne, but that she essentially viewed the shares as Mr Caldicott's.

21. I also accept Mrs Pearson's evidence that she met Mr Caldicott to discuss the draft will, that she explained to him how the trust would work and that she was included as a potential beneficiary, and that he told her that he knew how discretionary trusts worked because his advisers had explained that. In addition, I accept her evidence that he was offered a copy of the draft will but said that he did not want it among his papers, and that he stressed the urgency. I prefer this evidence to Mr Caldicott's evidence that he had no knowledge of the contents of the will and had not been provided with a copy. I find that he had knowledge of the key elements of the will, including the identity of the beneficiaries, and had been offered a copy.

22. Prior to his bankruptcy Mr Caldicott had also had a consultancy role with Wyvern, for which he had been paid. He resigned from that role by a letter dated 21 February 2012, stated to be effective on 28 February 2012, the date on which his mother signed her new will. Mr Caldicott suggested that he was asked to resign by his sister, but I think it more likely than not that it was something he wanted to do in connection with his bankruptcy. His evidence was that the income was replaced by monthly gifts from his mother.

23. The next area of material factual dispute relates to Mr Caldicott's role as executor and trustee. Again, I preferred Mrs Pearson's account of what happened. At the time of his mother's death Mr Caldicott was still bankrupt. I accept Mrs Pearson's evidence that, at a meeting with Mr Caldicott in early December 2012, shortly after Yvonne's death, he told her that he wanted nothing to do with the administration of the estate or the

Trust and that he wanted both to renounce the executorship and disclaim any interest as trustee, because he did not want his trustee in bankruptcy to get wind of the estate. In contrast, the particulars of claim asserted, and Mr Caldicott's witness statement stated, that Mrs Pearson persuaded him not to take up the office of executor or trustee due to the potential difficulties that his bankruptcy would cause. He also gave evidence in cross-examination that he would have had real difficulty with the probate valuation of the Holiday Park if, as he anticipated, it was based on the methodology used in previous valuations because he believed that an unduly negative assumption had been made about the conditions that would be attached to planning consent.

24. Counsel for the claimants, Mr Sawyer, relied on the fact that it was clear from an email dated 19 December 2012 that Mrs Walker had done some work on the question of disclaiming trusteeship following a conversation with Mrs Pearson the previous week, and that a search of Hunters' files had also revealed an undated note with some extracts from PLC (a practitioner's resource) about the effect of bankruptcy and whether a bankrupt could act as a trustee. I did not find this material to be supportive of the claimants' case on this point. It would have been surprising if one or both defendants had not thought it prudent to check whether Mr Caldicott could take on a trustee role whilst bankrupt, and the reproduced research does not indicate that he could not do so.

25. I also do not accept Mr Caldicott's evidence about the significance of the valuation issue in respect of the Holiday Park. He refers to it in his witness statement as a point that he raised with his sister at the meeting, but without suggesting that it would cause him difficulties in acting. If he had taken on the executor role with his sister, he would have been able to influence the valuation approach, and indeed presumably veto an approach that he did not agree with. Much more significantly, however, he agreed to the Share Sale being made at the probate value. If he really thought that was too low then agreeing to a sale on that basis, as I conclude that he freely did, would be completely contrary to his interests. He would have had no reason to act in that way.

26. It was also clear from Mr Caldicott's evidence and from the pleadings that he took advice from his accountant before deciding to renounce probate and disclaim trusteeship. Although he sought to suggest in cross-examination that this advice related to the valuation issue, I do not accept that. It is likely that it related to his status as a bankrupt.

27. The same meeting in December 2012 also gave rise to another area of dispute. Mrs Pearson's account was that Mr Caldicott told her that he needed to raise £200,000 for a business opportunity in which he and two others were to invest, and that she told him that the estate would have a large inheritance tax bill because their mother had not done any lifetime tax planning. She told him that she could not say at that stage what distribution of capital might be available from the Trust but that she hoped to be able to make dividend distributions to the Trust of around £40,000 per year for the following couple of years. Mr Caldicott's version of the discussion was that his sister made it clear that he could have no further role in the Holiday Park or consultancy income, but that the Trust would have enough cash to advance £200,000 and that there would be annual dividends of £40,000, possibly rising to £60,000. In addition, he says that Mrs Pearson told him that she would resign as trustee within two years and that he could trust her to give effect to the terms of the will, make the advance of £200,000 and pay the promised dividend income. Mr Caldicott referred to this as a

"package" that Mrs Pearson offered at the meeting in December 2012 but subsequently reneged on.

28. I prefer Mrs Pearson's evidence. It is in my view inherently improbable that Mrs Pearson would have volunteered an offer of £200,000 as Mr Caldicott claimed, and I have concluded that she did not do so. Yvonne had died very recently. Whilst her estate did include an investment portfolio with Charles Stanley and cash, values for which should have been readily available, the major asset in her estate was her interest in the Holiday Park, which obviously required professional valuation to determine the tax payable, and which Mrs Pearson was aware would not qualify for inheritance tax business property relief. No such valuation was undertaken until February 2013. Mrs Pearson could not have known in December 2012 what cash would be available after paying tax and other liabilities, and after allowing for the cash legacies that Yvonne had also left to her grandchildren. My conclusion on this point is also consistent with Mrs Walker's note of a meeting with Mrs Pearson on 20 February 2013, which records that Mr Caldicott had been keen to receive a significant cash distribution, but that Mrs Pearson would need to consider that further, considering the total inheritance tax liability on the estate.

29. Similarly, I do not accept that Mrs Pearson agreed to vacate her role after two years. I accept her straightforward denial of that. Given her role in the discussions with her mother about her will, the care she had taken to redraft the will, the trouble she subsequently went to in having prepared a letter of wishes recording what her mother wanted in respect of the Trust (see paragraph [5] above) and the fact that the principal asset of the Trust comprised shares in Wyvern, a company that she ran, it is clear to me that she did not intend to resign in the short term. It is notable that the draft letter of wishes was intended to be kept not only with the Trust papers but also with Mrs Pearson's own will papers, so that her executors would know what Yvonne had intended in relation to the Trust. That draft also indicated a wish that Mrs Pearson's own son would take her place as trustee in the event of her death, failing which another named partner of Hunters. She explained, and I accept, that she trusted that her son would look after the interests of David Alexander in due course.

30. I also do not accept Mr Caldicott's account of the discussion about dividends. Mrs Pearson gave a cogent and credible explanation of the position, namely that dividends of around £40,000 per annum could be paid to the Trust for the next couple of years (that is, 2013 and 2014) because five year leases had just been granted on a number of chalets at a premium. That gave rise to distributable reserves. However, once these reserves were depleted, dividends would be dependent on the level of future profitability. This also explained another issue. One of the claimants' complaints was that after the first couple of years of the Trust's operation the timing of dividends to the Trust, and the resulting income distributions from the Trust (which were invariably made to Mr Caldicott and David Alexander), were delayed. I accept Mrs Pearson's straightforward explanation, namely that the companies normally paid dividends in around October, following approval of the annual accounts for the year to 31 March. Because distributable reserves were available from the lease grants, and to assist the claimants, it was possible to pay dividends earlier than normal in 2013 and 2014, following which it was necessary to revert to the historic pattern so as to ensure that reserves were available to declare the dividend.

31. Another complaint by Mr Caldicott was that cash would have been available to advance £200,000 from the Trust if Mrs Pearson had taken full advantage of the option available to pay inheritance tax on unrealised illiquid assets (principally the Wyvern shares) over 10 years. In fact, Mrs Pearson paid one instalment but then paid pretty much the full balance of the tax due in October 2013[1]. This, together with income tax, other expenses and legacies, virtually exhausted the liquid assets, leaving only the Wyvern and IoSHV shares and limited cash available to the Trust and Mrs Pearson as residuary beneficiaries.

32. In the circumstances, I consider that it was entirely reasonable for Mrs Pearson to take the view that, given her potential personal liability for it, the tax should be accounted for in full before distribution of the estate was completed. If tax had continued to be paid in instalments to allow a cash advance to be made then the ability to pay the tax in future would have depended on an uncertain dividend stream (quite apart from the fact that there may not have been funds available to make an equivalent advance to Mrs Pearson in respect of her half share of the residuary estate). I accept her evidence on this issue and there is no good basis for the criticism made. I also accept that she was clear from an early stage in the process that tax would need to be paid in full before the residuary estate was distributed.

33. The shares in Wyvern and IoSHV were valued for probate purposes by Kings Mill Partnership, a firm of chartered accountants, at around £1.36 million in a report which was sent to Mrs Pearson on 7 February 2013. The valuation was prepared on a net asset basis, using a separate valuation of the underlying property which had been produced the previous month and which valued the Holiday Park at £1.5 million. The valuation incorporated a reduction of over £300,000 for the corporation tax that the companies would need to pay if they disposed of the site. Mr Caldicott received a copy of the probate valuation.

34. Mr Caldicott and Mrs Pearson met again on or shortly before 1 March 2013. Mrs Pearson said that prior to this meeting her brother had repeated his request for £200,000, but that by the date of the meeting it was clear that little cash would be available. I accept her clear evidence that at the meeting he asked her how cash could be found, that she said that the only way would be for the Trust to sell some shares, and that he asked her if she would buy some, which she agreed to do. The understanding was that the proceeds of the sale would be used to make a £200,000 loan to Mrs Caldicott. Mr Caldicott said he would want an option for the trustees to repurchase the shares at the higher of market value or probate value. I also accept Mrs Pearson's evidence that either at that meeting or shortly thereafter Mr Caldicott suggested that the valuation to be used for the Share Sale should be the probate valuation. Both Mrs Pearson and Mrs Walker subsequently spoke separately to the partner at Kings Mill Partnership, Richard Clarke, to confirm that this was acceptable. Mr Clarke confirmed that the probate valuation would be a reasonable valuation basis for the sale because the value would not have changed since Yvonne's death.

35. Mr Caldicott's evidence was that he discussed his sister's offer with his wife and son and they decided it was acceptable, because it would provide interest-free investment finance for use in a proposed new business venture and the shares would be restored when the loan was repaid.

[1] An immaterial final balance was paid in June 2014.

36. Mrs Pearson met with Mrs Walker on 7 March and discussed the potential application of the self-dealing rule, which had first been raised in a telephone conversation between them on 1 March shortly following Mrs Pearson's meeting with Mr Caldicott. It was agreed with Mr Caldicott by telephone from the meeting that counsel's advice should be obtained. There was some urgency because Mr Caldicott was pressing for the funds. An attendance note of a telephone call by Mrs Pearson to Mrs Walker on 13 March 2013, the date Mr Caldicott came out of bankruptcy, records that Mr Caldicott had just heard that his bankruptcy order had been lifted, and that he was chasing for the money. Instructions to counsel were sent on the same date.

37. Mrs Pearson and Mrs Walker met again on 3 April 2013, by which time counsel's written advice had been received. Mrs Pearson again phoned Mr Caldicott from the meeting. It was agreed that the claimants would all come up from their home on the Isle of Wight to a meeting at Hunters' offices to sign letters of consent to allow the transaction to proceed. Mrs Walker's attendance note records that Mr Caldicott wanted the cash to be lent to Mrs Caldicott by 13 May, that Mrs Pearson confirmed to Mr Caldicott that the loan would be interest-free and repayable on demand, that she discussed with him having a formal agreement under which she would agree to sell the shares back to the trustees at market value or probate value, and that she explained to him that this would need to be drafted by counsel or by Hunters' company department.

38. The attendance note records that, after discussing the position, it was "provisionally agreed" that Mrs Pearson would simply write a "side letter" to Mr Caldicott confirming her agreement to sell the shares back to the trustees if requested, and that Mrs Walker discussed with Mrs Pearson the risks of not putting a formal agreement in place. Mrs Walker explained in cross-examination that she thought the reference to risks related to concerns over whether the option would be enforceable by the trustees. I accept this explanation.

39. Based on the evidence of Mrs Pearson and Mrs Walker, I consider it more likely than not that the reason that no formal agreement was produced was the one provided by Mrs Pearson, namely that Mr Caldicott did not want the Trust to bear the additional cost of having counsel or Hunters' company department prepare it, as opposed to Mrs Walker drafting a side letter. Both defendants would have preferred to have a formal agreement. I also understood from Mrs Walker's evidence that she uses the term "side letter" to refer to letters of wishes.

40. The attendance note makes no mention of a two-year period for the option. In the defence to the claim the defendants pleaded that, during the same telephone conversation with Mr Caldicott on 3 April, he told Mrs Pearson that his intention was to raise sufficient funds within two years to buy back the shares, which she confirmed was acceptable. The defence then refers to a lunch a short while later in which it is alleged that Mrs Pearson recommended that the claimants take independent advice on the transaction, a recommendation which Mr Caldicott rejected on the basis that all three of them fully understood the position.

41. Mrs Pearson's witness evidence differed from this. Her witness statement repeats that she made a recommendation about independent advice at a lunch at around the same time as the meeting on 3 April, but says that it was at that lunch meeting that she had insisted that the claimants would need to attend a meeting, which Mr Caldicott

queried saying that he preferred to deal with the matter by post. She recalls that the lunch was at the White Hart pub in Brasted. Mrs Pearson also said both in her witness statement and in cross-examination that the two-year period for the option was discussed not in the telephone call on 3 April but instead in the pub car park following the lunch. In cross-examination her evidence was that Mr Caldicott volunteered a two-year period for the option, and she agreed to it. She was not sure about dates but suggested that the pub lunch occurred before the meeting on 3 April (in contrast to the defence which stated that the lunch occurred afterwards).

42. Mrs Pearson had a further meeting with Mrs Walker on 19 April. Mrs Walker's handwritten note and typed up attendance note for that meeting are the only written record, apart from the letter of wishes described below, of any discussion of a time period for the option. The relevant paragraph of the typed attendance note reads as follows:

> "[Mrs Pearson] had agreed with [Mr Caldicott] the need for an option agreement and agreed that this would be done informally. She would complete a Letter of Wishes ([Mrs Walker] to prepare a draft) setting out the timescale for any request to be made by the Trustees for the shares to be transferred back to the Will Trust. Provisionally it was agreed that the timescale should be three years from the date of the sale and they should be sold back to the Trust at the Probate value or market value, whichever is higher."

A subsequent paragraph states:

> "We briefly discussed the issues that would arise in connection with [Mrs Pearson's] estate if she died within the three year (or other) time period."

The handwritten note also has a reference to three years.

43. Mrs Walker wrote letters in substantively the same terms to each of the claimants on 25 April 2013. These are the disclosure letters that were countersigned at the meeting on 10 May referred to at [8] above. Mr and Mrs Caldicott's letters were sent by email, and David Alexander's by post the following day. It was clear from the documentary evidence that this was done by arrangement with David Alexander's parents so that the letter would arrive on a date when Mr Caldicott would be at home and able to go through it with him. I do not accept Mr Caldicott's suggestion that it was solely the responsibility of the defendants to explain the transaction to his son and that he took on no role in that regard. Given David Alexander's difficulties it is highly likely that one or both parents would have wanted to take time to ensure that he understood the proposals properly, in advance of a formal meeting in unfamiliar surroundings. This might be expected as a matter of parental responsibility, but it is all the more the case in circumstances where it is obvious that both parents wanted the transaction to proceed so that funds could be provided. They had a strong interest in David Alexander providing his consent rather than refusing to cooperate. The arrangements made in relation to posting David Alexander's letter also support the conclusion that Mr Caldicott did in fact take on a responsibility for explaining the transaction to his son.

44. The disclosure letters explain the existence of the Trust and the assets that it was expected to have, and that Mrs Caldicott had requested a loan of £200,000 from the Trust which the trustees were minded to agree on the understanding that the other beneficiaries also agreed that it was appropriate. The letters go on to explain that the current assets of the Trust did not include sufficient cash to make the loan possible, but it was proposed that Mrs Pearson buy £200,000 worth of the shares in Wyvern which she would appropriate to the Trust in advance of the sale. This would provide the trustees with sufficient cash to make the loan. The letters go on to say:

> "It is also proposed that the trustees be granted an option (formal or informal) to repurchase the shares at the higher of either the probate value or their market value at the time of repurchase. They might decide to do so when the loan was repaid by [Mrs Caldicott]. This might result in Mrs Pearson making a gain from the sale and repurchase.
>
> As Mrs Pearson is a Trustee of the Will Trust the beneficiaries would in principle have the right to set aside the transaction. However it is our understanding that the sale and option agreement (formal or informal) would be welcomed by the beneficiaries as it would give the Trustees the necessary cash to make the loan."

The letters go on to make clear that by giving consent the relevant beneficiary would also be consenting to the repurchase of the shares under the option if the trustees were to resolve to do so. Apart from the addition of "(formal or informal)" the letters were in the form settled by counsel.

45. The meeting on 10 May was attended by the claimants, the defendants and David Alexander's then fiancée. At the meeting David Alexander was given a cheque for £50,000, being the legacy left to him by his grandmother. It is clear that it had been agreed with one or both of his parents that the cheque would be handed over to him at the meeting.

46. To the surprise of the defendants, it emerged at the meeting that the immediate need for the funds had disappeared, because the business venture that had been contemplated was not proceeding as planned. But Mr and Mrs Caldicott still wished to go ahead with the transaction.

47. At the meeting Mrs Walker explained the terms of the will and the trust, the lack of liquidity, the proposed loan and share sale, the nature of the self-dealing rule and the basis of the valuation. It was explained that the transaction would result in Mrs Pearson having effective control of Wyvern. Mrs Walker explained the nature of the option, but there is no record or recollection of the two-year period being raised. Both she and Mrs Pearson recall that all three claimants participated fully in the meeting and asked questions. Mrs Walker has a specific recollection of trying to make the effect of the transaction clear to David Alexander, to ensure that he understood the Mrs Pearson was buying the shares. This is reflected in the attendance note, which confirms that the shares were not being held as security for the loan, rather that Mrs Pearson would purchase and own them personally.

48. It is clear from David Alexander's evidence that he was uncomfortable about the proposed transaction, which he said gave him a bad feeling. He went out of the meeting at one stage and Mrs Caldicott also went out to speak to him. After his return he agreed to sign the disclosure letter, and Mr and Mrs Caldicott also signed.

49. David Alexander's witness statement indicates that he only signed the letter having received reassurance from Mrs Pearson following his return to the meeting that the shares would be transferred back when the loan was repaid, and that she encouraged him to sign. I am not persuaded by this. Mrs Caldicott was in my view not wholly forthcoming about the content of her discussion with her son outside the meeting, claiming that it was a private conversation, giving limited details and reiterating that the claimants were relying entirely on the defendants to explain the transaction. I consider it more likely than not that Mrs Caldicott was the person who managed to dispel her son's doubts about agreeing to the transaction. It was certainly in her interest to do so since she wanted to obtain the loan. Mrs Pearson had no similar strong interest in proceeding.

50. On the same day as the meeting with the claimants, the defendants had a separate meeting at which the formal documents were signed and the shares, comprising 15 ordinary shares in Wyvern valued at £204,525 and 135 preference shares valued at £135 (£204,660 in total), were transferred to Mrs Pearson.

51. The documents signed by Mrs Pearson on 10 May included a letter from her headed "Letter of Wishes". The letter is addressed both to the trustees of the Trust and to the executors and trustees of Mrs Pearson's own will. It describes Mrs Caldicott's request for a loan and the proposed Share Sale, and states:

> "It has also been agreed that the Will Trustees be granted an option (formal or informal) to repurchase the Shares at the higher of either the probate value or their market value at the time of repurchase. The beneficiaries understand that this might happen if the Loan is repaid by [Mrs Caldicott] within two years and this might result in my making a gain from the sale and repurchase."

The letter then records that it had been agreed with the beneficiaries:

> "…that it was not appropriate or necessary to have a formal option agreement between myself and the Will Trustees and that this will be dealt with informally. It has been agreed that any such repurchase of the Shares must take place within two years from the date of the completion of the sale of the Shares to me by the Will Trustees."

The letter goes on to state Mrs Pearson's "wishes" as regards the repurchase, stating that it was her wish that, provided a formal written request was made by the trustees within two years from the date of completion of the sale, the shares would be sold back at the higher of probate value or market value (Mrs Pearson's wish being that Richard Clarke carry out the valuation), that any sale should be completed within four months of agreement of the price, and that each party should bear its own costs. The letter concludes with a statement that Mrs Pearson's wishes were:

> "…subject to any amendments which I may communicate to you either orally or in writing during my lifetime".

52. I accept Mrs Pearson's evidence that she appreciated that this letter was not legally binding, but that she regarded herself as bound (which I understood to mean bound as a matter of honour or family responsibility), and would have sold the shares back on the terms set out if requested to do so within two years. However, although Mrs Pearson suggested in cross-examination that she had told Mr Caldicott that she had dealt with the option by a letter of wishes and had probably provided him with a copy, that important point was not in her witness statement and I am not convinced of the accuracy of her recollection on that point.

53. I have concluded that, in signing this letter, Mrs Pearson believed that she was reflecting what she had agreed with her brother. However, I am not sufficiently persuaded that the defendants have demonstrated, on a balance of probabilities, that the content and effect of the letter, and in particular the two-year period, were sufficiently explained to the claimants. My reasons are as follows:

    i) Although Mrs Pearson said in cross-examination that she had a clear recollection of the discussion in the pub car park and about agreeing a two-year period for the option with Mr Caldicott, that is not reflected in the defence or (in those terms) in her witness statement. As indicated above there are also some apparent inconsistencies between the defence and witness statement about what was said at the lunch and what was said on the phone on 3 April. Given the passage of time those inconsistencies or lack of clarity are not surprising, but they do contrast with the clarity of Mrs Pearson's evidence about the car park conversation.

    ii) Mrs Pearson's witness statement says that Mr Caldicott told her in the pub car park that it was his "intention" to raise enough funds within two years to buy back the shares, that she said she had no objection to that, and that they shook hands on the agreement. Her description in cross-examination was that Mr Caldicott said "I will raise the money" for the Trust to buy back the shares within two years, and she confirmed that that was acceptable. At least as described in the witness statement it is quite possible that what Mr Caldicott said was meant by him simply as a statement of intention, however it was construed by Mrs Pearson.

    iii) Although I found material parts of Mr Caldicott's evidence unreliable, I was more persuaded by his evidence that he did not agree, or at least did not intend to agree, to a two-year period. That he understood the loan to be open ended, and the option similarly so, is consistent not only with the fact that no steps were taken to find funds to repay the loan within a two-year period, or alternatively to ask for an extension to the option period, but also with his reaction on being told by Mrs Pearson at a meeting in late 2015 (referred to at [70] below) that the option had expired. Although the nature of his reaction at that meeting was disputed, it is notable that he emailed his solicitor the following week reporting that his sister had stated that there was a two-year time limit on the repurchase, and that this limit "has never been mentioned before".

iv) Although Mr Caldicott did discuss the transaction with his wife and son, I am not persuaded that this extended to any discussion of a two-year time limit. In my view there was no effective challenge to Mrs Caldicott's evidence that she had not been made aware of a two-year time period for the option. Rather, I think the understanding of Mrs Caldicott and David Alexander was that the shares could be bought back whenever the loan was repaid. In other words, the option was effectively linked to the loan, and because the loan was open ended so was the option.

v) In addition, I place some weight on Mr and Mrs Caldicott's evidence that if they had known about the two-year period they would have thought again about whether to go ahead with the transaction on 10 May, given that the immediate business need for the funds had disappeared. They may have asked for it to be delayed.

vi) The references to three years in Mrs Walker's handwritten and typed notes of the meeting on 19 April are also troubling. It was not suggested that this meeting happened before the time that Mrs Pearson said that the two-year period was agreed. Rather, it was suggested by counsel for the defendants either that Mrs Pearson mis-spoke, that Mrs Walker took an incorrect note or that having agreed a two year time limit Mrs Pearson temporarily reconsidered the time period before reverting to two years in the final document. I do not find this particularly persuasive. Mrs Walker struck me as an assiduous notetaker. Her own witness statement said that she did not remember how the "provisional three year period for the option subsequently became two years", suggesting both that she did not think that the references were a mistake, and that the period had not been finally fixed by that stage. The third suggestion was also inconsistent with Mrs Pearson's oral evidence, where she was firm about a two-year period having been agreed.

vii) Against this, the letter of wishes clearly provides for a two-year period, and there was no suggestion of any lack of honesty on the part of the defendants. By the time the letter of wishes was signed on 10 May both would have believed that two years was agreed. I also accept that the disclosure letters were drafted by counsel and that, because that was the case, the defendants wanted to change them as little as possible, simply inserting the words "(formal or informal)". In addition, it is the case that the disclosure letters are not definitive about any option being exercised, stating that the trustees "might" decide to do so when the loan was repaid.

viii) However, in my view these points do not outweigh those made in the preceding paragraphs. It is notable that there is no indication in the disclosure letters that the option was to be limited in time. If anything, the implication is otherwise, with the impression being given that the trustees would be able to exercise the option whenever the loan was repaid. In retrospect, the omission of a reference to the two-year time period was an unfortunate error, although I do not consider that it was an omission by design.

54. It is convenient to deal here with the question of valuation. The particulars of claim and Mr and Mrs Caldicott's witness evidence made a number of allegations about the value at which the shares were transferred to Mrs Pearson and the value of the shares

left in the Trust, which they said were additional grounds for concluding that fully informed consent was not obtained.

55. The value at which the shares were transferred was based on the probate valuation of the Wyvern shares and was determined by adopting a simple pro rata approach, using the same value per share for the 15% stake transferred as was implicit in the valuation of Yvonne's 100% stake. In particular, the claimants criticised the reduction for corporation tax referred to at [33] above on the basis that it related to a hypothetical disposal of the Holiday Park which would not be relevant on a sale of the business as a going concern. They also claimed that the valuation approach took no account of the fact that the result of the sale was that Mrs Pearson owned a controlling (65%) interest, whereas the Trust was left with only an influential minority holding (35%). Further valuation advice obtained in October 2015 indicated that a discount was appropriate to reflect the minority holding, a discount which Kings Mill Partnership suggested should be at a level of 35%.

56. I indicated at the trial that I had difficulty with these points, and after taking instructions Mr Sawyer confirmed that they would not be pursued. The principal difficulty was that, having initially indicated that they would do so, the claimants chose not to call any expert valuation evidence. In the absence of that, the court would need to do its best but, for example, I noted that the corporation tax was reflected in a professional valuation that was not being challenged, and would indeed be payable if the Holiday Park itself was sold (as might be expected if, for example, a sale for development was envisaged) rather than the shares in the companies owning it. I also noted that whilst points might be taken about Mrs Pearson obtaining a controlling interest and the Trust being left with a minority interest, there might also be questions about whether the 15% interest that was sold was correctly valued simply on a pro rata basis, or was sold at an overvalue because it was itself a minority interest. Furthermore, there must be an argument that, in reality, the nature of Wyvern was such that any sale to a third party would, in practice, be a sale of all the shares of the company. This is supported by the instructions to counsel in connection with the self-dealing rule, which record that there are restrictions in the Memorandum and Articles of Association of Wyvern preventing a sale to a non-family member. It was also common ground that in the long term both parties in fact expected that one side of the family would buy out the other's shares (rather than the shares being sold to a third party). In other words, the 35% discount referred to in the 2015 valuation seemed to me to be quite possibly theoretical rather than real.

57. I appreciate that under the self-dealing rule the burden of proof is on the defendants to show that all material facts were drawn to the claimants' attention, but in the absence of expert evidence all the court has is what are effectively expressions of opinion by or on behalf of Mr Caldicott about the alleged valuation deficiencies, together with the (doubtfully relevant) discount shown in the 2015 valuation.

58. Given that the valuation issue was not pursued, it might be thought that I do not need to address that question further or at all. However, the allegations made against the defendants are of some relevance to the wider issues between the parties, so I will make some additional brief comments.

59. I accept Mrs Pearson's evidence that she at no stage considered that any Wyvern shares should be valued on anything other than a pro rata basis, that is with no

discount. This was supported by the fact that (as discussed below) she made it clear after the 2015 valuation was obtained that she was prepared to buy out the Trust's remaining 35% holding on a pro rata basis. More importantly, however, each of Mrs Pearson and Mrs Walker checked the proposed use of the probate valuation for the Share Sale (which Mr Caldicott had suggested using) with Richard Clarke, who had performed the probate valuation. In other words, they took the appropriate professional advice. Of course, Mr Caldicott was also an experienced businessman and accountant, and it is notable that he raised no concerns about the valuation used or the impact on the Trust's remaining shares at the time.

60. I also record that it is not to Mr Caldicott's credit that his witness statement asserted that he was not aware of the corporation tax reduction in the probate valuation, which he said was an incorrect reduction that would mean that when his sister sold the shares back to the Trust she would make a profit simply because the true market value was higher than the probate value for that reason. At trial Mr Caldicott had to accept that he had seen the probate valuation and that he was not in a position to make that assertion. In addition I do not accept his evidence that if the option had been exercised Mrs Pearson would also have been able to obtain an inappropriate profit because she would have been selling part of a controlling block, which would have been worth more. There are a number of reasons why that may well not have been correct as a matter of fact (given that she would in fact have been selling a minority interest), but in any event it is quite clear that the possibility never occurred to Mrs Pearson.

61. Following the sale of the shares, Mrs Pearson continued to run the Holiday Park, paying annual dividends to the Trust that ranged between £35,000 and £42,000 per annum. The claimants never indicated that they wished to repay the loan or, for example, to accumulate dividends in the Trust to offset the loan. Rather, Mr Caldicott pressed for dividends to be paid out and complained when in his view they were delayed. Mrs Pearson's understanding, and through her that of Mrs Walker, was that the claimants continued to be short of cash and so would not be in a position to repay the loan.

62. In May 2014 Mr Caldicott told Mrs Pearson that he needed a further £20,000. There was some cash available in the Trust and Mrs Walker arranged for £20,000 to be lent to Mrs Caldicott, at Mr Caldicott's request.

63. Having considered various possible business opportunities, in October 2014 the claimants used the funds obtained from the Trust (insofar as not previously spent) and David Alexander's legacy, together with some loan finance, to buy a holiday park in the Isle of Wight called Roebeck for £330,000. The acquisition appears to have been a success.

64. Neither of the defendants took any steps to demand repayment of the loan prior to the expiry of the two years referred to in the letter of wishes, or to point out to the claimants that repayment would be required if the shares were to be bought back under the terms of that letter. Mrs Pearson's evidence was that it never occurred to her to raise the matter because the claimants had no money, and indeed that she had forgotten that the two-year period was expiring in May 2015.

65. During 2015, without prior discussion with Mrs Pearson, Mr Caldicott started investigating the possible redevelopment of the Holiday Park. Mrs Pearson's witness statement records that she did not consider his proposals to be viable or practical.

66. In June 2015 Mrs Pearson offered Mr Caldicott the opportunity to be added as a trustee of the Trust. He declined. I did not find the reasons he gave for this, namely that he was beginning to feel uncomfortable about the situation and that by that stage Mrs Pearson had offered to buy the Trust out (see below), particularly convincing. If Mr Caldicott had been genuinely concerned about the way in which the Trust was being run then it seems more likely that he would have been keen to get involved.

67. I think the most likely explanation is that, at least for the time being, Mr Caldicott preferred to retain the Trust, and to do so without him being involved as a trustee, in case his new business interests failed. Such an explanation is consistent with the fact that he never asked his sister to appoint shares out of the Trust. That would not necessarily have been a vain request. I note that handwritten notes Mrs Walker made of her meeting with Mrs Pearson on 19 April 2013 addressed various "what if" scenarios for the Trust, one of which was, "If David sorted out- all to David". I take this to be a reference to the trustees being willing to appoint the shares to Mr Caldicott if his financial position was put on a sound footing.

68. Also during 2015 there was a series of meetings between Mr Caldicott and Mrs Pearson that is the subject of some dispute. The first was in June 2015, where the timing of dividends was discussed and Mrs Pearson told Mr Caldicott that dividends would be paid later than they had been in 2013 and 2014 (this was for the reasons discussed at [30] above). Mr Caldicott was clearly still short of funds, and there was some discussion about the possibility of Mrs Pearson buying more shares to provide additional cash. However, it was clear from Mrs Pearson's evidence that her preference was to purchase the whole of the Trust's remaining 35% stake. She considered that an agreement in principle was reached at the meeting to work towards such a purchase, although an email sent by Mr Caldicott to his solicitor fairly shortly after the meeting does not suggest that he considered that he had agreed to such a proposal. Nevertheless, it was obviously agreed either at that meeting or subsequently that a further valuation would be obtained, reflecting Mrs Pearson's view that a new valuation would be needed because of the lapse of time. This required a further valuation of the underlying property as well, so the process took some time, the share valuation being provided on 1 October 2015.

69. This was shortly followed, on 8 October, by another lunch meeting between Mrs Pearson and Mr Caldicott at which she gave him the new valuation and confirmed that she was in a position to buy all the remaining shares, ignoring the suggested discount. I do not accept Mr Caldicott's evidence that Mrs Pearson said that if the offer was not accepted then there would be no dividend payments for the next two or three years, a threat clearly not borne out by events. At most, Mrs Pearson simply explained the factual point that by 2015 reserves were exhausted and further dividends would depend on profits being made.

70. At this meeting, Mr Caldicott suggested for the first time that he might like to buy Mrs Pearson out. There was a further lunch meeting on 18 November 2015 which Mrs Pearson thought was going to be about her buying the Trust's shares, but Mr Caldicott announced that having visited the site he wanted to own it, considering it "his right",

and he offered to buy her shares for £1 million, an offer which she refused. He suggested that in addition to the £1 million he could offer a share in future development profits. He also told Mrs Pearson that he had discussed with Mrs Caldicott the possibility of putting the Trust back in funds to repurchase the shares it had sold, but Mrs Pearson told him that the period of two years had elapsed and that the shares were not for sale.

71. The meetings in October and November 2015 were both covertly recorded by Mr Caldicott, and transcripts were produced at the trial (albeit that the poor sound quality meant that the transcripts were incomplete). In my view the existence of the recordings does not reflect well on Mr Caldicott, and the undoubted aim of being able to use them against his sister in due course should it suit him has not been realised. There appears to be little in them that particularly assists his case, and it is notable that they contain no record of two points on which he relied, namely the alleged threat in the October meeting that dividend payments would cease for two or three years, and a threat he claimed his sister had made not to answer any letter his solicitors sent.

72. One point that is covered in the transcript of the November meeting is a request by Mr Caldicott that the trustees resign. The transcript shows Mrs Pearson asserting a need to resolve tax issues before that could happen. From Mrs Pearson's evidence in cross-examination, I infer that this was her immediate reaction in what she thought was an informal discussion with her brother, rather than her considered reasons. Those reasons had more to do with remaining involved with the Trust at least until the ownership of Wyvern was resolved between the two sides of the family. In doing so, I think she had in mind her concerns about Mr Caldicott's financial stability. The transcript records her telling him that she was "terrified" of him buying shares "because you will start using them as security for loans".

73. Mr Caldicott also alleged that after he formally asked the defendants to resign as trustees in December 2015 they reacted by failing to provide tax deduction certificates (R185 forms) for the distributions he and David Alexander had received from the Trust, which delayed their claims for tax refunds. I do not accept that the trustees reacted in this way. It would not have been appropriate for the trustees to provide tax certificates until after the end of the relevant tax year, on 5 April 2016. By that stage a formal dispute had commenced, and I accept Mrs Walker's evidence that there was some confusion as to whether tax certificates could be sent direct to the beneficiaries in those circumstances. In the event tax certificates were provided, with an apology for the delay, on 23 May 2016. The delay was therefore not significant. I also note that on an earlier occasion Mrs Pearson went out of her way to ensure that tax certificates were prepared manually, allowing them to be provided earlier than they would otherwise have been to assist the claimants.

74. I should also record that in March 2018, shortly before the claim was issued in June 2018, the claimants made an open offer of £1.5m for Mrs Pearson's shares, less their costs. Mrs Pearson refused that offer and has subsequently not permitted the claimants access for the purposes of a valuation with a view to arranging finance for a purchase. Mrs Pearson's position, as it was when she refused her brother's offer in November 2015, is that she is enjoying running the Holiday Park and is not yet ready to sell. The shares are important to her and she has been involved in managing the business since her father died. She would be prepared to consider a sale when she decides to retire, but she will not commit to a date.

75. Mr Caldicott describes Mrs Pearson's attitude towards him as one of "unwarranted bitterness" and claims that she has had a long held desire to acquire all the shares. That was not my perception. It is clear that Mrs Pearson does not trust Mr Caldicott in business matters, and is not prepared to be involved in a business jointly with her brother. However, her actions are not consistent with Mr Caldicott's characterisation of her.

76. Mrs Pearson did not need to take the action that she did in relation to her mother's will, the effect of which was to save Mr Caldicott's interest in the residuary estate for his benefit and that of his family. If her objective had been to acquire full control of Wyvern then the best way of achieving that would have been to leave the will unchanged and, if her mother died while Mr Caldicott was bankrupt, buy the shares from his trustee in bankruptcy. Instead, she played a key role in her mother changing her will. Mrs Pearson then assisted with Mr Caldicott's request to provide cash from the Trust, which could only sensibly be done by selling shares. She cannot be criticised for not volunteering to enter into another transaction, such as a loan directly from her to Mrs Caldicott.

77. Although Mrs Pearson has continued to run the business as it was run in the past rather than taking forward Mr Caldicott's development suggestions, she has done so profitably and has broadly maintained dividends, in respect of which her personal interest is in line with that of the Trust. The evidence was that investment has been made in refurbishment, and there is no suggestion that the Holiday Park is being run down or mismanaged. Indeed, no specific criticisms were levelled of Mrs Pearson's management of the business, apart from some general criticism that she and her husband receive remuneration for their roles which (it was asserted) is not being independently scrutinised. However, the level of directors' remuneration has not materially altered since the financial year in which Yvonne died.

The self-dealing rule

Introduction

78. The self-dealing rule is described as follows in *Snell's Equity*, 34th ed. at 7-021 ("*Snell*"), citing *Tito v Waddell (No 2)* [1977] Ch 106 at 241:

> "The self-dealing rule is … that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction."

The rule is part of the wider rule that a trustee or other fiduciary may not place himself in a position where his personal interest conflicts or may conflict with his duty.

79. However, a self-dealing trustee has a defence if he can show that the transaction was entered into with the fully informed consent of the beneficiaries. That requires full and frank disclosure of all material facts, materiality being determined by whether it may, not would, have affected the consent given: *Snell* at 7-015. Consent must be deliberate, and where there is a class of beneficiaries it must be obtained from each member of the class: *Lewin on Trusts*, 19th ed, 2015 ("*Lewin*") and *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [223] and [226].

80. In determining whether consent was given the authorities indicate that considerations of fairness are relevant, as shown by the following passage from the judgment of Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108, cited by Harman LJ in *Holder v Holder* [1968] Ch 353 ("*Holder*") at 394:

> "The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."

Harman LJ went on to say at 394G that:

> "...the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee."

These comments were made in the context of the question whether the beneficiary had to know that, absent acquiescence, the transaction amounted to a breach of trust, but the point seems to me to be a more general one that explains the rationale behind the defence of fully informed consent. It also reflects the fact that a beneficiary who invokes the self-dealing rule is seeking an equitable remedy (see *Holder* at 395B).

Whether the rule applies in this case

81. Mr Dumont, for the defendants, submitted that the self-dealing rule could have no application where, as here, the trustee in question is one of the discretionary beneficiaries. Given that a Trust asset could be appointed to Mrs Pearson as a beneficiary, there could be no difficulty about a sale to her.

82. Mr Sawyer, for the claimants, submitted that this point had not been pleaded and was raised for the first time in Mr Dumont's skeleton argument. He submitted that it could not be run without an amendment to the defence, which it would be unfair to permit because if the point had been put earlier the claimants would have had a chance to seek to amend their own statement of case to advance an alternative case based on undue influence. Alternatively, the point was bad in any event because the will only authorised Mrs Pearson to act in a position of conflict in the exercise of dispositive powers under which she was a beneficiary, rather than in exercising the administrative power of sale.

83. I prefer to deal with this issue substantively rather than address the pleading point in any detail. I will limit my comments in relation to that point by noting that the focus of pleadings is facts rather than legal submissions. CPR16.4 requires particulars of claim to contain a "concise statement of the facts on which the claimant relies", and CPR 16.5 requires the defence to respond to those allegations. The focus is on the essential facts to be proved rather than on legal submissions. This is reflected in PD

16 paragraph 13.3, which states that the party "may" refer to points of law in his claim or defence. Although it is fair to say that the defence in this case did not give an indication that the point would be taken, and it certainly indicated that the defendants had proceeded with the Share Sale on the basis that the self-dealing rule applied, it did include a general denial that the self-dealing rule was breached as well as pleading facts (including consent) as reasons why the rule did not apply.

84. However, it is not necessary to reach a concluded view on the pleading point because in any event I do not accept Mr Dumont's submission, essentially for the reason given by Mr Sawyer.

85. Mrs Pearson is indeed one of the class of beneficiaries, and it would have been possible for the trustees to exercise their discretionary power to pay or apply income or capital to her or for her benefit under the terms of the Trust. However, that was not what the trustees sought to do. They were not seeking to exercise dispositive powers, and they had no intention of benefiting Mrs Pearson. They considered that they were making a sale of an investment at market value. If they had been exercising dispositive powers they would have needed to do so consciously, considering the interests of the range of beneficiaries and deciding whether the particular appointment was appropriate: see for example *Re Hay's Settlement Trusts* [1981] 3 All ER 786 at 792.

86. In *Re Beatty v Brooke* [1990] 1 WLR 1503, broad powers of distribution of property had been delegated to will trustees. A specific clause allowed the trustees to exercise any power conferred by the will notwithstanding that they might have a personal interest in the mode of exercise, and at 1506B Hoffmann J stated that that "arguably" allowed them to make gifts or payments to themselves. There is no similar clause in Yvonne's will. The nearest to it is a clause relating to the exercise of voting rights held by the trust, which not only permits such rights to be exercised as if the trustees were absolute owners but also specifically permits them to act as directors, secretaries or employees of any company in which the estate is invested, and to receive remuneration. In contrast, although there is a broad power of investment which states that the trustees "shall have the same powers in all respects as if they were absolute owners beneficially entitled", there is nothing that authorises them to deal with themselves.

87. The position is also different from that considered in *Edge v Pensions Ombudsman* [1998] Ch 512, which related to amendments to a pension scheme which benefited trustees who were members of the scheme. The Vice Chancellor noted at 540 that the rules themselves placed the member trustees in a position of conflict because they required the body of trustees to include employee members. It was therefore necessary to imply a provision allowing them to retain benefits that resulted from exercises of the relevant discretionary power. This approach reflected the exception to the general no conflict rule made clear by *Sargeant v National Westminster Bank* (1991) 61 P. & C.R. 518, namely that the rule does not apply if it was not the persons in the position of conflict who had put themselves in that position. The point was not re-argued in the Court of Appeal in *Edge* ([2000] Ch 602 (CA) at 622E).

88. In this case the terms of the Trust put Mrs Pearson in a position of potential conflict in the exercise of dispositive powers in favour of discretionary beneficiaries, but it did not do so in relation to the administrative power of sale. The conflict was one

resulting from Mrs Pearson's decision to participate in the proposed transaction. It is not an answer to this to say that she only did so at the request of one or more of the other beneficiaries. Mrs Pearson chose to enter into a transaction that was not contemplated by the testator and the terms of the will. In contrast, she was specifically permitted by the terms of the will to act as a director of Wyvern, and indeed to receive remuneration.

89. Mr Dumont submitted that this approach was too narrow, and that it could cause widespread difficulties because of the extensive modern use of will trusts, often with family members as trustees and usually with a class of beneficiaries that will include members (typically minors) who cannot give informed consent. It would lead to odd distinctions where, for example, an appointment of an asset to two trustee beneficiaries followed by a sale of the interest of one of them to the other would be acceptable, whereas a sale of the whole asset to a trustee beneficiary followed by distribution of cash would not be. I accept that may be the case, depending on the wording of the will trust, but in exercising the power of appointment the trustees would be undertaking a conscious exercise of their dispositive powers.

Fully informed consent

90. Having concluded that the self-dealing rule was applicable to the Share Sale, the next question is whether the defendants have established that the claimants gave their fully informed consent.

91. In the light of my conclusion at [53] above about the absence of sufficient explanation of the content and effect of the letter of wishes, I have decided that the defendants have not made out their case on this issue. The key point here relates to the two-year period. I have concluded that neither Mrs Caldicott nor David Alexander were aware of it, and I am not persuaded on the evidence that Mr Caldicott believed that he was agreeing to a two-year time limit on the option.

92. In my view the two-year period is a material point, in the sense that had the claimants known about it then that may have affected their agreement to allow the transaction to proceed, or at least (given that the immediate urgency had disappeared) to proceed at that time, or on those terms. I accept Mr and Mrs Caldicott's evidence to that effect. Knowledge of the two-year period was also obviously material to their future actions: if they had been aware of its existence they would at least have been able to consider whether they could raise funds to repay the loan before the period expired. The considerations of fairness that underlie the defence of fully informed consent are relevant here.

93. In addition to the two-year period, Mr Sawyer relied on what he said was a failure to disclose the fact that the so-called option was not an option at all, but merely an unenforceable and unilateral letter of wishes. There was no evidence of discussion with the claimants of the risk that Mrs Walker had identified of not having a formal option.

94. In my view this point also carries weight, albeit less obviously so than the two-year period. The defendants have not established that they explained exactly what "formal or informal" meant in the disclosure letters, and what was actually proposed. Those letters do not disclose that the option was not going to be legally binding. "Informal"

does not necessarily connote non-binding. For example, an oral contract or one entered into by email or even an exchange of letters might well be regarded as informal. The statement in the disclosure letters that it was proposed that "the trustees be granted an option (formal or informal)…" rather suggests that they will obtain something on which they can meaningfully rely. Although it might be said that the claimants should have asked for an explanation of what "formal or informal" meant, or asked to see a copy of the document proposed to be signed, that is not the test: the onus is on the trustees to disclose all material information. It is also not an answer to say that Mrs Pearson considered herself bound by the letter of wishes. On its terms the letter permitted her to change her mind in the future. That meets the test of materiality.

Discretion

95. Mr Dumont submitted that even if the self-dealing rule was engaged it was a flexible rule that should not be applied in this case, relying on the decision in *Holder*.

96. *Holder* was a case where one of the sons of the deceased, Victor, purported to renounce his executorship in order to buy farms left by the deceased, and subsequently bought them at a public auction. The plaintiff, another son, subsequently claimed rescission of the sale. It had been conceded at trial that the renunciation was ineffective because Victor had had some involvement in the administration. However, that was minimal, he had acquired no knowledge of the farms in his capacity as executor, and he had had no involvement in arranging the sale.

97. The Court of Appeal held the self-dealing rule did not apply. Harman LJ referred at 191 to the "very special circumstances" of the case, noting that the reasons for the rule, namely that a person cannot act both as seller and buyer and that conflicts of interest must be avoided, did not apply on the facts, and (at 192F) that the beneficiaries had never looked to Victor to protect their interests. Sachs LJ also considered that the self-dealing rule was inapplicable on the facts (see at 402C-D), and it appears that Danckwerts LJ shared this view (at 397G). In the alternative, it was held that the plaintiff had acquiesced in the sale.

98. Danckwerts LJ went somewhat further in the way that he expressed his reasons. As well as considering acquiescence he referred at 397D to rescission being an equitable relief and stated at 398D that, because a court could sanction self-dealing, there was:

> "…no more than a practice that the court should not allow a trustee to bid. In my view it is a matter for the discretion of the judge."

Sachs LJ also suggested at 402E that it was open to argument whether the rule was "nowadays quite as rigid" as counsel for the plaintiff had submitted, and referred at 403B to the fact that equitable relief was being claimed.

99. Some caution is needed here. *Holder* was a case on very special facts. Victor had not in any real sense acted as an executor and no one in the family viewed him as having that role. There was no real potential for conflict of interest. The question of acquiescence also involves considerations of fairness, as already discussed. The relief sought was rescission, which is an equitable remedy and therefore is not available

automatically. I note the comments of Nugee J about *Holder* in *Barnsley v Noble* [2014] EWHC 2657 (Ch) at [295] to [298], which also sounded a note of caution and doubted whether the statements about discretion applied to a claim for monetary compensation, as opposed to a claim for rescission. Similarly, in *Bhusate v Patel* 2018 [EWHC] 2362 the Chief Master considered *Holder* and noted at [44] that whilst it showed that "ex debito justitiae" requires some qualification, the circumstances in which the rule will be disapplied will be rare.

100. In my view, although the circumstances of this case are somewhat unusual, with the Share Sale being driven entirely by Mr Caldicott's request for funds, it is not the sort of exceptional case where the rule has no application. In contrast to *Holder*, Mrs Pearson was acting as a trustee and that was well understood by all the family. She was clearly involved as a trustee, as well as personally, in arranging the terms of the Share Sale and agreeing the wording of the letter of wishes. There was a real potential for conflict of interest, and I have also concluded that the consents obtained from the claimants were not fully informed.

The exemption clause

101. Clause 19 of the will provides as follows:

> "No Trustee shall be personally liable for any breach of trust by way of commission or omission done or suffered unless it shall be proved that at the time or [sic] his doing or suffering such breach or of his concurrence therein such act or default was done or suffered by him mala fide and in particular but without prejudice to the generality of the foregoing provisions he shall not be bound to take any proceedings against a co-trustee or past trustee or his personal representative for any breach or alleged breach of trust committed or suffered by such co-trustee or past trustee."

102. There is no allegation of bad faith in this case. Mr Sawyer did not press a claim for equitable compensation, but did maintain that clause 19 neither prevented rescission nor an account of profits, namely a sum equivalent to the dividends received on the shares acquired (which he calculated as £99,480) plus interest, which he suggested should be set off against the repayment of the £204,660 purchase price. He acknowledged the possibility of Mrs Pearson also being entitled to interest on the price she had paid.

103. I agree with Mr Sawyer that clause 19 does not exclude a remedy of rescission. The consequence of rescission being granted is that the Share Sale is set aside and the shares sold re-vest in the trustees. The remedy is a proprietary one rather than one involving personal liability for breach of trust. There is obiter support for this in Nugee J's decision in *Barnsley v Noble* at [310], and the point was also considered by Sales LJ, with whom other members of the Court agreed, when the Court of Appeal upheld Nugee J's decision ([2017] Ch 191). Sales LJ said at [29] that the exoneration clause in that case "has nothing to say about the question of rescission". The point is also reflected in a supplement to *Lewin* at 39-131, relying on *Barnsley v Noble*.

104. *Barnsley v Noble* was a case where it was too late to claim rescission, but the relevant exemption clause was held to preclude a claim for equitable compensation. I do not agree with Mr Dumont's argument that there is a material difference between the text of the exemption clause considered in *Barnsley v Noble* and clause 19 of the will.

105. In *Barnsley v Noble* the relevant clause provided:

> "In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust premises arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by him or by any other trustee hereof although the employment of such agent was not strictly necessary or expedient or by reason of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable…"[2]

106. Mr Dumont suggested that the wording "…for any loss to the trust premises arising…" qualified not only the first operative part of the clause but also the third part that starts with the words "or by reason of any other matter or thing except…", which was the relevant part of the text in that case, and that that distinguished it from clause 19. However, it appears from Nugee J's decision at [290] that the relevant part of the clause was construed by him as follows:

> "…no trustee should be liable…by reason of any other matter or thing except wilful and individual fraud or wrongdoing…"[3]

107. I accept that in the Court of Appeal Sales LJ may have read the clause in the manner suggested by Mr Dumont, given the way he expresses the clause at [29] of his judgment, but there is no indication that he was making a fine point about construction of the clause and indicating any significance in the reference to "loss to the trust premises" in saying that it had nothing to say about rescission.

108. Mr Dumont also submitted that the reference to "personally liable" was not a distinction between remedies in rem and remedies in personam, but rather reflected the point that trustees can normally recover liabilities incurred in the course of their work from the trust fund. What the testator was saying was that trustees should not be left with a personal cost of any kind in the absence of bad faith. If that was not right, then there would be odd distinctions depending on, for example, whether the relevant property had been sold to a bone fide purchaser without notice, when the only remedy would be equitable compensation.

109. I do not accept these arguments. The natural meaning of "personally liable" is personally exposed: it addresses the question whether the relevant trustee will have to fund a liability for breach of trust from his or her own resources or assets. If rescission is appropriate and is ordered, then the effect is that the Share Sale is set aside. The title Mrs Pearson obtained was a defeasible one: *Armitage v Nurse* [1998] Ch 241 at 253C. Equitable title may also be regarded as having been re-vested in the Trust from

[2] Nugee J's decision at [284].
[3] See Nugee J's decision at [284], read with [290].

the date that ownership was first transferred: see *O'Sullivan, The Law of Rescission*, 2nd ed. at 16.39 and 16.40. In other words, the shares transferred to Mrs Pearson are treated as never having been shares to which she was beneficially entitled. The process of rescission does not involve any personal liability since the shares are not her assets.

110. Mr Sawyer also submitted that clause 19 did not prevent an account of profits in respect of the dividends paid on the shares. He submitted that "personally liable", in a professionally drawn will, should be interpreted in accordance with its technical legal meaning, which he argued referred to a trustee's obligation to restore the trust fund following a breach of trust by paying compensation, referring to *Snell* at 30-011 (part of a section under the heading "Personal Remedies after Breach"). He also referred to *Lewin* at 39-131, which suggests that special wording is needed to authorise a trustee to retain unauthorised profits.

111. In my view this is too narrow, and clause 19 does preclude an account of profits. As already indicated, I think the words "personally liable" should be interpreted in accordance with their ordinary meaning. In everyday language, they capture any situation where the trustee would have to put his hand into his own pocket. In principle, and in that respect, there is no substantive difference between an account of profits and a requirement to pay equitable compensation. For example, the effect of the exemption clause applying in *Barnsley v Noble* was that compensation did not need to be paid to reflect the benefit received by the relevant trustee from acquiring trading companies on a demerger which benefited from potential claims to VAT repayments, the scale of which had not been appreciated by the claimant. A claim to compensation would in reality have encompassed accounting for the profits of which the claimants were deprived.

112. The conclusion I have reached on this point derives some support from the judgment of Sales LJ in *Barnsley v Noble* at [30], where he said that there was good reason to construe the exoneration clause in that case "as covering all categories of personal liability for loss to the estate".

113. A further point is that the right to claim an account of profits can be distinguished from the consequences of the exercise of a right to rescind. In principle, rescission entails restitution not only of the assets received but any fruits such as dividends. That is an incident of restitution, and is legally distinct from an account of profits. There is therefore a question as to whether clause 19 excludes restitution of dividends, even though it does exclude an account of profits.

114. However, as remarked in *O'Sullivan* at 2.19 and 2.20, there is a considerable overlap between the two remedies (albeit that the relief available on an account of profits may well be more extensive, and one type of relief may be available when the other is not). Furthermore, where (as here) there is no suggestion that the relevant dividends have been kept separate or are otherwise in a traceable form, the claim to them on rescission can only be personal in nature rather than proprietary.

115. I also note that difficulties could arise in relation to tax, which could mean that ordering an adjustment for dividends paid as part of an order for rescission would result in a requirement to account for an amount greater than the net amount received. This emphasises the point that the remedy would, in reality, involve personal liability.

116. In the circumstances, I consider that the better view is that there is no relevant distinction between the two remedies, namely an account of profits and being required to account for dividends as an incident of rescission, for the purposes of clause 19. Both involve personal liability of the kind contemplated by that clause, because both would require Mrs Pearson to fund the amount from her own resources. Clause 19 should be interpreted in a straightforward way rather than by reference to technical distinctions. However, in case I am wrong about that and clause 19 does not exclude a requirement to account for dividends as an incident of rescission, I will go on to consider whether, if clause 19 did not apply, it would be appropriate to order rescission on a basis that extends to the dividends paid on the shares.

Rescission

117. I have concluded that the Share Sale should be rescinded. The self-dealing rule applied, the consents obtained from the claimants were not fully informed, and there are no exceptional circumstances which justify the non-application of the rule.

118. However, as recognised in *Snell* at 15-021, when exercising its equitable jurisdiction to order rescission, the court has a range of powers that it can use to adjust the position of the parties. In determining the precise form of relief, the court must look at all the circumstances and do what fairness requires: *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164 at [79], citing *Cheese v Thomas* [1994] 1 WLR 129 at 137C.

119. In my view further provision is required as to the terms on which rescission is made in order to ensure that an equitable result is achieved on the facts. Those facts include the following:

    i) The claimants have benefited from an interest free loan which they sought, and which would not have been available but for the Share Sale. It is not disputed that the loan has been of significant benefit to them, allowing them to start a new, and apparently successful, business venture.

    ii) The claimants' case is that they consented to a sale of the shares, albeit on the basis that the trustees would have an open-ended option to repurchase them if the loan was repaid. Significantly, it is clear that all three claimants understood that while the loan was outstanding Mrs Pearson would own the shares, and would receive the dividends on them. Put another way, the claimants consented to the receipt of dividends by Mrs Pearson, and in my view it would not be just to ignore this. It was not an unauthorised profit.

    iii) Mrs Caldicott has at no time actually tendered repayment of the interest free loan, from which all the claimants have benefited.

    iv) In reality, the loan would need to be repaid by Mrs Caldicott before the Share Sale could be unwound.

120. Against this factual background, I have concluded that rescission should be ordered on the following basis. Subject to and upon repayment of the £200,000 loan by Mrs Caldicott to the Trust, Mrs Pearson will be required to reconvey to the Trust a 15% shareholding in Wyvern (comprising 15 ordinary shares and 135 preference shares)

against repayment to her of the £204,660 purchase price. Mrs Pearson will not be required to account for dividends paid on the shares during the period she has held them and will also not be entitled to any amount representing interest on the purchase price.

121. In my view this is the most equitable approach, reflecting all parties' understanding that Mrs Pearson would own the shares and receive dividends, whilst the claimants would benefit from an interest free loan. It effectively replicates the position that the claimants understood that they were in, but without giving Mrs Pearson the benefit of any increase in the value of the shares that she might have obtained if an option had been granted on the terms envisaged by the claimants.

Removal of trustees

122. The claimants seek an order for the removal of Mrs Pearson and Mrs Walker as trustees. They have proposed the appointment of two replacements, a solicitor who has acted for Mr Caldicott for a number of years and an accountant also known to Mr Caldicott. Alternatively, the claimants seek the appointment of such other persons as the court thinks fit. Mr Sawyer fairly acknowledged that, because the terms of the Trust do not permit trustees to charge for their time, it might be necessary for the court to authorise their remuneration.

123. The leading case on the removal of trustees is *Letterstedt v Broers* (1884) 9 App Cas. 371 (PC), where Lord Blackburn said at 385 to 387:

> "Story says, s. 1289, 'But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.'
>
> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

> The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported…
>
> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety…"

124. In *Jones v Firkin-Flood* at [284] Briggs J referred to a summary of the position in the 18th edition of *Lewin* which described the principle as follows:

> "The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct, the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, of a want of reasonable fidelity.
>
> Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed."

As Briggs J noted, this summary is substantially based on *Letterstedt v Broers*.

125. The principle that the passage from Lord Blackburn's judgment makes clear is that the key question is whether continuance of the relevant trustee in office would prevent the trusts from being properly executed, having regard to the fact that that trustees exist for the benefit of the beneficiaries. Their welfare is the main guide. However, the intentions of the settlor are relevant (see the reference in the penultimate paragraph to the "intentions of the framer of the trust", and the earlier reference to the creator of the trust). Effectively, I think Lord Blackburn was saying that in determining the interests of beneficiaries you should consider the perspective of the settlor and what he or she was seeking to achieve.

126. As remarked in *Lewin*, it is also not the case that every mistake or neglect of duty (falling short of positive misconduct) is a sufficient ground for removal. Equally, misconduct is not a prerequisite for removal. Similarly, friction or hostility between trustees and beneficiaries is not itself a reason for removing trustees, unless it prevents proper execution of the trust, or (potentially) risks doing so: *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch) at [256], per Newey J.

127. I have considered carefully whether a replacement of the trustees is required, and have concluded that in all the circumstances it is not.

128. Mrs Pearson was chosen for her role as trustee by Yvonne. She knows the family well, she has an appropriate professional background, and knows and runs the business. Yvonne would have been well aware of all of these points, and the will made specific provision allowing trustees to act as directors of, and receive remuneration from, companies in which the Trust was invested. Mrs Pearson was a deliberate choice.

129. Mrs Walker is similarly a professional. She requires no charge for her time as trustee, and as I understand it this is not simply because the terms of the Trust do not currently permit a charge to be made. In accordance with their normal practice, Hunters charge only for legal services provided rather than for acting as a trustee.

130. Apart from the issue of the option, the claimants have not made out any of their complaints against the trustees. In particular:

i) dividend payments have been maintained and promptly distributed by the Trust in the manner requested by the claimants;

ii) dividends have not been delayed as asserted by the claimants;

iii) the trustees have assisted the claimants in providing tax reclaim forms promptly;

iv) the trustees also assisted by making the loan of £200,000 requested by the claimants, and subsequently advancing a further £20,000, leaving only a small reserve in the Trust for potential liabilities;

v) Mrs Pearson cannot be criticised for not paying inheritance tax in instalments; and

vi) the valuation related complaints in respect of the Share Sale have in my view rightly not been pursued.

131. Although Mr Sawyer also complained about the absence of any formal trustee meetings or minutes of such meetings, that is not a material point in my view. It is clear that Mrs Pearson and Mrs Walker have had regular discussions when the need has arisen, with Mrs Walker keeping careful notes, and the absence of formal trustee minutes is understandable in the context of what is a relatively small family trust where the trustees are not charging for their time.

132. Mr Sawyer submitted that replacement trustees would be able to scrutinise the management of the business properly. Mrs Pearson was not applying independent scrutiny as a trustee, and although Mrs Walker confirmed in evidence that she received the accounts and spoke to the company's accountant, she was not actively scrutinising the conduct of the business. However, as I found at [77] above, no specific criticism has been made out about the day-to-day operation or management of the business, and Mrs Pearson's evidence that the business was doing well was not effectively challenged. The valuation conducted in 2015 also indicated that there had been some increase in the value of the Holiday Park, from £1.5 million to £1.6 million.

133. It does not strike me as irrelevant that, but for Mrs Pearson's actions, the Trust would not exist and Mr Caldicott's share of his mother's estate would have vested in his trustee in bankruptcy. Yvonne changed her will only following discussions with Mrs Pearson, and it was Mrs Pearson who did the work to redraft it, explain it to her mother and go through it with Mr Caldicott. I also did not accept Mr Caldicott's evidence that he was persuaded by Mrs Pearson to renounce his role as executor and disclaim as trustee.

134. It is also relevant that Mr Caldicott declined to be added as a trustee when offered the opportunity in 2015, because (as I have concluded) it suited his interests to maintain distance from the Trust in case his new business venture failed.

135. On the other hand, there are some areas of concern. There was an error in not making sure that all the beneficiaries were fully aware of the position in relation to the option, particularly as regards the two-year period. Furthermore, as the two-year time limit approached, the trustees did not take the action that might have been expected to discuss between themselves or with the claimants whether the loan could or should be repaid to allow the option to be exercised. Although this is somewhat understandable given that the trustees both understood that the claimants were in need of more funds rather than being able repay the Trust, the omission of any consideration of the point by the trustees carries some weight.

136. It is also the case that Mrs Pearson is, inherently, in a position of some conflict. Although she remains open to a sale of her interest when she is ready to retire, she still enjoys running the Holiday Park business, of which she has been a director since 1994, and for the time being she wants to carry on in that role. She clearly has a strong emotional attachment to the business. She is not prepared to do business with Mr Caldicott, having lost faith in his ability to manage financial affairs, and does not wish to take his redevelopment plans forward. In short, it suits her to remain as a trustee for the time being.

137. However, this point needs to be considered in the wider context. Yvonne would have been fully aware of Mrs Pearson's involvement in running the business and her attachment to it. Mr Caldicott was not involved in the management and resigned his consultancy at the time the new will was made. It follows that Yvonne knew about the inherent conflict and intended it. In the words of Lord Blackburn there is a "reason to the contrary" discernible from "the intentions of the framer of the trust". Furthermore, it is clear that Yvonne discussed her wishes with Mrs Pearson before her death, including her wish to ensure that the interests of David Alexander are looked after in due course.

138. It is also important to have regard to what the consequences would be of replacing the trustees, and not to lose sight of what this dispute is really about.

139. New trustees might be more active in, for example, scrutinising the accounts and activities of Wyvern and IoSHV. However, in the absence of a serious issue, such as a material breach of directors' duties or other grounds for an unfair prejudice petition, they will not be able to disturb the status quo. With a 50% shareholding they will be able to block significant changes but will not be able to force them through, and in particular they will not be able to dismiss and appoint directors. The companies will simply be deadlocked. Any concerns about friction or an absence of harmony will certainly not be resolved.

140. This dispute is not really about achieving a deadlock, the practical result of which would be to allow the business to continue as it is for the time being. What the claimants really want is to undermine Mrs Pearson's position and force her to sell out altogether, as Mr Caldicott proposed in late 2015. Having not been involved in the management of the business for a number of years, Mr Caldicott has now decided that it should be part of his family's legacy. He wants control, and he would need control to implement his development plans. However, that is not a good reason to replace the trustees.

141. Mr Sawyer emphasised the lack of harmony between the trustees and beneficiaries. This is obviously referred to by Lord Blackburn and was discussed in some detail in *Re Weetman* [2015] EWHC 1166 (Ch), where HHJ Purle QC (sitting as a High Court judge) focused on an absence of harmony, and a potential for conflict, in deciding to replace trustees. However, the existence or otherwise of harmony is not necessarily determinative. The key question, as already discussed, is whether continuance of the relevant trustee in office would prevent the Trust from being properly executed in the interests of the beneficiaries, taking account of the perspective of the settlor.

142. Overall, I do not consider that the continuance in office of Mrs Pearson and Mrs Walker would prevent the proper execution of the Trust in the interests of the beneficiaries. As a result of the rescission of the Share Sale the Trust will once again hold 50% of the shares of Wyvern, as contemplated by Yvonne. Mrs Pearson will for the time being continue to manage the business, as Yvonne also anticipated. The trustees do not charge for their time, which is a material point, and dividends are promptly distributed. Mrs Pearson is also acutely aware that Mr Caldicott has suffered financial difficulties, and that the Trust has a role in ensuring that assets can ultimately be maintained for the benefit of David Alexander, as Yvonne originally intended.

143. Accordingly, and taking account of all the circumstances, I do not think that it is appropriate to exercise the court's discretion to replace the trustees.

Conclusion

144. In conclusion:

i) the Share Sale is set aside on the terms referred to at [120] above, without requiring Mrs Pearson to account for dividends received; and

ii) the court will not exercise its discretion to replace the trustees of the Trust.