Neutral Citation Number: [2021] EWHC 1731 (Ch)

Case No: PT-2021-000119

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

Rolls Building
Fetter Lane
London, EC4A 1NL

28 June 2021

Before :

MRS JUSTICE BACON

- -

Between :

MARK ALAN BROWN

Claimant

- and -

(1) NEW QUADRANT TRUST CORPORATION LIMITED
(2) ARLENE ELIZABETH BROWN

Defendants

- -
- -

Mathew Roper (instructed by Bowcock Cuerden LLP) for the **Claimant**
Alexander Learmonth QC (instructed by Seddons Law LLP) for the **First Defendant**

Hearing date: 21 May 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to BAILII.

Mrs Justice Bacon:

1. This hearing concerns a dispute between Mark Brown, who is the main beneficiary under two trusts appointed out of the estate of his late father, and New Quadrant, which is a professional trust corporation and the current sole trustee of both of those trusts. Arlene Brown is the other beneficiary under the trusts and is joined as the Second Defendant, but she is not interested in the present dispute and has not appeared at the hearing or made any written submissions to the Court.

2. The dispute has given rise to two opposing applications before me. Mr Brown seeks an injunction or preservation order restraining the trustee from selling or otherwise dealing with shares in a company called Lifetime Home Securities Limited (**LHS**), which are held under one of the trusts. The trustee in turn seeks an order from the court approving its provisional decision to sell those shares, under the principles set out in *Public Trustee v Cooper* [2001] WTLR 901.

3. The matter initially came before me on 12 February 2021 as an application by Mr Brown on short notice, with the trustee's solicitor having received the papers the evening before the hearing. On the basis of the trustee's undertaking not to sell or otherwise dispose of the LHS shares until the determination of the application or further order, the application was adjourned for what was intended to be a short period of a few weeks. In the event the adjournment ended up being for three months.

4. In the intervening period Mr Brown has issued and served a claim form and particulars of claim, the trustee has served a defence and counterclaim, Mr Brown has served a reply and defence to the counterclaim, the trustee has issued its cross-application, and both parties have filed evidence. In relation to the injunction application I have two witness statements from Mr Brown and a witness statement from Mr Smeath for the trustee, and in relation to the trustee's application I have a witness statement from Mr Austin-Smith for the trustee. Mr Smeath and Mr Austin-Smith are the directors of the trustee with principal responsibility for the two trusts.

Factual background

5. The background to these proceedings can be shortly summarised. The trusts were established following the death in 1994 of Mr Brown's late father, David Brown, who was a successful businessman. David Brown's will made specific provision not only for his son but also for his second wife Arlene Brown, and Arlene Brown's daughter from an earlier relationship, Alison Brown. The will appointed Christopher Thomson and Jeffrey Riley as executors and trustees.

6. On the basis of the provisions in the will, as well as in settlement of claims that Arlene and Alison Brown made for reasonable financial provision, the original trustees appointed that, subject to certain prior interests for the benefit of Arlene Brown, they held the residuary estate of the deceased on two trusts known as the Discretionary Trust and the A&M Trust.

7. It is not necessary to set out in any detail the terms of those trusts; suffice to say that Mr Brown is in practice the main beneficiary of the two trusts, and receives

a monthly income from the trusts. Arlene Brown is also a specified beneficiary under both trusts, but she does not receive any income from the trusts. Under the terms of David Brown's will the trust period is a term of 80 years following his death. If both Mr Brown and Arlene Brown die before the end of that term, and if Mr Brown remains unmarried and childless, then Alison Brown and any of her children and grandchildren born by then will be the beneficiaries.

8. In the years that followed the establishment of these trusts, a dispute erupted between Mr Brown and the original trustees, with Mr Brown alleging that the original trustees had mismanaged the investment of trust funds and had thereby caused loss to the trusts. Two additional trustees were appointed and retired in succession without the dispute being resolved. In September 2019 Mr Thomson and Mr Riley appointed New Quadrant as an additional trustee, and they then retired as trustees, leaving New Quadrant thenceforth as the sole trustee.

9. Mr Brown was and remains aggrieved that the replacement of the original trustees by New Quadrant was done without his knowledge or consent. It appears that he threatened to seek the removal of New Quadrant almost immediately after it was appointed. That threat was not carried through at the time, but the particulars of claim now list several matters relating to potential claims against the original trustees and the provision of historic trust documents, on the basis of which Mr Brown says that the trustee is in breach of trust and should be replaced. While that objection has been relied on by Mr Brown to some extent at this hearing, the main focus of the applications before me is a separate dispute between Mr Brown and the trustee concerning the shares in LHS that are held under the Discretionary Trust.

10. LHS is a company that was established by the deceased to trade in home equity release arrangements. It now no longer trades actively, but it retains interests in 13 properties in a variety of locations in the UK. Until March 2021 its directors were Mr Thomson (one of the original trustees of the trusts) and James Cookson, but at the end of March 2021 Mr Thomson retired.

11. It appears that the original intention of the trustee (and indeed of the original trustees) was that LHS would remain within the Discretionary Trust, with the residual properties gradually falling into its hands until no further properties remained, at which point LHS would be dissolved. In July 2020, however, Mr Thomson wrote to the trustee suggesting that (for various reasons) it would be better to sell LHS now as a going concern.

12. Mr Brown is, in the words of his solicitor, "implacably opposed" to a sale of LHS, and considers that it should be retained in the trust. It appears that this is at least partly because of his attachment to the company as having been founded by his father, but also because he considers that the trust will gain more in the long term from retaining the shares.

13. While the material before me indicates that Mr Smeath and Mr Austin-Smith were initially content to accept Mr Thomson's recommendation, the trustee's evidence (set out in the witness statements of Mr Smeath and Mr Austin-Smith) shows that the trustee has since then given careful consideration to Mr Brown's grounds for opposing the share sale. The trustee nevertheless continues to consider that Mr

Brown's wishes are outweighed by the interests of the trust in selling the shares at this point. In particular the trustee considers that a share sale now would be more tax efficient than retaining the shares in the long term, and would diversify the trust portfolio. The trustee is also concerned about the potential for claims by LHS's clients or their representatives as a result of a recent investigation by the Financial Conduct Authority into home equity release arrangements. A further concern is that the remaining director of LHS, Mr Cookson, is 92 years old and wishes to retire, which will require the trustee to appoint a new FCA-approved director if LHS is not sold.

14. It appears that in November 2020 the trustees were close to agreeing a sale of the company for £1.285 million, but that then fell through. In December, however, two further offers of £1.1 and £1.2 million were made, and the trustee decided to proceed with the higher of those. (At that time there were 14 properties in the LHS portfolio, one of which has since been sold thereby reducing the value of the portfolio as set out further below.) Mindful of Mr Brown's opposition to the sale, however, the trustee offered to sell the LHS shares to him instead if he so wished.

15. Mr Brown did not respond to that invitation. Instead his solicitors sought an undertaking from the trustee that it would not commit to a sale of the LHS shares without giving him 14 days' written notice. The trustee refused, taking the view that this could have jeopardised the sale that was then progressing. It did, however, say that it would provide as much notice as it could. That was not acceptable to Mr Brown, who made the application that came before me on 12 February 2021 and was adjourned to the present hearing. Since then the trustee has made a further open offer to sell the shares to Mr Brown, in order to settle the dispute; Mr Brown declined that offer on grounds of affordability.

The opposing applications

16. Mr Brown seeks an order restraining the trustees from selling or otherwise disposing of the LHS shares until the conclusion of the proceedings that have been brought in the claim that he has filed. The grounds for the application are, in particular, that the proposed sale of the company would be a breach of trust and would cause loss to the Discretionary Trust that could not be compensated for by damages.

17. Following the initial hearing before me, Mr Brown's claim was filed on 17 February 2021. As noted above, in addition to putting in issue the sale of the LHS shares, the particulars of claim contend that the trustee is in breach of trust for further reasons and should be replaced with "fit and proper persons".

18. In its defence dated 9 April 2021 the trustee denied any breach of trust, and set out a series of reasons why the trustee considered that it was in the best interests of the Discretionary Trust to sell the shares. In addition, a counterclaim was pleaded in the following terms:

> "The First Defendant seeks an order of the Court approving its provisional decision as trustee of the Discretionary Trust to dispose of the Shares (and consequently discharging the undertaking not to sell the Shares given to Mrs Justice Bacon on 12 February 2021 …),

> or alternatively disapproving that decision and instead authorising and/or directing it to retain them …"

19. The trustee's application notice dated 10 May 2021 asks that the counterclaim be determined at the present hearing, by declaring that the trustee has the power and permission to sell the LHS shares for the best price reasonably obtainable, or on such terms as the court directs.

20. Mr Roper, representing Mr Brown, argued that the trustee's application is procedurally irregular and should not be considered at this hearing. His submission was that an application for a *Public Trustee v Cooper* approval (or "blessing") of a trustee decision should properly be made under CPR Part 8, and that in substance the trustee is seeking summary judgment on its counterclaim without the procedural safeguards set out in CPR Part 24.

21. While the way in which the point has been brought before me may be unusual, as Mr Learmonth QC for the trustees accepted, I do not consider that that prevents me from determining the trustee's application alongside Mr Brown's application. On the pleadings, it was entirely legitimate for the trustee to seek the approval of the court for the share sale by way of counterclaim; indeed, given the intrinsic connection between the counterclaim and the claim it would have been inefficient and duplicative for a separate Part 8 claim to have been brought by the trustee. The applications for determination at this hearing likewise both raise the same issue of whether the decision to sell the LHS shares is one that the trustee can properly take, the trustee's application being essentially a mirror of Mr Brown's application in that regard.

22. Mr Roper therefore rightly accepted that my decision on the question of serious issue to be tried for the purposes of his injunction application overlapped with and was in practice likely to determine the trustee's approval application, subject to certain additional points in relation to the approval application which I will address in due course.

23. Although the approval application was not filed until 10 May, 11 days before the present hearing, the trustee gave notice to Mr Brown on 6 May that the application would be made on the basis of "much the same ground" as Mr Brown's application. While Mr Roper suggested in general terms that there had been insufficient time for Mr Brown to file further evidence, he did not identify any specific substantive respect in which he or Mr Brown had been unable to prepare for or respond to the trustee's application in the time available. He did, however, suggest that by the time the trustee's application was filed leading counsel was not available to be instructed for the hearing. That submission does not, however, carry much weight in circumstances where the arguments relating to the two applications are in practice largely identical, and Mr Brown was apparently content for the submissions on his application to be made by Mr Roper. It is also notable that no application for adjournment of the hearing was made on this (or indeed any other) basis.

24. It is, therefore, in my judgment appropriate to consider both applications now. Indeed, it would be pointless for the approval application to be heard separately,

requiring a repetition of precisely the same arguments that are made in the injunction application.

Mr Brown's injunction application

25. There is no dispute that the relevant legal test is the standard *American Cyanamid* test, pursuant to which the court will first consider whether there is a serious issue to be tried on the merits, and if that is the case then the court will consider the adequacy of damages and the balance of convenience.

Serious issue to be tried: the approach of the court

26. It is common ground that the trustee has in principle the power to sell the LHS shares. Mr Brown's case, however, is that the decision to do so has been reached in an improper manner or negligently. In particular, it is said that the trustee has taken account of irrelevant considerations, has failed to take appropriate specialist advice, and has failed to take sufficient account of the wishes of the deceased and Mr Brown. On that basis, the particulars of claim say that the circumstances surrounding the trustee's decision call into question whether the sale of the LHS shares would be a breach of trust and/or a breach of the trustee's duty of care.

27. Before addressing the specific matters of which complaint is made, three preliminary comments as to the approach of the court need to be made.

28. First, it is important to bear in mind that it is not for the court to impose its own view of the merits of the provisional decision taken by the trustee. Rather, the question for the purposes of the present hearing is whether the material before me discloses a serious issue to be tried as to whether the trustee's decision is not one which a reasonable trustee could properly have reached. The comments of Hart J at §28 of *X v A* [2006] 1 WLR 741, in the context of whether the court should approve a particular transaction, are equally apposite in this context:

> "the task of the court is not to say how it would itself exercise the discretion but merely, in the formulation of Millett J in *Richard v Mackay* (1987) 11 Tru LI 23, 24:
>
> > 'to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate.'"

29. Secondly, in considering that question, there is no presumption that the trustee should have taken specialist independent advice on every aspect of the transaction proposed. Rather, in relation to a decision as to the way in which the trustee should exercise its powers of investment, the requirement under s. 5(1) of the Trustee Act 2000 is for the trustee to obtain and consider "proper advice"; but s. 5(3) provides that a trustee need not obtain such advice if it reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

30. In relation to other decisions that do not relate to the way in which the powers of investment are exercised, there is no specific duty to take advice, but there is an overriding duty of care set out in s. 1 of the Trustee Act, which requires the trustee to

> "exercise such care and skill as is reasonable in the circumstances, having regard in particular – (a) to any special knowledge or experience that he has or holds himself out has having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession."

31. Thirdly, the reasonableness of the trustee's decision is to be judged by reference to the facts as they stand when the matter comes before the court, rather than at any earlier point in the decision-making process. That is perhaps a rather obvious point, but is particularly relevant where it is apparent that – as in the present case – the considerations taken into account by the trustee have evolved over time, and have been the subject of discussions with Mr Brown.

The specific objections advanced

32. I will consider Mr Brown's specific objections in turn, bearing in mind the general observations above.

33. *Investment advice.* Mr Brown says that the trustee has not taken any or any proper advice as to the exercise of its powers of investment in accordance with the standard investment criteria. The trustee is, however, a professional trust corporation with considerable experience in the management of trusts. In those circumstances it took the view that it was unnecessary to obtain additional third-party advice as to the standard investment criteria. Given the experience of the trustee, that was in my judgment an entirely reasonable view for the trustee to take.

34. *Tax considerations*. Mr Brown says that the trustee failed to take into account that retention of the shares and placing LHS into voluntary liquidation following sale of all the properties would be the most tax-efficient course of action. He relies on tax calculations by his solicitors which differ from the trustee's tax calculations.

35. If there were a serious issue as to the accuracy of the respective tax calculations, that would not be a matter that I could resolve now but would rather be a matter for trial with further evidence as appropriate. On closer inspection, however, it is apparent that there is no dispute as to the accuracy of the calculations as such; nor has the trustee overlooked or ignored Mr Brown's analysis. Rather the dispute is as to the appropriate investment strategy, having regard to the current tax rules on offsetting capital gains against historic losses.

36. The trustee's tax calculation was sent to Mr Brown's solicitors on 17 December 2020. It compared the estimated return to the trust if the properties in the LHS portfolio were gradually sold as and when they fell into the trust and assuming (as is currently the case) that the sale proceeds were paid as dividends to the Discretionary Trust, with the position if the LHS shares were sold now, assuming

a modest return on the investment of the proceeds. In particular, the trustee's calculation noted that an immediate share sale would avoid payment of capital gains tax due to the availability of offsetting losses. Overall, the trustee concluded that it would be significantly more favourable to the trust to sell the LHS shares now than to retain the company in the trust until the properties were all sold.

37. Mr Brown has not ever disputed the accuracy of that calculation, based on the assumptions used for the comparison. Instead an alternative calculation was provided by his solicitors on 13 January 2021, based on the different assumption that the proceeds of sale of the properties would be retained within LHS until liquidated, and that capital gains tax upon liquidation would then be offset against losses.

38. Having reviewed that alternative analysis, Mr Austin-Smith sent a considered response on 22 January 2021, noting that Mr Brown's calculation depended upon the current capital gains tax rules remaining in place and offsetting losses remaining available when all of the properties had been sold, in what could be more than nine years' time. More importantly, Mr Austin-Smith pointed out that since Mr Brown's tax analysis also assumed retention of the proceeds of the sale of each property within LHS, rather than distribution of those proceeds to the Discretionary Trust, the Discretionary Trust would no longer have an income available to supplement the income from the A&M trust, in order to maintain payments to Mr Brown at the current level. On that basis Mr Austin-Smith said that the trustee maintained the view that a sale was in the best interests of the trusts and all the beneficiaries.

39. That conclusion was manifestly one that a reasonable trustee could have reached, and Mr Brown has not identified any basis on which that strategic decision might plausibly be said to be unreasonable or imprudent.

40. *Possible claims following FCA investigation.* Mr Brown takes issue with the concern expressed by the trustee that home equity release arrangements may be subject to future claims in the light of the FCA investigation, in circumstances where LHS has not actively traded for some years. While this issue is not said by the trustee to be decisive, the statutory investment criteria under s. 4(3)(a) of the Trustee Act require the trustee to review the suitability to the trust of "investments of the same kind as any particular investment proposed to be made or retained". In that context it is in my view manifestly reasonable for the trustee to have regard to the fact that the FCA has been reviewing and is continuing to review the home equity release sector, and has identified (in initial findings published in June 2020) areas of concern regarding the adequacy of advice given to consumers, as well as the fact that numerous complaints have been made to the Financial Ombudsman Service regarding equity release and similar schemes. That creates a degree of risk which it is entirely proper for the trustee to take into account in deciding whether to retain the LHS shareholding.

41. *The trustee's lack of expertise and the retirement of the directors.* Mr Brown relies on a letter sent to prospective bidders in July 2020, in which the trustee referred to its lack of expertise in the management of an equity release company such as LHS, and the imminent retirement of the directors. Both are said to have been irrelevant considerations to take into account. I do not consider that

objection to be sustainable. There is no dispute that the trustee does not itself have the expertise to run the LHS business; it is therefore necessary to have suitably-qualified directors in place. The fact that the longstanding directors of LHS were and are looking to retire and will therefore imminently have to be replaced is a material consideration for the trustee, particularly in circumstances where the LHS shares make up a major part of the assets of the Discretionary Trust (around 25% on the basis of the trustee's valuation). It is not, however, now suggested that this is a decisive issue for the trustee, and the trustee acknowledges that Mr Brown has identified a potentially suitable candidate who could be approached if the shares were to be retained within the trust. The trustee's approach in this regard is in my judgment entirely proper and reasonable.

42. *Wishes of Mr Brown and the deceased.* Mr Brown says that the trustee has paid insufficient regard to Mr Brown's opposition to the proposed sale and the family connection to LHS. I do not consider that there is any substance in this point. The trustee's evidence makes clear that the trustee has taken account of both Mr Brown's views and the family connection to the company, but considers that these factors are outweighed by other considerations. As Mr Roper fairly accepted in his oral submissions, questions of weight are a matter for the discretion of the trustee. While Mr Roper also suggested that the trustee may have failed to appreciate that the LHS shares were originally settled outside the trusts, which would explain why the deceased did not express any particular wishes in that regard in his will, that takes the matter no further: the position remains that irrespective of any wishes expressed by the deceased the family connection has indeed been taken into account, but is (entirely reasonably) not regarded by the trustee as decisive.

43. *Marketing strategy*. Mr Brown says that the trustee has failed to obtain proper advice as to the appropriate strategy for obtaining the best price for the shares. The trustee's evidence confirms, however, that the trustee has marketed the property with a specialist agent who acts as a broker in home equity release reversions. There might, no doubt, have been other means of marketing the shares. The question for the court is, however, not whether other strategies could have been adopted, but whether the evidence suggests a serious issue to be tried as to whether the trustee's chosen strategy was one that no reasonable trustee could have taken. In my judgment, having regard to the particular nature of the LHS business, it was manifestly reasonable for the trustee to market the property through a specialist agent in the way that the trustee did in this case.

44. *Valuation advice.* Mr Brown says that the trustee has valued the LHS shares by using estimates from the property website www.zoopla.co.uk rather than taking any or any proper advice as to the value of the properties in the LHS portfolio, or the value of LHS's interests those properties.

45. As explained by Mr Smeath in his witness statement, the trustee considered that a full valuation of each property in the portfolio would be disproportionate. Instead, the trustee took the mid-point of the valuation range provided by Zoopla for each property, which the trustee considered to be a reasonable starting point for its valuation of the portfolio. That methodology produced a total figure (as at January 2021, on a portfolio of 13 properties) of £2,221,900. The trustee then

applied a 10% discount to account for the likely condition of the properties with their elderly occupiers, giving an adjusted total of £1,999,710.

46. That methodology is on its face a reasonable and proportionate approach for the trustee to adopt. But if any doubt were to remain, the trustee's valuation may be compared with the 83-page valuation report procured by Mr Brown, which valued all of the properties individually but based on external inspection only. That report produced a total valuation for the 13 properties of £1,950,750, which is strikingly close to – and indeed marginally lower than – the trustee's adjusted valuation. I do not, therefore, consider that there is any sustainable basis on which Mr Brown could object to the trustee's initial valuation of the properties.

47. In particular, I do not consider that Mr Brown can plausibly contend that the trustee was required to go to the considerable expense of commissioning separate individual valuations of all the properties. There are obviously cases (and the *Cotton v Earl of Cardigan* case discussed below is one) where the nature of a property to be sold by trustees is such that one or more specialist valuations will inevitably be necessary. In the present case, however, the property portfolio consists of 13 properties in different towns, with a total current value of around £2m, and with a range of average values for the properties readily available on Zoopla. The trustee's view that it would in those circumstances be disproportionate to commission separate valuations of the properties is plainly a decision that the trustee could reasonably take.

48. As for the value of LHS's interest in those properties, it appears that this was calculated by Mr Thomson (before his retirement), taking account of the life expectancies of the tenants using actuarial figures available from the Office of National Statistics (**ONS**). On that basis the trustee's current estimate of the reversionary value of the properties to LHS is £1.077m.

49. While the trustee has not provided details of the underlying calculation methodology used by Mr Thomson, earlier versions of the calculations were provided to Mr Brown's solicitors in November and December 2020, and Mr Brown did not ever ask for the underlying calculations to be disclosed to him. Nor is it now suggested that the calculations are flawed on the basis of any methodological error, or that Mr Thomson was insufficiently qualified to be able to produce a reliable estimate of the reversionary value of the properties. Mr Roper noted at the hearing that Mr Thomson is an accountant rather than an actuary, but that is irrelevant given that the actuarial life expectancy figures used for the purposes of the valuation were not calculated or estimated by Mr Thomson himself, but were taken from publicly available ONS figures. In those circumstances I consider that it was entirely reasonable for the trustee to use Mr Thomson's calculations as the basis for its estimate of the value of LHS's interests in the properties.

50. It is also important to note that the trustee's valuation of LHS is merely a starting point and a safeguard to ensure that the price being offered by prospective purchasers is a fair and reasonable one. In the present case, the current prospective purchaser has independently valued the LHS portfolio (with the 13 remaining properties) at £1.078m, which is very close to the trustee's valuation. That purchaser made the higher of the two offers in December 2020, and no purchaser

has come forward with a higher offer for the portfolio. The trustee is in those circumstances reasonably entitled to conclude that the marketing process has resulted in a fair price being offered for the properties.

51. *Disclosure.* Mr Roper made various complaints at the hearing as to the adequacy of the disclosure provided by the trustee. In reality, however, most of those objections did not relate to the disclosure provided, but were rather submissions that further advice should have been taken (e.g. on valuation) which the trustee did not obtain.

52. The remaining objections were that the trustee had not provided the draft contract for sale to the prospective purchaser or the specific terms on which the marketing agent had been instructed. The particulars of claim do not, however, suggest that any breach of the trustee's duties might have arisen from any specific terms of the contract for sale (other than the sale price, which I have already addressed) or the marketing agent's terms of engagement. Rather, the particulars of claim put in issue the trustee's reasons for selling the shares in LHS at all, and hence include a request for disclosure of the documents evidencing the trustee's "reasons for determining to sell all or any of the shares in LHS … and all advice or other material upon which this determination was based". I cannot, therefore, accept Mr Roper's submissions that the failure to disclose the draft contract for sale or agreement with the marketing agent gives rise to a serious issue to be tried as to whether the trustee's decision to sell the LHS shares was one which no reasonable trustee could have taken.

Other considerations

53. For completeness, it is relevant to record three further reasons given by the trustee for its decision to sell the LHS shares. The first is that (as noted above) the shares account for around 25% of the portfolio of the Discretionary Trust, representing a very substantial part of the value of the trust as a whole. The need for diversification of the investments of the trust is, however, one of the standard investment criteria under s. 4(3) of the Trustee Act 2000. This is an important consideration in the trustee's decision that it would be more appropriate to sell the LHS shareholding and replace it with a diversified investment portfolio similar to the portfolio held by the A&M Trust.

54. Secondly, the trustee points out that the LHS shareholding does not produce any income in a conventional sense, but rather only produces an income when the occupier of one of the properties held by the company dies and the property (or a proportion of the property) then reverts to LHS and is sold. By contrast a standard investment portfolio similar to that held by the A&M Trust should, in the trustee's view, provide the Discretionary Trust with significantly more income on a regular basis, as well as greater flexibility in terms of the availability of income and capital. That is a material consideration in circumstances where income from the Discretionary Trust is required in order to maintain the current level of payments from the two trusts to Mr Brown.

55. Thirdly, the trustee notes that the market for equity release investments of this nature is small and diminishing, and the property portfolio held by LHS is already small and will inevitably get smaller over time as more properties fall into

possession. That will make it increasingly difficult to find a buyer for the reversions that remain.

56. All of these considerations are, in my judgment, appropriate and reasonable matters for the trustee to have taken into account in determining whether to retain the LHS shareholding within the trust.

Conclusion on Mr Brown's application

57. For the reasons set out above, I do not consider that the material before me discloses any real prospect of Mr Brown succeeding at trial on any of his objections to the trustee's provisional decision to sell the LHS shares. The trustee's reasons for taking that decision, as set out in the evidence of Mr Smeath and Mr Austin-Smith, are manifestly reasons that ordinary, reasonable and prudent trustees could take into account, and the evidence does not disclose any sustainable case that the trustee has taken account of irrelevant considerations or has failed to take account of relevant considerations.

58. Ultimately, the central reason for Mr Brown's objection appears to be a dispute as to the weight given to his desire to retain LHS within the trust. That is, however, a matter that is well within the discretion of the trustee; it has been taken into account but, for the reasons given above, the trustee (reasonably) does not consider this factor to outweigh the other considerations in favour of selling the LHS shares at this point.

59. Mr Brown's application therefore fails on the basis that there is no serious issue to be tried, without it being necessary for me to consider the adequacy of damages or the balance of convenience.

The trustee's approval application

60. There is no dispute as to the court's jurisdiction to approve or "bless" a decision by a trustee as to a particular investment within the trust. In *Public Trustee v Cooper*, p. 923, Hart J cited with approval an earlier unreported judgment of Robert Walker J setting out four categories of case where the court may be asked to adjudicate on a course of action proposed or taken by trustees. The present case falls within the second of those categories, namely cases where there is no real doubt as to the nature of the trustees' powers, and the trustees have decided how they want to exercise them, but because the decision is "particularly momentous" the trustees wish to obtain the blessing of the court for their proposed course of action. Examples of that type of decision given by Robert Walker J include "a decision by trustees to sell a family estate or to sell a controlling holding in a family company".

61. The relevant principles applicable to this type of case were discussed by Vos LJ in *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312 at §§12–17. In particular, the court must be satisfied:

    i) That the trustee has in fact formed the opinion that it should act in the way for which the court's blessing is sought, in other words that the trustee

considers its proposals to be in the interests of the trust and the beneficiaries.

ii) That the opinion of the trustee is one which a reasonable body of trustees properly instructed could properly have arrived at.

iii) That the trustee's opinion is not vitiated by any conflict of interest.

iv) That the court has been provided with full and frank disclosure of all the relevant facts and documents, so that it can be satisfied that the decision is proper and for the benefit of the trust and beneficiaries.

62. Vos LJ also noted at §78 that the procedure to obtain the approval of the court to a momentous transaction was "intended to be quick and accessible" and that the relevant question in such a case was whether the trustees had presented to the court "sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed".

63. In the present case, there is no doubt as to whether the trustee has in fact formed the opinion that it should sell the LHS shares; and it follows from my conclusions in relation to Mr Brown's application that the trustee's provisional decision to do so is in principle one that a reasonable body of trustees could properly have arrived at, taking into account all relevant considerations and such specialist advice as was appropriate in all the circumstances.

64. Mr Roper nevertheless submitted that I should refuse to approve the proposed share sale for three reasons. The first was his submission that the trustee has not provided full and frank disclosure of all relevant documents relating to the decision to sell the LHS shares. That submission, however, converges with his objections of the same nature for the purposes of Mr Brown's application, and fails for the same reasons: the objections are either in reality objections to the failure to obtain further advice (which I have found to be unfounded), or concern material that relates to the administrative mechanics of the share sale rather than the decision to sell the shares as such.

65. The second submission was that the court should not approve the trustee's decision to sell LHS in circumstances where the particulars of claim contend that the trustee should be replaced on the basis of further breaches of trust in addition to the decision to sell the LHS shares. Mr Roper cited in this regard the following comment of Briggs J in *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at §281 concerning the circumstances in which a finding that a trustee is unfit to act might affect the court's approval of its actions:

> "I am fortified in reaching my conclusion that I ought not to confirm or bless the provisional resolution by my perception, which I have already described in detail, that the Trustees had by their conduct prior to February 2008 demonstrated their collective and individual unfitness to be Trustees of this trust. It is most unusual for the court to be invited to bless a discretionary decision by trustees against such

> an unpromising background. Furthermore, it seems to me that the relatively limited role which the court has hitherto chosen to adopt in category (2) cases (within the *Public Trustee v Cooper* analysis) may well have been developed in the context of decisions by trustees whose general fitness was not in dispute. For that reason I would add to the category of cases in which the court may feel insufficiently certain about the propriety of a proposed discretionary decision that it declines to bless it, without at the same time prohibiting it, a case just like the present, where the trustees have demonstrated a general unfitness to act, by conduct prior to the taking of the decision in question."

66. This issue arose in *Cotton v Earl of Cardigan*, where Lord Cardigan had (at first instance) contended that the court should not approve the trustees' decision to sell a stately home while his application to remove the trustees was on foot. Rose J approved the decision to sell notwithstanding the pending removal trial, distinguishing *Firkin-Flood* as involving a very different situation to the case before her. By the time of the appeal the importance of the issue had significantly reduced, but it was nevertheless clear that that the pending judgment in the removal action did not affect the court's analysis of whether the decision to approve the intended sale could be impugned.

67. The present case is, likewise, very different to the situation in *Firkin-Flood*. In particular, in *Firkin-Flood* the judge had before him not only the question of whether the trustees' provisional resolution as to the distribution of the capital of the trust fund should be approved, but also the question of whether the trustees should be removed. The judge had concluded that the facts showed not only a number of breaches of trust by the trustees but more generally a "total abdication of their duties by all of them". The trustees had among other things failed to appraise themselves of the nature and extent of their duties at the outset, had failed to prepare or have prepared estate or trust accounts, and had failed to consider whether it was appropriate to leave the trust property as they received it in the form of shares in private companies producing no dividends. The judge concluded that from the outset the lay trustees had been "oblivious of the heavy responsibilities which they were undertaking, and did nothing whatsoever to discharge any of them prior to 2008", and that the sole professional trustee had demonstrated "beyond question" his unfitness to be the sole professional trustee of the trust (§§239–246).

68. That situation is not remotely comparable to the present case. The trustee is a professional trust corporation, and there is no suggestion that it has abdicated its duties as trustee, whether from the outset or at all. Indeed the present dispute has arisen because the trustees have done precisely that which the trustees in *Firkin-Flood* did not do, which is to consider whether it is in the interests of the trust to retain shares in a private company that produces no dividends. Furthermore, the merits of the removal claim do not arise for determination at this hearing, so unlike Briggs J in *Firkin-Flood* I have not reached any conclusion on that aspect of the particulars of claim.

69. Most importantly, while it is apparent that Mr Brown has lost confidence in the trustee, the specific breaches of trust on which Mr Brown relies in support of his

removal claim (apart from the objections to the sale of the LHS shares) do not allege a "general unfitness to act". Rather, they concern two specific allegations that the trustee has failed to consider and/or pursue claims against the former trustees for mismanagement of the trusts, and has failed to disclose historic trust documents to him. Neither of those issues has any bearing on the question of whether the quite separate decision to sell the LHS shares is one that the trustees are entitled to take.

70. The only respect in which the removal claim could conceivably be of indirect relevance to the approval application would be if Mr Brown had contended that the trustee could not reasonably rely on Mr Thomson's calculations as to the value of LHS's reversionary interest in the property portfolio, given that he was also one of the original trustees who is alleged by Mr Brown to have mismanaged the trust investments. As I have already noted, however, Mr Brown has not contended that Mr Thomson's analysis in that regard is unreliable. Nor is there in any event any connection between the matters said to have given rise to a historic mismanagement of the trusts and the present dispute concerning the sale of LHS, which might suggest any potential unreliability.

71. I do not, therefore consider that the pending claim for removal of the trustees, whatever the merits of that claim, could render it inappropriate to proceed with the sale of the LHS shares.

72. Finally, Mr Roper contended in his skeleton argument that the trustee's application for approval is vague, in that it does not seek the court's approval of a particular sale transaction, but rather seeks approval of the decision to sell the LHS shares "for the best price reasonably obtainable (or on such terms as the Court shall determine)".

73. There is, however, nothing vague in that request. Rather, it reflects the ambit of the dispute between the parties, which is as to whether the trustee can properly conclude that the shares should be sold at all. If the trustee is entitled to take that view, which I consider it is having regard to all the relevant factors set out above, then there is no dispute that the shares should be sold for the best price reasonably obtainable. The precise way in which that is done is a matter for the trustee to determine, and I have already found that the trustee's decision to engage the services of a specialist marketing agent in this case was an entirely reasonable course of action for the trustee to take.

74. It is, therefore, in my judgment appropriate to approve the trustee's decision on the terms sought.

Conclusion

75. For the reasons set out above, Mr Brown's application for an injunction restraining the sale of the LHS shares fails, and I will grant the trustee's application for the court's approval of its decision to sell the shares for the best price reasonably obtainable.