Case No: PT-2018-000862
Neutral Citation Number: [2020] EWHC 3381 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUST & PROBATE LIST

7 Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 25 November 2020

BEFORE:

CHIEF MASTER MARSH

BETWEEN:

PATRIK SCHUMACHER

- and –

(1) BRIAN CLARKE
(2) RANA HADID
(3) THE RIGHT HONOURABLE PETER GARTH BARON PALUMBO
(4) MARIE NOELLE M JANSSENS
(5) ALBERTO BARBA GUERRERO
(6) CHRISTIAN GIBBON
(7) THE ZAHA HADID FOUNDATION

Richard Wilson QC and Jamie Randall (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
Elspeth Talbot-Rice, James Brightwell and Max Marebon (instructed by **Quinn Emanuel Urquart & Sullivan LLP**) for the **1st to 3rd Defendants**
Nicole Langlois (instructed by Stevens & Bolton LLP) appeared for the **4th Defendant**
Richard Dew (instructed by Withers LLP) appeared for the **5th Defendant**
Adam Cloherty (instructed by Hausfeld) appeared for the **6th Defendant**

JUDGMENT
(Delivered at a remote hearing)
Approved

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. On 31 March 2016, Dame Zaha Hadid died at the age of 65. She was and remains an architect of world renown. It is now over four and a half years since her death and, sadly, due to major differences between her executors and trustees, the administration of her estate is not complete and it remains for the trustees to make appointments under her will trusts.

2. Dame Zaha left a will dated 2 April 2015 with a letter of wishes of the same date. She appointed the claimant ("Mr Schumacher") and the first to third defendants ("the Trustee Defendants") as her executors and will trustees. Where I refer to all four of them together, I will call them "the Trustees".

3. Dame Zaha left a substantial estate with a net value for probate of £67,249,458. The Trustees obtained a grant of probate on 14 December 2016. She ran a very successful international architectural practice which employed about 400 staff. In 2013 she set up a charitable foundation ("the Foundation") with the aim of protecting and exhibiting her works and enabling promising artists and architects of modest means to obtain education and training to develop their abilities. The Trustee Defendants are the trustee directors of the Foundation, although they are not parties to this claim in that capacity.

4. On 12 November 2020, I heard an application made by the Trustees for orders under Categories 2 and 3 as delineated in *Public Trustee v Cooper* [2001] WTLR 901. The Trustees applied under Category 3, based upon a total surrender of their discretion, because of a deadlock between them on a particular point. I gave an extemporary judgment on that point during the course of the hearing having agreed to accept the surrender of discretion. The Trustees also applied, under Category 2, for the approval of a decision that is regarded as being momentous, without the trustees surrendering their discretion. This is my judgment on the Category 2 application.

5. Richard Wilson QC and Jamie Randall appeared for Mr Schumacher; Elspeth Talbot-Rice QC, James Brightwell and Max Marenbon appeared for the Trustee Defendants.

6. Three additional defendants were joined to represent the interests of certain classes of beneficiary by my order dated 29 October 2020. Nicole Langlois appeared for the fourth defendant, Richard Dew for the fifth defendant, and Adam Cloherty for the sixth defendant. The Foundation was also joined as seventh defendant, but it has played no active part in the application.

7. I acknowledge the considerable assistance provided by all counsel during a hearing that covered a great deal of ground in a short space of time. The hearing was managed between them in a particularly helpful and cooperative way. I will come to describe what it is that the court has been asked to approve in due course. At this stage, I merely observe that the Trustees have not been entirely consistent in their approach to the Category 2 application seeking the court's blessing. It will be necessary to summarise the not-entirely subtle shift that took place between the application in its first manifestation and the way in which it was ultimately put to the court at the hearing on 12 November 2020.

Dame Zaha's Will

8. Dame Zaha's will, after leaving a number of legacies, set up will trusts. For the purposes of those trusts, there are three definitions which are material.

    (1) "The Companies": they were defined as comprising Zaha Hadid Holdings Limited ("ZHH") in which Dame Zaha held all the shares and was the sole director. ZHL had a wholly owned subsidiary Zaha Hadid Limited ("ZHL") which was the main trading entity through which she ran her architectural practice. Dame Zaha's companies also included Zaha Hadid Design Limited ("ZHD") and Zaha Hadid (Services) Limited ("ZHS") which were wholly owned by her.

    (2) "The Beneficiaries": for present purposes, there are three persons or classes that are relevant. The first is the claimant, Mr Schumacher, the second is "the past, current and future employees and office-holders of the Companies" and the third is the Foundation.

    (3) "Trust Fund": this comprised Dames Zaha's entire residuary estate.

9. Dame Zaha gave the Trustees wide powers of disposition and, at least in part, the hearing in relation to this judgment is given relates to the exercise of those powers.

10. Dame Zaha left a letter of wishes which bears the same date as her will. The material part of the letter of wishes is paragraph 3 where she says:

> "In my will, I have made substantial cash gifts to a number of named individuals. Save as provided below, I would like the remainder of my assets to pass to the Zaha Hadid Foundation the details of which appear in my will. In carrying this wish into effect, I would like you as far as reasonably possible to ensure the following:
> (i) …
> (ii) That my business continues to trade, adopting the same principles and business patterns as have been adopted in my lifetime.
>
> (iii) Patrik Schumacher should, as far as practicable, be in control of the business of ZHL and ZH Design Limited, and should benefit from at least 50% of their income and capital and the balance to be for the benefit of other employees."

11. In short, it is clear that Dame Zaha's wishes were that there should be continuity of her business and continuity of her design and architectural legacy through the Foundation; and, in addition, she desired that the three main beneficiaries should benefit from the assets she left behind.

12. I observe, so far as the second class of beneficiaries is concerned, that there have been different views amongst the Trustees about the extent to which Dame Zaha intended to

benefit past employees. A desire to benefit past employees of ZHL and possibly ZHD, inevitably created some difficulty for two reasons. First, with a business that has been in being for some years, and with the inevitable turnover of staff, the class of past employees would be large. Secondly, past employees include those individuals who are sometimes described as "bad leavers" as well as those who have made a major contribution to the business and, indeed, to Dame Zaha's vision. It follows that a class of past employees is both large and far from homogenous.

The Trustees

13. Dame Zaha chose her executors and trustees with care. Mr Schumacher is a director of ZHL and, as an architect, he worked alongside Dame Zaha in many of her projects. Clearly, he was highly valued by her and her will describes him as her "business partner". His importance to her practice is clear from the evidence as well as her will and letter of wishes. Since Dame Zaha's death, ZHL has continued to operate successfully under Mr Schumacher's leadership. This is indeed a considerable achievement.

14. The first defendant, Brian Clarke, is an artist in his own right and he was a close friend of Dame Zaha. The second defendant, Rana Hadid, is Dame Zaha's niece and was close to her. The third defendant Lord Palumbo is well-known for his interests in architecture and he was also a friend of Dame Zaha.

15. Mr Schumacher is a substantial beneficiary under the will and it can be seen from Dame Zaha's letter of wishes she intended he should also be a substantial beneficiary under the will trusts. He continues to operate ZHL for his own benefit and for the benefit of others. Clearly, there are and were conflicts arising from his roles as director, beneficiary and executor and trustee. The Trustee Defendants are independent of the architectural practice but were and are trustee directors of the Foundation which is in the class of beneficiaries under the will trusts and the default beneficiary. They face conflicts too. Although it is right to recognise that these conflicts arose because of the choices Dame Zaha made in appointing these four individuals, one of the issues that the court will have to bear in mind is the extent to which the Trustees have recognised and managed these conflicts in an acceptable fashion. Both sides, Mr Schumacher and the Trustee Defendants, have held and continue to hold strong feelings about the proper disposal of the assets held under the will trusts and it is clear too that they hold strong feelings about each other.

The section 50 claim

16. Substantial disagreements between Mr Schumacher and the Trustee Defendants led to the issue of this claim in September 2018. The nature of this claim in which the application is made is important context for the application. Mr Schumacher sought an order under Section 50 of the Administration of Justice Act 1985 for the removal of the Trustee Defendants and their replacement by one or more independent professionals and an order for them to resign as directors of ZHH which is the holding company for ZHL.

17. Mr Schumacher asserted that the Trustee Defendants had allowed their personal animosity towards him improperly to influence their decision-making. In his particulars of claim, he sets out in detail the basis upon which he made that allegation. A summary can be seen from paragraph 2. In short, he was saying, and indeed is saying, that the Trustee Defendants have failed to comply with their fiduciary duties.

18. The defence and counterclaim served by the Trustee Defendants runs to 35 pages. They deny that relations have broken down. However, they allege that Mr Schumacher has failed to distinguish between the roles of executor, trustee and director. Although they recognise that there were difficulties between the four of them, they allege that these difficulties were the result of Mr Schumacher failing to distinguish between his personal interests and his role as a fiduciary, compounded by his role as a director of ZHL. They said he was driven by a desire to control ZHL to the exclusion of the trustee directors. Their allegations, which I do not need to set out in detail in this judgment, were serious. The Trustee Directors counterclaimed that if the court concluded the relationship had broken down, then Mr Schumacher should be removed. The principal issue on both sides concerned whether the relationship had broken down and at a trial the court will have to consider these detailed allegations and counter-allegations although the extent to which detailed findings of fact will be needed is not clear.

19. The trial of the Section 50 claim was originally due to come on for hearing in September 2019. However, Heads of Agreement were produced shortly before that trial that were intended to provide a basis upon which the estate could be distributed. The trial date was vacated and the parties proceeded to apply those Heads of Terms. Unfortunately, relations broke down again and the section 50 claim was restored for a trial due to commence on 27 October 2020. By the time the pre-trial review came before me on 16 October 2020, it was clear that progress had been made between the parties. The recital to the order records that substantial agreement had been reached on the final administration of the estate, subject to the approval of the court.

20. Quinn Emanuel Urquart & Sullivan LLP, who act on behalf of the Trustee Defendants, issued an application notice on 22 October 2020. The application states it is made on behalf of all four trustees. The first paragraph relates to the surrender of discretion that was dealt with on 12 November 2020. The second paragraph asked the court to approve the claimant's and Trustee Defendants' decision to enter into a settlement agreement in the form attached to the application "… for the final distribution of the Will Trust and in full and final settlement of the proceedings". The third paragraph sought an order that the parties' costs of the approval application should be paid out of the estate. The application was listed for hearing on 29 October 2020.

21. There are a few points at this stage to note.

    (1) It is of importance that under paragraph 2 of the application, the Trustees sought a blessing on their decision to enter into the settlement agreement.
    (2) They also sought an order that the costs of the application be paid out of the estate but, of course, such an order would only be appropriate if the court were satisfied, on usual principles, that in the exercise of its discretion such an order should be made. This would necessarily involve considering

whether the surrender of discretion and the application for approval were justified.

(3) The agreement which the court was asked to approve provided for all the costs of the claim to be paid out of the estate. Hypothetically, had one side acted unreasonably in bringing or defending the section 50 claim, the court was not to have any oversight over the costs that had been incurred and I am told that these costs are very substantial.

(4) Without the court accepting a surrender on discretion on the first point, there could be no second stage to deal with. The agreement was conditional upon the surrender of discretion being accepted.

22. In the event, the hearing on 29 October 2020 did not proceed because the Trustees, at a rather late stage, realised that the interests of classes of the employee beneficiaries needed to be represented and an order was made for the joinder of the fourth, fifth and sixth defendants and the Foundation as the seventh defendant. Entirely understandably, the representative defendants needed time to consider their position and the hearing was adjourned until 12 November 2020. This was the minimum time that the representatives could have been given. I recognise that those representing the representative defendants and their counsel have undertaken a great deal of work in a short space of time. They made a significant contribution at the hearing, for which I am most grateful.

23. At the hearing on 29 October 2020, I expressed some concerns about what it was the court was being asked to do in relation to the Category 2 application and, in particular, that the court was being asked to approve a settlement that included terms for the distribution of the will trust's assets, the settlement of a major dispute between the trustees and approval of an indemnity for the Trustees for their costs out of the estate. I need say nothing more about the dispute other than to say that had the section 50 application come on for trial or, indeed, if it comes on for trial, the Trustees cannot assume that the starting point under CPR 46.3, that the Trustees should have an indemnity, would or will necessarily be the end point after consideration of the provisions of paragraph 1 of Practice Direction 46. Surprisingly, although I have to assume not by oversight, although the court was asked to approve the indemnity, it was not provided at that stage with any information about the costs that had been incurred.

The Settlement Agreement

24. I now refer to the agreement that is referred to in the application dated 22 October 2020. Some of its provisions have been changed as a result of further negotiations since the hearing on 29 October 2020 but the changes are not material for present purposes. Before referring to the principal clauses, I note that "dispute" and "proceedings" are both defined as meaning the current litigation between the parties, namely the section 50 claim. To my mind, it is striking that the Trustees have defined the dispute between them as being these proceedings, because the only relief that is sought in this claim, disregarding this application which has been tacked on, is the removal and replacement of the Trustees. I have already outlined the issues between the parties, which are essentially about their respective breaches of fiduciary duty and their deadlock. The court was not being asked in the section 50 claim to make a determination about the appointment under the will trust or, indeed, to give guidance to the Trustees. It was merely a removal and replacement application.

25. The material provisions of the agreement, in outline, are these.

(1) Clause 3 records that the parties have reached full and final settlement of the dispute (as defined) and clause 10 contains a wide release of claims between the Trustees.
(2) Clause 4 provides for a transfer of the shares that ZHH holds in ZHL to an Employee Benefit Trust ("the EBT"). For these purposes, Mr Schumacher has forsaken the 50 per cent share of ZHL in accordance with the letter of wishes. It is, however, only current employees and office holders of ZHL who are to be beneficiaries under the EBT. Past employees do not automatically qualify despite, at least on one view, Dame Zaha having expressed a wish that they should do so. Past employees merely have the right to apply to be added as beneficiaries of the EBT on the basis of agreed criteria, and only in accordance with the absolute discretion of the EBT trustees.
(3) Under clause 5, ZHH is to be appointed to the Foundation and is obliged to pay to ZHL £1,879,000 million. This is an agreed sum that is said to settle a disputed debt between these two entities.
(4) Under clause 6, the shares in ZHD are to be appointed to the Foundation. Furthermore, either ZHD or ZHH is required to pay £6,231,000 to the EBT or to ZHL. There are also provisions that enable those in the design cluster of employees working for ZHL to apply for transfer to ZHD.
(5) Under clause 7, provision is made for the disposition of Dame Zaha's works and the intellectual property in those works.
(6) Clause 8 concerns steps taken to follow through with the DAC Beachcroft investigation into allegations made by a whistle-blower against Mr Schumacher. They are intended to ensure that the EBT board is aware of the conclusions of the investigation so that the EBT may take such steps as it wishes.
(7) Under clause 9, the outstanding fees of Weil Gotshal, Forensic Risk Alliance and DAC Beachcroft are to be paid by ZHH. Those fees are of the order of £900,000.
(8) Clause 10, I have mentioned, contains the release.
(9) Clause 11 contains provision for legal costs which I, again, have mentioned.
(10) Finally, under clause 17, there are provisions that relate to the investigations into Mr Schumacher's alleged conduct.

26. Perhaps the most notable decision the Trustees ask the court to approve concerns ZHD. According to the letter of wishes, employees of both ZHL and ZHD were to be treated equally. However, the Trustees have reached a division of the estate essentially between ZHL, which is to be owned by the EBT, and the Foundation, which will own ZHH and ZHD. In broad terms, the division of the net assets of the will trust comes to approximately £40 million in value to the EBT, and £32.6 million to the Foundation.

27. Although there is no objection to tacking on the application for *Public Trustee v Cooper* relief to these proceedings for convenience, it is important not to lose sight of what the parties were seeking to achieve. They clearly wanted to settle a bitter dispute between them that had manifested itself in this claim and a dispute which is far wider than just removal and replacement of trustees. I observe it is clear from the substantial body of evidence that has been placed before me, there has been no rapprochement between Mr Schumacher and the Trustee Defendants or, indeed, the other way round.

The Evidence

28. At the hearing on 29 October, the court already had a body of evidence that was relevant to the application. It would not be warranted to refer to all the evidence in this judgment, but there are some aspects that must be mentioned.

29. Mr Schumacher's fourth witness statement refers in a number of paragraphs to the proposal he understood was being placed before the court at that stage, namely approval of the agreement. That is not, in fact, what the court is now asked to do. In paragraph 17 he expresses the view that he thinks it is fair and reasonable for his costs and the trustee defendants' costs to be borne by the estate and he says he expresses the view that in the context of the administration it would have been possible to avoid these costs in reaching agreement on how the estate would be distributed.

30. He goes on at paragraph 18 to acknowledge that he has a personal interest as one of the beneficiaries of the will trust, and then, he concludes his witness statement by saying:

> "While I do not want to return to the disputes about the defendants, it is well-documented that I consider them to have been hostile towards me and consider that they have sought to minimise the extent to which I benefit. The settlement agreement has been reached with the defendants and me essentially taking opposing sides. In those circumstances, I believe that the interests of all the potential beneficiaries have been adequately represented and the settlement agreement represents a fair outcome for everyone."

31. Mr Clarke in his fourth witness statement asks for the court to approve the agreement. As with Mr Schumacher, therefore, there is a mismatch between what he is asking the court to do and what the court is now being asked to do. There is also a rather surprising element at paragraph 31 of his witness statement. He says that the Trustees have managed to reach agreement and he goes on:

> "The agreement takes into account the fact there has been a protracted dispute between Patrik on the one hand and Rana, Peter and me on the other. In our view (and, it is also to be inferred, Patrik's) the settlement agreement provides for a reasonable division of the interests."

32. He then sets out those various interests. I simply observe it was surprising for Mr Clarke to say that he "infers" that Patrik agrees with his view. This would suggest, on its face, there has been very limited, if any, personal engagement between them.

33. The third witness statement of Ms Hadid was signed the day before Mr Clarke's fourth statement. Although that statement relates to the surrender of discretion, it is of direct relevance to the approval application. The Trustee Defendants appear to have approached the application from two different directions, separating out the surrender of discretion from the approval application. However, the two elements do not sit comfortably with each other. Mr Clarke's evidence, to which I have made brief reference, explains the process which the defendant trustees have adopted to reaching

agreement about the appointing out of the trust assets. In contrast, his fellow trustee, Ms Hadid, resurrects in her statement a range of serious allegations about Mr Schumacher that the Trustee Defendants would have relied upon and, indeed, may still rely upon at the trial of the Section 50 claim. It is right to recall, in addition, that Mr Schumacher's case in the Section 50 claim is that the Trustee Defendants have acted in a non-fiduciary manner by allowing their personal feelings about him to influence their approach to the administration of the estate. In summary, Ms Hadid says in her statement that Mr Schumacher:

> (1) Has as a track record of abusing veto powers even when held in a fiduciary capacity;
>
> (2) When exercising fiduciary powers, he has previously failed to distinguish between his own interests and the interests of those to whom he owes fiduciary duties; and
>
> (3) Has demonstrated a lack of commitment to basic principles of corporate governance.

34. Ms Hadid's evidence is disputed and it is not part of this judgment to make any findings about it. I do remark, however, that during the course of the last hearing (that is, dealing with the surrender of discretion) I felt it was necessary to ask Ms Talbot-Rice, who appeared for the Trustee Defendants, whether they were saying, as appeared to be the case, that Mr Schumacher was not fit to be a director of the EBT. After a period of time during which instructions were taken, the court was told that the Trustee Defendants agree to Mr Schumacher being a trustee director of the EBT and that he was a fit and proper person, provided there were checks and balances including the power to remove him. However, they did not consider he was suitable to be a sole director or to have what were described by Ms Talbot-Rice as "superpowers", in other words, a power of veto as chair of the board of the EBT. This was hardly a ringing endorsement of him as a fellow trustee exercising fiduciary powers and it remains the case that the Trustee Directors rely on the allegations they have made against Mr Schumacher, albeit they seek the court's approval to the terms they have agreed for the appointment out of the assets held under the will trusts.

35. Next in the chronology is a statement from Mr O'Rourke, who is a partner with Quinn Emanuel. Although I do not need to refer to it in any detail, I note that he, perhaps in response to the court's concerns about the Trustees' costs, provided some information on that subject. He says in terms at paragraph 19 that the Trustee Defendants are not asking the court to sanction the costs and are not asking the court to make a costs order in the section 50 proceedings either. He goes on to explain the steps the Trustee Defendants have taken to reach agreement. He says there had been more than 20 meetings between solicitors and also a mediation. There have been parallel streams of work, dealing with the claim on the one hand and negotiations relating to the administration of the estate on the other. He concludes by saying:

> "The trustee defendants worked with Mr Schumacher and have now signed an agreement providing for the completion of the

> administration of the estate and final dispositions out of the will trust. Given Mr Schumacher's entrenched role at ZHL, it is my view that any other different composition of trustees would have encountered the same difficulties and incurred a similar level of costs in doing so."

36. At paragraph 16, he explains the process that led to the agreement concerning the EBT. I do not need to refer to it in detail, although the process is one which I find concerning.

37. His evidence together with the very substantial costs that have been incurred suggest, whether rightly or not, that the Trustees have found it nearly impossible to work together. His description of Mr Schumacher's "entrenched role" is telling. Elsewhere, the evidence makes it clear that in order to reach agreement, the Trustees have had to make significant compromises.

38. Both Mr Clarke and Mr Schumacher then provided further evidence about the processes that were adopted in their dealings and this evidence is contained in their witness statements dated 4 November 2020. Even at this stage, there are no signs of an evidential convergence between the opposing camps. Mr Clarke gives evidence only about the views of the Trustee Directors and he ends his statement with a further telling remark. After saying that the Trustee Defendants did not reach their decisions, itself an interesting choice of language, about distributions in order to avoid a trial of the Section 50, he says:

> "We took and take the view that it was and is better for the beneficiaries for us to complete the administration of the will trust than to hand over to a new trustee, who would encounter exactly the same problems with Mr Schumacher that we encountered, but who would have had to start from ground zero and duplicate much of the work we have done."

39. His observation chimes with the evidence I have referred to earlier and, indeed, it chimes with Ms Hadid's statement. Similar indications about the extent of the estrangement between the trustees can be seen in Mr Schumacher's sixth statement. At paragraph 14, he remarks that it was always going to be difficult to give effect to Dame Zaha's wishes but he considers the agreement does this. He adds:

> "I understand Brian, Rana and Peter share this view, that we have found an appropriate solution to a difficult problem." [my emphasis]

40. Again, I note that he is not able to say from his own dealings with his fellow trustees that they found an appropriate solution, but merely that he understands that they share his view.

41. Finally, in terms of the procedure, I record that on 10 November 2020, the Trustees issued a further application notice, without having disposed of the earlier application notice, and it is this application that the court has been asked to deal with. Instead of the court being asked to approve the agreement, the court is now only asked to approve the determinations that are contained in clauses 4, 5, 6 and 7. It follows that the court is not asked to approve clause 3, which is the full and final settlement provision, clause 8, which concerns the DAC Beachcroft investigation, clause 9, which concerns fees, clause 13, which concerns the release and clause 11, which deals with the Trustees combined legal costs.

The Representative Defendants

42. Three persons have been appointed to represent classes of employee:

(1) Class 1: the current and future employees and office-holders of ZHL;

(2) Class 2: the former employees and office-holders of ZHL, and;

(3) Class 3: the former, current and future office-holders of the non-ZHL companies (ZHH, ZHD, ZHS and the Foundation).

43. In each case, their evidence and submissions have been helpful. In broad terms, they all wish there to be finality, although in the case of classes 2 and 3, for different reasons, they say that the proposals are unfair. I can, of course, fully accept that there is a universal wish for there to be an end to the dispute between the Trustees. It is entirely understandable that this dispute is damaging to morale and, indeed, is potentially damaging to the businesses.

The Law

44. I can summarise the relevant law quite briefly, because there is no dispute between the parties. The jurisprudence, as it relates to Category 2 *Public Trustee v Cooper* approvals is a well-developed area of law. It is helpful, however, to refer directly to paragraph 39-095 in Lewin on Trusts 20th ed. where the editors say this:

> "The approach of the court has been summarised both in England and overseas as requiring the court to be satisfied after proper consideration of the evidence that:
>
> "(1) the trustees have, in fact, formed the opinion that they should act in the way for which they seek approval;
>
> "(2) the opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at; and
>
> "(3) the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring."

45. They go on:

> "The second requirement involves two aspects. First: process. Has the trustee properly taken into account relevant matters and not taken into account irrelevant matters? Second: outcome. Is the decision one with a rational trustee could have come to?"

46. I am happy to adopt this helpful formulation. There are, however, several further matters that can usefully be highlighted and I take these from a number of observations made in Lewin at paragraphs 39-095 and 39-096.

> (1) It bears emphasis that the giving of approval is a matter of discretion. Trustees have no entitlement to demand a blessing if the relevant criteria are met. The court is exercising a broad discretion as part of its supervisory powers. Of course, as a general rule, the court will wish to be supportive and helpful to trustees if it is indeed the case that the decision is momentous. That said, and I agree with the observation made in Lewin, that the court acts with caution because the result of giving approval is that the beneficiaries cannot later complain that there has been a breach of trust, provided full disclosure to the court has been given.
>
> (2) The court is entitled to take into account the consequences of refusing to approve the trustees' decision. I observe, however, that this is not a case where the Trustees have faced conflict with the beneficiaries, and the approval will resolve a dispute not with the beneficiaries but between the trustees. The beneficiaries have only been brought in (other than Mr Schumacher, that is) at a very late stage.
>
> (3) A failure to acknowledge a conflict of interest and to explain how it has been managed may be fatal. Reference is made to the decision in *Hawksford Jersey Ltd v A* [2018] JRC 171. *Hawksford* is, however, a very different case to this one because there the court was asked to approve the sale of the trust's only asset, which was a property in London. The trustee failed to acknowledge the very substantial amount of fees the trustee was owed which on a sale would be paid. However, I accept the general proposition which the court put forward at [51] in the judgment, that where there are conflicts, the court will give heightened scrutiny to the decision.
>
> (4) There appears to have been little discussion in the authorities about how a conflict of interest may “vitiate” the decision the trustees have reached. It seems to me that for these purposes, "vitiate" is used in the sense of “impair”. It is not used in the alternative sense of the decision being entirely set aside or destroyed.

Conclusions

47. There is no doubt that the Trustees have power to make the dispositions for which they seek approval and they have decided, subject to obtaining approval, that they should

make the dispositions that are set out in the agreement at clauses 4 to 7. With the decision made by the court on the surrender of discretion having been made, the deadlock between the trustees has been broken, and a major obstacle to the disposition of the assets held by the will trust has been removed.

48. It seems to me that this application is a most unusual one. I accept in principle that the court is able to give its approval in a *Public Trustee v Cooper* Category 2 application where there is a dispute. What is unusual here is that the dispute is solely, or at least principally, between the Trustees. I have concerns both about the process that the trustees have adopted in reaching their decisions and the manner in which conflicts of interest have been managed. As a consequence, I consider there is a real risk that the decisions they have made are vitiated (in the sense in which I have used it) by the conflicts of interest.

49. It follows that I do not consider it is appropriate for the court to grant its approval on the basis requested in the application notice dated 10 November 2020. That is a matter of regret because I recognise that finalising the administration of Dame Zaha's estate and making dispositions under the will trust are much delayed already. I also recognise there is a general wish amongst the beneficiaries of Dame Zaha's will trust for finality. The beneficiaries (here, I leave out of account Mr Schumacher) wish to be able to concentrate upon the future. This sense strongly emerges from the evidence and from a letter sent by 57 senior employees of ZHL. The way they put it is:

> "The agreement resolves a long-term dispute that has been most unsettling for us as individuals vested with our careers in, devoted to the future and with our livelihoods depending on the continued prosperity of Zaha Hadid Architects, a practice we helped to build."

50. In the judgment given at the hearing on 12 November 2020, dealing with the surrender of discretion, I described the dispute between the Trustees as being “toxic”. Having reflected further since that hearing, I consider the description remains apt. The context in which the application is made is that the two trustee camps have been in dispute with each other since 2018 about the suitability of the other camp to play the part of an executor and trustee; and they were locked in a dispute long before the claim was issued. They have accused each other of breaches of their duties as fiduciaries and failures to recognise and/or deal with conflicts of interest. This clearly does not provide a promising platform from which to make an application for the court's approval which is premised upon the Trustees collectively having undertaken a process of decision-making that was careful and principled. As I have pointed out, far from the trustee directors putting aside their case against Mr Schumacher, they have positively relied upon it for the purposes of the surrender application. I do not see how they can, with any credibility, at the same time retreat from those allegations and promote the notion that the decision-making that has been adopted has been a proper one. Equally, it remains Mr Schumacher's case that the Trustee Defendants are motivated by hostility against him.

51. I have highlighted certain elements of the evidence. I have pointed to Mr Clarke, in his fourth statement, saying that he “inferred” that Mr Schumacher agreed with the Trustee

Defendants' view and, in his sixth statement, Mr Schumacher saying that he "understands" that the Trustee Directors share the view he expresses. These are glimpses into the true state of affairs and they indicate to me that the two camps have operated in separate silos. They have dispatched envoys to negotiate their dispute without any real engagement between the individuals whom Dame Zaha chose as her executors and trustees.

52. There are five inter-related reasons why I consider it is not appropriate for the court to give its approval:

(1) The reliance by the Trustee Defendants upon Ms Hadid's third statement at the recent hearing make it quite impossible for the court to accept that they have a genuine belief that the conflicts of interest under which Mr Schumacher is labouring, which he acknowledges, have been properly managed. Their evidence, in summary, is that he cannot be relied upon to manage conflicts. However, nothing in this judgment should be taken as the court endorsing the views that the Trustee Defendants have expressed about Mr Schumacher or their evidence.

(2) The parties mutually accuse each other of acting in a non-fiduciary manner. Those accusations remain unresolved. It is simply inconsistent for them to maintain those allegations and to ask the court to approve the dispositions they wish to make as trustees on the premise that they have acted properly as fiduciaries.

(3) The Trustees only invite limited scrutiny to their decision-making processes and the decisions they have made. I am much troubled by their decision to drop their initial application seeking an approval of the agreement and to replace it with a request for approval of part of the agreement. This has left a substantial mismatch between the evidence upon which they rely and the current application. The Trustees all understood when they made their witness statements that the court was being asked to approve the agreement. It transpired that the original application was put on one side, albeit the basis upon which that can happen in procedural terms is not explained. Leaving that procedural point aside, in the circumstances of this case, I do not consider it is open to the Trustees to withdraw part of their agreement from the approval application or at least, if they do so, they cannot expect the court to be willing to give approval to the elements they choose to place before the court. I have referred to the terms of the agreement and noted the fact that it settles the dispute (that is, this claim) and that the parties agree to their costs of the proceedings being paid out of the estate. Their personal interest in reaching that agreement conflict directly with those of the beneficiaries. I am told that the costs of the Trustee Directors alone in these proceedings are nearly £2.7 million. It is not an answer to say that if limited approval is given, the beneficiaries are entitled to challenge the legal costs. In reality, such a challenge is unlikely to happen because of the costs and risks that beneficiaries would face in making such a challenge.

(4) The evidence of the processes the Trustees have adopted is unsatisfactory. It is clear that each side has adopted an intransigent approach. Mr Wilson submitted there is nothing wrong with an agreement that is the fruit of strong disagreement. As a general principle, I agree. Disagreement can be a positive force and vigorous debate can lead to sound decisions. The position is different, however, where the Trustees have been at loggerheads for a period of years. When conflicts of interest are added to the mix, there is a degree of potential infection that could be fatal to the proper exercise of the duties of a fiduciary. The evidence is that the Trustees have achieved a compromise package that accommodates their strongly held views. However, it appears to be much closer to the compromise of a dispute than being the fruit of proper engagement between fiduciaries.

(5) Perhaps most importantly, the Trustees do not require the court's approval for the dispositions they wish to make. They have the powers they need and they can exercise them. Indeed, there is no reason to suppose that they cannot, or will not, do so. I accept that if they do proceed, they will be open to the possibility of a claim by the beneficiaries. However, they are already, on the basis of their revised application, willing to take that risk concerning the settlement of the dispute and the costs they have incurred in the Section 50 claim. It seems to me, in any event, the risk of a claim is a risk of their own creation.

53. In conclusion, therefore, I record that I have said nothing about the decisions the court is asked to approve. My reasons for declining to approve the provisions of the agreement that are placed before the court are more concerned with process than the decisions themselves. It is simply that I am not satisfied the dispositions are untainted by the approach the Trustees have adopted and the way they have or have not managed conflicts of interest. It will now be a matter for the Trustees to decide whether they wish to enter into the agreement without the court's approval. I should make it clear that nothing in this judgment disapproves of the dispositions they are proposing. They are within the Trustees' powers, and if they are satisfied that they are proper dispositions, and that they are a fair reflection of Dame Zaha's wishes, they should act accordingly, albeit without the court's approval.

54. I will dismiss both applications for approval and I will hear counsel now or at some point in the future on other issues including costs.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge