



Neutral Citation Number: [2024] EWHC 12 (Ch)

Case No: PT-2022-000316

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST (ChD)

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

Date: 15/1/2024

Before:

MASTER CLARK

Between:

(1) FOLDS FARM TRUSTEES LIMITED
(2) CUTTS TRUSTEES LIMITED
(as trustees of the Susan Mary Cutts Will Trust and the
Oliver Alfred Sidney Cutts Discretionary Will Trust)

Claimants

- and -

(1) OLIVER ALISTER SYDNEY CUTTS
(2) VICTORIA DELVILLE-CUTTS
(3) CHARLOTTE SPRINGALL
(4) CECILIA DELVILLE-LINDSAY
(5) CLOUDIA KINSVILLE-HEYNE

Defendants

Josh Lewison (instructed by **Wilson Solicitors LLP**) for the **Claimants**
Daniel Burton (instructed by **Penningtons Manches Cooper LLP**) for the **First Defendant**
The **Second Defendant** in person
Graham Stott (instructed by **gunnercooke LLP**) for the **Third Defendant**
Julian Reed (instructed by **Leonard Solicitors LLP**) for the **Fourth Defendant**
The **Fifth Defendant** in person

Hearing date: 17 October 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10am on 15 January 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

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Master Clark:

1. In this claim, trustees seek the court’s approval or “blessing” of a decision (“**the Decision**”) that is within their powers as trustees, but is of such significance and importance that they seek that approval.

Parties

2. The claimants, Folds Farm Trustees Limited and Cutts Trustees Limited (“the trustees”), are trustees of two trusts (“**the Trusts**”) established by:
 - (1) a deed of variation dated 14 August 1997 of the will of Oliver Alfred Sidney Cutts (“**the 1997 Trust**”);
 - (2) the will dated 18 December 2013 (“**the Will**”) (and codicil dated 25 March 2015) of Susan Cutts (“**the Will Trust**”);

For clarity, I refer to members of the Cutts family by their first names, without intending any disrespect.

3. The directors of the claimants are Nicholas Gooch, Philip Pollard and Paul Cutts. They, together with John Keen (sadly no longer alive), were the executors of the Will, and the original trustees of the Will Trust. Mr Cutts and Mr Keen were the original trustees of the 1997 Trust.
4. Mr Gooch is a chartered accountant. He became Susan’s accountant in the mid 1990s, and from 2009 was responsible for her financial affairs. Mr Pollard is a chartered surveyor, and a former partner (now a consultant) in Symonds & Sampson, a firm of estate agents, auctioneers and surveyors. Mr Cutts is Oliver’s nephew, and a lay director of the trustees.
5. Oliver and Susan were husband and wife. Together they had four children, Alister Cutts, Victoria Delville-Cutts, Charlotte Springall and Cecilia Delville-Lindsay, who are the first four defendants to the claim. I refer to them together as “the children”, and to Victoria, Charlotte and Cecilia as “the daughters”. The fifth defendant, Clodia Kinsville-Heyne is Victoria’s daughter.
6. The primary asset of the Trusts is a farm in the New Forest in Hampshire: Folds Farm, Godshill Wood, Fordingbridge, Hampshire SP6 2LU (“**the Farm**”), comprising various buildings, and farmland totalling almost 340 acres. The majority of the Farm is within

the Will Trust. The only assets within the 1997 Trust are 2 cottages and an adjoining paddock.

7. Oliver died on 15 August 1995, and Susan died on 11 April 2015. In these circumstances, the beneficiaries of the Trusts are:
 - (1) 1997 Trust: Susan's children, grandchildren and remoter issue that were living on 14 August 1997, or are born before 14 August 2075;
 - (2) Will Trust: Susan's children and remoter issue born before 11 April 2080.

8. The living beneficiaries are, therefore, the defendants and
 - (1) Cecilia's son, Edward (aged 19);
 - (2) Charlotte's 3 sons, Dylan (aged 18), Noah (aged 12) and Malachi (aged 3);
 - (3) Alister's son, Bertie (aged 9).

9. There are also unborn beneficiaries, whose interests will be affected if the trustees implement their decision. On 16 November 2022, Deputy Master Glover ordered that Cloudia and Edward be served with notice of the claim pursuant to what is now CPR 19.13. Edward has not filed an acknowledgement of service, so he will be bound by the order made in this claim. Cloudia did file an acknowledgement of service opposing the claim, resulting in her being joined as the fifth defendant.

10. However, Deputy Master Glover did not make a representation order in respect of the minor and unborn beneficiaries. However, without such an order, they would not be bound by the court's decision: see *Denaxe v Cooper* [2023] EWCA 752, at [169] onwards. To prevent that outcome, I ordered on the first day of the trial that Charlotte represent the interests of the otherwise unrepresented children and remoter issue of Victoria, Charlotte and Cecilia; and that Alister represent Bertie, and his (Alister's) unborn children and remoter issue.

The Decision

11. The claim form itself does not set out the Decision. It states that details of it are set out in Mr Gooch's witness statement dated 25 March 2022. Paragraph 62 of that statement sets out that the trustees have decided, subject to the court's blessing, to appoint the Farm to Alister in return for:
 - (1) a payment of £4.2 million, having taken advice from Savills, who valued it at £6.3 million (in October 2020);
 - (2) an overage provision requiring Alister to pay the trustees 10% of the gross proceeds of selling any part of the Farm;
 - (3) Alister accepting a holdover of Capital Gains Tax (CGT) that would otherwise be due on a transfer of the Farm;

(4) certain other restrictions;
all of which are set out in a Heads of Terms dated December 2021 (“**the HoT**”).

12. The HoT includes a provision that the trustees will repay, using the funds received from Alister, a loan owed by them to the Agricultural Mortgage Corporation (AMC). This will leave the trustees, Mr Gooch says, with about £3.75 million after settling that liability. The significant cash fund thereby provided would enable the trustees, he says, to appoint large capital sums to the daughters in the near future, while also having funds with which to help her grandchildren in due course. The trustees are not however asking for approval of any appointment to the daughters.

Procedural background

13. The claim was commenced on 12 April 2022. Alister, of course, supports the claim. Victoria, who has acted in person throughout, filed an acknowledgment of service opposing the claim and seeking:

“[t]hat Folds Farm is purchased at a true up to date market value. A new valuation by an independent professional completed and proceeds to be distributed equally. In line with my mother’s wishes as the Co. she envisaged has not worked.”

14. Charlotte’s acknowledgment of service opposes the claim, and states that she will seek the court’s directions as to how the first claimant should exercise its discretion.
15. Cecilia’s acknowledgment of service states that she does not oppose the claim, but will contest the proposed distribution “and other terms as outlined in” Mr Gooch’s statement. She seeks a revised proposal for distribution and overage “on a fair and equitable basis”.
16. On 17 May 2023, there was a directions hearing before Deputy Master Hansen, who joined Cludia as a defendant, and gave directions to trial. He gave the trustees and Charlotte permission to rely on updated expert valuation evidence; and, unusually, directed that the trustees’ witnesses (the directors) attend the final hearing for cross-examination.

Trustees’ evidence

Nicholas Gooch

17. Mr Gooch made 2 witness statements dated 25 March 2022 (“**Gooch 1**”) and 16 June 2022 (“**Gooch 2**”), and was cross-examined.
18. Mr Gooch gave his evidence in a careful and considered way. The overall tenor of his evidence was that the trustees were trying to strike a balance between Susan’s wish to

keep the Farm in the family and to provide some substantial benefit to the daughters. Cecilia's counsel criticised Mr Gooch as being evasive, but did not provide any examples, and I reject that criticism. Mr Gooch is also not to be criticised in my judgment for referring to Alister occupying part of the Farm under an oral FBT, when he was in fact holding over under a written FBT dated 18 August 2016 (which was referred to in Gooch 2). I consider that Mr Gooch was an honest witness doing his best to help the court.

Paul Cutts

19. Mr Cutts made 2 witness statements dated 25 March 2022 (“**Cutts 1**”) and 13 June 2022 (“**Cutts 2**”), and was cross-examined. He gave his evidence in an honest and straightforward way.

Philip Pollard

20. Mr Pollard made 3 witness statements dated 30 March 2022 (“**Pollard 1**”), 15 June 2022 (“**Pollard 2**”) and 10 May 2022 (“**Pollard 3**”).
21. Mr Pollard's evidence is admissible under CPR 8.5 and 8.6, but he was not tendered for cross-examination. The trustees relied upon a witness statement dated 11 October 2023 of their solicitor, Peter Bourke, who is also a long standing personal friend of Mr Pollard. Mr Bourke sets out that, following Mr Pollard being diagnosed with cancer, a minor operation in respect of it and “conflicting information” from Salisbury NHS, Mr Pollard has had unforeseen mental health issues, such that Mr Bourke was not satisfied he was even properly able to give instructions, let alone give evidence in court. No medical evidence as to Mr Pollard's condition was filed, and Mr Bourke is not of course qualified to give medical evidence. I accept, however, that a solicitor is able to form a view as to whether a person has capacity to give evidence; and I accept Mr Bourke's evidence that Mr Pollard was unable to do so.
22. As to the weight to be given to Mr Pollard's evidence, much of it sets out undisputed facts, or exhibits undisputed documents (such as the inspection reports of the parts of the Farm occupied by Alister and Victoria). Insofar as he explains the trustees' reasoning or seeks to justify it, he does so on behalf of the trustees; and Mr Gooch was cross-examined as to this. As to the factual matters he sets out concerning his dealings with Alister, the primary facts are not challenged, and whether they give rise to a conflict of interest is a matter for submissions.

Defendants' evidence

23. The Defendants' evidence comprised:
 - (1) Alister's witness statement dated 23 March 2023;

- (2) Victoria’s witness statements dated 24 May 2022, dated 24 May 2022 (2nd) and 29 June 2023;
- (3) Charlotte’s witness statements dated 24 May 2022 and 29 June 2022;
- (4) Cecilia’s witness statement dated 24 May 2022;
- (5) Cloudia’s undated witness statement;
- (6) Witness statement of Jennifer Curry dated 28 June 2023.

Background and context of the Decision

24. Oliver Cutts had a strong personality and a litigious nature. He had been a wealthy man, but his assets were depleted over the years by litigation and other difficulties. When he died in 1995, he left Susan with significant debts, some of which she settled by selling another farm, adjoining land and woodland. She farmed beef cattle, but her main passion was Cleveland Bay Horses. She ran a livery yard at the Farm, initially with Charlotte, and later with Victoria.

1997 Trust

25. The 1997 Trust contains (Schedule 2, para 2 of the Deed of Variation) a power of appointment in favour or for the benefit of:

“all or any one or more exclusively of the other or others of the Beneficiaries as the Trustees ... in their absolute discretion shall ... appoint.”

Will Trust

26. The Will Trust contains powers to:
 - (1) apply the capital of the Trust Fund for the benefit of such of the beneficiaries as the trustees think fit: clause 5.2.1 of the Will;
 - (2) exercise their discretionary powers over capital or income when and how they think fit without having to make payments to or for the benefit of all of the beneficiaries or to ensure equality among those who have benefited: clause 5.2.4 of the Will.
27. In addition, on 25 March 2015 (the same day as she executed her codicil), Susan signed a letter of wishes (“**LoW**”) to the trustees of the Will Trust. This set out that she did not believe that her children would be able to come to any agreement as to how her estate should be dealt with on her death. The directly relevant parts of it are:

“1) It is my wish that the Farm is not sold unless absolutely necessary and I would like Folds Farm to continue to be held by my Trustees for the benefit of my family. Whilst I do not want the Farm to be sold or broken up, I do appreciate that you may need to raise funds either to pay Inheritance Tax or to deal with the ongoing management of the Folds Farm; and in those circumstances I would like you identify the peripheral fields that could be

sold to best advantage to raise funds. In addition, you may also find that it is better to sell some of the surplus dwellings to raise funds rather than land. However, in considering this it is my clear wish that Folds Farmhouse should not be sold.

- 2) I would like the Farm to be retained for future generations of the Cutts family and in retaining it for the future generations of the Cutts family it clearly has to be run as a going concern. In giving consideration as to how it should best [be] run, I would like my Trustees to take into account any proposals made by my children. However, my Trustees must take all such proposals on the merit in which they are made and I would expect my children to make proper, credible, professional proposals and ultimately my Trustees must decide whether they consider the proposals made by any of my children to be credible and if two proposals are of a similar nature but competing, then my Trustees must have full discretion to decide which, in their judgement, is the best proposal for the future benefit of the Cutts family.
- 3) It is my hope that you will be able to have calm and rational discussions with my children (and grandchildren if over the age of 18) over the future occupation and ongoing management of Folds Farm. In the event that my children put forward sensible and credible proposals for the future running of the Farm, then I envisage the Trustees charging a reasonable and affordable rent to my children for the parts of the Farm that they occupy. If no proper and credible proposals are received from my children, or if they are unable to agree between themselves as to which part of the property they would like to occupy, then I would ultimately expect the Trustees to rent out the Farm out to an un-connected Third Party.
- ...
- 5) My son, Alister, has used Folds Farm as a base for his commercial contracting business, and whilst it is my belief that he has always used Folds Farm to run his business on the basis of a personal licence which I have granted to him; I would like my Trustees to enter into discussions with Alister in regard to him paying a proper commercial rent for the area that he occupies in respect to Folds Farm on the basis that he will make a contribution to the future return that my Trust receives from Folds Farm. Whilst it is my belief that I can request Alister to vacate the Farm at any time, and that he has no ongoing right to occupy the land, subsequent to such request, it is my wish that Alister should be able to operate his business in a similar manner to which he has done to date.
- 6) I would ideally like to see Folds Farmhouse remain as a base for the whole family and I envisage this being achieved by one of my children living there but if that is the case then the child that lives in Folds Farmhouse would need to make a credible proposal for how Folds Farmhouse remains available to my whole family and how they can pay a reasonable rent to enable my Trustees to ensure that the property is properly maintained in the future.

- 7) My daughter, Charlotte, is not currently involved in the farming business and I have no desire for her to become involved, but I would like my Trustees to help her in her ambition to [buy] her property, but I realise that any help they can give may be limited and I do not want to allow my ambition to help Charlotte detract from my primary aim of retaining Folds Farm for the benefit of my family.
- 8) If any of my children obstructs or makes any unreasonable (in the sole judgement of my Trustees) claims against my Estate then my Trustees in carrying out their duties shall ensure that that child does not benefit from the Trust; although their children may continue to do so.
- 9) In the Event that Alister refuses to pay a fair and reasonable rent on fair and reasonable terms for the land and property he occupies, he should be asked to vacate Folds Farm. In the event that Alister refuses to vacate Folds Farm then I request that Alister should not receive any benefit from anything under my Will, and his share should instead be passed to my other children. However, I would like to stress that this course of action should be as a last resort only.
- ...
- 11) My daughter, Victoria, who lives in one of the properties is currently in arrears of rent. If this situation should be continuing at the time of my death then she must be asked to make credible proposals for how she will pay off the arrears of rent. If she is not able to make a credible proposal for how she will pay off the arrears of rent then I anticipate that my Trustees will ask her to move from New Barn so that it can be let at an open market rent for the benefit of my Estate.
- 12) In the event of that I do not own Folds Farm at the date of my death, which I must stress I see as extremely unlikely, I would wish that my Trustees to distribute my Estate between 80% equally between my children and the remaining 20% equally between my grandchildren.

...

In making this Letter of Wishes I appreciate that I cannot fetter your discretion, but I hope that you will find it helpful that I have set out above my wishes in respect of my property. In appointing you as my Trustees I have placed my faith in you to act fairly and reasonably with my children, but I give you, my Trustees, the ultimate discretion to decide how to administer my Estate.”

28. The claimants were both incorporated on 11 February 2020. On 31 March 2020, the then trustees of the Will Trust appointed the claimants as trustees, and themselves retired. On 6 October 2021, the then trustees of the 1997 Trust appointed the claimants as trustees, and then retired.

The children

Cecilia

29. Cecilia has not lived at the Farm since Susan's death. She now lives in Gloucestershire in her own property. She is the oldest child, and has largely detached herself from the Farm and family politics.

Charlotte

30. Charlotte ran the livery yard with her mother, but this arrangement ended before Susan's death. Charlotte has her own equestrian holding (which she rents) approximately 10 miles from the Farm, at Home Farm, Landford. Historically, Charlotte's relationship with her siblings has had its difficulties, including one incident when Charlotte removed a caravan belonging to Victoria from the Farm and took it to Home Farm. Victoria reported this to the police, who investigated, but concluded that it was a civil matter.

Victoria

31. After Charlotte left the Farm, Victoria ran the livery yard with her mother, and lived at a property at the Farm called New Barn House. Susan required her to pay rent for New Barn House, and she built up significant arrears of rent (approximately £18,000 - £19,000). Susan told Mr Gooch that she was very concerned about this. Shortly after Susan died, Victoria moved into the main farmhouse ("**the Farmhouse**"), telling the trustees that she wanted to do so in order to look after the property and the chattels within it. Victoria's occupation led to a number of problems.
32. Over time Victoria accrued arrears of rent for the Farmhouse and the livery yard. Alister, Charlotte and Cecilia each complained that Victoria had removed and sold some of Susan's possessions, but the evidence was unclear, so the trustees were unable to reach a firm view on the allegations. Victoria also alleges in her evidence that her siblings removed chattels. The trustees had to instruct solicitors (Wilsons) to tackle these and other problems. I am not required, and am in any event not in a position to reach a conclusion as to the merits of the various allegations and counter-allegations made by the children against each other.
33. In addition, Victoria was interested in running a camping business from a field at the Farm. Arrangements for her to do so with effect from the 2015 camping season had been put in place during Susan's lifetime. The trustees sought to formalise these arrangements and entered into negotiations with her. However, dealing with her occupation proved difficult: she built up further arrears of rent and did not carry out property repairs and maintenance (as shown by condition reports obtained by the trustees). Ultimately, Victoria left Folds Farm in the first week of November 2018. She still owes arrears of rent totalling £13,743.

Alister

34. Alister has a commercial contracting company, Earlcoate Construction and Plant Hire Limited (“**Earlcoate**”), which occupied a yard at the Farm during Susan’s life with her consent. He did not pay rent but claimed he, or Earlcoate, had been providing various services to Susan in lieu of rent.
35. After Susan’s death the trustees allowed Earlcoate to continue to occupy the commercial yard, but in return for rent. They also allowed Alister to occupy most of the Farm, excluding an area they offered to Victoria, and to run the farming business. Having taken advice, they agreed a rent with Alister which was around 27% less than the full market rent. They entered into a farm business tenancy (FBT) with Alister for a term of one year commencing on 1 February 2016. On its expiry, the trustees were advised that the FBT would not come to an end until formally terminated (by either side), and allowed it to roll over. There were unsuccessful long-running negotiations during 2019 for a new FBT.
36. After Victoria left the Farm, the trustees offered Alister occupation of the remaining farmland and the stables, which he accepted. The trustees treated this as a grant of additional land to Alister under the terms of the 2016 FBT. Alister carried out property repairs and maintenance work on the stables and livery yard. He has also carried out some works to the Farmhouse and the Coach House. He paid for some refurbishment works to be carried out at No. 1 Folds Farm Cottage (an expense the trustees have been offsetting against the rent due from Alister).

The Trusts’ financial position

37. The Trusts’ financial position as set out in their accounts, and summarised by Mr Gooch is as follows:
 - (1) The debts of the Will Trust are greater than £400,000, whilst the value of the cash assets is only approximately £12,000 for both trusts. Since 31 March 2021 the trustees have refinanced and consolidated the debts into a single interest only mortgage with AMC. For the reasons set out below, the trustees could only pay this debt by selling at least part of the Farm.
 - (2) There is no money in the Will Trust that could be used to improve the Farm or to make significant capital provision for any of the beneficiaries.
 - (3) Although the assets within the Will Trust have significant value, their nature means that the income they generate is comparatively modest, especially after deducting expenses and income tax. For the year ended 31 March 2021, for example, the net income was £39,372, of which £38,850 was distributed to the daughters. In the previous year, the net income was £23,513 and £5,000 was

distributed to the daughters. (Alister has never received income payments from the Trusts.)

- (4) Alister does not pay a full open market rent. However, the trustees consider that the shortfall is made up by the expenditure incurred by Alister on maintaining and improving the Farm, so that the rent is a notional open market rent. The advice of Mr Pollard, an RICS registered valuer, is that the rental income (taking into account the expenditure incurred by Alister), could not be significantly increased without very significant expenditure being incurred. As noted, there are no cash funds available and borrowing further funds to make such investment in the Farm is not an attractive option, if it would be feasible at all.
 - (5) During Susan's lifetime she had found it difficult to make the business a viable trading entity, and, therefore, since her death, the trustees have needed to address a lack of investment in property maintenance, as well as having to fund interest on the borrowings taken out by Susan.
38. The trustees acknowledge that there is potential to increase the income the Farm generates, but doing so would require a significant investment of capital. For example, the Farmhouse is in a poor state of repair, and is currently not in a fit state to be let out. The Coach House has planning consent for conversion into holiday lets. There is scope to set up an in-hand commercial shoot. In each case, however, success would depend upon the owner being ready, willing and able to invest substantial capital, time and effort.

Events leading up to (and after) the Decision

39. Although the terms of the Trusts mean that Susan's children and grandchildren are all potential beneficiaries, in practice, the trustees have so far treated Susan's four children as the principal beneficiaries.
40. On 30 June 2019, the administration of Susan's estate was completed. The trustees produced updated estate accounts, and sent them to the children by email.
41. On 27 September 2019, the trustees wrote to the children, enclosing the Trusts' accounts from Susan's death to 31 March 2019; and setting out the debts and liabilities that needed to be paid to put her estate on a secure financial footing, without any borrowing. They informed the children that they had decided to sell New Barn Cottage for £625,000 to £650,000 to achieve this.

42. This letter produced a rare display of unanimity by the children, who united in opposing the sale of New Barn Cottage, to the extent that (on 15 October 2019) Alister agreed to pay the fees of a solicitor to write to the trustees on behalf of all of them to prevent the sale. I note that in his email of 13 November 2019, Alister describes Mr Pollard as “a slippery character” and “quite incompetent”.
43. It would appear that the trustees revisited their decision as a result of this response – they did not pursue it. In November 2019 they proposed a 20 year FBT to Alister, who sent a detailed response back, but did not accept it.
44. The trustees had by then also heard from Victoria, who considered that the rent Alister was being invited to pay was too low. The trustees started to consider the longer term future of the Farm (including whether to sell some or all of it), and decided it would no longer be appropriate to enter into a long term tenancy with Alister. On 7 February 2020, Mr Gooch wrote again to the children setting out the two options the trustees were considering:
 - (1) the sale of the Farmhouse and around 20 acres to go with it; or
 - (2) the sale of the whole of the estate.
45. He then spoke by telephone on 10 and 11 February 2020 to each of Victoria, Charlotte and Cecilia about the extent to which each of them needed income or capital from the Trusts; attendance notes of these conversations were in evidence.
46. Victoria’s position was that she needed capital (to enable her to buy a house), that income was not particularly helpful, and she was prepared to see a sale of the whole estate. Charlotte also expressed a need for capital. Cecilia said that capital was more important to her than income, and that she would probably prefer the whole property to be sold.
47. The trustees appear at that stage to have obtained from Savills an informal valuation of the Farm at this stage of £6.2 million. This was not in evidence.
48. The trustees then had discussions about the possibility of selling the Farm or appointing it to Alister. This included discussions with Alister about the possibility of an appointment to him in return for payment of a balancing sum, which the trustees could then use to make much more meaningful provision for the other beneficiaries. During this period, the trustees did not initially pursue their discussions about a new FBT. Alister continued to pay rent, but at a lower rate than requested. The trustees decided that the best way to manage this shortfall was to set it off against the sums Alister had spent on refurbishment/improvement work at the Farm.

49. On 9 September 2020, the trustees received an Opinion from counsel that they could reasonably sell the Farm to Alister for £3.5 million, plus an overage agreement that would oblige him to pay 25% of the proceeds of sale to the trustees if the Farm were sold outside the family. This was premised on the value of the Farm being £6.2 million. This Opinion was sent to the children.
50. Victoria replied initially on 25 September 2020, confirming that she objected to the trustees' proposal, and stating that her reasons would follow. She then sent details of various properties to Wilsons, with the aim of persuading the trustees that Savills' valuation of the Farm was too low.
51. Victoria followed this with a more detailed reply on 27 September 2020, arguing that Savills' initial valuation of £6.2 million was too low – and a valuation of £10 million would not be unreasonable – and that the level of the discount the trustees were proposing to apply to the valuation amount of £6.2 million was too great. She also did not accept the trustees' methodology of discounting to reflect the overage agreement, then discounting to reflect a division of the funds to be paid for the appointment between the four children.
52. The trustees discussed these points with Victoria, Cecilia and Charlotte at a meeting on 14 October 2020, which they followed up with a letter dated 30 October 2020. An email Victoria sent on 3 November 2020, written on the basis that it reflected the views of Cecilia and Charlotte as well, confirmed that they did not object to a sale of the Farm to Alister, but did object to the discounted sum the trustees were minded to ask Alister to pay. They repeated their view that Savills' valuation was too low, and stated that they intended to obtain a valuation of their own to demonstrate this. They also felt that the proposed discount was too significant and would result in an unequal distribution as between the four children. The email also asserted that the trustees had no power to sell the Farm at a discount and that to do so would be "actionable as a breach of trust."
53. The trustees considered, and responded to these objections. They continued their negotiations with Alister. On 12 March 2021 Mr Gooch (on behalf of the trustees) and Alister agreed that he would buy the whole of the Farm for £3.8 million. The trustees then instructed their solicitors to apply to court for approval, who obtained a further Opinion from counsel (this was not in evidence).
54. On 11 May 2021, the trustees' solicitors wrote formally to Alister setting out that:
 - (1) the trustees were considering the possibility of appointing the Farm to him, subject to certain conditions, including provision for him to pay an agreed sum to the trustees;

(2) the daughters had asked the trustees to consider the possibility of offering the Farm for sale on the open market, with Alister being allowed to bid if he wished; and asking for his views.

55. Alister's response on 7 June 2021 to this was incandescent. His position was that he had an agreement with the trustees, subject only to the court process and contract. He stated:

"I am strongly against the sale of the farm on the open market under any circumstances. If this were to proceed then I would have little choice but to take the following action:

- a. I would seek substantial compensation for the significant investment that have made in the farm since 1989 and more substantially since 2002 along with interest. The total sum would be significant.
- b. I would seek to receive 20% share of the net proceeds
- c. I would make a claim for Proprietary Estoppel, quite simply I have been led to believe, by written correspondence and by the conduct of the Trustees that can expect to be given an interest in the land for consideration."

56. In July 2021, the trustees reached a final decision, and recorded their reasoning in a detailed 9 page note ("**the July 2021 Note**"), which they sent to the daughters. The benefits (as perceived by the trustees) of this course are summarised in paragraph 66 of Gooch 1:

"66.1 It would greatly increase the likelihood of Folds Farm remaining in the ownership of a member of the Cutts family in the future, as Susan wished.

66.2 It would place Folds Farm in the ownership of someone who has the desire and the means to invest properly in its future; something the Trustees do not have the resources to do.

66.3 It would give the Trustees a significant cash fund they can use to provide much more meaningful and prompt benefit to the [children]. Rather than having to spread a relatively modest annual income between several [children] (a problem that will become even more acute once the Trustees wish to provide for the next generation of Susan's family), the Trustees would be able to appoint large capital sums to each of Susan's daughters in the near future while also having funds with which to help her grandchildren in due course. They could provide each of Victoria and Charlotte with significant assistance in buying properties of their own and give Cecilia -who already owns her home -funds she can use in other ways of her choosing. It would also free up a fund the Trustees could invest -with minimal administration fees to pay - so that they are equipped to help Susan's grandchildren in due course.

66.4 It would greatly reduce future administration expenses."

57. On 19 October 2021, Charlotte proposed that the trustees appoint to her New Barn House and 50 acres of surrounding land inclusive of sporting rights and Rural Payment Entitlements.
58. On 16 December 2021, Alister confirmed to Mr Pollard that he was willing to pay £4.2 million for the Farm; and shortly thereafter the HoT were sent to him.
59. On 14 January 2022, Victoria proposed that she be appointed the Farmhouse, “the bungalow the gardens including the coach houses the green houses the garage, all of the gardens the tennis court swimming pool garden paddocks little green hill & fur-tree field”.
60. On 17 January 2022, the trustees held a telephone meeting at which they considered Charlotte and Victoria’s proposals. Mr Cutts left before the meeting ended but Mr Gooch phoned him and discussed the matters with him. The trustees were unanimous that they should go ahead with the proposal to appoint the Farm to Alister for a payment of £4.2 million.
61. On 19 January 2022, Alister confirmed that he was in principle happy with the HoT.
62. By February 2023, the trustees had obtained a further valuation of the Farm from Savills, at £6.8 million; and Charlotte and Victoria a further valuation from Fox Grant at £10.125 million. The trustees’ solicitors wrote to Alister’s solicitors setting out their understanding from previous negotiations that £4.2 million was at the upper limit of what Alister would consider affordable, and asking him to provide a more detailed explanation as to why.
63. On 15 March 2023, Alister’s solicitors responded, stating that:
 - (1) Alister had a loan agreed in principle over a 15-year term with a High Street bank;
 - (2) he would cover all costs and fees associated with the purchase;
 - (3) the interest payable on the loan had increased by over £1 million from that which would have been payable on the loan when Alister first agreed to the £4.2 million purchase price;
 - (4) £4.2 million remained the maximum which Alister was willing to pay for the Farm, given the increase in interest and other factors.
64. The trustees’ position remains that they seek approval of the Decision as originally sought, for reasons which are set out in Pollard 3 at paragraph 12:

- “12.1 But for the challenge to the trustees' decision by Victoria and Charlotte the trustees would have appointed the Farm to Alister as proposed in 2021.
- 12.2 The amount the trustees decided to ask Alister to pay is not directly related to the value of the property so an increase in the value of the property would not automatically lead to the trustees seeking an increase in what he is asked to pay.
- 12.3 The variance between the valuers who have all produced valuations shows the trustees' difficulties in considering the value of the Farm but, as I hope we have made clear, that is not the only factor the trustees took into account when making their decision.
- 12.4 Borrowing costs generally and the Bank Base Rate has increased significantly since 2021.”

Legal principles

65. This claim falls within category 2 in the well-known categorisation of cases in which trustees may seek the approval of the court set out in *Public Trustee v. Cooper* [2001] WTLR 901: 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 the action”.
66. As explained in *Lewin on Trusts* at 30-095:
- “The court’s function where there is no surrender of discretion is a limited one. It is concerned to see 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, ignoring irrelevant, improper or irrational factors; 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, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.”
67. The duties of the court in a category 2 case depend on the circumstances of each case, but the court has to be satisfied, after a scrupulous consideration of the evidence that:-
- (1) the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;
 - (2) the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at;

- (3) the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.

Public Trustee v. Cooper; approved in *Cotton & Moore v Brudenell-Bruce* [2014] EWCA Civ 1312; [2015] W.T.L.R. 39 at [12]

68. As to (2), the law is set out in *Lewin* at para 39-095:

“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 which a rational trustee could have come to? It is often necessary for the trustees to take expert advice, e.g. as to the terms of a sale, and if they do so they are not necessarily obliged to look behind the advice; if the advice received was sufficient to support their decision, then the court should not interfere merely because the advice might turn out to be wrong ... Equally, the requirement that the decision is one that a reasonable body of trustees could “properly” have arrived at necessarily requires the court to have regard to whether a proper decision-making process was followed, and that the trustees omitted from their decision any irrelevant, improper or irrelevant factors. Failure to acknowledge any potential conflicts of interest and to explain how they have been managed may be fatal.”

69. However, as explained at para 39-096:

“The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees’ deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees’ proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). ... But the fact that the court is asked to approve the trustees’ decision without the benefit of full disclosure and cross-examination cannot, by itself, cause the court to withhold its consent where there is sufficient and appropriate material upon which it can act. The court is entitled to take into account the consequences of refusing to approve the trustees’ decision, which might leave the trust assets in jeopardy or the trustees facing the unenviable task of making precarious choices in difficult circumstances under the shadow of a possible claim for breach of trust by beneficiaries who have already demonstrated their hostility in opposing the application in the first place.”

70. Thus, the burden of proof is on the trustees, and para 39-097 sets out their role in the application:

“[T]hey must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court’s assessment of the proposed exercise. The

trustees must also demonstrate that they have concluded how best to exercise their discretion and that they intend, subject to the approval of the court, forthwith to act on that conclusion, since they are not entitled to raise hypothetical questions. But it is not necessary for the trustees to give a detailed account of the process by which they reached their decision.”

Agreed matters and issues

Agreed matters

71. On the trustees’ application, the represented parties are agreed that:
- (1) the trustees have the power to do what they have decided to do (by the Decision);
 - (2) the trustees have made the Decision;
 - (3) the Decision is a momentous one;
 - (4) the trustees have not surrendered their discretion to the court.

Issues

72. The issues are therefore:
- (1) whether the Decision is one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause(s) could properly have arrived at, and, in particular,
 - (i) whether there are any relevant matters which the trustees have failed to take into account;
 - (ii) whether there are any irrelevant matters which the trustees have wrongly taken into account;
 - (iii) whether the Decision is one which a rational trustee could have come to;
 - (2) whether the Decision is vitiated by any conflict of interest on the part of any of the trustees.

Victoria’s position

73. Victoria put forward the following objections to the court approving the Decision:
- (1) the LoW required the trustees to treat the children equally, and not to favour Alister over the daughters;
 - (2) Mr Pollard and Alister’s relationship was too close and this affected the making of the Decision;
 - (3) The discount given to Alister is so high that it is irrational;
 - (4) The trustees have failed to take into account the fact that Alister has benefitted to a far greater extent than his sisters by receiving Farm subsidies and low rents, so that the only rational decision is that he should have no discount;
 - (5) Alister is driving the trustees: she relies upon Mr Gooch’s evidence (at para 68.8 of Gooch 1) that Alister has threatened to sue the trustees if they do not appoint the Farm to him and has made it clear that he would resist any attempt to remove him from the Farm.

- (6) Paragraphs 5 and 9 of the LoW require the trustees to show “tough love” to Alister and thereby protect the daughters, and they have not done so;
- (7) Alister has been favoured by the trustees by being allowed to receive Farm subsidies, and this has enabled him to fund the mortgage he is obtaining to buy the Farm.

Charlotte’s position

74. Charlotte’s position is that, in making the Decision:

- (1) The trustees failed to take into account the following relevant matters:
 - (i) that the value of the Farm could be increased by serving a notice to quit on Alister so that it would be valued as being with vacant possession;
 - (ii) by appointing the Farm to Alister, the administrative costs of the Trusts (including the costs of this claim) would fall only on the daughters and not on Alistair;
 - (iii) the financial imbalance between the value received by Alister and the amount proposed to be paid to the daughters;
- (2) The trustees failed properly to consider:
 - (i) the actual intention of Susan as articulated in the LoW;
 - (ii) the wishes and needs of the daughters;
 - (iii) the value of the benefits already conferred on Alister, including below market rents and farm subsidies;
 - (iv) the terms of the overage agreement to which the appointment of the Farm is subject;
 - (v) the availability or otherwise of hold-over relief for the CGT which will arise on the sale or transfer of the Farm.
- (3) The trustees took into account the following irrelevant matters:
 - (i) the threats made by Alister in his letter dated 7 June 2021 (set out at para 55 above);
 - (ii) the fact that since Alister is in actual occupation of the Farm, possession proceedings were likely to be necessary to achieve a sale on the open market;
 - (iii) Alister’s contention that he enjoyed protection under the LTA 1954 in respect of the commercial yard;
 - (iv) Alister’s contention that he had acquired an interest in the Farm by way of proprietary estoppel;
 - (v) Alister’s costs of borrowing.
- (4) the trustees’ decision was vitiated by a conflict of interest arising from Alister’s allegation that he had a proprietary estoppel claim based on the fact that he had been

“led to believe, by written correspondence and by the conduct of the Trustees that I can expect to be given an interest in the land for consideration”.

75. Charlotte’s counsel also criticised the trustees for not putting before the court minutes of the various meetings at which the trustees considered:
- (1) reducing the rents charged to Alister;
 - (2) giving Alister all of the farm payments/entitlements/subsidies/grants;
 - (3) Alister’s threat to litigate with them in his letter dated 7th June 2021;
 - (4) the Savills valuation in November 2020;
 - (5) the increased value in the updated valuation prepared for the purposes of these proceedings; or
- the resolutions recording what the trustees actually resolved to do following any meetings at which they considered how to exercise their discretion.

Cecilia’s position

76. Cecilia adopted Charlotte’s position, and made the following further points:
- (1) The trustees’ evidence and disclosure is insufficient to discharge the burden of proof on them;
 - (2) The trustees have not shown any proper inquiries on behalf of the estate into the issue of the subsidies received, their value to the estate, or their impact on the sale value of the Farm;
 - (3) The trustees have not, or not properly, considered the daughters in making the Decision;
 - (4) Since the trustees’ costs of the claim will be paid from the trust assets, this unfairly favours Alister;
 - (5) The level of the “discount” (i.e. the difference between the market value and the sum to be paid by Alister in return for the appointment of the Farm) is so outside the boundaries of reasonableness that no reasonable body of trustees could arrive at it;
 - (6) The only way to determine the true value of the Farm is by a sale on the open market;
 - (7) The trustees failed to consider an increase in the proposed “price” after Savills increased their valuation from £6.4 million to £6.8 million – this shows a bias towards Alister;
 - (8) The trustees failed properly to “analyse” the Letter of Wishes;
 - (9) The trustees were wrong to make the Decision without seeing any financial information from Alister;
 - (10) The trustees have favoured Alister by
 - (i) allowing him into occupation;
 - (ii) charging him a low rent;

- (iii) failing to take into account the farm subsidies received by Alister when setting his rent;
- (11) There is a clear link on the evidence between Alister and Mr Cutts, and Alister and Mr Pollard, in each case showing a conflict of interest.

Analysis and conclusions

Discretionary trust

- 77. The framework for the court’s decision is that the Trusts are discretionary. None of the beneficiaries have an entitlement to either income or capital; the decision to benefit a beneficiary is one of the unfettered discretion of the trustees. It is therefore unarguable that each of the children is entitled to an equal division of the assets of the Trusts, or that the trustees could only properly exercise their discretion by treating the beneficiaries equally. It is inherent in a discretionary trust that some beneficiaries may be treated more favourably than others.
- 78. The existence of the LoW does not affect this position. First, it expressly acknowledges that it cannot fetter the trustees’ discretion and gives the trustees the ultimate discretion to decide how to administer Susan’s estate. Secondly, the only circumstances in which the LoW contemplates an equal division between the children is in the “extremely unlikely” event that Susan does not own the Farm at the date of her death. That is not this case.
- 79. The proposed appointment is fundamentally different from the exercise of the power of sale of a trust asset (to a third party or to a beneficiary) where there are absolute vested interests in capital. That would ordinarily require testing on the open market and obtaining the best price reasonably obtainable (see e.g. *Killearn v Killearn* [2011] EWHC 3775 (Ch)).
- 80. Alister is a beneficiary upon whom the trustees are entitled to confer a benefit greater than that conferred upon his sisters. The fact that there is an element of gift in the proposed exercise of their discretion, and that the amount of the gift is greater than that contemplated as being conferred upon the daughters are not grounds of themselves for challenging the Decision.

Disclosure

- 81. The only formal record in evidence of the trustees’ decisions are:
 - (1) the July 2021 Note; and
 - (2) the minutes of the meeting on 17th January 2022, when the trustees considered and rejected Charlotte and Victoria’s proposals that parts of the Farm be given to them.

82. As noted, Charlotte and Cecilia’s counsel submitted that by not providing minutes and resolutions in respect of all their decisions, the trustees had not put sufficient material before the court to justify approval of the Decision.
83. As to this, the basis of the Decision is explained fully and in detail in the July 2021 Note and Gooch 1. The trustees’ reasoning upon receiving Savills’ updated valuation is set out in Pollard 3. Mr Gooch was also cross-examined on the trustees’ reasons for the Decision.
84. It is correct that the trustees have not disclosed all the written records of their decisions. However, the question for the court is whether the trustees have provided sufficient and appropriate material upon which the court can act. In my judgment, the trustees have sufficiently explained their reasoning, and the factors taken into account by them. In this context, it is relevant that applications for a blessing are normally decided on a summary basis, without either disclosure or cross-examination.
85. If and to the extent that the daughters wished to challenge the accuracy and completeness of the July 2021 Note, or the trustees’ evidence as to their reasoning process, then it was open to them to seek an order for disclosure at the directions hearings in the claim, but they did not do so.

Valuation

86. The court’s role is not of course to value the Farm.
87. The following formal valuations of the Farm have been obtained:

Valuation date	Amount £m	Valuer	Valuer’s client
11 April 2015	5.05	Symonds & Sampson LLP	Susan’s estate (probate valuation)
17 Aug 2020	4.48	Strutt & Parker	Commercial Mortgage Solutions (Alister’s proposed mortgagee)
1 Oct 2020	6.3	Savills	Trustees
27 Nov 2020	8.055	Fox Grant	Victoria, Charlotte & Cecilia
5 Jan 2023	6.8	Savills	Trustees
7 Feb 2023	10.125	Fox Grant	Victoria & Charlotte
20 Apr 2023	6.4	New Park Consultancy	Alister

88. Fox Grant's valuations are the highest. On their valuations, the increases in the value of the Farm were:
- (1) £2.07 million (26%) between late 2020 and early 2023 (just over 2 years);
 - (2) £3.01 million (60%) between 2015 and 2020;
 - (3) £5.07 million (100%) between 2015 and 2023.
89. By contrast, the Savills valuations show increases of:
- (1) £0.5 million (8%) between late 2020 and early 2023;
 - (2) £1.25 million (25%) between 2015 and 2020;
 - (3) £1.75 million (35%) between 2015 and 2023.
90. As set out below, the trustees have given full and detailed consideration to the Fox Grant valuations (including obtaining advice from Savills). Mr Pollard's written evidence puts forward a number of reasons why the trustees do not consider that they should rely on Fox Grant's valuations; and Mr Gooch gave detailed oral evidence as to the trustees' consideration of Fox Grant's February 2023 report.

Reasonableness of the Decision

91. In my judgment, the evidence establishes that the trustees have taken into account the following relevant factors in reaching the Decision:
- (1) The Farm is valuable but illiquid trust property, which generates only modest income for the beneficiaries (£34,000 in y/e 31 March 2023), who are numerous in number and, in the case of Charlotte, Victoria and Cecilia, in need of financial help.
 - (2) The secured debt (£452,681 as at September 2023) gives rise to substantial interest charges (£27,000 in y/e 31 March 2023). This favours raising cash to discharge that debt.
 - (3) There is no consensus between the daughters as to what the trustees ought to have done. Their proposals are incompatible with each other, and do not involve adding liquidity to the trust fund.
 - (4) The children do not get on with each other, as Susan herself set out in the LoW, and is recognised by all parties. For example, Victoria admits there is "a significant and deep rift between the four children"; and Cecilia refers to "this broken disjointed family". This, and the conflict when Alister and Victoria both occupied of the Farm, mean that there is no realistic prospect of the children

amicably sharing its occupation (and in any event, Cecilia does not wish to do so).

- (5) Susan expressed (in both her conversations with Mr Gooch, Mr Pollard and Mr Cutts; and in the LoW) her clear wish for Folds Farm as a whole to remain in the Cutts family; but this cannot be realised by the four children co-owning the Farm. In these circumstances, Susan's wish could be fulfilled by one of the children taking on the Farm and preserving generational ownership (albeit within one branch).
 - (6) Only Alister is in a position, both financially and practically, to take on the Farm and continue it as a going concern. Since Susan's death, Alister has invested significant effort and funds in improving the Farm.
 - (7) No other beneficiary has evidenced the financial ability to make such a payment, or the experience to preserve the Farm for future generations.
 - (8) Although Alister's evidence is that he wishes the Farm to stay in the Cutts family (to the extent of excluding his own children from inheriting it if they do not wish to carry on the farming business), the other beneficiaries can be protected from the risk of his selling it by an appropriately drafted overage agreement. Alister has agreed to the overage provisions binding his direct descendants.
92. As to the "price" of £4.2m, the trustees have taken into account the following relevant factors:
- (1) the range of professional valuations of the land:
 - (i) Savills' valuation is about the midpoint of the 2020 valuations;
 - (ii) Fox Grant's valuation is an outlier of the 2023 valuations, with the other two being £6.4m and £6.8m;
 - (2) Savills are an established reputable valuer with the relevant expertise, who set out the basis of their valuation in a detailed report;
 - (3) The trustees provided Fox Grant's February 2023 report to Savills, and Savills did not alter their valuation;
 - (4) As Mr Gooch explained in his oral evidence, the trustees went through Fox Grant's February 2023 report in some detail, to see whether they could be persuaded that they should place more weight on it than on their own expert. They were not persuaded that the Savills' report was wrong, or could not properly be relied upon;
 - (5) In particular, although all 3 daughters relied upon the availability of farm subsidies as relevant to the Farm's value, this factor was not considered relevant

to valuation by Savills, and the trustees were entitled to rely on Savills' expert advice in that regard;

- (6) Alister's position that £4.2 million is the most he is willing to pay;
- (7) The increased burden on Alister of borrowing £4.2 million in the current market; and that forcing him to borrow too much might result in him having to sell the land, thereby defeating Susan's intentions;
- (8) Alister's agreement to take on the capital gains tax liability on the transfer to him, £472,000, so that the Trusts will benefit from holdover relief;
- (9) the benefit to the Farm of the sum of £313,000 which the trustees acknowledge Alister has spent on it;
- (10) £680,000, estimated as the detrimental value of the overage agreement;
- (11) The saving to the Trusts of estate agents and legal fees, estimated at about £130,000 if the Farm were sold on the open market.

93. I therefore reject the submission that the level of discount given to Alister was so high as to be irrational. I also reject the submission that the trustees are required to sell the Farm on the open market to ascertain its true value – to do so would mean that the Farm would no longer be retained for the benefit of any member of the Cutts family. The trustees are entitled to act in a way that gives effect to Susan's wish that the Farm remains in the family.

94. I turn to the daughters' submissions in opposing approval of the Decision (to the extent that they have not already been considered).

Relevant factors said not to have been considered or not properly considered

95. The general position, as set out above, is that the court is not concerned to evaluate the trustees' consideration of relevant factors, even if the court itself might have reached a different conclusion. The court is only concerned with whether a relevant factor has been taken into account.

Increased value of the Farm by serving notice to quit so it would be valued with vacant possession

96. In valuing the Farm, Savills applied a discounts of either 2.5% or 5% to certain parcels of land reflecting the FBT, and in the case of the Farmhouse a further 5% to reflect a right of access by family members to an island within its grounds. However, valuing the Farm without these discounts would increase its value by a relatively small amount to about £7 million.

97. Even if, contrary to Savills' advice, it was appropriate to value the Farm with vacant possession, this could have been done without serving a notice to quit on Alister, as was

done by Fox Grant. More importantly, the trustees were not required rigidly to and did not link the price to be paid by Alister to the open market value of the Farm.

98. I therefore reject the submission that the trustees should reasonably have served a notice to quit on Alister before they had decided what course to take. In addition, if the notice to quit had taken effect, this would have deprived the Trusts of its main income, and seriously damaged the farming business at the Farm.

Administrative costs of the appointment falling only on the daughters

99. Both Charlotte and Cecilia's counsel submitted that it was unfair (and a relevant factor which the trustees failed to take into account) that the administrative costs of the appointment, including the costs of the claim should fall onto the Trusts, and not therefore on to Alister. It is correct that there is no evidence that the trustees have specifically considered the burden of costs of this claim as between the beneficiaries. This is not in my judgment a factor which would of itself justify refusing approval.
100. In any event, the costs of the claim remain at large; and it may be appropriate to make an order that Alister should bear a share of the costs of the claim, taking into account that the trustees would have needed to bring the claim even if the Decision had been unopposed.

Financial imbalance between the value received by Alister and the amount proposed to be paid to the daughters

101. I have already set out my conclusion that the trustees are not obliged to treat all the beneficiaries equally, and that the element of gift to Alister in the Decision does not vitiate it.
102. In any event, the trustees are, in my judgment, entitled to take into account the various burdens and obligations which Alister will take on if the Farm is transferred to him: loan interest, capital gains tax, the overage obligation, stamp duty land tax. To this may be added the need to invest (the trustees estimate about £300,000) in the Farm in order to produce a sustainable income from it.
103. By contrast, the capital sum of about £800,000 which the trustees envisage appointing to each of the daughters does not require any expenditure on their part, nor is it burdened with any financial obligations.

Value of benefits conferred on Alister, including below market rents and farm subsidies

104. All 3 daughters submitted that the rents charged to Alister were:
(1) too low; and

(2) did not take into account the farm subsidies received by him.

105. Victoria relied on this as justifying requiring Alister paying full market value for the Farm without a discount. Charlotte relied upon it as a relevant matter which had not properly been considered by the trustees. Cecilia additionally relied upon it as showing that the trustees have favoured Alister.

Rent

106. As to the level of rent to be charged, the LoW is not consistent, referring to a “reasonable and affordable rent”, a “proper commercial rent” and a “fair and reasonable rent on fair and reasonable terms”. Mr Gooch’s evidence was that the initial rent payable under the 2016 FBT was agreed (with a 27% discount on the full market rent) following advice having been taken by the trustees. The current rent paid by Alister reflects an element of credit for his capital expenditure on No 1 Folds Farm Cottage. I note that Victoria’s rent for the livery yard was at a 29% discount on the full market rent. The trustees were not, as explained above, required to charge either Alister or Victoria a full market rent in respect of their occupation of the Farm.

107. However, even if Alister’s rent was below market value, this does not significantly affect the trustees’ reasoning that the Farm is not capable, without substantial further investment, of producing more than a modest income, and, in any event, of enabling the trustees to make capital provision for the daughters, as they have requested. I also reject Victoria’s suggestion that the historically low level of Alister’s rents *requires* the trustees to press or require Alister to pay a higher price for the Farm.

Farm subsidies

108. Alister’s receipt of farm subsidies is only mentioned once (by Cecilia) in the correspondence from the daughters after Susan’s death; and barely features in the daughters’ written evidence: Charlotte sets out that Alister has been in receipt of all the farm subsidies payable for the Farm. However, Mr Gooch was extensively cross-examined on this topic.

109. I was also not referred to any statutory provisions as to entitlement to farm subsidies at the trial. After the trial, various documents were filed as to the entitlement and amount of subsidies received by Alister. I have not taken these into account, as to do so would require re-opening the evidence and, consequentially, submissions after conclusion of the trial hearing – there was no application that I do so; and, in any event, there are no circumstances justifying that course, where all the material sought to be adduced was available to the parties and could have been put before the court at the trial.

110. The trustees' understanding (which is supported by Fox Grant's 2023 report) is that farm subsidies are payable to the person who is farming, and not to the land owner. There is therefore nothing surprising or improper about a tenant of the land being transferred farm subsidy entitlements, or claiming such subsidies as may be available in respect of the land being farmed.
111. As to whether the trustees should have taken into account the farm subsidies received by Alister in respect of the parts of the Farm occupied by him in determining his rent, this was also not pre-figured in the daughters' evidence, and was unsupported by either factual or expert evidence.
112. The HoT provides at clause 8:

“(iv) The purchase will be subject to a turn overage so that on any sale or grant of a long lease of more than 21 years, the Purchaser will pay 10 of the gross market value of the part of the property disposed of to the Trustees, such sum to be paid within 10 working days of completion and if assessed on a long lease, will be 10% of the capitalised value of the lease. It should be noted that the occupation by Earlcoate, whilst the company is owned, controlled, and managed by the Purchaser or his direct descendants, will not trigger the turn overage The term of the turn overage to expire on 10 April 2080.

...

(vii) Transfers to a direct descendant of Susan will not trigger the turn overage.”

113. Charlotte and Cecilia submitted that these provisions were insufficiently detailed to enable the court to decide whether the beneficiaries' interests would be properly protected. I accept that detailed provisions will need to be drafted, including ensuring that if the Farm is transferred to a direct descendant of Alister, that person is also bound by the overage provisions (to which Alister confirmed his agreement in the course of the trial). However, the court's function is not to micro-manage the trustees, but to approve the Decision; and to leave to the trustees the details of implementing the Decision - which they must of course do in a way consistent with their general duties as trustees. I therefore reject the submission that the court cannot approve the Decision in the absence of detailed overage provisions.

Availability of holdover relief

114. Charlotte and Cecilia made similar submissions in respect of CGT holdover relief: that the trustees had not obtained advice (and the court had no evidence) that holdover relief would be available. Mr Gooch was cross-examined as to this – his firm has advised the trustees that they will qualify for holdover relief; and the daughters have not adduced any evidence to the contrary.

Alister's resources and ability to pay

115. The trustees are criticised for not making more extensive inquiries into Alister's financial resources and his ability to pay more than £4.2 million. However, the (false) assumption underlying that criticism is that the trustees are obliged to compel Alister to pay the most he can possibly afford. The trustees' position is that, taking into account the various factors set out in their July 2021 Note, the price they are asking Alister to pay is a fair and reasonable one, striking an appropriate balance. This is not an irrational position. They were not therefore in my judgment required to make more extensive inquiries into Alister's means, and approval of the Decision is not to be refused because they failed to do so.

Irrelevant factors said to have been taken into account by the trustees

Alister's threats and assertion of legal rights

116. The daughters allege that the trustees were pressurised by Alister's threats of legal action if the Farm was not transferred to him. However, the correspondence shows (and Mr Gooch and Mr Cutts confirmed in their oral evidence) allegations of breach of trust by the daughters. Both Mr Gooch and Mr Cutts said that they took no notice of any threats by beneficiaries; and Mr Gooch's unchallenged written evidence was that the trustees have been advised that there is no proper basis on which Alister could pursue claims based on proprietary estoppel, or for a declaration that he has a beneficial interest in the Farm. In any event, the trustees have taken the appropriate course to manage those threats by seeking the court's approval of the Decision.

117. As to Alister's contention that Earlcoate was entitled to protection under the LTA 1954, Mr Gooch sets out that the advice given to the trustees was that Earlcoate had a strong case to argue that it had a "1954 Act" tenancy of the commercial yard. In addition, the parties' experts' agreed position was that it was likely that Earlcoate has security of tenure and a right to extend the lease. That fact formed part of the factual circumstances within which the Decision was made – it cannot be considered irrelevant.

118. As to the need to bring possession proceedings against Alister to achieve a sale on the open market, there is no distinction in principle between these proceedings (which have generated high levels of acrimonious emotion) and possession proceedings. The trustees have also been threatened with breach of trust claims by the daughters. There is therefore no basis for concluding that in reaching the Decision the trustees were affected by a desire to avoid possession proceedings.

Alister's costs of borrowing

119. I also reject the submission that Alister's costs of borrowing were an irrelevant consideration and should not have been taken into for the trustees. As Mr Pollard

explains (para 29, Pollard 1) the trustees were concerned to ensure that Alister has the ability to make a reasonable return and does not borrow so heavily that he cannot make a success of the Farm. This is a proper and relevant concern.

Conflict of interest

120. There two bases on which conflict of interest is alleged. First, a conflict is said to arise from Alister’s proprietary estoppel claim being based on the conduct of the trustees. As I set out above, the trustees were advised that the proprietary estoppel claim had no merit, and any conflict is properly managed by seeking the court’s approval.
121. Secondly, the trustees are said to be biased in favour of Alister because of the following:
- (1) the dealings between Mr Pollard and Alister, and Mr Cutts and Alister;
 - (2) the trustees allowed Alister into occupation of the Farm – giving him a strategic advantage;
 - (3) the trustees not having given effect to the “tough love” provisions in the LoW: clause 5 requiring Alister to pay a “proper commercial rent” (already discussed at para 104 above), and clause 9, requiring Alister to pay to pay a “fair and reasonable rent”, and to be asked to vacate the Farm if he did not do so;
 - (4) not taking into account the farm subsidies received by Alister when setting his rent;
 - (5) the trustees’ not having increased the “price” after Savills increased their valuation from £6.4 million to £6.8 million.

Mr Pollard’s and Mr Cutts’ dealings with Alister

Mr Pollard’s dealings with Alister

122. Mr Pollard has, in his capacity as a partner of Symonds & Sampson, advised Alister. His evidence is that having advised Oliver, before his death and then Susan over many years, he has provided advice to all of the children as and when they needed it. He saw this as part of his role as land agent and advisor to Susan. He sets out occasions when he has provided help and advice (without charge) to Charlotte and Cecilia.
123. Although the daughters were not able to cross-examine Mr Pollard, this evidence was not challenged in their witness statements in answer.
124. As to Alister, Mr Pollard has given him advice as to how to achieve some replacement farm buildings at another farm, of which Mr Pollard already had knowledge by having acted for its previous owner. Mr Pollard has also invited Earlcoate to obtain a quote from an electrical contractor to be considered by one of Mr Pollard's clients, on the

basis that if the quote is accepted, Earlcoate would do the accompanying trenching work.

125. These dealings fall far short in my judgment of showing that Mr Pollard is biased or compromised in considering Alister's position. In any event, Mr Pollard is only 1 of 3 directors of the trustees.

Mr Cutts and the stuffed fish

126. Mr Cutts sets out that in 2013, Alister let him know that a stuffed pike that had previously belonged to Mr Cutts' father was coming up for sale at an auction. Alister offered to bid on the pike on Mr Cutts' behalf; and Alister's assistant managed to buy it for £950, which Mr Cutts refunded with an extra £50 for the assistant.
127. Mr Cutts saw this as returning a favour: he had told Alister about a stuffed chub which had belonged to Oliver coming up for auction at Bonhams; and Alister and Susan went to the auction and bought it.
128. The suggestion that these dealings show a level of closeness between Mr Cutts and Alister which would affect Mr Cutts' conduct as a director the trustees is in my judgment unarguable.
129. Finally, Mr Cutts' evidence was that about 6 months ago he offered Alister a garage door which he no longer needed, in return for use of a container for a year. Alister agreed, but did not take it any further. Again, the suggestion that these dealing show a level of closeness capable of affecting Mr Cutts's decisions as a director of the trustees is in my judgment unarguable.

Allowing Alister into occupation of the Farm

130. As to this, there is no evidence that any of the daughters sought to take over Susan's farming business on her death, or had the resources to do so. Alister was effectively the only candidate, and the fact that the trustees allowed him into occupation is not evidence of bias or favouritism.

Trustees not giving effect to "tough love" provisions

131. Mr Gooch acknowledges that in the LoW Susan encouraged the trustees to take a robust approach with her children, even inviting them to cut off from benefit entirely any children who, in the trustees' view, obstructed the trustees or made any unreasonable claims. The trustees have decided not to do this, and that decision is entirely within the range of their discretion. As noted above, both Alister and Victoria

were charged less than full market rent, as the trustees in their discretion were entitled to do. It is unarguable that that is evidence of bias.

Not taking farm subsidies into account when setting Alister's rent

132. The trustees set Alister's rent having taken advice. The criticism that the rent should have taken farm subsidies into account was not, as I have said, supported by any factual or expert evidence and I reject it.

Not increasing "price" to Alister after increase in valuation

133. As discussed above, the "price" at which the Farm is to be appointed to Alister was reached by the trustees after consideration of a number of different factors of which the valuation was only one. Their reasoning in response to the increased valuation is set out in paragraph 64 above. This decision does not in my judgment show bias.

Conclusion

134. For the reasons set out above, therefore, I approve the Decision.