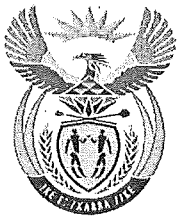

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 18932/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

KIDBROOKE PLACE MANAGEMENT ASSOCIATION	First Applicant
DAVID HEDLEY LEES	Second Applicant

and

NORMAN ANTHONY WALTON	First Respondent
AND FOUR OTHERS	Second to Fifth Respondents

JUDGMENT DELIVERED ON 25 MARCH 2015

BINNS-WARD J:

[1] This is an application for the removal from office of a trustee. The trust concerned is the Hudd Trust (T 618/87). The trustee is the first respondent, Mr Norman Walton. As he is the respondent who played the most central role in opposing the application, I shall for convenience henceforth, save where otherwise required by the context, refer to him simply as 'the respondent' or 'Walton'.[1]

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[1] Walton's co-trustees each made affidavits in opposition to the application and in support of Walton's position. I shall treat of them later in the judgment.

[2] The grounds for the application are founded in the common law and s 20(1) of the Trust Property Control Act 57 of 1988.[2] They are predicated on the allegation that the respondent has acted in breach of his fiduciary duties in various respects. The details of the main complaints advanced against the respondent will be considered presently to the extent considered necessary.

[3] The Trust was founded in the late 1980's by Mr and Mrs Hudd, who were the owners of Kidbrooke Farm near Hermanus. The respondent was a close confidant of the Hudds in the last few years of their lives. He was appointed by them as one of the six original trustees. He has continued in office as a trustee without interruption since his appointment. At the times most material for the purposes of these proceedings the only trustees then in office were the respondent and Mr J.C. (Koos) Badenhorst ('Badenhorst'), who became a trustee in 1992.[3] Badenhorst resigned as a trustee in 2008. Mr Neal Chapman was a trustee during the period 2003 to 2009. No allegations of impropriety have been made against Mr Chapman.[4] Two other persons who served as trustees from 2009 resigned at the request of the first applicant in 2012.

[4] The object of the Trust was to provide for the establishment on the land donated to it by the Hudds of what is known in statutory parlance as a 'housing development scheme' for retired persons.[5] A scheme of the nature contemplated was developed in due course. It is called Kidbrooke Place.

[5] The retired persons who have acquired housing rights at Kidbrooke Place enjoy the right to occupy the portions of the land to which their rights attach for the duration of their lifetimes. Hence the label by which they are commonly known: 'life rights'. The land is the property of the Trust. Prior to the alienation by it to a purchaser of the first housing interest in the scheme, the developer was required to appoint a managing agent.[6] The Trust was so appointed. The managing agent's

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[2] Section 20(1) provides: '*A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries*'.

[3] The first respondent and Mr Badenhorst were the only trustees during the period 23 November 1994 and 12 December 2002.

[4] I declared my previous association with Mr Chapman as a co-trustee of a testamentary trust prior to the commencement of argument. No objection was raised to my hearing the matter.

[5] See the definition of *housing development scheme* in s 1 of the Housing Development Schemes for Retired Persons Act 65 of 1988.

[6] Regulation 6 of the Housing development schemes for retired persons: Regulations ('the regulations'), published in GN R1351 in GG 11979 of 30 June 1989 [with effect from 1 July 1989] as amended by GN R2091 in GG 12717 of 31 August 1990

appointment falls to be renewed annually in terms of the applicable legislation, but is deemed to have been renewed each year unless the agent is notified to the contrary by the management association.[7] The contract in terms of which the Trust was appointed as managing agent contained a provision purporting to give the trustees a right of veto in respect of any decision by the management association to terminate its appointment as agent. It was only many years later, and after a number of legal opinions had been taken, that it was conceded by the trustees (Walton and Badenhorst) that the purported power of veto was unenforceable.

[6] A management association for the scheme became established in terms of the applicable legislation upon the first alienation by the developer of a housing interest in the scheme to a purchaser. All the rights-holders in the scheme from time to time are members of the management association *ex lege*.[8] The management association is entrusted by regulation with a wide range of duties and powers in respect of the management of the scheme for the common good of the rights holders.[9] It is entitled to assign or cede any of its duties or rights to the managing agent.[10] The Kidbrooke Place Management Association assigned and ceded all its duties and rights in terms of the regulations to the Trust, qua managing agent. If regard is had to the statutory context, it is clear that this apparent investment of plenary power in the Trust rendered the trustees accountable to the rights-holders in respect of the administration of the scheme in the manner that the management committee of the association would ordinarily be.

[7] Up until 2008, the holders from time to time of the housing rights in Kidbrooke Place were the designated beneficiaries of the Hudd Trust. In 2008, the deed of trust was amended to provide for the Kidbrooke Place Management Association to become the designated beneficiary instead of the individual rights holders. The effect of the change was essentially formal, for the Management Association is in all relevant respects representative of its members, who determine its conduct by means of resolutions adopted in general meeting. The amendment to the trust deed created a more business-efficient structure for relations between the occupants of Kidbrooke Place and the Trust.

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[7] Regulation 6(b) of the regulations.
[8] Regulation 7 of the regulations.
[9] Regulations 8 and 9 of the regulations.
[10] Regulation 9(4) of the regulations.

[8] The current litigation was instituted by two applicants. The first applicant is the Kidbrooke Place Management Association. The second applicant is Mr David Lees, who purchased a housing interest in the scheme in 2009 and has resided at Kidbrooke Place since 2011.

[9] Three other persons who are currently serving, or believed to be serving,[11] as co-trustees of the Trust together with Walton were cited as the second to fourth respondents, respectively, in their capacities as trustees. No substantive relief was sought against them. Their role in the current proceedings was to oppose the application in their capacity as Walton's co-trustees and to make affidavits in support of his fitness to remain in office as one of the trustees. The first respondent opposed the application in his personal capacity and, together with his co-trustees, on behalf of the Trust. The Master, who was cited as the fifth respondent, gave notice that she abides the decision of the court.

Preliminary objections by the first respondent

[10] The respondent raised a host of preliminary objections to the standing of the applicants, and even to the authority of the applicants' attorneys of record to represent them. This was an ill-advised strategy in a matter such as this, which concerns the desirability of his continuance in office as a trustee of what is essentially an altruistic trust. He would have been better advised to limit himself to dealing with the substance of the case. The technical points taken by the respondent contributed in no small measure to the generation of a record of staggeringly disproportionate volume; with even the combined heads of argument, including supplementary notes, running by themselves to approximately 400 pages. The effect on the costs of these proceedings must be significant. And all to no effect, because I have been unable to find merit in any of the points. I propose to deal with them with the minimum of elaboration.

[11] It is quite clear from the tenor of the minutes of the annual general meeting of the first applicant held on 19 June 2012 that the appointment of the attorney concerned was authorised by the rights holders, with only one person dissenting. In any event, the only practical reason for a challenge of the nature raised by the respondent in this respect is to vindicate a suspicion that the party cited as applicant

[11] It was not certain when the application whether the intended appointment of the fourth respondent had yet taken effect.

has not authorised the institution of the proceedings. The second applicant has made a number of affidavits in support of the application. It is quite clear from those affidavits that the institution of proceedings by the applicants' attorneys of record occurred with the knowledge, and upon the instructions, of the applicants. Insofar as there might have been some ambiguity in the resolution adopted by the members of the first applicant authorising the institution of the application, the position was put beyond doubt in terms of a further resolution adopted on 10 December 2013. It matters not that that resolution was adopted after the institution of proceedings. To the extent necessary, it had retrospectively ratifying effect; cf. e.g. *Baeck & Co SA (Pty) Ltd v Van Zummeren and Another* 1982 (2) SA 112 (W).

[12] The respondent's contention that the special general meeting held on 10 December 2013 had not been competently constituted by reason of short notice was cynical. The evidence suggests that the period of notice of the meeting that was given had been calculated in accordance with the longstanding practice of the association. It has not been suggested that anybody, let alone the respondent, was prejudiced by the slightly short notice. In the absence of demonstrable prejudice to an affected party, courts do not entertain highly technical objections of the nature taken by the first respondent in this respect; cf. *Law of South Africa* (LAWSA) Second Edition vol. 1, para 647 s.v. *Convening and notice*, and the authority cited there in note 9.

[13] Another objection was that votes exercised in terms of powers of attorney executed by some members not present at the special general meeting were recognised in the counting. The constitution of the first applicant allows for voting by proxy. It does not determine the form of the proxy. In this respect too, there has been a history in the conduct of the management association's meetings to recognise proxy votes exercised by virtue of a power of attorney. In my view there is nothing in the point. The respondent has not demonstrated in any event that the resolution to ratify the institution of the application would not have been carried had the proxy votes exercised in terms of powers of attorney been excluded from the tally.

[14] The contention that the first applicant did not have the capacity within its powers to institute the current litigation was not pursued in oral argument; advisedly so. The power to litigate invested in management associations in terms of the regulations made under the Housing Development Schemes for Retired Persons Act

65 of 1988 is very wide. It undoubtedly encompasses any matter bearing on the management or administration of the scheme. The suitability or probity of a trustee of the trust that fulfills the function of managing agent of the scheme - particularly when, as in the current case, the association's functions have been ceded to the agent – unquestionably comes under that heading.

[15] It was also argued that the second applicant had no standing. The argument was advanced on two bases. Firstly, that only a beneficiary of the trust concerned could claim the removal of a trustee, and the second applicant did not qualify as such. Secondly, it was alleged that the second applicant had ceased to enjoy a right of occupation in the scheme. Inasmuch as there is no doubting the standing of the first applicant, and both applicants have proceeded on the same basis in the case in terms of integrated sets of affidavits, it is not really necessary to determine this aspect of the matter except, possibly, in respect of the issue of costs. Even that is doubtful because a single team of legal representatives has represented both applicants throughout. I shall nevertheless deal with the argument for completeness.

[16] The first basis of the argument was premised on the first respondent's reading of the judgment of Leach JA in *Ras NO and Others v Van der Meulen and Another* [2010] ZASCA 163; 2011 (4) SA 17 (SCA). *Ras* also concerned an application to remove trustees from office. The utterance in *Ras* upon which the first respondent fastened was at paragraph 9, where the learned judge of appeal held '[t]*he court clearly erred in finding that, short of being a beneficiary, the respondent had an interest in the trust which justified her being entitled to seek the relief claimed. It is only if she is a beneficiary that she would be entitled to seek the removal of the trustees, and the respondent correctly did not seek to support the high court's contrary conclusion. If the trustees are correct and the respondent is not a beneficiary, her application would fall to be dismissed*' (underlining supplied). It is common ground that the first applicant is now the only beneficiary of the trust, and that the rights-holders are no longer beneficiaries in their own names. The amendment of the trust deed that brought this about was touched on earlier. Notwithstanding the amendment, however, the real interest that the rights holders, individually and collectively, have in the suitability of the trustees in control of the managing agent, however, remains the same as it had been when they were individually beneficiaries.

[17] The passage in the judgment in *Ras* just quoted supports the first basis of the first respondent's argument only if read in isolation, and without regard to the context. I do not find it necessary to recite the facts in *Ras* in detail. It is sufficient to note that the relief sought by the applicant in that matter was founded squarely on the allegation that she was a capital beneficiary of the trust concerned. The trust had been founded *inter vivos* by her father. Its object was to hold and administer a farm. The respondents countered that she had been validly removed as a beneficiary in terms of an amendment to the trust deed effected by agreement between the founder and the other trustees. The effect of this, if had been done validly, would be analogous to the exclusion of a relative from inheritance by means of a testamentary amendment. The excluded heir would have no interest in the administration of the estate. It was not suggested that if the applicant in *Ras* had not been a beneficiary, she would have any standing to seek the removal of the trustees; nor could it have been on the facts of the case. Thus the critical and contentious question which had to be answered affirmatively before the relief sought by the applicant in that case could be entertained was her alleged status as a beneficiary.

[18] It will be apparent from what has been said earlier that the factual context of the current case is quite distinguishable. I have not the slightest doubt that the judge did not intend in paragraph 9 of the judgment in *Ras* to suggest as a matter of generally applicable principle that a person with sufficient interest who was not a beneficiary was excluded from applying for the removal of a trustee. Any such view would be irreconcilable with the provisions of s 20(1) of the Trust Property Control Act, which gives the right to 'any person having an interest in the trust property' to apply for the removal from office of a trustee.[12] A co-trustee is an obvious example of someone who might not be a beneficiary, but who would undoubtedly have an interest in the trust property. In the current matter it is obvious that the second applicant, if he is a life rights holder, has an interest in the trust property. That gives him standing in terms of s 20(1) of the Act. In my judgment he also has standing in common law on the basis discussed in *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J-534E by virtue of his having a sufficiently direct interest in the subject matter of the litigation; cf. also *Gross and others v Pentz* 1996 (4) SA 617 (A) at 628I-J and 632D and *Theron NO v Loubser NO* [2014] 1 All SA 460 (SCA) at

[12] See note 2 above for the text of the subsection.

para 6. The *dicta* in the paragraph cited in the last-mentioned judgment expressly illustrate the axiom that the peculiar facts of the given case determine whether a litigant has standing to approach a court for relief concerning the status of a trustee. By virtue of the cession by the first applicant to the Trust of the former's powers and duties in terms of the regulations, the second applicant, as a rights-holder in the scheme, has a direct interest in the suitability of the trustees to hold office. Amongst other matters, it is they who have the power to exact levies from the rights holders and to hold and administer the scheme's funds. The Trust thus has the duty that the first applicant would otherwise have had to account to rights-holders like the second applicant.

[19] The second basis for the argument that the second applicant lacked standing was that he had divested himself of his right of occupation. The point was taken on the basis of an indication by the second applicant in mid-2012 that he wished to dispose of his right of occupation and an allegation by Walton that the Trust had accepted the 'offer'. It was correctly pointed out by the applicants' counsel that the purported acceptance by Walton, acting alone, was ineffectual because of the provisions of clause 4.2 of trust deed. The purported acceptance was in any event not on the terms proposed by the second applicant and a price was not fixed. The respondent also sought to rely on clause 11.2 of the trust deed and contended that a letter written by the second applicant, dated 30 July 2012, constituted notice in terms of the provision. The short answer to that contention is that the letter did not comply with the notice requirements in terms of clause 11.2 and, moreover, that it is evident from the conduct of the parties subsequent to 30 July 2012 that the letter had not been construed at the time as a binding notice in terms of clause 11.2. Two years after the event the second applicant remains a resident of Kidbrooke Place and has been paying levies as required of a rights holder.

[20] There is thus no merit in the respondents' challenge to the second applicant's legal standing in the current proceedings.

Matters related to the FNB loan

[21] The applicants allege that Walton and Badenhorst acted in breach of their fiduciary duties to the beneficiaries of the Trust in respect of their conduct concerning the settlement of an overdraft debt owed by the Trust to First National Bank ('FNB').

The debt was secured by a mortgage over the Trust's immovable property. This allegation constitutes one of the main bases for the application.

[22] At the beginning of 1997, when the overdraft stood in the amount of about R5 million, the bank gave notice to the trustees that it intended to call up the debt. The intimation was contained in a letter from the bank, dated 16 January 1997. It indicated that the bank was prepared to accept R1,74 million in settlement of its claim. The offer by the bank to waive the balance of its claim was stated to be conditional upon 'the Trust or its nominee taking over all the bonded land and concluding a sale agreement to this effect by no later than 31 March 1997'. The land in question consisted of 13 erven plus certain farmland. It bears mention that the Trust was the owner at the time of a number of freehold erven situated adjacent to the retirement village, as well as a substantial portion of undeveloped farmland. (It has been alleged that the farmland had no commercial value at that time. The allegation does not seem improbable in the context of the bank's willingness to compromise its claim on the basis described.) The bank indicated that it would accept the proceeds of the sale of any of the aforementioned erven at a unit price of R140 000 in reduction of the compromised balance of R1,74 million. The erven in question were in fact saleable for R195 000 each at the time - in other words, that was their market value.

[23] As matters turned out, the bank did not insist on payment by the end of March 1997. It became clear that it was actually prepared to forebear on receipt of payment pending the disposition of sufficient erven to redeem the debt in the reduced amount of R1,74 million. I shall describe presently what transpired.

[24] The respondent and Badenhorst procured the establishment of a company called Hudd Management Services (Pty) Ltd ('HMS'), in which they, either directly or indirectly, personally held the proprietary interest. An agreement was concluded in terms of which HMS purchased a number of the erven concerned from the Trust for a total of R1,5 million. The effective price payable by HMS was R145 000 per erf. The agreement provided that HMS only became liable to pay for the erven from the proceeds of their on-sale to third party purchasers. It follows that the respondent and Badenhorst, albeit in different capacities, were effectively contracting with themselves in concluding the sale of the properties by the Trust to their company. HMS thereafter disposed of the erven at their market value of R195 000 apiece, thereby making a gross profit on the transactions of R50 000 per erf. The gross

proceeds of the on-sale of erven by HMS were approximately R2,4 million. HMS also became owner of the so-called panhandle land and 32ha of farmland hitherto owned by the trust, although not part of the property given over to the development scheme. The offset was the redemption by HMS of the compromised claim of FNB against the Trust. HMS procured a loan from Absa Bank ('Volkskas') to settle FNB's compromised claim against the trust.

[25] Cameron *et al* op cit supra, suggest (at §223) that the purchase of immovable property by trustees from a trust is something that is required by custom in South Africa to be sanctioned by a court. The authors cite *Peffers NO v Attorneys, Notaries & Conveyancers Fidelity Guarantee Fund Board of Control* 1965 (2) SA 53 (C) at 57 in support of the proposition. The judgment in that matter described the custom as applying in respect of the purchase by an executor of a deceased estate of property in the estate, but I can think of no reason why the rationale for the custom should not apply equally in the context of the purchase by a trustee of immovable property from a trust. There is no material difference in the character of the fiduciary relationship involved; cf *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-180. In the current matter, not only did the trustees not see fit to seek such sanction, they failed to take independent advice or make prior disclosure to the beneficiaries of their actions.

[26] HMS also entered into an agreement with FNB in terms of which it took cession of the bank's claim against the Trust. The deed of cession was signed by the bank on 4 September 1997 and by HMS some weeks later, on 14 October. The respondent and Badenhorst also procured consent to the cession by the Trust. The recordal of the consent by the Trust to the cession incorporated in the deed of "Sale and Cession of Claim' was signed by the respondent on behalf of the Trust. The consideration stipulated for the cession was R1,74 million. By that stage the amount of the bank's claim against the Trust had risen to approximately R5,7 million. Payment of the R1,74 million was deferred until receipt by HMS of the proceeds of the on-sale of the erven that it had purchased from the Trust. The respondent and Badenhorst procured that R975 000 of the consideration was paid from the proceeds of erven sold by the Trust. The net result was that, after payment of the purchase price of the erven and the price of the cession, HMS was left with a loan claim of about R3 million against the Trust.

[27] HMS gave notice to the Trust of its intention to enforce the claim. This occurred at a meeting of the management committee of the first applicant attended by the first respondent and Badenhorst on 28 August 1997 – that is even before the execution of the relevant deed of cession. The event is recorded in the minutes of the meeting as follows:

> Koos Badenhorst stated that the trustees of Hudd Trust, namely Messrs. Norman Walton and Koos Badenhorst believed that the Trust's indebtedness to First National Bank, had persisted for too long and that the Trust should be relieved of this burden. With this in mind, the trustees, in their personal capacity and accepting full liability, had established a company, known as "Hudd Management Services Pty. Ltd." (HMS). HMS had raised a loan with Volkskas Bank for the purpose of purchasing the remaining plots for R1.5 million and, in so doing, would liquidate the outstanding loan balance with First National.
>
> The Volkskas loan, including interest, would be repaid from cash raised by the sale of plots and by diverting 4% of the 6% commission arising from resale of cottages to HMS loan account. This arrangement and action, will relieve Hudd Trust of all current loan liability except for an indebtedness of R3 million to HMS acquired from a cession to it of the First National Bank claim against the Trust. This claim, Mr. Badenhorst stated, would not be waived by HMS owing to some acrimony generated towards the trust by a previous committee. He undertook at the next meeting to table (a) the letter of discharge by First National Bank of the indebtedness of the Trust and (b) a copy of the draft agreement between the Trust and HMS.

No disclosure was made at that stage of the willingness by FNB, expressed in its aforementioned letter of 16 January 1997, to write off that part of the Trust's debt that exceeded R1,74 million. As the applicants' counsel pointed out, the debt to HMS pursuant to the actually then yet to be executed cession would actually be greater than R3 million. There was also no disclosure to the management committee of the precise nature of the personal interest of respondent and Badenhorst in HMS, or of the personal gain they stood to realise in the transaction. It would appear that the justification for the establishment of HMS, and, presumably, the gain that that the respondent and Badenhorst stood to make by its on-sale of some of the Trust's land, was the risk that they were prepared to assume in undertaking the provision of services to some of the erven before they could be sold. This was touched on in a letter by them to the then chairman of the management committee, dated 24 November 1997, in answer to queries raised by him in a letter dated 20 November. Their fiduciary duty as trustees behoved them, however, to have made full disclosure before embarking on the undertaking. They should not have proceeded without the

informed consent of the beneficiaries. What is more it would not be sufficient to obtain the consent only of the management committee, the consent of all the rights-holders, individually, was required. Disturbingly, the respondent in his answering affidavit appears to dispute the necessity for prior or informed consent to have been obtained.

[28] The respondent also sought to justify the HMS transaction as a means of warding off a possible application by FNB to sequestrate the Trust. I agree with the applicants that the available documentation from the time does not support any basis for serious concern in this respect. On the contrary, it would have been apparent to the bank that the only means of obtaining payment of its claim was the realisation of the encumbered property. The bank had no effective resort against the trust property given over to the housing development scheme because of the statutorily conferred preferent rights of the rights holders. The bank in fact executed the cession of its claim against the Trust before it was provided with any guarantee by Absa in respect of the consideration therefor promised by HMS.

[29] The claim against the Trust in terms of the cession was subsequently waived by HMS at a meeting of the management committee on 24 November. It seems probable that this was because Walton and Badenhorst would have realised that it would be impossible to defend their position in the face of being under pressure to disclose the letter from FNB indicating its willingness to have waived the claim. The waiver by HMS is confirmed in the minutes of a meeting on 24 November 1997 (by which stage the bank's letter of 16 January 1997 had finally been disclosed). The trustees gave the impression at that meeting that the Trust was not indebted to HMS in any respect. No mention was made by the trustees of a liability of R429 000. But the trustees in fact procured the payment of such sum by the Trust to HMS. The transaction was disclosed, after the event, at a meeting on 9 December 1997. Badenhorst confessed at that meeting that there was no contract providing for the payment of the amount. It was merely advised that the payment had been made in terms of a so-called 'April scheme'. This would appear to have had something to do with the sale of land by the Trust to HMS to settle the compromised claim by FNB. Even as of today, however, it is not clearly apparent what the nature of the 'April

scheme' was.[13] As counsel for the applicants emphasised, there is no documentation on record reflecting or evidencing the 'April scheme'. In a memorandum provided by Badenhorst to a member of the management committee in late 1998, the R429 000 was described as interest on the R5,7 million claim against the trust that FNB had ceded to HMS. It was stated that payment of this had been agreed to as part of an agreed adjustment of the purchase price payable by HMS to the Trust for the land. There is, however, nothing in any written agreement to that effect and, in any event, any agreement to that effect would have been yet another example of respondent and Badenhorst agreeing with themselves under different hats.

[30] It is also apparent that when the letter from FNB was disclosed and the apparent waiver by HMS of the ceded claim against the Trust announced, the members of the management association were not privy to the terms of the cession agreement in terms of which the Trust had paid R975 000 of the consideration due by HMS to FNB for the cession.

[31] The respondent emphasised in his answering affidavit that the management committee expressed its satisfaction with the HMS transaction at the beginning of 1998 and conveyed its gratitude to him and Badenhorst for having undertaken personal risk to clear the trust's debt to FNB. Various minutes of meetings at the time bear him out in this respect. However, whereas the then chairman and members of the management committee appear initially, in early 1998, indeed to have been satisfied by the explanations furnished to them concerning the HMS-related transactions, it is evident from the notes of meetings later in the year that all their concerns had in fact not been addressed and that the chairman felt that he was inadequately apprised of the detail to be able to explain them to the members of the first applicant.

[32] It is also apparent that in circumstances in which it must have been clear to the respondent and Badenhorst that the members of the management committee of the first applicant were dissatisfied about HMS's claim to payment of R429 000 by the Trust, they effected payment of the disputed amount without informing the members of the committee that this was done.

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[13] In a telefax from Badenhorst to Mr Marincowitz of the first applicant in December 1997, the 'April scheme' was defined in the following way: 'HMS and Hudd had an agreement ("April scheme") whereby HMS would buy all Hudd's land for R1,74 mil'.

[33] The matter was referred for legal opinion to a firm of attorneys. The opinion, dated 7 December 1998, referred to a payment by the Trust to HMS in the sum of R611 310 'being part payment of a loan (R182 190) and as a final settlement of the claim [against the Trust by FNB ceded to HMS] (R429 000)'. It recorded that '[t]he balance of the claim was waived [by HMS] in favour of the Trust'. The members of the management committee were not satisfied (unsurprisingly, in my view, having regard to its palpably tentative formulation) with the opinion provided and appear to have been of the view that it was founded on incomplete or incorrect instructions. A further opinion was sought on the basis of 'amended instructions' drafted by the committee. The second opinion, dated 28 March 2000, was even more opaque. It seems that the persons on the management committee who had been the driving force in querying the actions of the respondent and Badenhorst at the time became indisposed and died within a short period at this time. No-one else took up the task and, as the second applicant put it in the founding affidavit, 'the impetus was lost'.

[34] In or about April 2000, an agreement was purportedly concluded between the management committee of the one part and the respondent and Badenhorst representing HMS of the other part in terms of which the first applicant's concerns about the HMS-related transactions were 'finally' settled on the basis of the recognition by HMS of certain rights in favour of the Trust for the benefit of Kidbrooke Place over the land that HMS had acquired from the Trust and for the transfer back to the Trust of 'the gravel pit erf' to rectify an encroachment by one of the cottages in the Kidbrooke Place development on the land acquired by HMS. The settlement agreement was subsequently implemented. The respondent contended in his answering affidavit that the conclusion of the settlement agreement constituted a waiver of any claim by the first applicant for his removal as trustee. He also contended that the claim had been extinguished by prescription. These contentions were misdirected. Whatever the financial and proprietary implications of the settlement agreement may have been – on which I refrain from expressing any opinion – it could not have been determinative of the respondent's suitability to remain in office as a trustee. Moreover, the issue in the current application is not one that is susceptible to being extinguished by prescription.

[35] The matter appears to have been raised again in 2007 - 2008. This is evidenced by a letter from HMS to the trustees of the Hudd Trust, dated 21 January

2008,[14] signed by Badenhorst and the respondent,[15] in which HMS purports to respond to the trustees' 'request regarding more information on the sale of certain plots and land' to HMS. The letter makes no mention of the R429 000 payment by the trust to HMS and misrepresents that Mr Nico Marincowitz, one of the two individuals on the management committee most responsible for investigating the position and pressing the trustees during 1997-98, was satisfied - and indeed grateful - for the role played by HMS at the time. At the time the only other trustee, apart from the respondent and Badenhorst, was Mr Neal Chapman.

[36] In the answering papers the respondent contended that it was common knowledge that he and Badenhorst held the proprietary interest in HMS. He also alleged that adequate disclosure of the 'notional profit' that stood to be made by HMS in the transaction had been made. The history of the matter, described above, does not bear out these contentions. Contrary, to the respondent's assertions in this connection, it would seem that whatever disclosure did occur, was made only after searching questions were raised and pursued by committee members such as Messrs Horsley and Marincowitz. The information provided in response to these enquiries was incomplete and, at least in certain respects, not always correct.

Codé Design CC

[37] The other main complaint against the respondent raised in the founding papers is the commission earned on the sale of life rights in the development by a close corporation, Codé Design CC. The respondent and his spouse are the only members of the close corporation. The accounting officer of the close corporation is a firm of chartered accountants of which Badenhorst is (or was) a partner. The applicants allege that as there has, since the mid-nineties, been a waiting list of persons wishing to acquire life rights at Kidbrooke, there was no commercial justification for the incurrence by the Trust of a liability in respect of commission. They alleged that the respondent was conflicted in his position as trustee by his profitable involvement in Codé Design CC. It was alleged that the close corporation had been paid a total of just over R5,8 million in commission and administration fees by the Trust between 2001 and 2011.

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[14] The respondent avers that the letter was misdated and should in fact have borne the date 21 January 2009.

[15] The copy of the letter annexed to the founding papers bears only Badenhorst's signature. A copy bearing both signatures was annexed to the answering affidavit.

[38] In September 2009, the Trust - then represented by the respondent, and his then co-trustees, Messrs Du Toit and Oosthuizen, who had assumed office after the resignations of Badenhorst and Chapman - appear to have formally decided that Codé Design CC should be paid an annual management fee of R540 000 'to deal with the management of the Hudd Trust including the sale of life rights at Kidbrooke Place' plus the salary of one employee (described in the answering affidavit as the respondent's 'personal assistant since the inception of Kidbrooke') and 'all other office expenses relating to the activities of the Hudd Trust'. This decision was recorded in a letter from the firm of attorneys of which Mr Du Toit was a partner, to the respondent, qua managing member of the close corporation, dated 22 September 2009. In his answering affidavit, the respondent avers that the management fee was in lieu of the percentage-based commission that had hitherto been paid to the close corporation on the sale by the Trust of life rights. He alleged that the management fee had been calculated based on an 'average yearly sales figure'.

[39] In August 2011, after assuming the position of chairman of the first applicant's management committee, the second applicant sent an email to the respondent in which he raised a number of questions about the relationship between the Trust and Codé Design, including a query as to why the 'special relationship' had not been disclosed in the trust's financial statements prior to 2010. The letter in reply, which also dealt with a number of unconnected issues, was signed by the respondent and his then two co-trustees. The trustees stated that they 'refuse(d) to answer any questions in regard to Codé Design CC as the said CC is a third party with no obligations in regard to Manco'. As to the non-disclosure of the close corporation as a 'related party' in the earlier financial statements, the letter referred the second applicant to the Trust's auditors. The applicants allege that the reply was evasive. They contend that the 'only reasonable inference was that the ...respondent declined to answer the question in order to obfuscate the true interest he held in Codé Design'. In the answering affidavit the respondent contended that the trustees' response was employed by the applicants out of context. It had been written, so he alleged, in response to enquiries by a committee of residents who had constituted themselves under the name of the 'financial advisory group' which had no formal status and which had 'begun to raise various and diverse queries'.

[40] The management committee requested the resignation of the respondent and his then two co-trustees in a letter sent by its attorneys in June 2012. The co-trustees acceded to the request. The respondent declined to do so. In his letter notifying the applicants' attorneys of his decision he called in aid a 'forensic report' commissioned by the trustees from a firm of chartered accountants, Aucamp, Scholz & Lubbe, arising out of the complaints of the management committee, including those particularised above.

[41] The chartered accountants were instructed to consider and investigate a number of issues. These included the transaction between the Trust and HMS and the appointment of Codé Design as marketing agent. In regard to the former, the accountants reported that had it not been for the involvement of HMS 'or a similar party, the Trust would clearly have been in a serious financial situation'. They accordingly concluded that the transaction had been 'in the best interest of Life Right Holders of Kidbrooke Place'. In regard to the latter issue, the report dealt with the arrangement between the Trust and Codé Design in the period post 2008. It found that there was a lack of clarity about the contractual relationship between the Trust and Codé Design, in particular about precisely which services were provided by Codé Design to the Trust in consideration for the monies paid by the latter to the former. The report was confessedly prepared from a purely accounting perspective. It did not really address the legal and ethical questions raised by the current application.

[42] In his answering affidavit the first respondent relied on the provisions of the original version of the trust deed that permitted the payment of commissions to the trustees. That provision was, however, subsequently amended to provide for commissions to be payable to the Trust. The amended trust deed also made provision for trustees to recover remuneration for services rendered to the Trust in their professional capacity. Indeed, in my judgment, the provisions of clause 8.1 of the original trust deed, which envisaged the payment of 'Trustees commission' from the income of the Trust, were in fact directed at directed at affording the trustees an entitlement to remuneration generally, and not specifically at sales commission on the life rights as the respondent appears to contend. As the applicants' counsel pointed out, the respondent was not a registered estate agent and thus in any event not entitled to recover commission on property-related transactions. (The respondent contested the notion that Codé Design CC was not entitled to earn commission on the sale of

life rights in his answering affidavit. His position in this regard was misconceived. It overlooked the definitions of 'estate agent' and 'immovable property'[16] in s 1 of the Estate Agents Act 112 of 1976 and the provisions of s 26 of the Act. There is, of course, no prohibition on the Trust itself raising such a commission.)

[43] Moreover, in the trustees' reports to the first applicant's committee and to the rights holders at general meetings, the impression was given that the commissions on the sale of life rights were paid to the Trust. There was no disclosure that the commissions were paid to an entity (Codé Design) controlled by the respondent, or that they generated an income for the first respondent in the form of that entity's profits. The respondent's conduct in this regard points to an inadequate appreciation of the nature of his fiduciary duties with the result that he failed to properly distinguish the proprietary affairs of the Trust from those of his own. It is disturbing that even in his answering affidavit, the respondent gives no indication - even with benefit of the opportunity for reflection - of being astute to how his conduct deviated from that expected of a trustee in his position. The respondent's conduct appears to me probably to be explicable, at least in part, to the circumstances of the formally unregulated basis upon which he spent a considerable amount of his time and energy attending to the development of the housing development scheme and related matters. I am of the view that the income generated through Codé Design was probably seen by him as affording reasonable recompense for his exertions on behalf of the Trust and the Kidbrooke Place development. The position remains, however - as argued by the applicants' counsel - that Walton's 'profound misappreciation' of his duties and obligations signifies a risk that he may act in breach of his fiduciary duty in other respects should he remain in office.

[44] Walton also placed reliance on a letter signed by the founder of the Trust in 1994, which recorded an indication by the latter that Walton might earn commission. I agree with the argument of the applicant's counsel that this does not avail him because, as a general principle, a settlor's intentions in a trust deed are ascertained from the language of the trust deed; cf. *Sea Plant Products Ltd v Watt* 2000 (4) SA 711 (C) at 720-721 (per van Heerden J, Hlophe JP and Motala J concurring). On any

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[16] '[A]*ny housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988 (Act 65 of 1988), and any proposed housing interest*' was added to the definition of 'immovable property' in terms of s. 1 (h) of the Estate Agents Amendment Act 90 of 1998 with effect from 1 January 1999.

approach, the letter could not absolve the respondent from compliance with the common law and trust deed requirements[17] in respect of a trustee entering into contracts with the Trust for his personal interest.

[45] Walton's contention that the payment of commission to Codé Design was known to various persons, such members of the management committee and certain of the other rights-holders, also does not avail him. It does not address the common law requirement of *prior* informed consent from all the beneficiaries, or the requirements of clause 6.2.10 of the trust deed.[18]

Discussion

[46] In the answering affidavit, the respondent ascribed the institution of the current proceedings to a malicious campaign by certain residents of Kidbrooke Place against him. He illustrated the alleged campaign by reference to correspondence generated over the issue of dissatisfaction by certain residents about his ownership of life rights in two cottages in the development which he lets out. A similar complaint was made about the then village manager, who is now a co-trustee and cited as the fourth respondent in the current proceedings. The respondent conceives of the current proceedings as a stratagem by some residents of the village to take over control of the Trust and its assets. The subletting issue led to the trustees taking counsel's opinion. Counsel opined that nothing in the applicable legislation prohibited the letting of use right accommodation to retired persons. It would appear, however, that the concern of the complainant residents was that the holding of multiple life rights by a single individual eroded the trust's ability to generate income from the resale of life rights by limiting turnover. In this regard it should be noted that the profits made on such resales were applied in subsidising the costs of the running of the village and thus also in limiting increases to the levies payable by rights holders for that purpose.

[47] The conflict of interest situation in which the first respondent and Badenhorst placed themselves as trustees in respect of the transactions involving HMS and Codé was stark. This was in manifest breach of their duties to the Trust and the rights holders as beneficiaries.

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[17] See para [48], below for the trust deed requirements.
[18] Quoted below, in para [48].

[48] Not only was their conduct in conflict with the duties of a trustee at common law, it was also in breach of express provisions of the trust deed that reiterated the common law duties of trustees. In this respect mention may be made of clauses 6.2.9 and 6.2.10, in particular:

> 6.2.9 No trustee who has a direct or personal interest in the method or result of the exercising of any of the powers or discretions vested in him by law or in terms of this trust deed may exercise or concur in the exercise of such powers or discretions, and must allow his co-trustees or co-trustee to act alone in the exercise of the powers and discretion aforesaid in relation to such matter.
>
> 6.2.10 Each trustee who has an interest in any transaction affecting the trust fund, shall be obliged to disclose beforehand the nature and extent of his interest when exercising any power or discretion in such matter.

[49] As stated in Cameron *et al* op cit supra, at §223, 'A trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the court'. I have considered the leading authorities on the issue as to when it might be appropriate for a court to exercise the power to remove a trustee from office: *Letterstedt (now Vicomtesse Montmort) v Broers and Another* 9 AC 371, 1884 UKPC 1, *Sackville West v Nourse and Another* 1925 AD 516, *Volkwyn NO v Clarke and Damant* 1946 WLD 456 and *Hoppen and Others v Shub and Others* 1987 (3) SA 201 (C).

[50] *Letterstedt* concerned an appeal to the Privy Council from a decision of the Supreme Court of the Cape of Good Hope. In the absence of any reference by counsel in argument to Roman-Dutch authority, Lord Blackburn applied the '*principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones*'. His Lordship enunciated two salient considerations in that regard that have informed the approach adopted in the subsequent judgments of the courts in this country. Referring to a passage in Story's *Commentaries on Equity Jurisprudence* at Sect. 1289, at which it was recorded that '*...in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity*', he stated '*...the jurisdiction*

which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate'[19] and further '*In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great-nicety. But they proceed to look carefully into the circumstances of the case*'.[20]

[51] Lord Blackburn's opinion also contained the following observation, which I find of pertinence in the current matter: '*It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded*'.[21]

[52] In *Sackville West*, Solomon ACJ, whose judgment in this respect was not distinguished in that of Kotze JA to which the other members of the court subscribed, endorsed the Privy Council's opinion in *Letterstedt* as '*laying down the broad principles by which the Courts administering the Roman-Dutch law would be guided*'. Following those principles in *Volkwyn*, Clayden J stated '*the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate*'. The provisions of s 20(1) of the Trust Property Control Act posit essentially the same test.

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[19] At p. 386 (Appeal Cases report).
[20] At p. 387 (Appeal Cases report).
[21] At p. 389 (Appeal Cases report).

[53] Inasmuch as certain of the dicta in *Volkwyn* (at p. 464) and their highlighting in *Hoppen* (at p.219B-C) might suggest - as appeared to be argued by the respondent's counsel - that findings of dishonesty, gross inefficiency or untrustworthiness on the part of the person must necessarily underlie any decision by a court to remove someone from office as a trustee, I do not agree that that is so; nor, indeed, do I consider it to be what the respective judgments were intended to hold. My view in this regard is supported by the statement from Cameron *et al*'s work quoted in paragraph [49], above.

[54] It is evident that the respondent has played an important and central role in the establishment and on-going administration of the Kidbrooke Place housing development scheme. His efforts in this regard appear to be highly valued and appreciated by a significant number of the life rights holders and by his current co-trustees. It seems clear to me, however, that it is the respondent's close identification of himself with the concept of the scheme and the extent of his immersion of himself in its affairs that has caused him to misconstrue in material respects the nature of his role, duties and responsibilities as trustee. It is also clear that the unresolved issues that I have discussed in relation to the discharge of his functions as trustee are a festering problem in the administration of the affairs of the Trust that will not be laid to rest for so long as he remains in office.

[55] The prosecution of the current application, which obtained the support and endorsement of the majority of the life right holders, is manifestly the precursor to further proceedings in which a proper accounting for and disgorgement of unauthorised profits will be sought from the respondent. Objectively considered, he would have been well advised in the circumstances to have appreciated, with regard to the best interests of the administration of the trust, the untenability of his continuing in office in the context of the claims that it is intended to advance against him, and to have resigned.[22] His failure to do so, and decision instead, with the loyal support of his current co-trustees, to oppose the application for his removal has exposed the Trust to potential liability for the costs of this application - all in defence of his own position. This, in my view, affords an unsettling further indication of a material lack of insight by the respondent as to the legal character of his position as a trustee and serves only to confirm my conclusion that the interests of the Trust and its

[22] Cf. the remarks of Lord Blackburn in *Letterstedt* supra, at 386 fin- 387 (Appeal Cases).

beneficiaries will be best served by the removal of the respondent from his position as trustee.

[56] I should mention that in arriving at this conclusion I have weighed the views of the first respondent's co-trustees that he plays an important institutional role in the administration of the housing scheme's affairs. His removal from office as a trustee will, however, not prevent the trustees in office from time to time from continuing to avail of his services (or those of Codé Design) on an arms' length contractual basis, if so advised. I have also had regard to the clear intention of the founders of the Trust that the first respondent should be a trustee for as long as he should wish. I have, however, regarded it as more important in the whole conspectus of the matter to have regard to the best interests of the Trust in the context of events that subsequently unfolded.

[57] The first to fourth respondents made an application to strike out certain very limited parts of the applicants' papers. I have not found it necessary to make any formal determination in this regard. Even were it assumed in the respondents' favour that the application to strike out should have been upheld, the result would not have affected the outcome of the main proceedings. The striking out application was of such a minor incidental nature in the conspectus of the matter that it does not warrant the consideration of a separate costs order.

[58] An order will be made that the applicants' costs of suit, including the costs incurred as a result of the postponements of the application,[23] will be borne by the first respondent in his personal capacity. The applicant was represented by senior counsel, who appeared without the assistance of a junior. For the assistance of the taxing master I should indicate that I consider that the importance and complexity of the matter justified the employment by the applicants of senior counsel. A costs order against the trustees in their representative capacity is not indicated as that would redound to the prejudice of the applicants and in a financial sense essentially negate their substantive success in the proceedings. The applicants' counsel asked also for an order obliging the respondent to refund any costs paid by the Trust to date in opposing the application. In my view, however, the question whether the respondent

[23] The decision in respect of the costs of the postponements has been made in accordance with my acceptance of the arguments advanced in that regard in the applicants' supplementary heads of argument, dated 19 September 2014.

is liable to the Trust for the expense his co-trustees have incurred in joining with him in opposing the application is not a matter before me. I make no finding in that regard, but it seems to me in any event difficult to distinguish the respondent's position, qua trustee, from that of his co-trustees in regard to any expenditure the Trust may have incurred in unsuccessfully opposing the application.[24] The trustees might have been advised before incurring any costs by the Trust to oppose the application, which bore centrally on one of their number personally rather than on the Trust itself, to seek a so-called *Beddoe* order,[25] but whether they should be liable to reimburse the Trust for that expenditure is a discrete issue to be pursued by the beneficiaries, if so advised, and on which I express no opinion.

Order

[59] The following order is made:

1. The first respondent is hereby removed from office as a trustee of the Hudd Trust (Master's Office reference T618/87).
2. The fifth respondent is directed to take the appropriate steps to give effect to the provisions of paragraph 1 of this order.
3. The first respondent shall be liable for the applicants' costs of suit, including the costs incurred as a result of the postponements of the application on the scale as between party and party.

A.G. BINNS-WARD
Judge of the High Court

[24] The answering affidavit of the second respondent indicates that the trustees' decision to oppose the application was taken by the respondent's co-trustees 'to the exclusion of first respondent'.
[25] After the case of *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA), as to which see the discussion in *Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C) from para 48.