COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/unnumbered

IN THE MATTER of the trusts of the Deed of Settlement establishing the X Settlement

IN THE MATTER of the Trustee Act, 1998

IN THE MATTER of an application by the Trustee of the X Settlement made pursuant to Section 77 (1) of the Trustee Act, 1998

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. N. Leroy Smith and Mr. Jonathan Deal of Higgs & Johnson for the Applicant Trustee

Hearing Date: 10 December 2020, 10 February 2021

Trust – Section 77 of the Trustee Act, 1998 - Application for the opinion, advice and/or directions of the Court – Construction of trust instrument – Scope of a power to pay or apply capital and power of resettlement – Resettlement

The X Settlement is a discretionary trust that was established under the laws of The Bahamas by a Deed of Settlement in 1988 for the primary benefit of "X" and her issue. The Applicant Trustee is the sole trustee of the X Settlement and was appointed to that office in 2012.

In 2019, the settlor wrote a letter to the Applicant Trustee in which she expressed concern over the fact that a trust established for the benefit of X's brother "Y", which is also administered by the Applicant Trustee and contains near identical provisions to those of the X Settlement, was at risk of attack in potential divorce proceedings involving Y's wife.

The expressed concern from the settlor that Y's trust might be at risk of attack in potential divorce proceedings precipitated analysis of the provisions of the X Settlement, whereupon a similar risk of spousal claims was perceived to exist. In particular, it was not conclusive whether X's spouse was included in class of beneficiaries and, further, the definition of "Beneficiaries" appeared to include the spouses of X's descendants and other included relations.

The settlor wished for the Applicant Trustee to take whatever steps it deemed necessary to clarify that the X Settlement was established for the benefit of X and her issue only and were not intended to benefit spouses.

The Applicant Trustee applied under Section 77(1) of the Trustee Act, 1998 by way of a Trustee Statement dated 2 November, 2020 for the opinion advice and/or directions of the Court on the following questions:

(i) whether, on the true construction of the Settlement Deed, any natural person falling within the definition of "the Beneficiaries" has (a) a present entitlement either in possession or reversion to any part of the Trust Fund or (b) a right to require that any such entitlement be conferred upon them?

(ii) whether, on the true construction of the Settlement Deed, the current and/or any future spouses of X fall within the definition of "the Beneficiaries" contained therein?

(iii) in the event of a positive response to item (ii) above, whether, on the true construction of the Settlement Deed, the Applicant Trustee is authorised and empowered pursuant to (a) Clause 3(1)(i) and/or (b) Clause 3(4) and/or (c) any other provisions to cause the provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the X Settlement onto new trusts on like terms save for the desired modifications) so as to effect the removal and/or exclusion of the current and future spouses of X from the class of beneficiaries?

(iv) whether, on the true construction of the Settlement Deed, the Applicant Trustee is authorised and empowered pursuant to (a) Clause 3(1)(i) and/or (b) Clause 3(4) and/or (c) any other provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the X Settlement onto new trusts on like terms save for the desired modifications) so as to remove and/or exclude the current and future spouses of all other beneficiaries of the X Settlement (other than X) from the class of beneficiaries?

(v) in the event of a positive response to item (iii) above, whether the Applicant Trustee may properly exercise its power(s) as described in item (iii) as aforesaid by executing a Deed of Appointment, Deed of Application, Deed of Amendment/Variation, Deed of Exclusion and/or Deed of Resettlement drafted in a conventional form?

(vi) in the event of a positive response to item (iv) above, whether the Applicant Trustee may properly exercise its power as described in item (iv) as aforesaid by executing a Deed of Appointment Deed of Application, Deed of Amendment/Variation, Deed of Exclusion and/or Deed of Resettlement drafted in a conventional form?

Held: The Court provided the opinion, advice and/or directions sought as follows:

1. On the true construction of the Settlement Deed, no natural person falling within the definition of "the Beneficiaries" in the Settlement Deed has either (i) a present entitlement either in possession or reversion to any part of the trust fund of the X Settlement or (ii) a right to require that any such entitlement be conferred upon them.

2. On the true construction of the Settlement Deed, no current or future spouse of X falls within the definition of "the Beneficiaries" contained in the Settlement Deed.

3. On the true construction of the Settlement Deed, the Trustee is authorised and empowered pursuant to both (a) Clause 3(1)(i) and (b) Clause 3(4) to cause the provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the X Settlement onto new trusts on like terms save for the desired modifications) so as to effect the removal and/or exclusion of the current and/or future spouses of descendants and relatives of X from the class of beneficiaries under the X Settlement.

4. Having regard to the facts and matters set forth in the Trustee Statement, the Court approved the execution by the Trustee of a Deed drafted in a conventional form to cause the provisions of the X Settlement Trust to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund onto new trusts on like terms save for the desired modifications) so as to remove and/or exclude the current and/or future spouses of X's descendants and relatives from the class of beneficiaries under the X Settlement.

RULING

CHARLES J:

Introduction

[1] By a Trustee Statement dated 2 November 2020 (the **"Trustee Statement"**) tendered pursuant to Section 78 of the Trustee Act, 1998 ("the Act"), the current trustee of the X Settlement applied to the Court for the following relief pursuant to Section 77 of the Act:

> **"3.1 On the basis of the matters set forth in this Statement, [the Applicant Trustee] prays for the following relief in respect of the [X Settlement], namely the opinion, advice and/or directions of the Court on the following questions:**
>
> **(i) whether, on the true construction of the Settlement Deed, any natural person falling within the definition of "the Beneficiaries" has (a) a present entitlement either in**

possession or reversion to any part of the Trust Fund or (b) a right to require that any such entitlement be conferred upon them?

(ii) whether, on the true construction of the Settlement Deed, the current and/or any future spouses of [X] fall within the definition of "the Beneficiaries" contained therein?

(iii) in the event of a positive response to item (ii) above, whether, on the true construction of the Settlement Deed, [the Applicant Trustee] is authorised and empowered pursuant to (a) Clause 3(1)(i) and/or (b) Clause 3(4) and/or (c) any other provisions to cause the provisions of the [X Settlement] to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the [X Settlement] onto new trusts on like terms save for the desired modifications) so as to effect the removal and/or exclusion of the current and future spouses of [X] from the class of beneficiaries?

(iv) whether, on the true construction of the Settlement Deed, [the Applicant Trustee] pursuant to (a) Clause 3(1)(i) and/or (b) Clause 3(4) and/or (c) any other provisions of the [X Settlement] to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the [X Settlement] onto new trusts on like terms save for the desired modifications) so as to remove and/or exclude the current and future spouses of all other beneficiaries of the [X Settlement] (other than [X]) from the class of beneficiaries?

(v) in the event of a positive response to item (iii) above, whether [the Applicant Trustee] may properly exercise its power(s) as described in item (iii) as aforesaid by executing a Deed of Appointment, Deed of Application, Deed of Amendment/Variation, Deed of Exclusion and/or Deed of Resettlement drafted in a conventional form?

(vi) in the event of a positive response to item (iv) above, whether [the Applicant Trustee] may properly exercise its power as described in item (iv) as aforesaid by executing

a Deed of Appointment Deed of Application, Deed of Amendment/Variation, Deed of Exclusion and/or Deed of Resettlement drafted in a conventional form?

3.2 In addition to the opinion, advice and/or directions of the Court as aforesaid, [the Applicant Trustee] seeks the following ancillary relief:

3.2.1 an Order that [the Applicant Trustee] shall be relieved and excused wholly from any liability and be fully indemnified pursuant to Sections 77(3) and 98 of the Act for any acts or things done or not done by it in accordance with or further to any Order or opinion or advice or directions of this Court;.

3.2.2 an Order that the Costs of this application shall be borne by the Trust Fund of the Trust; and

3.2.3 such other orders, directions and relief as this Honourable Court may deem fit."

[2] On 10 December 2020, I made the following Order and adjourned the application for the purposes of receiving written submissions from the Applicant Trustee on the issues remaining to be determined:

1. "On the true construction of the Settlement Deed, no natural person falling within the definition of "the Beneficiaries" has either (i) a present entitlement either in possession or reversion to any part of the trust fund of the [X Settlement] or (ii) a right to require that any such entitlement be conferred upon them.

2. On the true construction of the Settlement Deed, no current or future spouse of [X] falls within the definition of "the Beneficiaries" contained in the Settlement Deed.

3. (Without prejudice to paragraphs 1 and 2 above) this matter shall stand adjourned to 4:00pm (EST) on 9 February 2021 at which time the Court shall hear and determine such questions as have been raised in the Trustee Statement that remain to be answered.

4. **The Trustee shall be relieved and excused wholly from any liability and be fully indemnified pursuant to Sections 77(3) and 98 of the Trustee Act, 1998 for any acts or things done or not done by it in accordance with or further to this Order.**

5. **The Costs of this application shall be borne by the trust fund of the [X Settlement].**

6. **The [Applicant Trustee] shall be at liberty to apply."**

[3] On 5 February 2021, Counsel for the Applicant Trustee lodged written submissions and a Bundle of Authorities addressing the issues then outstanding.

[4] On 10 February 2021, upon the continuation of the Applicant Trustee's application and after hearing submissions from Mr. N. Leroy Smith, Counsel for the Applicant Trustee, I made the following Order:

1. **"On the true construction of the Settlement Deed, the [Applicant Trustee] is authorised and empowered pursuant to both (a) Clause 3(1)(i) and (b) Clause 3(4) to cause the provisions of the [X Settlement] to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the [X Settlement] onto new trusts on like terms save for the desired modifications) so as to effect the removal and/or exclusion of the current and/or future spouses of descendants and relatives of [X] from the class of beneficiaries under the [X Settlement] (i.e. that certain class defined within the Settlement Deed as "Beneficiaries");**

2. **Having regard to the facts and matters set forth in the Trustee Statement, the Court approves the execution by the [Applicant Trustee] of a Deed drafted in a conventional form to cause the provisions of the [X Settlement] to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund onto new trusts on like terms save for the desired modifications) so as to remove and/or exclude the current and/or future spouses of [X's] descendants and relatives from the class of beneficiaries under the [X Settlement] as aforesaid;**

3. **The [Applicant Trustee] shall be relieved and excused wholly from any liability and be fully indemnified pursuant to Sections 77(3) and 98 of**

the Trustee Act, 1998 for any acts or things done or not done by it in accordance with or further to this Order;

4. **The Costs of this application shall be borne by the trust fund of the [X Settlement]; and**

5. **The [Applicant Trustee] shall be at liberty to apply."**

[5] As this application raises some interesting issues of trusts law, I thought it useful to reduce my reasons to writing. That said, this was a confidential matter concerning the internal affairs of a private trust, and so, I anonymized my reasons.

Factual background

[6] The subject trust, the "X Settlement", is a discretionary trust which was established under the laws of The Bahamas pursuant to a Deed of Settlement (the "**Settlement Deed**") made in 1988 between the settlor (the "**Settlor**") and a professional trust company in operation at the time, for the primary benefit of "X" and her issue.

[7] The current and sole trustee of the X Settlement (the "**Applicant Trustee**"), a non-resident professional trustee, was appointed to the office of trustee of the X Settlement in 2012. The Applicant Trustee is also the trustee of a 'related' trust containing near identical provisions, the "Y Settlement", established for the primary benefit of X's brother, namely "Y" and his issue.

[8] Under the terms of the Settlement Deed, Clause 3(1)(i) invests the Trustee with power to pay or apply the income or capital of the Trust Fund (the "**Clause 3(1)(i) Power**") as follows:

> "**The Trustee during the Trust Period…may pay or apply the income of the Trust Fund (or the balance thereof not accumulated or otherwise applied by the Trustee under any other provisions hereof) and may in its absolute discretion from time to time pay or apply the whole or any part of the capital of the Trust Fund to or for the benefit of such one or more to the exclusion of the others or other of the Beneficiaries as are for the time being in existence in such shares if more than one and in such manner generally as the Trustee shall in its absolute discretion think fit**". [Emphasis added]

[9] The foregoing Clause 3(1)(i) is subject to Clause 3(5) of the Settlement Deed, which provides:

> "**No payment under paragraphs (1) and (2) of this Clause shall be made to or for the benefit of any beneficiary without such beneficiary's consent if sui juris and otherwise without the consent of such beneficiary's parent guardian tutor curator committee or receiver or such other person as shall then have the lawful custody or control of the property of such beneficiary.**"

[10] In addition to the power conferred by Clause 3(1)(i), under Clause 3(4) of the Settlement Deed, the Trustee is empowered to appoint the whole or any part of the Trust Fund upon the trusts of a new settlement in favour of or for the benefit of one or more of the Beneficiaries (the "**Clause 3(4) Power**"):

> "**Notwithstanding any of the trusts powers and provisions herein contained the Trustee shall have power at any time or times during the Trust Period at the absolute discretion of the Trustee by any irrevocable deed or deeds and without infringing the rule against perpetuities to appoint that the whole or any part of the Trust Fund shall thenceforth be held upon the trusts and with and subject to the powers and provisions of any other settlement not infringing the rule against perpetuities applicable to this Settlement and approved by the Trustee and in favour or for the benefit of all or any one or more exclusively of the others or other of the Beneficiaries and upon any such appointment being made the Trustee shall transfer to the trustees for the time being of the said other settlement the property comprised in the said appointment and thereupon the trusts herein declared concerning such property shall cease and determine and the said property shall for all purposes be subject to the trusts powers and provisions contained in the said other settlement and be subject to and governed by the proper law of the said other settlement whether such proper law shall be the proper law of this Settlement or not.**" (Emphasis added)

[11] Both Clause 3(1)(i) and Clause 3(4) employ the defined term "the Beneficiaries". The term "the Beneficiaries" is defined in the Settlement Deed at Clause 1(4) as meaning and including "the persons as set forth in the Second Schedule hereto". The Second Schedule of the Settlement Deed contains the following definition:

> "**The Beneficiaries of this Settlement shall be [X] … her descendants and other relatives up to and including persons within the third degree of consanguinity and including their respective spouses; provided that any part of the Trust Fund not applied at the expiration**

> **of the trust period in accordance with the trusts and powers of this Settlement shall be distributed to such charity as the Trustee shall determine and in default of such determination to [a named default beneficiary]**".

[12] Despite the apparent width of the beneficial class, the Applicant Trustee averred by its Trustee Statement that only three beneficiaries – X and her two minor children – had actually received distributions under the X Settlement during its 30+ year existence.

[13] In August 2019, the Settlor wrote to the Applicant Trustee, in its capacity as trustee of the Y Settlement, and expressed concern over the fact that the Y Settlement's assets might be at risk of 'attack' in potential divorce proceedings involving Y and his wife, contrary to the Settlor's original intention that the Y Settlement be for the benefit of Y and his issue only.

[14] The expressed concern from the Settlor that the Y Settlement's assets might be at risk of 'attack' in potential divorce proceedings led to an analysis of the position under the X Settlement, in relation to which a similar risk of spousal claims being brought was perceived to exist.

[15] In September 2019, the Applicant Trustee responded to the Settlor in the following terms (so far as is relevant):

> "**Dear [Settlor]**
>
> **Thank you for [your letter of August, 2019] and we note your wishes as expressed.**
>
> **With this in mind we intend to take certain actions in relation to the [Y Settlement] to try and ensure that it is safe from any potential attack from [a named foreign court] in the unfortunate event of divorce proceedings.**
>
> **As you will be aware, the second schedule within the Trust Deed [for the Y Settlement] details who the beneficiaries are. The wording has caused some issue with previous trustees, particularly in relation to whether the spouse of the named beneficiary is included. Given your very clear clarification, we intend to amend the second schedule so that the beneficiaries are stated without ambiguity. Unfortunately we are unable to do this without going to the Bahamian courts as the [Y**

> **Settlement] does not give us the power to make the amendment ourselves. ….**
>
> **The other Trust of which you are the Settlor [i.e. the X Settlement] has the same wording in the second schedule, albeit that that Trust is for the benefit of [X] and her issue. We have been considering whether it would be prudent to make the same amendment to the second schedule for [the X Settlement] and would welcome your comment in this regard….**"

[16] In October 2019, the Settlor issued a letter by and according to which she consented to the Trustee taking 'whatever steps it deemed necessary to clarify that the X Settlement and the Y Settlement are intended for the benefit of respectively Y and X and their respective issue only and are not intended to benefit their respective spouses'.

[17] Under the terms of the Settlement Deed, neither the Settlor nor the Applicant Trustee enjoys an express power of amendment and the Settlor does not enjoy a power of revocation from which a power of amendment might be implied.

[18] However, in 2012, it had been suggested to the Applicant Trustee that the Clause 3(1)(i) Power or the Clause 3(4) Power might be used to appoint the Trust Fund of the X Settlement and resettle it on identical terms but for the benefit of a modified class of beneficiaries. In other words, the Applicant Trustee might exercise the powers to cause a variation, whether in the technical sense or in the broader sense, to bring about a state of affairs whereby the trust assets are held on similar terms but with a different beneficial class.

[19] Against this backdrop, the Applicant Trustee made the present application as it considered the overall position under the X Settlement not entirely free from doubt given the perceived opacity of the description of the beneficial class and the fact that there was no express power of amendment, power to remove beneficiaries or power of release contained in the Settlement Deed.

Section 77 of the Act

[20] As mentioned, this application was brought pursuant to Section 77 of the Act. However, to better appreciate the present application, it is imperative that section 77 be read conjunctively with section 78 of the Act. The sections provide as follows:

> **"*Trustee may apply to Court for advice or direction.***
>
> **77. (1) A trustee or personal representative may without commencing an action apply upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate.**
>
> **(2) Such application shall be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.**
>
> **(3) A trustee or personal representative acting upon the opinion, advice or direction given by the Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee or personal representative in the subject matter of the said application.**
>
> **(4) Subsection (3) shall not extend to indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction if he is guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.**
>
> **(5) The costs of such application shall be in the discretion of the Judge.**
>
> ***Application for advice or direction to be signed by counsel and attorney.***
>
> **78. Where any trustee or personal representative applies for the opinion, advice or direction of a Judge under section 77, the written statement shall be signed by a counsel and attorney and the Judge may require the applicant to attend him by his counsel and attorney either in Chambers or in Court where he deems it necessary to have the assistance of a counsel."**

[21] While perhaps something of an anomaly insofar as no formal action need be commenced under it in order to obtain relief, the procedure under Section 77 (the "**Section 77 Procedure**") is one that will be familiar to most practitioners of trusts law in The Bahamas.

[22] The method of application contemplated by the Section 77 Procedure is a “written statement”. In practice, the “written statement” will, at a minimum, be a statement signed by the applicant’s counsel and attorney, outlining the background to the question(s) concerning the administration or management of the trust property or the assets of the testator or intestate upon which the Court’s opinion, advice and/or directions are sought.

[23] The purpose of the Section 77 Procedure is to provide trustees and personal representatives with an efficient and cost-effective means of obtaining the opinion, advice or direction of a Judge in Chambers on any question regarding the management or administration of the trust property or the assets of the testator or intestate, for the protection of the trust or estate and the applicant.

[24] The Section 77 Procedure gives effect to the general supervisory jurisdiction of the Court over the administration of trusts and is modelled upon the procedure for obtaining the “opinion, advice or direction” of a judge on isolated questions relating to the administration of trusts that was introduced in England and Wales by Lord St. Leonard’s Law of Property Amendment Act 1859, 22 & 23 Vict, c 35 but later superseded by Rules of Court.

[25] The principal attraction for trustees and personal representatives of the Section 77 Procedure is that, if the trustee or personal representative acts in accordance with the opinion, advice or direction given by the Judge to whom the application is made then, by statute, they are deemed, so far as regards their own responsibility, to have discharged their duty as trustee or personal representative in the subject matter of the application.

[26] The Section 77 Procedure cannot be invoked unless some question respecting the management or administration of the trust property or the assets of any testator or intestate arises. Even where the Section 77 Procedure is properly invoked, the Court has discretion whether to give its opinion, advice or direction and as to what opinion, advice or direction it gives**.**

[27] In my opinion, this was an appropriate case in which section 77 of the Act was invoked given the diversity of cases in which it has been invoked in modern practice before this Court and the fact that the Applicant Trustee was ultimately seeking guidance as to the scope of and the manner in which it should exercise its powers.

Service and notification

[28] Section 77(2) of the Act stipulates that an application under section 77 **shall** be served upon and the hearing attended by the following persons:

> **"(2) Such application shall be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient."**

[29] It is permissible under section 77 for the applicant to refrain from serving the application on any person interested in the application and to seek procedural directions as to service from the Court. In the present case, the Applicant Trustee adopted this approach.

[30] Even where an applicant has attempted to serve the application on the persons that it considers to be interested in the application, it is ultimately for the Court to determine whether it is expedient for any additional persons to be convened. In trust matters, the Court may convene non-beneficiaries such as the settlor or the protector, provided that they are interested in the application.

[31] In this case, I initially considered directing service of the application upon the Settlor and hearing from the Settlor as to her wishes regarding the X Settlement given she was alive and resident in the jurisdiction. However, I was ultimately satisfied that her wishes were sufficiently expressed in the correspondence discussed and exhibited to the Applicant Trustee's Trustee Statement.

[32] While it will often be appropriate to convene at least some of the beneficiaries when the Court is exercising its supervisory jurisdiction over trusts, since the trust property is held for their benefit, each case must turn on its own facts. In this case,

I was satisfied that it was not necessary to convene any of the beneficiaries given the nature of the issues arising, the specific factual context and the fact that the X Settlement is a discretionary trust.

Entitlements of the Beneficiaries

[33] The first question posed by the Applicant Trustee focuses on the nature of the rights of beneficiaries under discretionary trusts governed by Bahamian law.

[34] Before me, learned Counsel Mr. Smith submitted that the X Settlement is a discretionary trust which serves to invest no person with any actual interest in any particular trust property; rather, by the terms of the X Settlement, the trustee has full and virtually unfettered discretion to determine to whom and in what amounts if any assets or distributions of the income or capital of the trust fund should be made.

[35] I accepted Mr. Smith's submission on this issue. While it was not cited to me, this Court dealt with a similar issue in **Richard Anthony Hayward and others v Striker Trustees Limited and others** 2010/CLE/gen/01137 in a decision dated 10 March 2020 and reported as [2020] BHS J. No. 7. In that case, the Court was asked to determine whether the applications of a deceased beneficiary under a Bahamas-law governed discretionary trust challenging the appointment of a judicial trustee survived his death. The Court held that his estate could not maintain his applications, in part because the deceased's interest under the trust did not survive his death. The headnote reads (in pertinent part):

> **"2. The 1993 Settlement is a discretionary trust. The Deceased, being a beneficiary of the Settlement, was a mere object of that trust. The Deed of Inclusion did not make any provision for the transmission of his interest to any spouse, child or remoter issue, so there can be no issue of any interest in the Settlement surviving his death.**
>
> **3. A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. But that right is not a proprietary interest in the assets held by the trustees: Y v R [2018] 1 CILR 1 [Grand Court of the Cayman Islands relied upon".**

Construction of the Second Schedule

[36] The second question posed by the Applicant Trustee was a strict question of construction.

[37] The principles of interpretation that apply to trust instruments do not, in general, materially differ from the principles that apply to the interpretation of other documents.

[38] In **HM Attorney General v Zedra Fiduciary Services (UK) Ltd and others** [2020] EWHC 2988 **(Ch)**, Zacaroli J. helpfully summarised the general approach that should be taken when interpreting trust instruments at paragraphs 43 and 44 in the course of considering the purpose of the particular charitable trust before His Lordship:

> **"43. All parties are agreed that this is a question to be determined by reference to the terms of the Deed construed in accordance with the usual principles of interpretation of a written instrument. It was also common ground that the construction of the Deed is to be approached in the manner which the court approaches the construction of all instruments: see *Marley v Rawlings* [2015] AC 129, at [17] to [23]. Lord Neuberger summarised the task as follow (at [19]):**
>
> > **"…the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."**
>
> **44. It is a unitary exercise involving an iterative process "by which each suggested interpretation is checked against the provisions of the [instrument] and its commercial consequences are investigated": *Wood v Capita Insurance Services Ltd* [2017] UKSC 24."**

[39] Against this backdrop, it is convenient to reproduce the provisions of the Second Schedule of the Settlement Deed:

> "**The Beneficiaries of this Settlement shall be [X] … her descendants and other relatives up to and including persons within the third**

> **degree of consanguinity and including their respective spouses; provided that any part of the Trust Fund not applied at the expiration of the trust period in accordance with the trusts and powers of this Settlement shall be distributed to such charity as the Trustee shall determine and in default of such determination to the Bahamas Heart Foundation.**"

[40] Mr. Smith submitted to me that the Second Schedule did not link X to the term "respective spouses" – rather the use of the second "including" in the description of the Beneficiaries was exclusively referable to X's descendants and other relatives and did not modify or relate to X herself. I accepted the correctness of this submission and concluded that X's spouse is not a member of the class of Beneficiaries.

Construction of the Clause 3(1)(i) and Clause 3(4) Power

[41] By virtue of my conclusion in relation to the second issue, it was unnecessary for me to address the third issue identified in the Trustee Statement as requiring the Court's opinion, advice and/or directions.

[42] I found the fourth issue identified as requiring the Court's opinion, advice and/or directions to be the most challenging. For this reason, I directed that Counsel for the Applicant Trustee provide me with full written submissions. As Learned Counsel for the Applicant Trustee addressed the scope of the Clause 3(1)(i) Power and the Clause 3(4) Power separately and in that order, I too do so.

<u>The Clause 3(1)(i) Power</u>

[43] Mr. Smith submitted that the Clause 3(1)(i) Power is a power which authorizes the Applicant Trustee to deal with both the income and capital of the X Settlement and gives the Applicant Trustee a broad power to pay or apply the income or capital to or for the benefit of any one or more of the Beneficiaries to the exclusion of the others of them in such manner as the Applicant Trustee thinks fit. Learned Counsel further submitted that the Clause 3(1)(i) Power is akin to a power of advancement and is an overriding power, insofar as it enables the Applicant Trustee to override or modify the terms of the trust.

[44] Mr. Smith expounded that there is strictly a distinction between powers of advancement and powers of appointment, the latter of which authorizes the trustee to direct and cause assets to be appointed for the benefit of a beneficiary, that is to say, to be held for the beneficiary. At paragraph 19 of the Applicant Trustee's written submissions, Counsel referred to paragraph E3.2 of Tolley's Administration of Trusts (Society of Trust and Estates Practitioners, LexisNexis Library), whereat the learned authors stated:

> **"EXERCISING POWERS OF APPOINTMENT OR ADVANCEMENT**
>
> **[E3.2]**
>
> **One or other type of power, if not both, will commonly be found (sometimes disguised) in most trusts, of whatever type. A synopsis of their respective key features follows.**
>
> **A power of appointment is a power which permits the holder of the power (who will usually be the trustees, but who could be the settlor, a third party or a beneficiary) (a) to declare in a fully discretionary trust what the fixed trusts are (over a specified asset or fund and in favour of a beneficiary or class), or (b) to amend the existing fixed trusts by declaring new beneficial interests. It is a means of crystallising donative intent and the typical means by which a discretionary trust is operated, but can also be a useful tool in a trust where the interests are otherwise more or less fixed. Different forms of power exist: trustees typically have 'special' powers of appointment, in favour of a limited class; beneficiaries sometimes have a wider 'general' power, potentially in favour of the whole world. A power of appointment is usually exercisable by deed.**
>
> **A power of advancement is usually a more limited power which enables trustees to accelerate contingent or presumptive interests of a beneficiary in the capital: an express power may be conferred by the settlor to 'enlarge' the interest of a pure income beneficiary into an interest in the underlying capital; the statutory power more usually accelerates (at the expense of the income beneficiary) the rights in remainder of the underlying capital beneficiaries. A power of advancement is most commonly exercisable by resolution or administrative act (handing over title to the asset).**
>
> **However, in practice, the distinction between a power of appointment and a power of advancement is frequently blurred and has taxed the courts. This is partly because a power of appointment can of course be used to declare that a beneficiary takes capital outright (as is common in most advancements) and, partly the result of case law: this has established that a power of advancement may be exercised**

> **(like a power of appointment) not simply to hand over capital outright, but also in such a way as to declare new trusts and confer new discretionary powers for the benefit of the person or persons in whose favour the power is exercised (*Pilkington and Another v IRC and Others [1962] 3 All ER 622* and the authorities cited in the House of Lords speeches).**
>
> **Where a power of appointment or a power of advancement permits the declaration of new trusts, the rule against perpetuities applies to these new trusts as if they had been written in the original trust deed, ie the restrictions that apply to the old settlement apply to the new trusts (*Re Wills' Will Trusts, Wills and Others v Wills and Others [1958] 2 All ER 472* and *Pilkington, per* Viscount Radcliffe)."**

[45] Mr. Smith submitted that trustees are often given broad powers to benefit the beneficiaries, such as the Clause 3(1)(i) Power, as it is not possible at the outset for the settlor to anticipate all eventualities that may arise. At paragraph 20.1 of the Applicant Trustee's written submissions, Counsel referred to paragraph 10.1 of the practitioner text Drafting Cayman Islands Trusts by James Kessler QC and Tony Pursall (Kluwer Law International, 2006):

> **"10.1 The fundamental desire of the settlor, in creating his trust, is this: to benefit the beneficiaries of his trust in the most appropriate way. It is impossible for settlor or drafter to anticipate in advance exactly what that will be. Other than the reserved powers and STAR precedents,' drafts in this book are based on the premise that the trustees should be trusted — as their name suggests — and they may be given wide powers to achieve the settlor's intention. This is the principal function of the overriding powers…"**

[46] Mr. Smith submitted that there is salient learning that powers akin to the Clause 3(1)(i) Power do authorize trustees to direct that assets subject to a given trust shall be held on new terms, or the terms of a trust may be modified, by exercising the power so as to provide that henceforward the trust assets should be held on identical terms save that certain paragraphs in the trust instrument shall be replaced by new paragraphs.

[47] Within the Applicant Trustee's written submissions, Mr. Smith referred to, *inter alia*, paragraphs 10.9 and 10.12 of Drafting Cayman Islands Trusts, the English case **Re Hampden Settlement Trusts [1977] TR 177**, the Bahamian case of **Rawson**

Trust Co. v Perlman [1990] BHS J. No. 64 and the Singaporean case **Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani** [2020] SGHC 216 (for its discussion of **Blausten v Inland Revenue Commissioners** [1972] 2 WLR 736 and **Re New Huerto Trust** 18 ITELR 477, both of which were included in the Applicant Trustee's Bundle of Authorities).

[48] Mr. Smith specifically drew my attention to the case of **Re New Huerto Trust** 18 ITELR 477, a decision of the Eastern Caribbean Court of Appeal concerning an application by a trustee to the court to approve a deed of appointment excluding the settlor from receiving benefits under a trust for tax reasons and to protect the assets of the trust from being treated as the property of the settlor in matrimonial proceedings, which Mr. Smith described as being comparable to the present case.

[49] In that case, clause 2 of the trust deed read:

> **"THE Trustees STAND POSSESSED of the Trust Fund and the income thereof UPON DISCRETIONARY TRUSTS for the benefit of the Beneficiaries or any one or more of them exclusive of the others in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance, education or advancement or for accumulation of income during minority or for forfeiture in the event of bankruptcy or otherwise and such other conditions as the Trustees may from time to time appoint by Deed revocable or irrevocable executed before the Vesting Day."**

[50] The salient part of the proposed deed is described at paragraph 4 of the judgment delivered by Michel JA (with whom the other members of the Court concurred):

> **"[4] The relevant portion of the terms of the proposed draft deed which the court was being asked to sanction reads as follows:**
>
> **'The Appointor, in exercise of the power in clause 2 of the Trust and of every other power it enabling, hereby declares that the Appointor shall continue to hold the Trust Fund and the income thereof upon, with and subject to all of the trusts, powers and provisions of the Trust and of the September 2010 Deed, but as if the trust, powers and provisions of the trust had been varied as follows:**
>
> **(1) in the place of the wording of clause 1 a) of the Trust there was substituted the following: "a) 'the Beneficiaries' means the children**

and remoter issue of the Settlor born after 6 December 2002 and who presently comprise the Settlor's three sons …" ' "

[51] At first instance, Bannister J held that the trustee lacked the power to do what it proposed to do. At paragraphs 19 to 21 of the Court's judgment, the position that obtained at first instance was summarized thusly:

> "**[19] Bannister J expressly held, in para 12 of his judgment, that 'the Trustee has no power under the Trust deed to vary the terms of the settlement as proposed in the draft' and that cl 2 of the trust deed, which was relied on by the trustee to do that which it proposed to do by the draft deed 'gives the Trustee a power to appoint capital and income'. He further held that the draft which he was being asked to approve 'would not, as executed, appoint any property in favour of any person and would not, therefore, be an exercise of the power conferred by cl 2' and that 'in the absence of any express power to vary, it would, accordingly, be a nullity'.**
>
> **[20] In arriving at the conclusions that he did, Bannister J expressly disagreed with the decision of the English Court of Appeal in *Blausten v IRC*, which had held that the appointment in that case was one under which the capital was directed to be held upon trusts for the benefit of members of the specified class, and that although the objectives of the trustees in making the appointment may not have been the kind of objective which the settlor had in mind when he conferred the power of appointment upon the trustees, the appointment nevertheless fell within the power. Bannister J stated quite categorically that Buckley LJ, who gave the lead judgment in the Court of Appeal, was obviously wrong when he found that what was done by the deed of appointment in that case was clearly within the terms of the power of appointment. He noted that the *Blausten v IRC* case is mentioned in three of the standard books on trusts, namely, *Lewin on Trusts*, *Underhill and Hayden's Law of Trusts and Trustees* and *Snell's Principles of Equity*, but never in relation to the proposition that a special power of appointment may be used to vary the provisions of a discretionary, or indeed any other, trust. He further noted that none of the standard works on trusts rely on the case for the proposition for which it was relied on in the present case, nor has there been reference to any authority, whether English or otherwise, in which the proposition in *Blausten v IRC* relied upon by the appellant has been followed.**
>
> **[21] In terms of *Muir v IRC*, where the English Court of Appeal held that a purported exercise of a special power of appointment was effective to enable the donee of the power to settle the whole fund on trusts identical to those contained in the original settlement, but with the omission of a power contained in the original deed to capitalise income, Bannister J took the view that the decision in that case was**

> **expressed to have been reached on the language of the clause conferring the power of appointment and in the absence of authority, and in any case was made against the background of a settlement which had itself created beneficial interests, so that any settlement would be to the same effect. He concluded therefore that that case did not assist the appellant in this case."**

[52] The Court of Appeal disagreed with Bannister J and allowed the appeal. The Court identified the central issue on appeal, at paragraph 23, as follows:

> **"[23] Although there are 12 grounds of appeal contained in the appellant's notice of appeal, the determination of the appeal really comes down to the question of whether a power of appointment in a trust deed authorising the trustee to appoint capital among named beneficiaries permits the trustee to exclude a named beneficiary from the objects of a discretionary trust, and to do so even in advance of appointing any capital to the other named beneficiaries."**

[53] At paragraph 32, the Court of Appeal stated:

> "**[32] If the trustee can validly appoint property among two or more objects of the trust while excluding altogether one or more objects, then there is no reason why the trustee cannot, in advance of appointing any property to the objects of the trust, use the power of appointment to exclude one of them from benefiting under the trust. The necessity in this case for the trustee to have exercised the power of appointment by excluding one of the objects of the trust in advance of appointing any property to the remaining objects arose only out of the desire of the trustee to protect the trust property from an adverse claim against it which, if successful, would diminish the property interests available for distribution to the remaining objects of the trust."**

[54] The Court of Appeal went on to conclude at paragraphs 35 to 37:

> **"[35] For me, I see no reason based on principle, in terms of the powers of trustees in the exercise of powers of appointment under a trust deed, why the trustee in this case could not properly exercise the power of appointment conferred on him by the trust instrument in excluding the settlor from benefiting under the trust, with the resulting increase in the property interests available for distribution to the children and remoter issue of the settlor, who are obviously the intended beneficiaries of the settlor's benefaction. And, as I stated earlier (at [32], above), why the trustee could not exercise this power of appointment even in advance of appointing any property interests to the other objects of the trust.**

> **[36] Bannister J, as a judge of the High Court of the Eastern Caribbean Supreme Court sitting in the Commercial Court in the British Virgin Islands, is of course not bound by the decisions of the English Court of Appeal, even on the same issue which he is adjudicating, but decisions of that court, although not binding precedents, have always been treated as persuasive authorities in the British Overseas Territory of the Virgin Islands and ought in my view to be so treated on the point in issue in this case.**
>
> **[37] On both authority and principle, I would allow the appellant's appeal and grant the declarations sought by the appellant in the court below, as follows:**
>
> > **(1) The trustee of the New Huerto Trust has the power under cl 2 of the trust deed of 2002 to permanently and irrevocably exclude the settlor of the trust from any benefit under the trust; and**
> >
> > **(2) The terms of the proposed draft deed of appointment under cl 2 of the trust deed excluding the settlor from future benefit under the trust are terms which the trustee can properly include in the deed of appointment, and the trustee is at liberty to execute the deed if, in its discretion, it considers it appropriate to do so."**

[55] Mr. Smith reiterated that the high level point borne out in the authorities is that courts have held that where a trust instrument supplies a power of appointment or advancement, the relevant power can be exercised in a multiplicity of ways including so as to cause trust assets to be held on new terms. Mr. Smith submitted that the same conclusion should be reached in relation to the Clause 3(1)(i) Power.

[56] Mr. Smith next submitted that the proposed exercise of the Clause 3(1)(i) Power was not subject to Clause 3(5) of the Settlement Deed (which would require beneficiary consent) because it did not concern a payment of the income or capital of the trust fund *per se* but an application of it by resettling the assets of the X Settlement.

[57] On the basis of the material before me and the very forceful submissions of learned Counsel Mr. Smith, I was satisfied that, on the true construction of the Settlement Deed, the Applicant Trustee was and is authorised and empowered pursuant to Clause 3(1)(i) to cause the provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the

X Settlement onto new trusts) so as to effect the removal and/or exclusion of the current and/or future spouses of descendants and relatives of X from the class of beneficiaries; accordingly, I so ordered.

The Clause 3(4) Power

[58] Mr. Smith submitted that the Clause 3(4) Power is a power of resettlement and that one customarily finds two types of power of resettlement in trust instruments – narrowly drawn powers simply permitting trustees to deal with the trust fund in various ways including by transferring the assets to different trusts and wider hybrid powers of appointment. Mr. Smith submitted that the Clause 3(4) Power is of the latter type. In either case, the effect of a power of resettlement is to remove assets from a trust and subject them to the terms of different trust. This can effectively achieve the same result as a variation.

[59] Mr. Smith next submitted that the Clause 3(4) Power expressly authorizes the Applicant Trustee to cause the trust assets to be held on new trusts. However, Mr. Smith specifically drew my attention to and placed reliance upon the decision of Neville Smith J in **Rawson Trust Co. v Perlman** [1990] BHS J. No. 64, which concerned (among other things) the scope of a similar power of resettlement. Within their written submissions, Counsel for the Applicant Trustee provided a helpful discussion and summary of the decision:

> "**22.1 The Perlman family established a valuable discretionary trust (called the "Stead Fund") by a Deed of Settlement dated 31st December, 1982. The first Protectors of the Stead Fund were the settlors (Henri Perlman and Susan Perlman), Robert Perlman, and Louis Perlman. However, after a deterioration in relations that occurred between the Perlmans following the death of Henri Perlman, the administration of the Stead Fund became hampered by the fact that the unanimous consent of the Protectors was required for a number of trustee actions. In circa 1986, the trustee thought it prudent to create a new vehicle for the administration of the Stead Fund to avoid the need for unanimous Protector consent and, at the same time, it wished to make a distribution to Robert Perlman (but believed Louis Perlman would not consent to the distribution).**

22.2 On 13th January, 1986, the trustee, with the consent of Susan Perlman, set up a new trust referred to as "the 1986 Trust"/"the Stead Fund II" and immediately thereafter purported to appoint to the 1986 Trust all of the assets of the Stead Fund. The trusts set up by the 1986 Trust were similar to the existing trusts over the Stead Fund except that the provisions relating to the Protectors were changed and also changes were made to the identification of some of the beneficiaries. Following the appointment, the trustee purported to make a distribution to Robert Perlman (as it originally intended to do prior to the appointment).

22.3 The trustee sought various reliefs from the Court relating to its decision-making. Louis Perlman argued that the first question posed by the trustee concerning the 1986 Trust (which need not be elaborated upon for present purposes) ought not to be answered at all as the trustee was not empowered to establish the 1986 Trust and to make the appointment that it did to it. The validity of the 1986 Trust was therefore put into issue.

22.4 The critical provisions of the 1982 Deed of Settlement were clauses 4(B) and clause 13.

22.5 Clause 4(B) provided (see paragraph 29):

> **"4(B) The Trustees shall until the Perpetuity Date have the power to raise any sum or sums out of the capital of the Trust Fund and pay or apply the same to or for the benefit of all or any one or more exclusively of the other or others of the Beneficiaries and in such respective amounts if more than one and generally in such manner as the Trustees shall in their like discretion think fit."**

22.6 The trustee and the members of the Perlman family that supported the trustee argued that the trustee had the power to create entirely new and different trusts and to appoint the Stead Fund into those new trusts pursuant to clause 4B and/or clause 13 of the 1982 Deed of Settlement.

22.7 With respect to clause 4B in particular, Smith J. considered that clause 4B *did* authorize the trustee to do what it did (although he did not base his ultimate decision on the effect of clause 4B alone). His Lordship stated (at paragraphs 30 to 40):

> **"30 It is clear that this clause does not provide for any direct resettlement of the Stead Fund as does clause 13. Subject to any consent which may be necessary therefor, this clause would permit the Trustee to take any part of the capital and pay or apply it exclusively to all or one or more of the beneficiaries of the Stead Fund; and Counsel for Robert suggests that the Trustee**

could have settled for beneficiaries any distributions of capital on any new trusts not similar to those in the 1982 Deed because the Trustee was given the power to apply distributions of capital "generally in such manner as the trustees shall in their absolute discretion think fit".

31 In the English case In re Rank's Settlement Trusts, Newton and others v Rolle and others, reported at (1979) 1 WLR 1242 the court had to construe a clause in a settlement where the trustees with narrow investment powers held property "upon trust for all or any one or more exclusively ... with such provisions for maintenance, education and advancement and otherwise at the discretion of any person ..." The Court held that the person having the discretion properly exercised that discretion to confer on the trustees new and additional powers of investment. Slade J at page 1248 of the judgment said this:

[INTERNAL QUOTATION OMITTED]

32 This case is obviously not exactly on the point to be resolved on clause 4 B as it was then dealing with different terms. Cited cases rarely are on point; but the case does show that the Court has been flexible in the interpretation of these kinds of provisions. Here, the Trustee had the power to apply the capital generally and in such manner as in its absolute discretion it thought fit. I would not think that there would be an improper use of this power if the Trustee raised capital from the Stead Fund to apply it for all the beneficiaries on trusts that are different from those set up in the 1982 Deed if those trusts were and were said to be for the benefit of the beneficiaries.

33 The Trustee would obviously be doing nothing wrong as far as clause 4 B is concerned in distributing to any one of the beneficiaries part of the capital of the Stead Fund. The Trustee would have also been empowered to distribute the remaining part or parts of the Stead Fund to any one or more of the beneficiaries. It is possible therefore for the Trustee to maintain that the method of appointment employed in 1986 was no more than a carrying into effect, in the way the Trustee in its absolute discretion thought fit, what is provided in clause 4 B.

34 If that could have been done, and there is nothing to show that it could not, it would therefore be proper for the Trustee to have appointed the capital of the Stead

Fund to all of the beneficiaries in such a way as to get the Stead Fund free of the particular trusts created in the 1982 Deed. And that, the Trustee could say, is no more than it sought to do so as to benefit the beneficiaries and permit a workable administration of the Stead Fund.

35 Counsel for Louis readily conceded that the power given the Trustee under clause 4 B of the 1982 Deed would permit the Trustee to apply the capital of the Stead Fund in such a way as to denude the trusts in that deed and to vest that capital in a completely new trust. The Trustee could certainly from the outset have stated in the summons that it was relying on all the powers enabling it to do what it did without identifying clause 13 as providing for what it did. Louis' stance might very well have been different. Indeed, it was only during the hearing of the matter that an application for the amendment of the originating summons was made and allowed and the matter was presented on the grounds that the power contained in clause 13 might not have been the only power the Trustee could have prayed in aid for its action. Before the amendment was sought the question was related only to the power expressed in clause 13 of the 1982 Deed notwithstanding that the deed of appointment itself invoked all the powers the Trustee had to make it. It would seem that when the Trustee came to the Court, it was on the premise that clause 13 provided the power, and possibly the only power, on which it could act to achieve the purpose it set out to achieve.

36 It might be argued that for the Trustee to claim to have used the power given in clause 4 B there should have been genuine distributions of the capital to specific beneficiaries. This is not what shows up as having been done by the Trustee. The crux of the matter is, however, that the Trustee did have power to deal with the capital of the Stead Fund in such a way as to remove it from the original settlement and apply it in such manner for the benefit of the beneficiaries as the Trustee thought fit. This would include appointing it for the beneficiaries onto the completely new trusts of the 1986 Trust in the way the Trustee did it albeit when the Trustee made the appointment in 1986, it might hardly have been addressing the power of distribution provided for in clause 4 B of the 1982 Deed.

37 There would be no further need to look elsewhere to see whether the Trustee did have the power to make what amounted to completely different trusts under

which to hold the Stead Fund. The power to do so would be said to be contained in clause 4 B so that without looking at what the 1986 Trust provided and how the Stead Fund could get under that trust, if it did, one could say the Trustee had power to apply the Stead Fund to new trusts for the beneficiaries and thus create new and different trusts on which to hold the Stead Fund.

38 When operating under this clause, as also under the clause with which I shall deal immediately hereafter, the Trustee was acting in its absolute discretion. It was submitted by Counsel for Mrs. Perlman that when a trustee is given power to act in his absolute discretion a Court will not exercise its ordinary power nor look into the exercise of that discretion by the trustee unless there was mala fides or the trustee did not understand what he was doing and used the power clearly for the wrong purpose.

39 No mala fides has been alleged or was shown by Louis to exist in this matter. No wrong purpose was shown if the clause 4 B power was used.

40 The Trustee has not however put its eggs, at least not all of them, in this clause 4 B basket, so that even if what has been deduced above relative to clause 4 B is flawed, it does not mean that the 1986 actors of the trustee were invalid or ineffective."

[60] Smith J. also had occasion to consider clause 13 of the 1982 Deed of Settlement, which constituted a power of resettlement in the following terms:

"13. Transfers to Other Trusts

Notwithstanding any other trusts, powers and provisions herein contained the Trustees shall have power at any time or times before the Perpetuity Date at the absolute discretion of the Trustees to raise and pay or transfer the whole or any part or parts of the Trust Fund freed and discharged from the trusts and powers and provisions of this Settlement to the trustees (one or more of whom may be one or more of the Trustees hereof) or any other settlement or trust not infringing the rule against perpetuities applicable to this Settlement and approved by the Trustees and in favour or for the benefit of all or any one or more exclusively of the others or other of the Beneficiaries, whether or not the Trustees or trustees of such other trust are resident within the jurisdiction applicable at the time of that settlement, and thereupon the property so paid or

> **transferred shall be subject to the trusts, powers and provisions of that other trust and be governed by the proper law of that other trust whether or not such proper law is the proper law of this Settlement."**

[61] Smith J. considered and rejected a number of arguments raised by Counsel for Louis Perlman that the clause 13 power did not authorize the trustee to appoint the assets of the Stead Fund onto the trusts of the 1986 Trust/the Stead Fund II created by the trustee. He stated:

> **"42 It is common ground that by clause 13 the Trustee is given power to transfer, in its absolute discretion, the whole Stead Fund to trustees of any other settlement or trust provided that other settlement or trust does not infringe the perpetuity periods set up for the Stead Fund and the trustees are approved by the Trustee. This would mean that if a trust has trustees who have been approved by the Trustee and has perpetuity periods which do not offend those for the Stead Fund, that trust would generally be a proper receptacle for the deposit by the Trustee of the Stead Fund.**
>
> **43 Counsel for Louis contended, however, that clause 13 does not permit a revocation of or change or alteration in the trusts for the Stead Fund since the deed setting up the Stead Fund provides in clause 22 that the settlement shall be irrevocable and not subject to future change or alteration. Counsel for Mrs. Perlman submitted that the provisions against revocation and future change only relate to a revocation by the original settlers. He further submitted that because clause 13 is to be construed without reference to any other provision in the 1982 Deed, the clause providing against revocation and future change has no effect upon clause 13.**
>
> **[…]**
>
> **46 It has always been accepted that in the drafting of documents, the use of the word "notwithstanding" opens the way for the person to whom the document is addressed to ignore completely such things that are stated to be without regard. In this case, any provision in the 1982 Deed may be disregarded if its effect would be to nullify what clause 13 provides. Clause 22 itself is a provision in the deed and if construed in the way Louis contends for it will nullify clause 13; and the Trustee may therefore ignore it when dealing with clause 13.**
>
> **[…]**
>
> **48 I would hold that clause 22 does not affect clause 13 and that clause 13 takes effect according as it verbally provides.**

49 Clearly the Trustee did have the power set out in the clause to transfer the whole or any part of the Stead Fund to the trustees of another settlement for the benefit of all or one or more of the beneficiaries and thus to make valid and effective appointments from the Stead Fund to crew and different trusts.

50 It was observed for Louis that if there was power for the Trustee to make new settlements under clause 4 B (where there are very wide powers to deal with capital) clause 13 should not be stretched to include the power sought to be exercised by the Trustee in appointing the Stead Fund to the 1986 Trust. Implicit in this observation would be a concession that the Trustee may have had the power to make a resettlement under clause 4 B. It is to be noted, however, that clause 4 B does not give the direct power to transfer to new trusts as appears in clause 13. The power given in clause 4 B is to the Trustee to apply capital in any manner in its absolute discretion as it thinks fit for the benefit of the beneficiaries; but it could have been open to the Trustee to determine that the creation of new trusts may be a fit means of exercising that power for the benefit of the beneficiaries. It cannot be straining the meaning of clause 13 to hold that the clause does confer on the Trustee the power to transfer the Stead Fund to new trusts different from those created by the 1982 Deed.

51 It was said that the appointment by the Trustee would be bad if the 1986 Trust is not a proper receptacle for the Stead Fund. Louis contends that it is not a proper, receptacle because the Trustee is the trustee of the 1986 Trust and that is not permissible on a correct construction of clause 13.

52 Counsel for Louis submitted that clause 13 could not have been meant to apply to a trust set up as was the 1986 Trust because the clause did not envisage the Trustee becoming the settler in a trust set up by the Trustee. In neither case would the trustee of the new trusts be approved by the Trustee as is provided for in the 1982 Deed since the Trustee could not properly approve itself for the purposes of clause 13.

53 I do not see why, by setting up a trust with itself as trustee, there would be any doubt that the Trustee did approve of itself, for those purposes. There can hardly be a clearer case of trustee approval. Clause 13 does not provide how the trusts to which the Stead Fund may be transferred are to be set up. It provides only that the trustees are to be approved by the Trustee and the perpetuity periods are not to infringe those for the Stead Fund in the 1982 deed. It would be straining these matters too much to suggest that another trust in which the Trustee is the sole trustee does not have a trustee who is approved by the Trustee. When so put it seems strange that the position is one to be strongly argued. There is no direct evidence, one way or the other, as to whether the trustees of the 1986 Trust have been approved by the Trustee; but there is enough in what has been

done for this Court to conclude that there must have been approval of the trustee of the 1986 Trust by the Trustee."

[62] Mr. Smith submitted that the **Rawson Trust Co.** case, which was heavily argued by leading counsel, concerned virtually identical provisions as are at issue in this case and therefore ought to be followed by this Court.

[63] In his written submissions, Mr. Smith next submitted that if it is accepted the Clause 3(4) Power enables the Applicant Trustee to appoint the assets of the X Settlement onto the trusts of an already established settlement of which it is also the trustee, then, as a matter of principle, it should be possible under the Clause 3(4) Power for the Applicant Trustee to simply declare the assets of the X Settlement will simply be held on new trusts by reference to the Settlement Deed albeit with the desired modifications as equity will not insist on circuity of action.

[64] I was satisfied that, on the true construction of the Settlement Deed, the Applicant Trustee was and is also authorised and empowered pursuant to Clause 3(4) Power to cause the provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund of the X Settlement onto new trusts) so as to effect the removal and/or exclusion of the current and/or future spouses of descendants and relatives of the X from the class of beneficiaries.

"Blessing" Application

[65] By virtue of my conclusion in relation to the second issue, it was unnecessary for me to address the fifth issue identified in the Trustee Statement as requiring the Court's opinion, advice and/or directions.

[66] By the sixth issue identified in the Trustee Statement as requiring the Court's opinion, advice and/or directions, the Applicant Trustee sought this Court's approval before proceeding to exercise the Clause 3(1)(i) Power or Clause 3(4) Power to effect the removal and/or exclusion of the current and/or future spouses of descendants and relatives of X from the class of beneficiaries.

[67] It is well established within this jurisdiction that trustees are able to seek the Court's approval of momentous decisions arising in the administration of their trust before they are implemented under the "blessing" jurisdiction considered by Hart J in **The Public Trustee v Cooper** [2001] WTLR 901 (20 December, 1999). Where a trustee obtains a "blessing order", they will ordinarily be protected from liability from breach of trust so far as the beneficiaries are concerned.

[68] The legal principles that should be applied where a "blessing" application is made to the Court are well established. In their written submissions, Counsel for the Applicant Trustee cited Hargun CJ's summary of them in **Re R Trust** 22 ITELR 123 at paragraphs 22 to 26:

> "**[22] The general principles governing the approach of the Court to an application for approval by the Court of a momentous decision by the trustees are not in dispute and are set out in the judgments of Kawaley CJ in *Re A Trusts* [2018] SC (Bda) 42 Civ and Vos LJ in *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312, [2015] WTLR 39.**
>
> **[23] In *Cotton* Vos LJ summarised the requirements which have to be satisfied in a case where the trustee had the power to make the decision but seek the approval of the Court because the decision is particularly momentous:**
>
> > **'[12] In *Public Trustee v Cooper* [2001] WTLR 901, Hart J repeated Robert Walker J's now well-known categorisation of cases in which trustees may seek the approval of the court. These proceedings fell into the second of Robert Walker J's categories (see p923 in *Cooper*), namely where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them "but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action". In *Cooper*, Hart J said at p925 that the duties of the court in a category 2 case depended on the circumstances of each case, but that in that case, it had to be satisfied, after a scrupulous consideration of the evidence, of three matters as follows:**
> >
> > > **i) That the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;**
> > >
> > > **ii) That 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;**

iii) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.'

[24] In the formulation of the general principle, Vos LJ referred to the need for caution given that one consequence of authorising the trustees to exercise the power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. However, the need for caution has to be placed in context: 'The court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason' (Vos LJ at [84]).

[25] In *Re A Trusts,* counsel (Mr Singla QC) argued that the Court should also ask the question: 'Whether it can be said that in reaching its decision to implement the proposal the trustee has taken into account irrelevant, improper or irrational factors or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.' Kawaley CJ accepted that the additional question was part of the inquiry whether the decision would have been reached by a reasonable body of trustees. At [7]–[8] Kawaley CJ said:

> **'[7] Properly analysed, there is no real distinction between the third question approved by this Court in *Re ABC Trusts* [[2012] SC (Bda) 65 Civ, [2012] Bda LR 89] and the "additional" question proposed by Mr Singla QC. The latter is simply an expanded articulation of the former. The question "*is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at*?" necessarily requires regard to whether a proper decision-making process occurred. Reasonable trustees would not take into account irrelevant, improper or irrational factors, and would only be informed by considerations which are relevant to their decision. This more fully articulated test was adopted by Blackburne J in *Merchant Navy Ratings Pension Fund Trustees Ltd. -v- Chambers & Ors* [2001] PLR 137 at [7]. The latter "*threshold test*" for approving a category 2 decision was approved by Asplin J in *Pollock -v- Reed* [2015] EWHC 3685 (at paragraph 129) in a passage to which Mr Singla QC referred:**
>
> > **"It is whether in reaching its decision the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached."**
>
> **[8] Accordingly I accepted the submission of Mr Singla QC that this Court was required, as part of the process of deciding whether or not the decisions would have been reached by a reasonable body of trustees, to have regard to whether or not the**

Trustees had taken into account irrelevant, improper or irrational factors.'

[26] The current legal position in relation to the approach of the Court in category 2 case, as here, is set out in *Lewin on Trusts* (19th edn, 2015) at 27–079:

'Application without surrendering discretion – role of court

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.'"

[69] Before me, Mr. Smith, in his very persuasive oral arguments, submitted that, by virtue of the salient considerations identified at paragraph 31 of his written submissions, including the specific intentions of the Settlor, coupled with the fact that the X Settlement was intended to be dynastic, this Court ought to approve the proposed exercise as a proper exercise of the Applicant Trustee's powers.

[70] At paragraph 33 of their written submissions, Mr. Smith submitted:

"33. In the present case:

33.1 …the Trustee has the requisite power to resettle the assets of the Trust on the terms of new trusts for the benefit of the desired beneficial class.

33.2 the decision of the Trustee to resettle the assets of the Trust on the terms of new trusts for the desired beneficial class is momentous insofar as it would entail the removal of certain beneficial objects and would involve assets being removed from the current settlement and settled on new terms.

33.3 **we are instructed that the Trustee wishes to act in the way proposed (provided that it first verifies there will be no adverse tax consequences from the proposed resettlement, which it has not done but must do).**

33.4 **the Trustee in taking its decision has taken into account and places reliance upon the wishes of the settlor (but it is not simply acting as an "unthinking cipher" for the settlor, which it must not do). The settlor's wishes are a material consideration in the exercise of dispositive discretions…**

33.5 **it will be for the benefit of the living discretionary objects of the Trust that are not removed for the class of objects to be reduced in scope as it would increase the likelihood of distributions being made to them and will reduce the likelihood that distributions will be made to others.**

33.6 **the decision that the Trustee has reached is a reasonable one given the absence of an express power of amendment. It would not be as satisfactory to leave spouses as Beneficiaries given the clear wishes of the settlor and the fact that for so long as they remain Beneficiaries the Trustee shall be obliged to give due consideration to any request for a distribution it may happen to receive from them from time to time."**

[71] I accepted these submissions and ordered that, having regard to the facts and matters set forth in the Trustee Statement, the Court approves the execution by the Applicant Trustee of a Deed drafted in a conventional form to cause the provisions of the X Settlement to be amended and/or otherwise modified (including by way of the appointment of the Trust Fund onto new trusts on like terms save for the desired modifications) so as to remove and/or exclude the current and/or future spouses of X's descendants and relatives from the class of beneficiaries under the X Settlement.

Costs

[72] I was satisfied that the Applicant Trustee had not acted unreasonably or improperly in making this application and, in making the same, had acted for the benefit of the trust estate. For this reason, I awarded the Applicant Trustee its costs to be paid out of the trust fund of the X Settlement.

Postscript

[73] Last but not least, I owe a great depth of gratitude to both Mr. Smith and Mr. Deal for their immeasurable assistance in anonymizing this Ruling.

Dated the 7th day of May, A.D. 2021

Indra H. Charles
Justice