Neutral Citation Number: [2020] EWHC 3114 (Ch)

Case No: PT 2019 000273

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

Rolls Building, 7 Rolls Buildings
Fetter Lane, London. EC4A 1NL

Date: 18/11/2020

Before :

MASTER SHUMAN

- -

Between :

PTNZ **Claimant**

- and –

(1) AS
(2) CFS
(3) AMS
(4) MIB
(5) FS
(6) CS
(7) NS
(8) SS
(9) THE UNBORN BENEFICIARIES
(10) CA

Defendants

- -
- -

Richard Wilson QC and Zahler Bryan (instructed by Burges Salmon LLP) for the Claimant
Gregory Pipe and Ciar McAndrew (instructed by Cooke, Young & Keidan LLP) for the Second to Fourth Defendants
Clare Stanley QC and William Buck (instructed by RPC LLP) for the Sixth and Seventh Defendants
Elspeth Talbot Rice QC and Elizabeth Weaver (instructed by Stewarts) for the Eighth Defendant took no part in the hearing
Mark Hubbard (instructed by Rosenblatt Limited) for the Tenth Defendant

Hearing dates: 11 to 13 May 2020
- -

HTML VERSION OF JUDGMENT APPROVED

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2pm on 18 November 2020.

MASTER SHUMAN :

1. This is the first of two hearings listed to determine issues arising out of the restructuring of four family trusts and subsequent events. The claimant is a corporate trustee seeking the blessing of the court in respect of two momentous decisions made on 10 May 2017 and 29 January 2019. The trusts are governed by English law and administered in Jersey.

2. The Part 8 claim form was issued on 28 March 2019 pursuant to CPR Part 64, a Public Trustee v Cooper [2001] WTLR 901 category 2 claim. The complexion but not the underlying structure has transmogrified during the course of the proceedings. HL, a director of the claimant and a lawyer, has now filed 10 witness statements. There are 15 files of documents and 2 files of authorities. It is a feature of the number of defendants and the sums involved in this case together with one part of the family appearing to stand odds with other parts of the family that the claimant has had an increasingly tortuous path to navigate.

3. I have been greatly assisted by all counsel who appeared before me at the remote hearing. In particular Mr Wilson QC and Ms Bryan have had to walk a fine line to remain neutral but also to provide assistance to the court on how to approach the identified issues in a claim that the claimant elected to bring to court to seek directions. A position accentuated by the 8th defendant having engaged hitherto in the proceedings but electing neither to file a substantive skeleton argument nor attend this hearing. Whilst one could readily see why she did not wish to be treated as a hostile beneficiary and therefore lose entitlement under the trusts for herself and for her issue it caused some consternation for the other parties. I heard argument on day 1 as to what the role of the claimant should be and gave an ex tempore judgment at the start of day 2. The effect of the volte-face of the 8th defendant is that although witness statements were filed by her directly and on her behalf together with extensive exhibits and an opinion on Monegasque law she elected not to attend court and argue a positive case. Whilst I did not strike out that evidence it seems to me that that evidence carries little weight before me. Where it departs from the agreed position of the other parties I do not accept the 8th defendant’s evidence.

4. The issues for determination at this hearing are:

(1) whether the appointment of the 10th defendant as protector of the trusts on 9 October 2019 was valid or void ("the validity issue");

(2) if the 10th defendant was validly appointed as protector:

(a) whether his consent is required in relation to the decisions of the trustee that are the subject of the blessing application

(b) whether there should be any restriction on the role he should play at all in relation to the blessing hearing

("the protector issues").

THE PARTIES

5. The family trusts comprise 4 English law discretionary trusts, which were created on 6 March 2008 ("the trusts"). The claimant is the trustee and based in New Zealand. The beneficiaries of the trusts are the two male children of A, the 1st defendant and E, and their respective children ("the A family"). E died some years ago.

6. The 1st defendant was the settlor and principal beneficiary of the trusts. He was also protector of the trusts from 11 March 2008 until his death on 13 April 2019.

7. The 2nd to 4th defendants are the adult children of the 1st defendant and his wife, LS; they are discretionary beneficiaries.

8. The 5th to 8th defendants are the adult children of E and are discretionary beneficiaries. In addition E had 2 illegitimate children, who are not beneficiaries under the trusts but are intended to be beneficiaries under the proposed restructuring.

9. The claim originally included the 9th defendant as the class of unborn beneficiaries. With the death of the 1st defendant this class is now closed.

10. On 9 October 2019 the 2nd to 4th defendants and LS appointed the 10th defendant as protector of the trusts. The validity issue concerns his appointment.

THE FACTUAL MATRIX

11. On 23 January 2008 there was a meeting in London with JLM, a representative of the claimant based in Jersey, during which the wishes of the 1st defendant were set out. The meeting note records that he wishes to,

> "… settle four new NZ trusts which in turn will each hold a Bahamian company (BAH) …. settled by [the 1st defendant]. The assets of each BAH will be cash - €300m : €25m : €25m : €25m.
>
> [The 1st defendant] will be the Protector to each trust and appoint his successor."

12. The note also records that the class of beneficiaries will cover the entire A family. JLM was to prepare the necessary trust documents to give effect to the 1st defendant's wishes.

13. On 6 March 2008 the trust deeds were executed ("the trust deeds"). The trusts were formally settled by the claimant, operating under its former name. Ms Stanley QC makes the point that in reality the trusts were settled by the 1st defendant as settlor. The settlement instruments are in materially identical terms. The trusts are discretionary in nature and the trustee has broad dispositive powers. Schedule 3 of the trust deeds sets out matters concerning the appointment of the protector and his powers.

14. On 7 March 2008 the 1st defendant, giving a residential address in Monaco, provided letters of wishes in relation to the trusts. As principal beneficiary of the trusts his wish was that he would benefit from the income and capital.

15. On 10 March 2008 deeds of variation were executed in relation to the trusts. There were a number of changes made to the trusts including a revision to clause 13, hostile beneficiaries, which added that the protector may by deed reinstate a hostile beneficiary as a beneficiary of the trust. For present purposes the most significant variation was the expansion of the powers of the protector and the categories of powers and discretions that could not be exercised by the trustees without the written consent of the protector. Unless I state otherwise references hereafter to "the trusts" mean the trust deeds executed on 6 March 2008, as varied on 10 March 2008.

16. By a deed dated 11 March 2008 made between the claimant and the 1st defendant, the 1st defendant was appointed as protector of the trusts. Recital C records,

> "the trustees wish to appoint the original protector as the 1st protector of the trust and the original protector has been joined as a party to this deed to confirm his acceptance of the appointment."

17. On 13 March 2008 the 1st defendant transferred shares in Bahamian companies to the trusts. On 25 November 2008 there was the first capital distribution from the trusts to the 1st defendant; the second capital distribution to him took place on 28 November 2008. There have been 3 loans made to the 1st defendant from the trusts: January 2009, April 2009 and December 2011.

18. The A family had significant business interests. There were separate investigations by the relevant authorities in another jurisdiction ("the investigating country") into environmental offences and criminal offences alleged to have been committed by some of the beneficiaries of the trusts. This led to the freezing of A family assets in Switzerland and Jersey.

19. A settlement agreement was entered into providing full and final settlement of all civil claims against the relevant beneficiaries. The criminal investigation was against E, the 1st defendant, the 5th defendant and the 7th defendant. A plea bargain was entered into. The settlement agreement and the plea bargain required the payment of over €1 billion to the authorities of the investigating country. This was funded by the A family trusts, not including the trusts that are the subject matter of the claim before me, and

payments to be made by the 1st defendant. There was a need to restructure the A family wealth including the trusts.

20. In October 2016 Jersey-based lawyers contacted the claimant proposing that the trusts be terminated and the assets distributed to the 1st defendant on the basis that he would resettle €340 million on 6 new trusts for the benefit of certain beneficiaries and their children.

21. In early 2017 the 1st defendant issued a number of representations in the Jersey Royal Court including one involving the trusts. The representation in respect of the trusts is described by HL as unconventional in that it was made by the 1st defendant as beneficiary and protector and said to be on behalf of the beneficiaries for the blessing of a decision not yet taken by the claimant.

22. Following further discussion the proposed restructuring was revised and the representation was amended. The 1st defendant, given the pregnant conflicts in his position, may have surrendered his discretion to the Jersey Court: although that appears to be a contentious issue between the parties in the Jersey proceedings. There has never been any suggestion that the claimant or the 1st defendant have surrendered their discretion to the English court. It is also contentious as to whether the 1st defendant acted on behalf of all the beneficiaries in the Jersey Court.

23. On 10 May 2017 the claimant made a momentous decision to restructure the trusts and to redistribute the funds. The trusts would be varied or amended, and 2 new trusts created adding E's two illegitimate children and their issues as beneficiaries so that there would be 6 trusts ("the original decision"). The 1st defendant was to receive the balance remaining in the trusts after payment of costs. The Jersey Court blessed the original decision on 12 May 2017 and was said to have exercised the surrendered power of the 1st defendant to approve the original decision ("the May 2017 Jersey Order").

24. Following the blessing the family wealth was generally restructured but the original decision was not implemented. There were two separate requests to vary the new trusts: from the children of the 5th defendant (to divide their fund) and the children of the 7th defendant (to remove their potential issue as beneficiaries). In December 2018 the claimant resolved to approve the two requests and to distribute the benefit of loans to the 1st defendant. The claimant then made a further decision on 29 January 2019 reversing the approval of the second request but continuing to approve the first request ("the revised decision").

25. On 30 January 2019 the claimant, having already circulated draft proceedings, issued further proceedings in the Jersey Court for a blessing. At that stage the 5th defendant's plea bargain had been rejected, although he was subsequently acquitted at trial, the claimant had not implemented the May 2017 Jersey order and was intending to implement it in a different way, and the claimant had decided to bring proceedings in England and had decided to distribute the benefit of certain loans to the 1st defendant.

26. In February 2019 the 6th and 7th defendants issued proceedings in the Jersey Court challenging the May 2017 Jersey order and opposing the claimant's revised decision. It is their case that they were unaware of the 2017 proceedings in Jersey and did not

consent to what was being put forward by the 1st defendant. In a pragmatic step the claimant decided to consider matters anew on the basis that the 6th and 7th defendants' position was correct.

27. On 21 March 2019 the claimant passed resolutions dealing with the loans to the 1st defendant, resolving to distribute them immediately to him.

28. On 28 March 2019 the claimant issued proceedings in this court seeking a blessing of the court in respect of the original decision and the revised decision.

29. On 13 April 2019 the 1st defendant died.

30. The 6th and 7th defendants have filed an acknowledgement of service opposing the claim. There are now various disputes within the A family including the beneficiaries and the intended beneficiaries as to how the claimant should proceed with the restructuring of the trusts. Mr Wilson QC submits that the claimant has considered the matters raised by the 6th and 7th defendants but decided it is appropriate to continue to seek the relief sought in the claim form and therefore seek the blessing of the court to the original decision and the revised decision. This is set out in HL's 9th witness statement, albeit that part of the reasoning is that the 1st defendant had surrendered his power to the Jersey court. It will be a matter for the blessing hearing whether the claimant has taken into account relevant matters and not taken into account irrelevant matters during the process of it exercising its power, and whether the decision is one which a rational trustee could have come to.

31. On 9 October 2019 the 2nd to 4th defendants and LS appointed the 10th defendant as protector. On 5 November 2019 the 10th defendant notified the claimant's solicitors that he intended to replace the trustee of the trusts. Following injunction proceedings the 10th defendant has given an undertaking not to exercise any power of the protector including his power to replace the trustee until determination of the validity issue.

THE VALIDITY ISSUE

32. In order to determine whether the 10th defendant was validily appointed it is necessary to construe paragraph 1.3 of schedule 3 to the trusts and specifically who constitutes the 1st defendant's "executor, administrator or personal representative" and therefore is able to exercise the power to appoint a replacement protector.

33. The material parts of the trusts are as follows, clause 1 of the trusts define "the Protector" as,

> "… the person (if any) who in accordance with paragraph 1 of schedule 3 (appointment of protector) shall be the protector of this trust for the time being."

Clause 14 provides that the governing law of the trusts is English law but under clause 14.2 that,

> "the trustees shall have power … to carry on the general administration of the trusts in any jurisdiction in the world

> whether or not such jurisdiction is for the time being the proper law of this trust or the courts of such jurisdiction for the time being the forum for the administration of these trusts …".

34. The key provisions are contained in schedule 3 to the trusts. Paragraph 1.3,

> "The Protector for the time being, or in the event of his death his executor, administrator or personal representative, shall have power by instrument in writing delivered to the Trustees to appoint a replacement or additional Protector. Any instrument in writing delivered in accordance with this paragraph appointing a replacement Protector shall specify whether the appointment is to take effect immediately or only upon the current Protector ceasing to hold office due to his death, Incapacity, retirement or removal."

35. The question appears deceptively simple. However the 1st defendant was born in the investigating country, took citizenship of a different country, was domiciled in Monaco at the date of his death and died in Switzerland. The trust is governed by English law, but it is administered in Jersey for a New Zealand-based trustee with the trusts' funds comprising Bahamian registered companies who hold bank accounts in Jersey with substantial funds.

The Law

36. There is a significant amount of agreement between counsel, albeit not complete, on the applicable legal principles. The starting point is that the trust is governed by English law.

37. In Marley v Rawlings [2014] UKSC 2 Lord Neuberger at paragraphs 19 to 22 confirmed that the approach to construction in commercial contracts applies to wills.

> "19. When interpreting a contract, 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. …
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To

> the same effect, Sir Thomas Bingham MR said in Arbuthnott v Fagan [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".
>
> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts – see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 , per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H- 780F".

38. Mr Wilson QC submits that "prima facie, words are to be given their ordinary and natural meaning". Whilst acknowledging that the modern approach to construction is to look at intention in a broader sense he emphasises that the task remains to look at the words that were actually used. He had developed this in his skeleton argument by relying on chapter 13 in Theobald on Wills, 18th Ed, sections 13-012-13-031. He says that this canon should apply *"unless it can be shown in the context that they should not, because they are intended not to bear that meaning."* He observes that the ordinary meaning of a word may prevail even if it might lead to a capricious result although acknowledges that if there are two possible meanings the court might prefer the one that does not lead to a capricious result. However this is to take the section in Theobald out of context as the start to chapter 13 makes it clear that interpretation of wills follows the same approach as bilateral contracts save that the nature of the document is part of the contextual circumstances.

39. As Lord Hodge said in Wood v Capita Insurance Services [2017] UKSC 24 at paragraph 10,

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching this view as to that objective meaning."

40. If it is being suggested that this canon is elevated in will cases, that is not the law. Lord Neuberger was quite clear, will construction follows the same approach as bilateral agreement construction. This is but one part of the iterative process. Lord Hodge in Woods v Capita Insurance Services said at paragraph 13,

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when

> interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

41. The principles of construction, as summarised by Lord Neuberger in Marley v Rawlings, which apply to wills similarly apply to lifetime settlements.

42. In a joint statement of the applicable legal principles counsel agree that the task for the court in construing the trust is ascertaining *"the objective meaning of the words used, and the objective intentions of the parties to it (or in the case of a unilateral document such as a settlement or a will, the settlor or testator) by interpreting the whole of the words used against their documentary and factual context."* To put that in another way the court needs to sit in the settlor's armchair and construe the objective meaning of the words in light of the relevant factual matrix. The relevant factual circumstances are those which existed or were in the reasonable contemplation of the settlor when the settlement was made and therefore do not include unforeseen circumstances.

43. Norris J in Rafferty v Philp [2011] EWHC 709 (Ch) at paragraphs 23 to 25 summarised the principles as follows,

> "23. In order to understand what the Declaration of Trust actually achieved, it is necessary to construe its terms. The approach to that task cannot be in doubt. Lifetime settlements are no different from other documents in that the subjective intentions of their authors are irrelevant. What counts is the objective meaning that the words of the document convey to the court when considered as a whole in the light of the surrounding circumstances — see Lewin on Trusts at paragraph 6.03[1] .
>
> 24. In the task of ascertaining the surrounding circumstances, the parole evidence rule applies. That is to say that no evidence of extrinsic circumstances is admissible to add to, contradict, vary or alter the terms of a deed or another written instrument — see Lewin, paragraph 6.03, page 201.
>
> 25. The surrounding circumstances can and must be taken into consideration however in interpreting the instrument. This is not to contradict, vary or alter its terms, but to apply them. The circumstances or facts so admissible for this purpose are objective external facts. They do not include direct evidence of the subjective intention of the settlor except in case of a latent ambiguity. But the settlor's written instructions may at times be admitted not as evidence of subjective intention, but to find out the state of a settlor's knowledge — see Lewin, paragraph 6.08."

[1] The previous edition of Lewin. Set out fully in the 20th Ed, para 7-004-7-011.

44. Mr Wilson QC submits that the technical legal words and expressions used are to be given their technical meaning and the fact that a document is professionally drafted may be a relevant factor. That is an accurate statement of legal principle. However the objective meaning of words in some documents may not be found by primarily applying a textualist approach. A point acknowledged by Lord Hodge in Wood v Capita Insurance Services, paragraph 13. The literal words in a will or lifetime settlement may not accord with the objective intention of the testator or settlor when viewed in the surrounding circumstances, hence the need for an iterative process.

45. Ms Stanley QC submits that the court should prefer an interpretation which does not render a provision otiose. Whilst this has more direct relevance to the second issue, in a lifetime settlement case (or a will case) one can see that the settlor or testator, viewed objectively, would be unlikely to have intended a provision to be otiose. Whilst that may not be the same in a bilateral document in Beckett Investment Management v Hall [2007] ICR 1539 Maurice Kay LJ at paragraphs 16 to 18 still observed that using this canon of construction would avoid depriving the provision of "all practical utility".

Executor, administrator or personal representative

46. In English law "executor" is understood to mean the person or persons appointed by the deceased in his will to put his testamentary wishes, as recorded in his will, into effect. The executor's authority is derived from the will. The grant of probate is evidential proof of that title to act. They can do almost all acts which are incident to the office of executorship, prior to grant. This contrasts with the position on intestacy when the personal representative's authority is derived from the grant of letters of administration. Therefore if the executor does not need to prove his title in order to deal with the estate, for example because there is no property in England and Wales, then no grant of probate may be necessary.

47. Where there are several executors they are usually all considered in law as an individual person so that the acts of any one of them carried out in the administration are deemed to be the acts of all of them. There are some limited exceptions to this, for example, dealings with land which require the executors to concur.

48. Under section 25 of the Administration of Estates Act 1925 the executor is under a duty to collect and get in the real and personal estate of the deceased and to administer it according to law. This includes, for example, a duty to pay the testator's debts having regard to the estate assets and what can properly be applied for that purpose and to take action against the testator's debtors.

49. An "administrator" has no fixed meaning and there is no technical definition. When used in the context of the Administration of Estates Act 1925 an "administrator" is *"a person to whom administration is granted"*, section 55(1)(ii). "Administration" is defined in section 55 (1)(i) with reference to the real and personal estate of a deceased person as *"letters of administration, whether general or limited, or with the will annexed or otherwise"*.

50. In its narrow sense, as a holder of a grant, an administrator derives title to administer the estate from the grant. They must therefore apply for and obtain a grant of letters of administration in order to exercise their functions. Until the grant is made the

deceased's estate vests in the Public Trustee. Upon grant the administrator has the same right and liabilities and is accountable as if they were an executor and is also subject to the duties imposed by section 25 of the Administration of Estates Act 1925.

51. Mr Wilson QC refers me to Dicey, Morris & Collins The Conflict of Laws (15th Ed) paragraph 26-037 and the statement that, *"as a general principle of English law […] no person will be recognised by the English courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration."* Further that a foreign representative who wishes to represent the deceased in England must obtain a grant of representation in England. There is commentary under rule 144 which provides that, *"A grant of representation or other authority to represent a deceased person under the law of a foreign country has no operation in England."*

52. However the 1st defendant died domiciled outside of the jurisdiction, indeed had never been domiciled in the jurisdiction, and has no estate in the jurisdiction. A district judge and registrar have a discretion whether to order a grant to be issued in respect of a deceased domiciled outside of the jurisdiction under r. 30(1) Non-Contentious Probate Rules 1987. The general rule is that they will not do so unless there is property to be administered in the jurisdiction. It is likely that the power will therefore only be exercised if there are special circumstances for doing so[2].

53. "Personal Representative" tends to be used in a broader and more flexible way. There is no single fixed meaning or technical definition. In the Administration of Estates Act 1925 it is used in a collective sense to encompass both administrators and executors. Whereas under the Guardian (Missing Persons) Act 2017 it is a collective term denoting a person who is either an executor, an administrator or a person who, under the law of another country or territory, has functions equivalent to those of administering the person's estate under the law of England and Wales.

Decision

54. The claimant has set out two opposing arguments on the construction of "executor, administrator or personal representative" in paragraph 1.3 of schedule 3 of the trusts: (1) "an executor, administrator or personal representative appointed by an English court" or (2) "a person who holds a foreign office or otherwise has attributed to him or her legal characteristics equivalent to an executor, administrator or personal representative appointed by an English court." This forms part of the overarching issue of whether the 10th defendant was validly appointed as protector as set out in paragraphs 4 and 5 of the prayer in the re-re-amended claim form.

55. The 1st defendant made two holographic wills ("the wills"). The first will dated 12 January 2012 appointed LS as heir to all his rights and shares in 2 identified companies and the current accounts of those companies of which he is a beneficiary. The second will dated 20 February 2019 provides, as translated into English,

> "I dispose of my hereditary estate under the laws of Quebec, Canada.

[2] Williams Mortimer & Sunnucks on Executors, Administrators and Probate (21st Ed) para 5-02.

> I confirm all acts of donation effected by me in the past in favour of my heirs; assets having been thus donated shall not be included in my estate for the purposes of my succession".

56. In the sense understood in English law the 1st defendant did not appoint an executor, administrator or personal representative in either the 2012 will or the 2019 will. For the reasons that I will go on to set out, that does not matter.

57. The parties agree that the 1st defendant's choice of law in the 2019 will is ineffective, and I do not need to consider Quebec law. Similarly the fact that the 1st defendant died in Switzerland has no bearing on the issues before me.

58. The 1st defendant died domiciled in Monaco. The parties agree that the wills and the administration of the 1st defendant's estate are governed by Monegasque law. HL in his 9th witness statement, paragraph 5.4, comments that there is no concept of executors, administrators or personal representatives and no equivalent role under Monegasque law. This is again common ground.

59. HR, a registered notary in Monaco, issued a notarial deed on 1 August 2019 which commences the administration proceedings in respect of the 1st defendant's estate in Monaco[3] . This recorded that the *"sole legal heirs with the capacity to collect all assets of his estate"*[4] are LS and the 2nd to 4th defendants and that in accordance with Canadian law the estate is divided ⅓ to LS and the remaining ⅔ divided between the 2nd to 4th defendants. It also recorded that LS and the 2nd to 4th defendants unconditionally accepted the 1st defendant's estate.

60. By letter dated 7 October 2019, sent by email to the claimant on 9 October 2019, LS and the 2nd to 4th defendants purported to exercise the power under Schedule 3 paragraph 1.3 of the trusts appointing the 10th defendant as protector with immediate effect. The letter states that under Monegasque succession rules, which are applicable to the estate of the 1st defendant, they are the heirs and together are the personal representatives of that estate. They also enclosed the 1st defendant's death certificate, the notarial deed, the 10th defendant's acceptance of the office and his curriculum vitae.

61. Mr Wilson QC quite properly reminds me of the genesis of the trusts. These form an important part of the relevant surrounding circumstances for the purposes of construction. In particular I have regard to the fact that the 1st defendant had no obvious ties to or connection with England when the trusts were settled. It was unlikely that the 1st defendant would have any assets in England to administer, as has proved to be the case. The 1st defendant's intentions in respect of the trusts, as evidenced in the note of the meeting on 23 January 2008, were put into effect. The trusts were effectively settled by the 1st defendant. I do not consider it appropriate to look at the sequence of events as separate acts. The fact that the amendment to the terms of the trusts occurred 4 days after the execution of the trusts and before the 1st defendant had been appointed protector and added the funds to the trusts is irrelevant, they form part of one transaction. They reflect the wishes of the 1st defendant as

[3] The filing orders dated 4.7.19 and 16.7.19 respectively record that the 2012 will and the 2019 will were presented to the Monegasque Court.
[4] "Qu'il a laissé pour seuls héritiers de droit, habiles à recueillir la totalité des biens composant sa succession …"

recorded in the note of the meeting. In particular it is recorded that the 1st defendant *"will be the Protector to each trust and appoint his successor."* The 1st defendant was appointed protector and had the power to appoint a substitute or additional protector. A power that was also reserved to his "heirs, executors or personal representative." The wide powers included supervising or regulating the trustees and a regime where the settlor, in his office of protector, could veto important decisions made by the trustees. The main assets of the trusts were shares in Bahamian companies, settled into the trusts by the 1st defendant.

62. It is also highly pertinent that at the time of the creation of the trusts in 2008 the 1st defendant was resident in Monaco. Whilst he was born in the investigating country and acquired citizenships of two other countries he moved to Monte Carlo in 1997. I do not know if he was domiciled in Monaco by then, although it seems highly likely that he was. He was certainly domiciled there at the date of his death.

63. Under Monegasque law succession to a deceased's estate is governed by the law of his domicile at the date of his death. FC of A Legal Services has provided an opinion dated 23 October 2019 on the role of personal representatives and the administration of estates under Monegasque law. He says that there is no equivalent figure to a personal representative and by inference an executor or administrator either. Under the Civil Code article 607 the heirs immediately upon the death of the deceased become the joint owners of all the assets in the estate and are jointly responsible for the administration. The former seems to be similar in effect to section 1 of the Administration of Estates Act 1925, albeit the estate vests in the personal representatives, which provides that,

> "1(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person.
>
> (2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.
>
> (3) The personal representatives shall be the representatives of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate."

64. Under article 655 of the Civil Code once the assets are in joint ownership each heir decides whether to accept the succession unconditionally, accept it up to the value of the net assets or to waive it. Here none of the 1st defendant's heirs have waived their rights. Having initiated the administration process the heirs have tacitly accepted their succession: article 659.

65. The 2nd to 4th defendants rely on the expert report of JG, Avocat-Défenseur, dated 28 January 2020. This report answers questions posed following the service of a report

prepared on behalf of the 8th defendant by GH of Monaco. JG has clarified that the notaire has no legal power over the estate. In a very helpful analysis JG explains how there are two different mechanisms at work when dealing with the deceased's estate. The legal fiction of saisine héréditaire, where the estate is deemed to be directly transferred to the legal heirs on death so that they manage what have become their own assets in their capacity as "continuators" of the deceased. Once the heirs have accepted the estate those rules co-exist with coparceny. Acts of administration require the consent of all coparceners. He describes the heirs thus,

> "- individually own the assets as continuators of the deceased through the legal fiction of saisine héréditaire;
>
> - collectively own the assets as coparceners."

66. There is no specific provision in Monegasque law to enable the heirs to obtain a formal order that they are entitled to administer the estate and no case law governing this issue; although JG considers it is theoretically possible. Similarly it is unclear whether the heirs must act in unison or whether one may pursue such a legal claim, albeit for the benefit of the estate.

67. The heirs have not applied for a grant of letters of administration with will annexed in England: there are no assets here, the 1st defendant died domiciled in Monaco and English law has no relevance to succession and the administration of his estate. In accordance with Monegasque law there is no concept of executor and therefore the 1st defendant had no need to make such a provision in the wills.

68. Even if it were permissible to construe the words simply by giving them their ordinary and natural meaning, a literal and abstract context alone, it is by no means obvious that they were intended to mean only those persons who have obtained a grant of probate or letters of administration from an English court. An executor derives their title from the will not from the grant of probate and property vests in them on the death of the deceased. The generic term of personal representative includes both executors and administrators. Whilst the latter does derive its title to act from the grant, the former does not. It therefore follows that the words used include a person or people who have not obtained an English grant as well as those who have. Further as Mr Pipe, counsel for the 2nd to 4th defendants, rightly points out, the paragraph uses the terms in a disjunctive way. The implication being that "personal representative" is intended to bear its own separate meaning.

69. Construction is not simply a literal exercise but one that involves ascertaining the objective intention of the settlor from the surrounding circumstances. Sitting in the armchair of the settlor at the time the trusts were established I am satisfied that he did not intend that "executor, administrator or personal representative" was to be given a restricted meaning. The effect of construction 1 is that those acting in a representative capacity in respect of the 1st defendant's estate would be compelled to obtain a grant of representation in England in order to appoint a substitute protector under the trusts. This is so even though a foreign court has supervisory jurisdiction over the 1st defendant's estate, it is being administered in a foreign jurisdiction and there are no assets in the jurisdiction of England and Wales. Given that the 1st defendant had no connections with the jurisdiction at the time of the creation of the trusts, and indeed subsequently, that would be a paradoxical construction. I accept Mr Pipe's submission

that construing words by reference to English law does not on this factual matrix involve insisting that a particular individual has a status within this jurisdiction.

70. I have further tested the opposing constructions by considering whether the 1st defendant's objective intention would have been to have a gap between his death and a substitute protector exercising their powers under the trusts, a gap which would inevitably follow from a requirement that someone must obtain a grant from an English court in order to exercise the power of appointment. The answer to that must be no. That would defeat the objective intention of the settlor as to the role of and powers to be exercised by the protector. This is reinforced by the fact that it is by no means certain that an English grant could be obtained so that the power of appointment would potentially fail on death.

71. I therefore consider that the correct construction of "executor, administrator or personal representative" is a person who holds a foreign office or otherwise has attributed to him or her legal characteristics equivalent to an executor, administrator or personal representative appointed by an English court. I also consider that "personal representative" is used in a wider and more flexible sense. For example, by analogy section 24(1) of the Guardian (Missing Persons) Act 2017 defines a personal representative as an executor or administrator or a person performing equivalent functions under the law of another country or territory.

72. Given my construction, the next question is whether the 2nd to 4th defendants and LS as heirs fall within that definition. This case demonstrates the inherent dangers of conflating English concepts with those used and applied in foreign jurisdictions, specifically here under Monegasque law. I am satisfied that "heirs" under that law has the characteristics of the office of personal representative. It carries a range of rights, powers and responsibilities in respect of the deceased's assets and in the administration of the deceased's estate. For example as "continuators" they are "legally responsible to collect the deceased's assets, pay the liabilities and deal with the administration of the estate until its sharing among the heirs and legatees"[5] .

73. Therefore the 10th defendant was validly appointed as protector of the trusts.

THE PROTECTOR ISSUES

74. Although it is not set out in the re-re-amended claim form the claimant seeks guidance from the court on three discrete points: (i) is the consent of the 10th defendant required for the original decision because of the alleged surrender of the discretion of the 1st defendant in the Jersey Court? (ii) What is the nature of the decision that the protector has to make if exercising his consent power? (iii) What role should the 10th defendant play in the blessing? These were summarised in the recital to the order dated 17 December 2019 as what role the protector has in respect of the forthcoming blessing hearing and refined in paragraph 4 above.

75. The deed of variation set out a substantial expansion of the powers of the protector under the trusts.

[5] JG's report, point 2, page 6.

(a) The protector has powers vested in him or her: by clause 8 to appoint trustees; clause 9.2 to remove trustees; and clause 13 to restore hostile beneficiaries to the class of beneficiaries.

(b) The trustees shall not exercise specified powers and discretions without the written consent of the protector, these include in summary:

(i) clause 3.1(b) to pay or apply trust income during the accumulation period;

(ii) clauses 4.1 and 4.2 the power to appoint the trust fund or any part of it and to create any provisions including discretionary trusts and the power to pay or apply the whole or any part of the capital of trust fund for the advancement or benefit of any beneficiary;

(iii) clause 6 to add any person to or remove any person from the class of beneficiaries;

(iv) clause 12 the power to vary the provisions of the trusts;

(v) schedule 1, paragraph 16.1 the power to lend the whole or any part of the trust fund to specified classes including any beneficiary and in respect of the latter to treat it as either an investment loss or a distribution to a beneficiary who is directly or indirectly benefited;

(vi) schedule 1, paragraph 17.1 the power to charge the trust fund and guarantee debts;

(vii) schedule 1, paragraph 32 the power to change the governing law of the trusts.

76. Schedule 3, paragraph 2.6 of the trusts provides that the protector should not be prevented from exercising any power or discretion conferred by the trusts by reason of any direct or indirect interest, whether personal or in a fiduciary capacity.

77. Mr Hubbard rightly identifies clauses 4 and 6 of the trusts as the key provisions in respect of this claim. Both of which require, if there is an appointed protector, the written consent of the protector for the trustees to exercise their powers. In addition, the power under clause 12, is again subject to the written consent of the protector.

78. Mr Hubbard has complained in his skeleton argument about the claimant not providing documents to the 10th defendant and the latter's frustration. I make no criticism of that. On 1 May 2020 the protector gave a preliminary indication that he would be minded to consent to the addition of beneficiaries, as decided upon by the claimant, and in principle consent to the creation of the new trusts but reserved his position in respect of those trusts where the class of beneficiaries was not agreed. Without the disclosure of all relevant facts and documents that can only be an indication. However until determination of the validity issue the claimant is bound by confidentiality orders from the Jersey court and this court. The 8th defendant until shortly before the hearing was challenging the validity of the appointment of the 10th defendant. Whilst I have every sympathy for the 10th defendant the claimant was in an invidious position.

The Law

79. The parties agree that the protector's power of consent are powers which are to be exercised in good faith and for the purposes for which they are conferred. Accordingly the fraud on a power rule applies to the protector.

80. There is a divergence of view between the claimant and the 10th defendant as to whether the latter's power is properly described as a fiduciary power or a limited or restricted power. Mr Wilson QC submits that there is little doubt that the powers of consent are fiduciary. He refers me to Lewin on Trusts, 20th edition, paragraph 28 - 018,

> "the significance of the fiduciary obligation is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and they have various remedies open to them if the donee does not or cannot do so. He is not bound to exercise it merely by virtue of its being a fiduciary power: the duty is to consider its exercise, though in the case of what is called a trust power he is bound to exercise it."

81. Here the trust instrument authorises the donee to exercise the power in a way which benefits himself, whether he has a direct or indirect interest in the exercise of the same; which accords with the intentions of the 1st defendant when the trusts were established. However that does not preclude the power from being classified as a fiduciary power although it would more obviously fit within the limited or restricted power class. Mr Hubbard referred me to Lewin paragraph 28-041 which says that a power of veto conferred on a beneficiary is more likely to be intended to be a beneficial power than where it is conferred on a trustee.

82. The protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion. Whilst the beneficiaries views are material to the exercise of the protector's powers of consent, he is not bound to follow them. The fact that the decision of the protector is contrary to the wishes of one or more beneficiaries is not in itself a valid criticism of the exercise of that power. Further when considering the exercise of his powers of consent it is not necessary for the protector to reach the same conclusion as the trustee by the same route in order to consent to the trustee's decision.

83. In Lewin at paragraph 39-094 the approach of the court is summarised as follows,

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

If it is so satisfied the court will give approval of a trustee's momentous decision.

84. The requirement that the opinion was one that the trustees could "properly have arrived at" requires the court to have regard to whether a proper decision-making process was followed so that the trustees omitted from the decision any irrelevant, improper or irrelevant factors and as a corollary took into account relevant matters. Inevitably the court will consider that process and the impact of any material changes in circumstances which may have occurred between the making of an initial decision and the hearing at which the court is asked to give its blessing. A trustee is under a fiduciary duty to keep an unimplemented decision under review. Mr Hubbard submits that the trustee has to take account of material changes of circumstances before deciding to implement an earlier unimplemented decision. Whilst I accept that general statement it does not follow that the trustee's decision in continuing to seek to implement its original decision is a "momentous decision".

The decision

85. I do not need to determine the classification of the relevant powers and their distinctions for present purposes. Mr Hubbard submits that the 10th defendant, *"intends to exercise his powers of consent acting in the interests of the beneficiaries of the trusts as a whole (and has no personal interest in any potential exercise of those powers)"*[6]. I need to determine the scope of the 10th defendant's powers.

86. At the outset of this hearing I invited Mr Wilson QC to assist the court by setting out the contrary argument to that being advanced by Mr Hubbard on behalf of the 10th defendant. In making his oral submissions to the court Mr Wilson QC was expressly not adopting that position but retaining the claimant's neutral stance. He submits that the 1st defendant surrendered his discretion to the Jersey court as part of his application to that court and the exercise of that discretion by the court formed part of the blessing by the Jersey court of the original decision[7]. He suggests therefore that the consent of the 10th defendant is not required in respect of the original decision.

87. However the claimant has not issued and pursued the claim in this court on the basis that the English court should recognise or is in any way bound by the May 2017 Jersey order. The re-re-amended claim form does not seek recognition of the May 2017 Jersey order as a foreign judgment against the beneficiaries of the trusts or the protector.

88. Indeed Mr Wilson QC has advised the claimant that there is some doubt as to whether an English court could recognise the May 2017 Jersey order. The Reciprocal Enforcement of Foreign Judgments (Jersey) Order 1973 brings judgments of the Jersey court within the scope of the Foreign Judgments (Reciprocal Enforcement) Act 1933. However the primary provision for recognition in the 1933 Act, section 1, does not apply to an order authorising trustees to act in a particular way.

89. Mr Wilson QC rightly acknowledges that section 8(3) of the 1933 Act preserves the common law rules concerning recognition of foreign judgments. The parties agree that the relevant principles are set out in Carl Zeiss Stiftung v Rayner & Keeler Ltd

[6] Summarised in the 10th defendant's skeleton argument, para 68.
[7] The May 2017 Jersey order.

(No 2) [1967] 1 AC 853. In summary issue estoppel may arise if (a) the court making the order was a court of competent jurisdiction in relation to the party who is to be estopped, (b) the judgment is final and conclusive and (c) on the merits. The parties to the foreign litigation must be the same as the English litigation and the issue or issues must be identical. It is by no means certain that all of the beneficiaries were parties to the Jersey proceedings. The 10th defendant was not before the Jersey court. I also observed during the course of the hearing that the 6th and 7th defendants have issued proceedings in Jersey challenging the May 2017 Jersey order; their case is that the 1st defendant did not represent them and they were not "before" the court.

90. The claimant in the Jersey proceedings has taken a pragmatic view and invited the Jersey court to reconsider its decision; albeit there were two parts to that process, the court exercising the protector's power and its own blessing of the decision. Mr Wilson QC is not counsel in the Jersey proceedings and his understanding is that the court is only reconsidering the second part of the process. I also note that in Dicey & Morris on the Conflicts of Laws, 15th ed, para 14-034, there is doubt cast on whether a person who is involuntarily joined or deemed to have been joined is a party to the proceedings for the purposes of issue estoppel. It is also highly doubtful that the issue before the Jersey court can be said to be the same issue as before the English court. Whilst the claimant is proceeding with its claim to seek a blessing from the court in respect of the original decision that will require the court to consider any relevant change of circumstances up to the date of the blessing hearing. It is open to the court to accept that the momentous decision satisfied the matters identified in paragraph 83 above but that subsequent events mean that the court can no longer bless that decision. There is also a dispute between the parties as to whether the claimant can and should simply proceed with seeking a blessing in respect of the original decision and the revised decision. If it remains contentious that will be a matter raised at the blessing hearing.

91. I do not consider that it is open to the claimant to effectively cherry pick the actions of the 1st defendant in allegedly surrendering his discretion under the trusts to the Jersey court. The claimant's rationale for bringing these proceedings is summarised in HL's 6th witness statement, specifically sub-paragraphs 7.1 to 7.7. The claimant's position, quite patently, is that it requires the blessing of this court, both in respect of the original decision and the revised decision, and that the approach of this court is that set out in paragraph 83. I do not consider that the 10th defendant's power in respect of the original decision has been rendered impotent by the 1st defendant's acts in the Jersey Court by arguably surrendering his discretion. As I have already stated the claim is not being argued on the basis that the judgment of the Jersey court is to be recognised here and that the English court is bound by the May 2017 Jersey order: this is a freestanding claim seeking the blessing of this court to approve the original decision and the revised decision.

92. As to the content of the protector's power of consent, the parties agree that there are two alternative approaches. Either the protector holds effectively a joint power with the trustees or he has a power of review. The significance of this is that the former would permit the protector, if he disagreed with the trustees, to withhold his consent even if the trustees are neither acting unreasonably nor for improper purposes. That approach would of course still be subject to the protector not misusing his power and therefore having to exercise it in good faith and for the purposes for which it was

conferred. A power of review would give the protector a more limited role effectively ensuring that the trustee is neither acting unreasonably nor for an improper purpose: a role similar to that of the court in a Public Trustee v Cooper category 2 case.

93. Mr Wilson QC says that the parties agree there is no direct authority on the point. Although as Mr Hubbard pithily observed they agree that there is no direct authority on Mr Wilson's proposition that the protector's power is restricted to a power of review. Mr Wilson QC drew my attention to Bathurst v Bathurst [2016] EWHC 3033 (Ch). This was an application under the Variation of Trusts Act 1958 where the scheme of arrangement proposed that the principal beneficiary should have the power to appoint new trustees with the written consent of the trustees, a power that was reserved by the settlor under the original settlement and he was now deceased. One of the four trustees did not agree with this proposal suggesting that the existing trustees should retain the power they had been exercising with a power of veto to the principal beneficiary. The judge considered that the difference between the two was small but preferred the proposed scheme.

94. Mr Hubbard submits that the powers of consent to be exercised by the protector are independent of those of the trustee and are therefore a joint power not simply a review.

95. In Re Forster's Settlement [1942] 1 Ch 199 the husband and wife were parties to a settlement which contained a power of advancement by the trustees out of the capital of the fund for the benefit of remaindermen with the written consent of the tenant for life. The husband divorced the wife, married again and had 3 children. The husband died leaving his widow and their 3 infant children. Meanwhile the wife had married an Austrian citizen in 1930 and went to live with him in Austria. On the outbreak of war in 1939 she became an enemy alien. She was believed to be living in Germany or Austria but there had been no information about her whereabouts for a considerable time. The trustees wished to advance some of the capital for the benefit of the 3 children. A summons was taken out on behalf of the infant remaindermen for a determination as to whether the trustees required the consent of the tenant for life. Morton J held on the evidence that the court could not presume that the wife had died and her consent to the advance could not be dispensed with. At page 206 the judge referred to Klug v Klug [1918] 2 Ch 67 a case that he was taken to in argument. In that case one third of the testator's residuary estate was held in trust for his daughter. She was unable to pay the legacy duty and applied to the trustees for assistance. One trustee was willing to exercise their discretion to aid the daughter but the other trustee, the testator's widow, declined to exercise it because her daughter had married without her consent. The court directed that a sum out of capital be paid to benefit the daughter. Morton J said,

> "in my view, however, *Klug v Klug* does not assist Mr Cross. The position in the present case is not that of a trustee refusing or failing to exercise a discretionary power. The parties to this settlement thought fit to provide the discretion conferred on the trustees should not be exercised without the consent of a particular person. In those circumstances I do not think that the court can say that the power shall be exercised without the consent of that person. Nor do I think that *Klug v Klug* is any authority for saying that the court can take that course."

96. As Mr Hubbard emphasises in Re Forster the person who had the power to give consent was the life tenant who was an enemy alien and may or may not have been alive yet the court considered it could not dispense with her consent. He also submits, which I accept, that there is no magic in the word protector, what the court is concerned with is the nature of the power that that person holds. Lewin at paragraph 28-036 says,

> "Wills and settlements have for many generations conferred powers that are exercisable by persons other than the trustees. The donees may, for instance, be beneficiaries, or the settlor himself, or a friend or adviser of the settlor with no beneficial interest. … Example of powers frequently given to third parties include powers of appointment, powers to appoint new trustees and powers to direct investments. Settlements and Wills have likewise often required the consent of third parties to the exercise of various powers by the trustees, the requirement thus conferring a power of veto. … in the absence of a consent by the terms of the power a purported exercise is simply invalid."

97. A protector's power of veto is as the name suggests exactly that and not a power of review. Under the trusts the trustees have a wide range of powers and discretions which require the written consent of the protector; I have summarised the key ones in paragraph 75(b)(i) to (vii) above. In passing I note that this is consistent with how the judge approached the parties' respective positions in Bathurst.

98. Mr Wilson contends that if the settlor required a joint exercise of the dispositive powers by the trustee and the protector the trust deeds could easily have said so. Instead they provide for the trustee to exercise the power with the protector's consent. Mr Wilson suggests that as a matter of construction there is a distinction to be drawn between the powers that each has. I do not accept that that follows from the wording of the trust deeds and the mechanism by which the officeholders were to exercise their powers. As SW observed in his 1st witness statement the purpose of the protector holding the power of consent is to control the trustees' exercise of their broad discretionary powers. I have not been referred to anything in the trusts that is consistent with a restrictive interpretation of the protector's role. In contrast the genesis of the trusts (as referred to in paragraph 61 above), the language used in the trusts and the wide expansion of the powers of the protector set out in the deed of variation are consistent with the 1st defendant's intentions when the trusts were established that the protector would hold joint power with the trustee.

99. This position is also consistent with an offshore trust which typically appoints a protector. The trustee may very well be a corporate entity located in a different jurisdiction. The settlor and trustee may not know each other and there may be limited trust between them. In that context the imposition of a power of consent in the sense of being a joint power rather than a restrictive review power provides a solution to control the power exercised by the trustees.

100. I am satisfied that properly analysed the power of the protector is a joint power with the claimant and not a review power.

101. The third point raised by the claimant is what role the 10th defendant should play in the blessing hearing. In light of my decision there is no reason to limit the role of the protector at the blessing hearing. If there are matters which the 10th defendant considers are relevant for the court to consider he will no doubt be represented at that hearing and it will be of assistance to the court.