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Case No: PT-2021-000023

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

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

Date: 13 January 2022

Before:

DEPUTY MASTER BRIGHTWELL

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Between:

WOMBLE BOND DICKINSON (TRUST CORPORATION) LIMITED **(as trustee of the Stephris Trust)** **- and -** **NO NAMED DEFENDANT**	**Claimant**

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Adam Cloherty (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimant**
Heather Murphy (instructed by **Womble Bond Dickinson (UK) LLP**) as the **Advocate to the Court**

Hearing date: 22 July 2021
Draft judgment sent to parties: 24 November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Deputy Master Brightwell:

Introduction

1. In 1986, Stephenson Clarke Shipping Limited ("Stephenson Clarke") was a subsidiary of Powell Duffryn plc, and thus a member of the Powell Duffryn group of companies ("the PD Group"). The PD Group was a well-known shipping and logistics business whose roots can be traced to the 19th century, part of which latterly came to be known as PD Ports.

2. By a trust instrument dated 29 April 1986, Stephenson Clarke as the named settlor settled cash and defined securities on a discretionary trust for the benefit of employees and former employees of the PD Group, in terms which are considered later in this judgment. The three original named trustees were John Raymond Carr, Geoffrey Walker and John Peter Seagrave. The trust is known as the Stephris Trust ("the Trust").

3. Even though a business still operates under the name of PD Ports, Powell Duffryn plc was first delisted, and then dissolved on 14 December 2016. Up until a deed of retirement and appointment ("DORA") made on 1 November 2018, the trustees of the Trust were individuals connected to the former PD Group.

4. Before executing the DORA, the former trustees recorded their thoughts in relation to their retirement in a resolution document. There were doubts as to the construction of the Trust and thus as to the identity of the Beneficiaries. They did not consider the Trust to be viable in the long term for the relief of hardship suffered by the Beneficiaries and it was probably appropriate for the trustees to take steps towards winding up the Trust, which would require a significant amount of work and legal advice, including in overseeing an application to court and consideration of the eventual winding up of the Trust.

5. By the time the DORA was executed, by which the current trustee, Womble Bond Dickinson (Trust Corporation) Limited, was appointed as an independent trustee, the former trustees had already obtained the advice of Mr Adam Cloherty, who continues to represent the current trustees. I have been assisted by his opinion dated 27 March 2018 and the instructions for it. His submissions on behalf of the current trustee are essentially those contained within his 2018 opinion.

Procedural background

6. Permission was sought to issue the claim form under CPR Part 8.2A, or Practice Direction 64B paragraph 4.3, without naming any defendant. At the first hearing of the claim on 18 March 2021, Master Pester gave permission for it to proceed in that form, directing that notice of the claim be served on

the former trustees, together with the claim form and evidence in support. He also directed that if none of the former trustees indicated their willingness to be joined as a party the Claimant's solicitors were to instruct independent counsel, i.e. effectively as an Advocate to the Court, so as to ensure that all arguments were fully presented. This direction was not made pursuant to Practice Direction 3G, which involves a request to the Attorney-General. Paragraph 2 of the Practice Direction, however, provides that such an appointment will be made by the Attorney-General "in most cases". A claim involving the supervisory jurisdiction of the court in relation to trusts, where the advocate is appointed in place of a representative beneficiary, and where the cost is to be borne by the trust fund in question, would seem to be an appropriate case for the appointment by the court and for the choice of counsel to be made by the trustee's solicitors. This was a case where there did not at the outset appear to be an obvious individual to represent the Beneficiaries generally.

7. Nonetheless, one effect of this way of proceeding is that no representation order has been made. Such an order can be made at the end of the proceedings: see *IBM United Kingdom Pensions Trusts Ltd v Metcalfe* [2012] 3 Costs LO 420 at [24] (Warren J). It will be a matter for the trustee whether it wishes to seek a representation order following the handing down of this judgment and before the trust is wound up.

8. Ms Heather Murphy was instructed to fulfil the role of Advocate to the Court, and I am satisfied that the Court has been given full argument on the points which require to be determined.

The Trust

9. By clause 4 of the Trust instrument:

> "The Trustees shall during the Trust Period [being the period expiring eighty years from the date of the Trust] hold the Trust Fund and the income thereof UPON TRUST as to either capital or income or both capital and income for or for the benefit of all or such one or more of the Beneficiaries at such age or time or respective ages or times and if more than one in such shares for such periods and with such trusts for their respective benefit (including either protective trusts or discretionary trusts of capital and income exercisable from time to time at the discretion of the Trustees or of any other person) and generally in such manner in all respects as the Trustees (not being less than two in number or being a Trust Corporation) shall in their absolute and uncontrolled discretion from time to time during the Trust Period determine (having due regard to any rule governing remoteness of vesting)…."

10. The Beneficiaries are defined in clause 1(h) as follows:

> '"the Beneficiaries" means the employees and their spouses and dependants and the former employees and their spouses and dependants from time to time during the Trust Period of the Powell Duffryn Group….'

11. The Powell Duffryn Group is then defined in clause 1(l):

> '"Powell Duffryn Group" means Powell Duffryn plc and any holding Company or subsidiary Company (as defined in section 735 of the Companies Act 1985) of Powell Duffryn plc.'

12. Clause 6 provides default trusts for those Beneficiaries living at the end of the Trust Period and to take effect then, with the proviso that "On the expiry of the Trust Period…should there be no such Beneficiaries who are alive and capable of taking the Trustees shall hold the capital and income of the Trust Fund UPON TRUST for such Charities [as defined] as the Trustees shall in their discretion determine". In the event there were now no Beneficiaries in existence, therefore, there would be a resulting trust of income until the end of the Trust Period, unless the gift to charity were accelerated. In light of my decision on the construction of the Trust this point does not require to be determined.

13. The current value of the Trust assets is approximately £900,000. This includes the value of two Royal Albert Hall debentures, which as at July 2021 were being marketed for sale at £290,000 (although the trustee was considering reducing the sale price).

14. Evidence given on behalf of the current trustee by its solicitor, Ms Emily Pike, explains that she has made enquiries of the former trustees, who do not believe that any substantial distributions have been made in the last 15 years or so, although funds have been used on occasion to make small hardship payments or to provide holidays or hampers to Beneficiaries. The last payments to Beneficiaries appear to have been made in the year to 5 April 2009 (despite the fact that the accumulation period applicable to the Trust expired in 2007). When payments were made by the former trustees, it is unclear how the Beneficiaries were defined, although Ms Pike states that the former trustees had made attempts to research the history of the Powell Duffryn group and to identify potential Beneficiaries.

15. Ms Pike also explains that the current trustee was required to regularise the tax affairs of the Trust, and that HM Revenue and Customs accept that this has now been completed.

16. It is also of some relevance that there was at one time in existence another trust, also called the Stephris Trust, established by a trust instrument dated 1 August 1928 made by inter alios Mr (later Sir) Ralph Stephenson Clarke, declaring trusts over the sum of £3,070 and over property in Wembley, London conveyed to the original trustees on the same date by Stephenson Clarke & Co Ltd (acting by its liquidators in voluntary liquidation) and Stephenson Clarke and Associated Companies Ltd. By clause 2 of this trust instrument, the trustees declared that they held the trust premises until sold "to permit the committee and the members to use the same free of rent for the purposes of" the Stephris Tennis Club. There is no perpetuity period applicable to this trust, nor any provision requiring the trust property to vest in ascertainable objects at any time. This trust appears to have been administered until the 1980s although, as I will mention later, the lack of perpetuity period suggests that it was likely void.

17. A memorandum dated 29 April 1966 on the notepaper of Stephenson Clarke Ltd and addressed to 'All members of the Staff at Branch Offices' reads as follows:

> "1. The Stephris Trust was founded in 1928 for the benefit of the employees of Stephenson Clarke Limited and the Maris Export and Trading Co. Limited: a tennis Club was provided at Wembley, Middlesex, for the use of the London based staff of these Companies. Over the years, as a result of the changes and expansion in the Group, membership of the Club has been extended to include the London staff of all Powell Duffryn Group Companies.
>
> 2. Due to the steady decline in the use of the Club ground by members of the staff, it was decided some eighteen months ago to sell the Wembley property and to invest the proceeds. Since completion of the sale, the Stephris Trustees have given very careful consideration to the future use of these funds. They have now decided that they should be used to give financial assistance to staff amenities, sports and recreational activities on the lines described later in this notice.
>
> 3. The Trustees have also decided that, whereas in the past the benefit of the Stephris Trust has been limited to the London staff of the Group, in the future it should be extended to include all staff of Stephenson Clarke Limited and its Subsidiary Companies (in London and in the provinces, both indoor and outdoor staff)."

18. There was then a list of the uses to which the trust assets could be put, most of which are clearly connected to sporting and recreational purposes. There is also provision for grants to be made under the heading "Assistance in Hardship Cases", with provision that "grants in cases of exceptional hardship

involving a member of staff or his family, in circumstances not justifying a payment (or further payment) by the employing Company" may be made. The example given (in the language of the day) is that "a grant might be made to enable the member of staff, and/or his wife, to have a convalescent holiday following a long or serious illness".

19. A chain of deeds of retirement and appointment of trustees of the 1928 trust is in evidence, and it is apparent that the final trustees of that trust were the same persons as the initial trustees of the (1986) Trust. Whatever doubts there may be as to the validity of the 1928 trust, the trustee submits that the assets of that former trust appear to have been applied for the benefit of employees of the PD Group and that such information about it as is available are admissible background facts for the purpose of construing the Trust, as it can be treated as a form of predecessor trust.

20. I should add that the former trustees considered it likely that the assets which formed the initial trust property of the Trust may have derived from the 1928 trust. At the hearing of the claim, I invited Mr Cloherty to consider whether the available evidence supported this inference, which would be potentially problematic if the 1928 trust were void. I granted permission for a further witness statement to be produced after the hearing, which I have taken into account. In that statement, Ms Pike indicates that the trustee does not share the view that the Trust assets are likely to have derived from the 1928 trust. She points out that the (1986) Trust instrument, drafted by Slaughter and May, recites that the initial trust property was provided by the settlor, a different company to that which made a conveyance of property in 1928. This suggests in terms that the remaining assets of the 1928 trust (if any) did not form part of the initial 1986 Trust fund and the suggestion to the contrary is now a matter of speculation, which is of little assistance to the court. Ms Pike also confirms that the 1928 trust documents were stored by the former trustees together with those relating to the Trust.

21. I agree that the wording of the Trust itself suggests that the Trust property was provided by the settlor and not by the trustees of the 1928 trust. I also agree, however, that the fact that the two settlements shared trustees at the time when the Trust was declared means that the way in which the 1928 trust was in fact administered (whether or not correctly) may be admissible background as to the construction of the 1986 Trust.

Construction

22. The questions of construction which fall to be determined as identified in paragraph 2 of the claim form are whether:

i) "employees… and former employees… of the PD Group" have ceased to be such (and, therefore, ceased to be Beneficiaries) because the PD Group no longer exists; and

ii) reference to the PD Group means that corporate group and its constituent companies as it and they were constituted (a) from time to time or (b) as at the date of the 1986 Deed.

23. The claim form also seeks a declaration as to whether there are now any potential Beneficiaries and, if not, whether the Trust fund is now held for charity (i.e. in accordance with clause 6 of the trust instrument) and, if so, how those persons should be ascertained. Whilst this relief is claimed in paragraph 1, I consider it to flow from the questions set out in the paragraph above.

24. In essence, the issue is whether the fact that the PD Group no longer exists (Powell Duffryn Ltd itself having been dissolved) entails the lack of any Beneficiaries, such that the former employees of companies previously within the group (and their spouses and dependants) cannot now be Beneficiaries and, if that is not the case, whether the identity of the group is fixed as at the date of the trust instrument.

25. The principles applicable to the construction of a trust instrument are the same as those to apply to contracts or other instruments. As Lord Hoffman said in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14]:

> "There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."

26. That lifetime settlements are no different from other documents, in that it is not the subjective intention of the settlor that is sought, but the objective meaning of the words as a whole in light of the surrounding circumstances, is also clear from the judgment of Norris J in *Rafferty v Philip* [2011] EWHC 709 (Ch) at [23]. At [25], the judge said that the surrounding circumstances can and must be taken into account in order to apply the words of the instrument.

27. Mr Cloherty has also referred me to the summary of the test adopted by Master Shuman in *PTNZ v AS* [2020] EWHC 3114 (Ch) at [42], in accepting the test put forward by counsel in that case:

> "…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." (emphasis in original text)

28. The reference to the settlor's armchair invokes the dictum of James LJ in *Boyes v Cook* (1880) 14 ChD 53, which concerned the construction of a will, with the reference there having been to the testator's "arm-chair". In the *PTNZ* decision, unlike the present, there was only one individual settlor, so the analogy was particularly apt. Here, the initial trust property was provided by a corporate settlor and the trust instrument was declared by three individuals. Nonetheless, the point is clear, that the objective meaning of the language used is to be ascertained as at the time when the instrument was made and in light of the information that was reasonably available to those who declared the trust.

29. I will consider first, as argued before me, the question whether the reference in clause 1(h) to the PD Group means that corporate group and its constituent companies as it and they were constituted (a) from time to time or (b) as at the date of the 1986 trust instrument.

30. Mr Cloherty, relying on the evidence of the factual matrix, puts forward five principal factors in support of the interpretation of the PD Group as that group as it was constituted from time to time rather than as at the date of the Trust:

    i) The Trust was intended to endure for a considerable time (80 years), when the identity of the companies within the group structure was likely to change. The Powell Duffryn Annual Report for 1986, being the year in which the Trust was declared, refers to the disposal of more than one group company in that year. It can thus have been envisaged from the outset that the PD Group would not remain static. It would be irrational to exclude employees of companies added later to the group, but to include those whose employer was within the group as at the date of the trust instrument but was no longer within the group. The inclusion of current employees can reasonably be assumed to have been the intention behind the Trust, and is supported by the ethos of the 1928 trust (as evidenced by the 1966 memorandum), this Trust being likely to have followed the ethos of that previous settlement.

ii) The words "from time to time" in clause 1(h) would be otiose if they qualified only the employees etc; they must have been intended to qualify also the description of the PD Group.

iii) There is a wide definition of persons and companies in clauses 1(i) and (j), such that companies incorporated or established in any part of the world are to be included (and it can be seen that the definition of companies is relevant as "the PD Group" is defined by reference to section 736 of the Companies Act 1985).

iv) The trust instrument was professionally drafted, and (following on previous points) it was appreciated that the notion of a group of companies entails companies moving in and out of that group.

v) Finally, clause 6, which provides for a gift over where there are no Beneficiaries who are alive and capable of taking, might be construed as taking effect only when there are reasons personal to the individual Beneficiaries which prevent them from taking, or where they have all died. In other words, it presupposes that there will in principle always be Beneficiaries capable of taking.

31. Before moving on, I would note that I see the force of the first, third and fourth of these factors. Particularly in the context of a group of companies whose composition was known to be changing, and thus could be anticipated to change further within the Trust Period, a limitation to those connected with companies in existence only at a certain date does seem to be somewhat arbitrary.

32. I do not think, however, that the words "from time to time" would be otiose if they referred only to the persons who could benefit and not also to the companies by reference to which they are to be ascertained. The relevant definition is "the employees and their spouses and dependants and the former employees and their spouses and dependants from time to time during the Trust Period of the Powell Duffryn Group". Even if the words were otiose in relation to the reference to employees and former employees, because an employee would naturally in due course become a former employee, the identity of such individuals' spouses and dependants will fluctuate from time to time. But this does not necessarily mean that the words "from time to time" should not also qualify the reference to the PD Group for the other reasons given on behalf of the trustee.

33. I also consider that Mr Cloherty's final argument is essentially an attempt to say that the intention was to create a valid trust so the court should construe this Trust as widely as possible in order to ensure that it does have Beneficiaries. As I think he acknowledges, it may be an attempt to pull his

construction argument up by its own bootstraps. I do accept, however, that the settlor of a trust is objectively more likely, all other things being equal, to intend that the trust does not fail on the occurrence of a foreseeable event and where there is a construction in accordance with which it does not fail.

34. I would also note that it is clear that the reference in clause 1(l) to section 735 of the Companies Act 1985 is in error and that it was intended to refer to section 736, which defined a subsidiary company (before that section was replaced by section 1159 of the Companies Act 2006). This is the sort of clear mistake that can be corrected by construction: see *Chartbrook* at [22]–[24] (applying *East v Pantiles (Plant Hire)* (1981) 263 EG 61, Brightman LJ). The reference to section 736 of the 1985 Act should furthermore now be read as a reference to section 1159 of the 2006 Act: Interpretation Act 1978, sections 17(2)(a) and 23(3).

35. Ms Murphy puts forward the arguments in support of the alternative construction of clause 1(h), that the Beneficiaries are defined by reference to anyone who is or was an employee or former employee of the PD Group, as it has been constituted at any time since 29 April 1986 (and not merely from time to time). On this footing, the former employees of companies once within the group but no longer so, and their spouses and dependants, will be Beneficiaries. Ms Murphy suggests that this construction will not include current employees of such companies or, presumably (but not stated explicitly), former employees of such companies if their employment occurred only at times when their employer was not part of the PD Group. The arguments in favour of this construction are very straightforward:

    i) The former individuals are Beneficiaries because they were employed by the PD Group during the trust period. They are relevant former employees not because of their own change of employment, but because their employer is no longer part of the group.

    ii) This construction would take particular account of the inclusion of former employees as Beneficiaries whereas they were not beneficiaries of the 1928 trust.

36. Putting the argument for the contrary interpretation, that the PD Group was fixed as at 29 April 1986, Ms Murphy relies on four points:

    i) The placement of the words “from time to time” within the relevant definition appears to show that it does not qualify the definition of the PD Group but only of the individuals who will benefit.

ii) It avoids the trustees having to investigate, at every stage, the holding and subsidiary companies of Powell Duffryn plc. That may not be an easy or obvious task.

iii) The definition of the PD Group does not compass, as did the 1928 trust the "successors in business" of any company, which would more naturally support an ambulatory definition of the group.

iv) The exclusion of employees of group companies not in the group as at the date of the trust instrument would be no more surprising than the exclusion of former employees of subsidiaries once within the group, which would follow from the trustee's preferred construction.

37. To deal with the final construction argument first, I consider that these points are outweighed by the first argument put forward by Mr Cloherty, that the matrix of fact, including the way in which the 1928 trust was in fact administered, suggests that the employees (and former employees etc.) of those within the PD Group on an ongoing basis were to benefit. The Trust was drafted in a very different form from the 1928 trust, which was initially apparently intended to provide sports facilities on a single site for the employees of two companies. I do not consider that a comparison of the terms of the two trust instruments to be a useful exercise; the 1986 Trust is professionally drafted in a recognisably modern form.

38. There is also no reason from the evidence to suppose that the identification of those companies satisfying the definition by reference to section 736 of the Companies Act 1986 was envisaged to be especially cumbersome. Indeed, the parent company would no doubt need to be aware not least for tax purposes of which companies were within its group at any point and I do not see why it could or would not make this information available to the trustees upon request; it would likely be available in its published annual report.

39. This therefore leaves the choice between the trustee's submission (Beneficiaries defined by reference to PD Group companies from time to time) and Ms Murphy's preferred construction (Beneficiaries defined by reference to PD Group companies at any time since 29 April 1986, provided the relevant employment occurred whilst the employer was a group company). I appreciate that the distinction between the two constructions may have a significant impact on the class of Beneficiaries but the difference in principle is not so great. The question is whether the employee of a PD Group company, who was clearly intended to be an object whilst that state of affairs continued, including when her own employment ceased, was objectively intended to cease being a Beneficiary because her employer ceased to be within the group.

40. Mr Cloherty's arguments (with the exception of the second, concerning the scope of the words "from time to time", about which I have already expressed some scepticism) can be prayed in aid as much in support of Ms Murphy's primary construction as in support of that of the trustee. They are arguments in favour of a construction which expands the relevant companies beyond those within the PD Group as at 29 April 1986 to those also within the group at a later date and during the operation of the Trust.

41. In the final analysis, I have come to the conclusion, for three cumulative reasons, that the correct interpretation of the meaning of "Beneficiaries" is the employees and their spouses and dependants and the former employees and their spouses and dependants of the Powell Duffryn Group (as defined), provided that the employment occurred during the Trust Period, and provided that the relevant contract of employment subsisted whilst the employer was a member of the Powell Duffryn Group (as defined):

    i) The inclusion within the class of Beneficiaries of former employees of PD Group companies suggests a continuing wish to benefit individuals once they were no longer employed within the group. It would be arbitrary if they could continue to benefit if they retire or move on from employment with a company which remains in the group, but not if their employer leaves the group. The connection of each individual with the PD Group (through their former employment status) remains the same. The relevant point is not that former employees were not beneficiaries under the 1928 trust; the point is that they were expressly included in 1986 for a reason.

    ii) I further consider that this construction sits most happily with the location of the words "from time to time" within clause 1(h) of the trust instrument. Those words are expressly connected with the employees, former employees and those who are Beneficiaries by reference to them, and not to the group companies as subsequently identified within the same clause. I have already explained why this construction does not render the words "from time to time" otiose.

    iii) Finally, consideration of the second point of construction, below, leads me to the view that the dissolution of Powell Duffryn Ltd does not cause the class of that company's former employees, or those companies once within the PD Group, to cease to exist. The possible dissolution of that company was objectively possible in 1986 even if not then contemplated. Unforeseen circumstances should not be taken into account (*Marley v Rawlings* [2015] AC 129 at [42]), but "business common sense" should be considered (*Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [11]). There is presently no PD Group as defined in the trust instrument in existence. There will now be no

> Beneficiaries if their own existence depends upon there being an extant PD Group. Where the clear intention of the Trust is to be able to provide benefits to former employees, common sense would suggest that this purpose was not intended to be thwarted by the fact that the PD Group might cease to exist. This is all the more so when the default provision for charity does not come into effect until the end of the trust period, some 45 years hence.

42. I recognise that, in order to give clarity to the meaning, the words of proviso must be treated as added, viz. "provided that the employment occurred during the Trust Period, and provided that the relevant contract of employment subsisted whilst the employer was a member of the Powell Duffryn Group (as defined)". This is to prevent individuals being a Beneficiary if their employment by a relevant company subsisted only whilst that company did not meet the test of being within the PD Group. When one stands back and considers the purpose of the Trust, this proviso flows naturally from that purpose and is thus objectively understood by the words of clause 1(h) even though not spelt out within that clause.

43. If red ink may, without limit, be applied in order to correct a mistake (see *Chartbrook* at [25]), there can be no objection to it being applied in order to clarify what can be seen to be an ambiguity in a trust instrument. As Carnwath LJ said in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336 at [50], the correction of mistakes and the construction of wording "as it stands" is in fact all one single process. The application of red ink or verbal rearrangement may be required whether or not there is a mistake.

44. This then leads to the second question of construction, whether "employees… and former employees… of the PD Group" have ceased to be such (and, therefore, ceased to be Beneficiaries) because the PD Group no longer exists. My conclusion to this question has already been stated, as I have considered the construction of the Trust as a whole. I do not consider that the relevant former employees (and their spouses and dependants for the time being) have ceased to be Beneficiaries.

45. Mr Cloherty, while contending for a construction where the Beneficiaries are identified by reference only to the PD Group from time to time, submitted that a former employee of a defunct group can properly be described as a former employee of the group without straining language; just as Mrs X can still properly be described as the wife of Mr X even after he has died. I agree with him on this, but consider that this argument is not necessary in light of the view I have adopted on the first question.

46. Mr Cloherty also submits that Powell Duffryn Ltd (formerly Powell Duffryn plc) could be restored to the Register of Companies and the issue would fall

away. I do not consider that this answers the point; such restoration would not cause the reconstitution of the PD Group and the company is not in existence today.

47. Ms Murphy, on the other hand, points out that this second question arises if the trustee's interpretation on the first question is accepted. On her preferred construction on the first question, which I consider to be correct, the dissolution of Powell Duffryn Ltd and the fact that the PD Group is therefore defunct, does not lead to there now being no Beneficiaries, as those formerly employed by PD Group companies remain Beneficiaries. Ms Murphy does, however, submit that if the trustee's interpretation of the first question were to be accepted, then the court should consider that there is no evidence that the Trust was intended to benefit former employees after the demise of the PD Group. To the extent this could be raised as an objection to the construction I have found to be correct, I consider that the answer is that there is no evidence that the demise of the PD Group was in contemplation at all in 1986.

48. I have already concluded that the Trust was objectively intended to benefit former employees within the PD Group, whether or not their employer remained in the group. The demise of the PD Group thus does not prevent such individuals from falling within the class of Beneficiaries. I have indicated that I have considered both questions together, and have reached the conclusion that common sense leads to the view that the Trust was objectively intended to continue to benefit former PD Group employees whilst they existed. Of course, the demise of the group might lead to the Trust then being finally distributed and thus wound up, but that is precisely what the trustee now proposes. I do not consider that the Trust was solely designed to co-exist with the PD Group or merely to provide leisure benefits. As the evidence about the actual operation of the 1928 trust suggests, it seems that it was in fact also intended to alleviate hardship; a purpose which does not depend on the continued co-existence of the PD Group. I agree that this evidence is admissible background material and is likely to cast light on the intended operation of the 1986 Trust.

49. I should finally point out that I gave counsel an indication of my thinking on the construction of the trust on 21 September 2021, in order to clarify their views on whether the trustee should surrender its discretion on the future exercise of its powers to the court. At that point, my indication was that I was minded to prefer the trustee's construction, limiting the Beneficiaries to the employees and former employees etc. of the PD Group for the time being. Further consideration of the matters I have set out above has led me to a slightly different view for the reasons I have given, that the former employees (etc.) of companies within the PD Group during the subsistence of the Trust did not cease to be Beneficiaries upon their employer companies (or Powell

Duffryn Ltd itself) ceasing to be part of the PD Group. In any event, the key point is that I consider the Trust to have current Beneficiaries, such that the default provision in clause 6 does not need to be considered.

Administration issues

50. In the claim form, the trustee seeks the directions of the court concerning the administration of the Trust in light of the determination as to its construction. The relief sought is "directions as to the manner in which the Claimant may identify and fix the class of Beneficiaries, particularly in light of the very large number of potential Beneficiaries and the relatively modest value of the Stephris Trust Fund".

51. In framing the claim, the trustee was aware that if the Trust was held to have Beneficiaries, an issue would arise as to its administration. Both the trustee and the former trustees before it (at the time represented by the same solicitors) have sought extensively to make enquiries as to the identity and whereabouts of the former employees of companies once within the PD Group, with some but limited results. They have searched publicly available information about companies once within the PD Group, and corresponded with such companies (or at least those as at the date of the Trust instrument), and have corresponded with Capital Cranfield Trustees Ltd ("CCTL"), the company which provided administrative support to the administrators of the Powell Duffryn Pension Plan. CCTL initially indicated that it had records for some 4,160 pensioners as at 2011, which could include former employees or spouses and dependants in receipt of a pension then. This would not include those who have transferred or commuted their entitlement. CCTL initially indicated that it would be able, for a fee, to assist in contacting potential Beneficiaries, whose details it would often hold. Unfortunately, that indication has been withdrawn, with GDPR considerations at one time being cited as a reason.

52. The correspondence with other entities once within the PD Group suggests that there may be many more unidentified Beneficiaries. Ms Pike has exhibited to her first witness statement a table showing the result of the trustee's enquiries.

53. As I have already noted, the current estimated value of the Trust fund is around £900,000. As Mr Cloherty puts it, the cost of identifying all the potential Beneficiaries (or, more accurately, discretionary objects) of the Trust would easily exceed the distribution to be made to them. If 4,000 or so Beneficiaries were identified (presumably limited to former employees only), and an equal distribution of the remaining fund were made to each of them, they would likely receive between £100 and £200 each, depending on the

costs of administration, including those to be incurred in searching for Beneficiaries.

54. At the hearing, Mr Cloherty indicated that the Trustee presently has the means of access to about 600 names of apparent Beneficiaries. Enquiries carried out by the Trustee's solicitors suggest that they could be traced for around £120,000 (i.e. around £200 per person). In addition to that, there will inevitably be further administration and tax costs before assets are realised and put in the hands of Beneficiaries. The assumption in the Trustee's thinking appears to be that the remaining fund ought (after payment of expenses) to be distributed equally between those Beneficiaries who can be located, with an indication that it may be fiscally more advantageous for the winding up not to occur all at once.

55. With those considerations in mind, the Trustee has put forward five potential ways of proceeding:

i) To seek a direction from the court that the Trustee may under its wide overriding power of appointment exclude as Beneficiaries those Beneficiaries that it has not already identified. It relies in this context on *NBPF Pension Trustees Ltd v Warnock-Smith* [2008] 2 All ER (Comm) 740 at [39]–[40], where Floyd J permitted pension trustees to add the shares of both untraced and unknown beneficiaries to a reserve, thus defeating their claims. The cost of insurance against such members later claiming was a relevant consideration; there is no evidence before me about such insurance but the sheer number of potentially unknown Beneficiaries and the likely value of each share means that such insurance would not be a practical solution here.

ii) To seek a direction permitting the Trustee to distribute the fund on the footing that it has taken reasonable steps to identify Beneficiaries and that those it has identified are the only Beneficiaries.

iii) To direct the Trustee to carry out some further limited searches or enquiries, and then to give the Trustee permission to proceed on the footing that those beneficiaries it has identified are the only Beneficiaries (i.e. a variation on suggestion (ii)).

iv) To direct the Trustee to apply the Trust fund, for the benefit of the Beneficiaries, for such charities or public bodies that it reasonably believes would cater for the needs and wishes of the class of Beneficiaries generally.

v) To direct advertisement in the London Gazette in accordance with section 27 of the Trustee Act 1925.

56. In her first witness statement, Ms Pike said the following at paragraph 50:

> "Ultimately, the Trustee would respectfully suggest that it might be sensible for the Trustee to be *authorised* to act in all ways in which the Court thinks it might legitimately proceed, albeit without the necessity to follow any particular one of those ways, such that the Trustee would then be able to take a view and react as appropriate once matters are put into practical operation (without the need to incur further expense in returning to Court). Again, however, the Trustee is of course in the Court's hands."

57. Mr Cloherty indicated that the Trustee sought directions as summarised above under the court's general supervisory jurisdiction over trusts, including the *Public Trustee v Cooper* and the *Benjamin* jurisdiction. It is important to be clear about precisely what jurisdiction the court is being asked to exercise.

58. The role of the court in a case where there are missing beneficiaries was considered in some detail in *Re MF Global UK Ltd (in special administration) (No 3)* [2013] 1 WLR 3874. That case concerned the trusts arising under the Clients Assets Sourcebook rules made under statute by (what was then) the Financial Services Authority. Under this trust, there are identifiable beneficial interests but no procedure is set out for the recovery of client moneys so held on trust, see at [8]. For present purposes, it is important to note that such a trust is not discretionary.

59. In a passage relied on by Mr Cloherty, at [25]–[32], David Richards J said, in a clear explanation of the nature of the *Benjamin* jurisdiction:

> "[25] …. The court does, however, have an inherent jurisdiction in relation to trusts. In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, para 36 Lord Walker of Gestingthorpe said: "It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust." In *Finers v Miro* [1991] 1 WLR 35, to which I will refer below, Balcombe LJ said, at p 45:
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> > "What gives the court jurisdiction is the fact that the plaintiffs undoubtedly held assets for the defendant and are also potentially liable as constructive trustees at the suit of the insurance company. English law has always imposed strict liabilities on trustees but in return has been ready to allow trustees to come and seek the directions of the court if they need to do so."
>
> [26] The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to

> trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so. A well established example of the exercise of the jurisdiction in this respect is the making of *In re Benjamin* orders: *In re Benjamin* [1902] 1 Ch 723. In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in *In re Green's Will Trust* [1985] 3 All ER 455, 462, an *In re Benjamin* order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them.
>
> [27] ….A recent example was *Capita ATL Pension Trustees Ltd v Gellately* [2011] Pen LR 153 in which Henderson J made a declaration that the trustees of a pension scheme should be at liberty to administer the scheme on the basis that the only members of a particular class entitled to certain more generous benefits than other members were the members listed in a schedule to the order. The judge was satisfied that the trustees had properly undertaken the exercise of trying to identify the relevant members and that it was appropriate to make the order, which made clear that further members could be added to the class if evidence of their entitlement came to light in the future."

60. *Lewin on Trusts*, 20th edn at 39-032, says that a *Benjamin* order is useful where there is doubt as to the existence or as to the continued existence of a person who, if alive, would be prejudiced by a distribution on a proposed footing. One example given of a circumstance where an order might be made, citing *Re MF Global UK Ltd*, is "[w]here the class of beneficiaries having beneficial interests (not merely discretionary beneficiaries) is very large and the trustees have taken all reasonable steps to identify them, they may be authorised to distribute on the footing that the beneficiaries so identified are the only beneficiaries."

61. While the suggestion that a *Benjamin* order cannot be made where the only beneficial interests are those of discretionary objects is not stated in terms in *Re MF Global UK Ltd*, it is implicit in what is said there. The purpose of an order is to "balance fairness to an absent person (if in existence), or a person otherwise possibly interested, against the desirability of not postponing a distribution indefinitely": *Lewin* at 39-034. It is thus apparent that the entitlement must already be established. The order is to enable distribution on

a stated footing, not prospectively to permit the exercise of the trustee's discretion on the footing that certain objects of a power do not exist.

62. Nonetheless, I do not consider the reliance on *Re MF Global UK Ltd* to be misguided. Mr Cloherty was clear that he relied on it by analogy, such that the trustee might distribute only among those Beneficiaries it has identified. The decision exemplifies the nature of the court's role. As David Richards J said at [32], "The purpose of the court's inherent jurisdiction is to enable practical effect to be given to a trust."

63. This leads to consideration of the *Public Trustee v Cooper* ([2001] WTLR 901) jurisdiction. At this point, it is the second and third categories of trustee application, as explained by Robert Walker J, which may be relevant:

> "(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers 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 on which they have resolved and which is within their powers … In such circumstances … they think it prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries.
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> (3) The third category is that of surrender of discretion properly so called. There the court will accept a surrender of discretion only for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs…The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion."

64. It was not apparent from the documents filed by the trustee which category was relied on. I do not doubt that it is in principle possible for a trustee to make a decision which may be implemented in more than one way, and to ask

the court to bless either, with the trustee having discretion as to the best way to proceed in the circumstances that prevail. So, in *NBPF Pension Trustees Ltd v Warnock-Smith*, Floyd J would not approve the purchase of missing beneficiary insurance in relation to unknown (as opposed to untraced) members, but indicated (at [59]) that the trustees could act differently without coming back to court if it transpired that insurance was available for such members without increasing the overall cost of cover. But, this was predicated on the trustee having made a decision.

65. The trustee has in the event indicated that it wishes to surrender its discretion to the court, thus treating the application as a category (3) *Public Trustee v Cooper* application. There has to be a good reason for the court to accept a surrender of a trustee's discretion, and this is most commonly found where there is deadlock between trustees or where they are acting under a conflict of interest and duty. The trustee relies on (i) the practical difficulty of ascertaining the Beneficiaries, (ii) the difficulty of forming a fixed view on how to deal with this issue, and particularly (iii) its concern that it may be exposed to claims if it exercises its discretions without having been able properly to identify all of the beneficial class.

66. Ultimately, I have come to the view that in light of the difficulties experienced by the trustee, which is now having to deal with the administration of this trust without any contemporaneous knowledge of the PD Group companies and given the relatively modest size of the fund, there is only one sensible way for this trust to be administered, to which I will come below. While the court will usually not accept a surrender merely because a trustee is concerned about being sued for making a decision, that concern must be seen in the context of all the circumstances I have described, together with the fact that some clarity on the most appropriate way to proceed has emerged. It is also a relevant factor that trust corporations and professional trustees should not be discouraged from assuming the trusteeship of difficult trusts. I will accordingly accept the surrender of discretion.

67. My role accordingly is to act as a reasonable trustee could be expected to act having regard to all the material circumstances: *Lewin* at 38-099.

68. Of the options put forward by Mr Cloherty (see paragraph 55 above), the fourth and fifth (appointing the fund to appropriate charities or similar bodies, or advertisement in reliance on section 27 of the Trustee Act 1925) are not suitable options. The trustee has struggled to identity suitable recipients, where Beneficiaries themselves might actually benefit. Ms Murphy helpfully suggests a number of possible charities, such as those focused on industrial disease, or Unite's benevolent fund. The difficulty is that there would be no guarantee, or even likelihood, that any actual Beneficiary of the Trust would benefit: this would have been a more suitable approach had the fund been held

now to be applied for charity. As to section 27 of the 1925 Act, it (like a *Benjamin* order) enables distribution of trust assets where the trustee has not been able to trace all those entitled, on the basis of advertisement. It does not enable advertisement in order to remove consideration of the objects of a discretionary power.

69. On analysis, I consider that the first three options put forward on behalf of the trustee are variations on the same theme. This theme is that, with or without some further enquiries, the trustee should appoint the remaining fund (i.e. after deduction of properly incurred liabilities and other administration expenses) among those Beneficiaries of whom it is aware and who have been located.

70. During the course of submissions, it was made clear that what the trustee would have in mind would be distribution to those former employees it has traced, with each to receive an equal share of the remaining fund. On the basis that there were around 600 traceable former employee Beneficiaries, this would realistically mean that each would receive around £1,000. This would provide some tangible benefit to a significant number of people, albeit there would be an element of arbitrariness in their identification. It would exclude spouses, surviving spouses and dependants and would not give priority to those with particular financial needs.

71. In a helpful series of submissions, Ms Murphy suggested in a most balanced way the arguments that might be made against this approach:

    i) The identification of discretionary objects by reference to the trustee's present state of knowledge was certainly arbitrary. Some of the companies who have been contacted are insolvent and their liquidators were not motivated to assist. There was reference in the papers to some of those companies having former employees who suffered industrial disease and who might be particularly worthy objects for consideration.

    ii) Further advertisement, or investigation, e.g. through trades unions, would very likely identify further Beneficiaries. It was, however, not known which unions were involved, or whether all companies were unionised. Advertisement also raised the spectre of spurious claims.

    iii) It would in one obvious sense be fairer to apply a test of hardship, rather than an equal division. This would add more value, but it would also add more cost to the exercise. That cost may outweigh the additional benefit. I also consider that while some hardship might be identified, other hardship would undoubtedly be missed, given the number of potential Beneficiaries.

iv) The exclusion of dependants and family members might also exclude worthy cases. It would also raise problems. For instance, whilst same-sex spouses would be included, it may not be clear that civil partners were. Further, the identification of dependants would be far from straightforward.

72. Ms Murphy also said, realistically, that this was very much a case where the perfect was the enemy of the good. I could not agree more. Whatever solution is to be adopted will have to be pragmatic and given the constraints of the size of the fund and number of potential objects, will necessarily be less than ideal. Having taken full account of the points made by Ms Murphy I consider that the trustee's discretion should be exercised so as to appoint the balance of the fund, in as tax-efficient a manner as possible, to those former employees who are Beneficiaries and whose identity and contact details have been ascertained by a date to be fixed. I consider that the primary purpose of the Trust was to provide benefits for employees, and former employees and others by reference to them. The inclusion of spouses and former spouses and dependants would add a layer of complexity and cost, dependency being particularly difficult for the trustee to verify. I have reached the view, which clearly accords with that of the trustee even though it has surrendered its discretion, that equal division among former employees is the fairest approach given that this Trust exists for the benefit of individuals by reference to their employment. It also enables practical effect to be given to this Trust, which is the very purpose of the inherent jurisdiction of the court.

73. I will not direct that the trustee make further proactive attempts to identify Beneficiaries, but I will direct that the trustee must include within the appointment any former employee who makes him or herself known to the trustee by a certain date. The pros and cons on this point were also addressed by Ms Murphy. This will mean that any former employee who becomes aware of this decision will be able to make a claim, but it will not require the trustee to expend trust resources in pursuing investigations about Beneficiaries of whose identity it is not already aware. Such investigations would seriously erode the modest available fund in a way that would not be in the interests of the Beneficiaries as a whole. Trust resources should be spent only in tracing Beneficiaries of whom the trustee is presently aware and in verifying the claims of any other individuals who may present themselves.

74. The precise method of implementation of this direction will, as discussed at the hearing, be finalised at a consequential hearing following the handing down of this judgment. I would ask those representing the trustee to prepare a draft letter to be sent to those whom it believes to be Beneficiaries and succeeds in tracing, and a draft order. I can see that further issues may arise in due course and agree that there should expressly be permission to apply.

Other relief

75. The trustee also seeks an order permitting it to distribute the Trust fund notwithstanding the possibility that assets comprised within the 1928 trust fund might have become mixed with the assets of the Trust. As I have already noted, the former trustees assumed that the remaining assets of the former trust will have become vested in the original trustees of the Trust. The current trustee appears initially to have adopted that assumption. If this were so, the concern would be that the 1928 trust was in fact void so that its remaining assets are held on resulting trust for whoever provided them. The 1928 trust was on its face a trust for the provision of sports facilities for company employees. Even if it could be treated as a trust for ascertainable objects, and thus within the principle of *In Re Denley's Trust Deed* [1969] 1 Ch 373, there is no perpetuity period applicable to the trust and it thus appears to breach the rule against remoteness of vesting.

76. Having considered the circumstances, the trustee believes that there is no reason to suppose that assets from the 1928 trust did in fact become vested in the original trustees of the Trust, and that it would simply be speculation that they did so. I accept that view.

77. In those circumstances, I consider it appropriate to make a direction of the kind sought by the trustee. The jurisdiction to make such orders was discussed in *Re MF Global UK Ltd* itself, at [30]. Any claim by a third party to be beneficially entitled to any Trust assets under a resulting trust by virtue of their being derived from the 1928 trust would be remote and essentially speculative. In particular it is not clear who actually provided all of the assets of the 1928 trust.

Conclusion

78. I will make an order declaring that the Beneficiaries of the Trust are as I have found at paragraph 41 above, and directing the trustee to distribute the remaining assets of the Trust among such Beneficiaries who are former employees of the PD Group as it is aware of and has located, in equal shares and as at a date to be fixed.