In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 424

IN THE MATTER OF the trusts of the AQ Revocable Trust for Sons dated 1976 (the "Sons' Trust"), and the trusts of the AQ Revocable Trust for Grandchildren dated 1976 (the "Grandchildren's Trust").

AND IN THE MATTER OF THE TRUSTEE ACT 1975

BETWEEN:

(1) BQ
(2) CQ

Plaintiffs

- and -

(1) DQ
(2) EQ (a minor)
(3) FQ
(4) TRT.

Defendants

Date/s of Hearing: 22 – 24 March 2010
Date of Judgment: 16 April 2010

Frank Hinks QC and John Riihiluoma for the plaintiffs;
Robert Hildyard QC and Timothy Marshall for the first defendant;
John Martin QC and Jai Pachai for the second defendant;
Brian Green QC and Paul Smith for the third and fourth defendants; and
Francis Barlow QC and Mark Chudleigh as Amicus Curiae.

JUDGMENT

Introduction

1. This judgment is given on the plaintiffs' application for declarations that certain trusts are invalid. The trusts are two family trusts[1] set up by a businessman ('the Settlor[2]'), by instruments dated 1976 for the benefit of his sons ("the Sons' Trust") and his grandchildren ("the Grandchildren's Trust") respectively. The plaintiffs are two of the Settlor's sons, and are beneficiaries under the Sons' Trust[3]. The first defendant is a son, and a beneficiary under the Sons' Trust. The second defendant is a grandchild and a minor[4]. The third and fourth defendants are the trustees of the Trusts.

2. The grounds of the application are that the Trusts are, either on their face when properly construed, or when taken in the factual context, testamentary in nature and have been revoked either by the Settlor's subsequent marriage in 1978 or by the standard revocation of all previous Wills and codicils contained in his last subsequent Will of 1978. The result of granting the relief sought would be that the property of the Trusts fell into the trusts established by that Will and its codicils ("the Testamentary Trusts"). Such an outcome would have certain tax advantages.

3. The first defendant supports the application, and the other defendants are neutral. The trustees in particular feel unable properly to support an application which attacks their own status. In those circumstances, aware that the Court would not make a declaration by consent, and to ensure that the application was properly argued, the plaintiffs applied for the appointment of an independent *amicus curiae* to argue the contrary position. By order of 28th January 2009 I appointed Francis Barlow QC ("the Amicus"), a senior and distinguished English trusts practitioner, to put the case in support of validity.

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[1] Following the death of the Settlor, each trust was divided into separate shares, for each of his sons and their descendants, each share to be held upon a separate trust, but that is an unnecessary refinement for the purposes of this application.

[2] I have used the expression 'Settlor' notwithstanding that the validity of the Trusts is in dispute. I think it preferable to the expression 'Donor' used in the Trust Agreements themselves.

[3] The second plaintiff became subject to an incapacity during the course of the proceedings, and his son was appointed as his next friend by order of 16th February 2010.

[4] The second defendant appears by his guardian *ad litem*, Keith Bruce-Smith. The Originating Summons sought an order that he be appointed to represent all persons who are now or might become interested under the Trusts other than the plaintiffs and the first defendant, but in the event that was not pursued.

The Trusts

4. The trusts are in similar form. Each takes the form of a 'trust agreement' purported to be between the Settlor and himself, as trustee. At the same time the Settlor delivered to himself 12,000 shares in one of two holding companies for his business enterprises, and schedule A to each trust comprises a record of that signed twice by the Settlor, once in each of his two capacities. At the time the Trusts were constituted the Settlor was the sole trustee (and he remained so until the appointment of his wife, FQ ("F"), as co-trustee four years later in 1982). While such an agreement with oneself is unknown to English law, it is common ground that it takes effect as a declaration of trust. However, the plaintiffs point to this as indicating that the draftsman of the trust may have been working to an American model, which may account for some of the features of the Trusts which are more germane to the issue of their validity.

5. Article I of each Trust declares that it is revocable during the Settlor's life, and Article II confers upon him the right to the entire net income, and such of the capital as the trustee shall determine, during his lifetime:

> ARTICLE I
> Donor's right to Revoke and Amend During his Lifetime
>
> The Donor hereby declares this Agreement to be fully revocable by the Donor, and subject to amendment by him in whole or in part at any time and from time to time, any such revocation or amendment to be by an acknowledged instrument signed by the Donor and delivered to the Trustee.
>
> ARTICLE II
> Dispositions During the Donor's Lifetime
>
> During the Donor's life the entire net income of the trust and so much of the principal as the Trustee shall determine in the Trustee's absolute discretion, shall be paid to the Donor.

6. Article III then deals with the trusts that were to arise on the Settlor's death, and it provides for the division of the trust corpus into shares each to be held on a separate trust for each of the sons and their descendants:

ARTICLE III

Disposition of Income and Principal After the Donor's Death

Upon the death of the Donor, this Agreement shall become irrevocable and thereupon all of the property then constituting the trust shall be divided and set apart into equal shares, one such share for each son of the Donor who shall survive the Donor, and one such share for the issue who shall survive the Donor of each son of the Donor who shall not survive the Donor[5].

7. There then follow various administrative provisions, including wide powers of investment. The trustees are empowered to designate the governing law of the trust, but in default the trust is to be governed by the laws of Bermuda. The Settlor is also given an unfettered power to appoint and remove trustees. There are various provisions concerning the trustees' liability. By Article VIII E the trustees are absolved from liability in respect of investments. Article XII contains a fairly standard exclusion of liability for breach of trust in the absence of bad faith or gross negligence:

ARTICLE XII

Trustee's Indemnity

No Trustee shall be liable for breach of trust in respect of any act or omission on the part of such Trustee or of any of such Trustee's co-Trustees or of any agents or servant employed by such Trustee or by any of such Trustee's co-Trustees (whether or not such employment was strictly necessary or expedient) unless it is proved either that such act or omission was done, omitted or concurred in by the Trustee whom it is sought to make liable in bad faith or gross negligence, or (if the act or omission is the act or omission of an agent or servant) that such agent or servant was employed by such Trustee in bad faith or gross negligence.

But there is also a rather unusual provision upon which the plaintiffs rely heavily, namely Article VIII H, which provides as follows:

"H. The written approval by the Donor of any trust transaction during his lifetime shall be a complete release of the Trustee (including the Donor) of any liability or responsibility of the Trustee to any person with respect to this transaction."

[5] This is the version of Article III from the Sons' Trust. The Corresponding article from the Grandchildren's Trust is necessarily slightly different, but the division *per stirpes* is essentially the same.

The Law

8. The law is that a trust which only comes into real force and effect on the death of the Settlor is regarded as a testamentary disposition, and as such is subject to the formal requirements necessary for a Will[6]. Testamentary dispositions are also subject to revocation in the same way as a Will, including upon the marriage[7] of the Settlor or by a subsequent Will[8].

9. For a statement of the general principle see Lewin on Trusts (18th ed.) paragraph 1-14:

> **"Settlement and will**
> 1-14 A document that looks like a settlement may be a will in disguise. "It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary." If that was the intention of the settler, then the settlement is a testamentary document, and therefore void under the Wills Act 1837 unless it was executed in the presence of two witnesses, and otherwise as required by that Act**.** The reservation by the settlor of large beneficial powers and interests may leave the lifetime trusts declared in favour of others so squeletic as to be considered illusory. If a power of revocation is also reserved, this can turn a settlement into a will. There are a number of judicial decisions to this effect in Canada and New York, and the principle has been recognised by the Privy Council. Often, however, declarations of trust that might otherwise run the risk of being held testamentary documents contain some provision that is plainly intended to take effect during the lifetime of the settlor. An example is a power for the trustees to apply capital of the trust fund for the benefit of the settlor while he is alive but under disability. Any such provision is enough to show that the declaration is intended to take effect during the settlor's lifetime, does not depend on his death for its vigour and effect and so is not a testamentary document that needs to be executed as such. Moreover, even without such a clear indication that the trust is intended to take immediate effect, it is not thought that the reservation even of very considerable rights and powers would make the trusts illusory during the settlor's lifetime unless the settlor was virtually the equitable owner of the trust property during his life. It has been held that retained powers do

[6] Those requirements are that, with the exception of holograph Wills, the instrument be signed at the foot and that such signature be made or acknowledged by the testator in the presence of two or more witnesses present at the same time who must attest and subscribe to the Will in the presence of the testator: see section 7 of the Wills Act 1840, which was the governing legislation at all material times. It has now been superseded by the Wills Act 1988, section 7 of which is to like effect.
[7] For the revocation of a Will upon marriage see section 16 of the Wills Act 1840, and section 14 of the Wills Act 1988.
[8] See section 18 of the Wills Act 1840, and section 16(b) of the Wills Act 1988.

> not make the settlement into a testamentary document if they are subject to the trustees' consent, that a settlement reserving a life interest and a power of revocation (though of the same economic effect as a will) is not a will, and (in the United States, but it would be the same in England) that it is not enough that the object was to avoid the expense of a will and the need for probate . . . In some jurisdictions there are express statutory provisions to the effect that various kinds of powers or interests reserved by the settlor neither invalidate a lifetime trust, or delay or prevent it taking effect as a lifetime trust rather than a testamentary disposition. Such provisions may go no further than give effect to what is the position without statutory intervention in England and Wales, but have the advantage of eliminating doubt as to the scope of the common law rules and are no doubt a comfort to settlors who wish to establish lifetime trust in those jurisdiction reserving wide powers to themselves."

10. I have been taken through the cases in support of those propositions. The principle was formulated in Cock v Cooke [1866] L.R. 1 P & D 241 from whence comes the expression "dependent upon his death for its vigour and effect" at 243. The admissibility of the grantor's intention was recognized in Cock v Cooke (supra) itself, and derives from the following passage in The King's Proctor v Daines (1830) 3 Hagg. Ecc. 218 –

> "If there is any proof, either in the paper itself, or from clear evidence dehors; first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to probate as testamentary."

11. Those principles were applied in the Canadian case of Shinbane v Minuk [1927] 3 D.L.R. 550, where the same language was adopted. They have been applied in subsequent Canadian cases, even though the effect was to render the instrument void for non-compliance with the statutory formalities required for Wills: see Re Pfrimmer [1936] 2 D.L.R. 460, and Re Beardmore Trusts [1952] 1 D.L.R. 41, where it was said at p. 45 –

> "The form of the instrument makes no difference and documents quite absolute and immediate in their terms have been declared void when a Court has found that it was the grantor's intention that such instruments could take effect only upon his death."

12. Indeed the law in Canada appears to be essentially the same as that in England as is made clear in Waters' Law of Trusts in Canada, 3rd ed. (2005) at p. 205:

> "Closely associated with the issue of revocability is the problem of when a purported *inter vivos* trust is in fact a testamentary disposition. . . . Against the background of all the evidence it may appear to the court that the would-be donor either did not really intend to create a trust or that he retained such a degree of control over the trust property that it is impossible to say his trust takes immediate effect, as opposed to taking effect on his death."

13. In commenting on Re Beardmore Trusts (*supra*) Waters' says the following at p. 207:

> "The point was that until his death the settler had totally unrestricted opportunities, as would any property owner, to deal with and dispose of his effects as he thought fit."

Similarly in respect of Re Pfrimmer (*supra*) it says at p. 210:

> "The test is really an objective one. Has the settler reserved such a degree of control over the trust property during his lifetime that the trustees are merely his agents? The settlor's intention as to when the trust should take effect is only one factor to be considered . . . the question is whether that trust takes immediate effect upon creation. The crucial factor in *Re Pfrimmer* was that the donor retained unrestricted right of disposal without the need to account in relation to the trust property."

14. These principles have been recognized by the Privy Council in Baird v Baird [1990] 2 AC 548, although in that case Lord Oliver also set the limits of their application when he said:

> "It is not, however, the case that every revocable instrument which creates interests taking effect on the death of the person executing the instrument is necessarily a will. The most obvious example of such a revocable but non-testamentary instrument is the exercise of a revocable power of appointment under a settlement inter vivos."

A passage upon which the Amicus relies.

15. The Amicus also relies upon the position in the United States, where the law appears to have developed differently from the English and Commonwealth jurisprudence. Thus §57 of the Restatement of Trusts was modified in 1957 to read:

> "Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial

> life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."

16. In commenting on that The Law of Trusts, Scott & Fratcher, 4th ed., says –

> "The trend of modern authorities is to uphold an inter vivos trust no matter how extensive may be the powers over the administration of the trust reserved by the settlor."

And the authors go on to cite National Shawmut Bank of Boston v Joy 315 Mass. 457, 53 N.E. 2d 113 (1944), to which the Amicus took me in some detail.

17. However, I do not think that the American position is decisive. This would not be the only occasion in which the law in the United States has evolved differently from that in England and other parts of the Commonwealth. In Bermuda the position is governed by section 2(3) of the Trusts (Special Provisions) Act 1989 ('the Act') which provides:

> "(3) The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

It seems to me that that merely acknowledges the general common-law position. It certainly does not go as far as the Restatement (*supra*) and indeed, by the inclusion of the words "not necessarily", implicitly contemplates that in certain circumstances the reservation of rights to the settlor and the trustee having rights as a beneficiary may indeed be inconsistent with the existence of a trust. I therefore hold that the law as it applies in Bermuda is correctly stated by Lewin on Trusts (18th ed.) as set out above.

18. In applying that law a key question is the degree of accountability of the trustee. In this respect the plaintiffs rely upon the following passage from the judgment of Millet LJ (as he then was) in Armitage v Nurse [1998] Ch. 241 at 253/4:

> " . . . there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."

19. The plaintiffs also rely upon a reformulation of that in the New Zealand case of Harrison v Harrison [2009] WTLR 1319 at 1324, which takes up the theme of enforceability:

> "Trust is a word used to sum up a relationship where equity will compel a person holding the legal interest in a property to use it for the benefit of someone else."

20. And in Bermuda that theme of enforceability, in the form of 'accountability', finds expression in section 2(2)(a) of the Act, which lists the characteristics of a trust as follows:

> "(2) A trust has the following characteristics:
> (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
> (b) title to the trust stands in the name of the trustee or in the name of another person on behalf of the trustee;
> (c) the trustee has the power and the duty *in respect of which he is accountable*, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law."
> [My emphasis]

The Facts

21. The factual background is put before me in two affidavits, one made by the Settlor's second wife (F) and the other by the first plaintiff (BQ ("B")). I am told by the Amicus, and accept, that he considered applying to cross-examine F on her affidavit, but decided against it in view of her age, she now being over 90. In those circumstances I accepted that it would be appropriate and permissible for him to comment adversely on her evidence, notwithstanding the absence of cross-examination. However, there appears to be no real challenge to much of the direct evidence that she gives, the issue being rather with the conclusions that she draws from it.

22. Prior to her marriage F had been the Settlor's personal assistant for many years. They were married in 1978, after the death in 1976 of his first wife. F deposes that the trusts were set up with the professional assistance of a US law firm, and that their purpose was 'so that the sons of [the Settlor] could manage the businesses after his death.' She asserts that it was her understanding that the Trusts were not effective until his death, and that the documentation was written so that it could be invoked at the time of his death. She was appointed his co-trustee in 1982, and she says that that was the Settlor's wish, although he offered no explanation for the appointment at the time. She was already a director of the two holding companies, having been appointed in 1978. Following her appointment as trustee all but five of the issued shares of each of the companies were transferred into their joint names as trustees, although her role as director did not change. She produces various corporate waivers, some of which she and the Settlor signed in their own names, others of which are signed by them as trustees. She does not know the reason for this distinction. Despite her appointment as trustee she was not a signatory on any of the bank accounts of the Trusts, or of the underlying holding companies, prior to the Settlor's death, and she says that it was normal for him to be sole signatory on bank accounts. Generally she paints a picture of a man who would not willingly relinquish control of his property.

23. B's affidavit pulls together the evidence and the issues relating to this application. He produces the Trust Agreements and other documentation relating to the trusts, and gives the family background. He explains that his father left his native land, eventually settling in Bermuda, and that after the father's departure he and the first defendant were each given responsibility for managing the principal divisions of their father's business, but that they remained on salaries because "they remained my Father's businesses: we were paid salaries to manage what were his businesses: there was never any question in our minds about that." He says that he understands that the Trusts were executed in Bermuda in the presence of two witnesses from the US law firm, and that therefore the plaintiffs will not be contending that they were not validly executed as testamentary instruments[9]. He recounts the appointment of F as trustee, and also the appointment in 1982 of JJH, an attorney in the US

[9] This notwithstanding that he says that one witnessed the Settlor sign in his capacity as 'Donor' and the other witnessed his signature as trustee, although they were all together when this was done.

law firm to be trustee on the death or retirement of one or the other of the Settlor and his wife, an appointment which JJH eventually took up on the death of the Settlor. B also confirms F's picture of the Settlor, saying that his father was "a man of very strong personality who throughout his life made it clear that the businesses he had created were his." He acknowledges the potential tax ramifications, but deposes that "Leading Counsel raised the issue of the invalidity of these trusts in 2006 before anyone had identified the tax consequences". He also produces excerpts from the trust tax returns for 2003 – 2005, which were made on the basis that for tax purposes the Trusts were testamentary in nature.

24. Among the documents that B produces is an extract from a memorandum or letter from WW, a member of the US law firm's Trusts & Estates Department, and one of the witnesses to the Settlor's signature. It is dated 1976, and raises the very issue raised by this application:

> ". . . the question is whether retention by our client of practically absolute control would render the trusts testamentary in nature."

He then went on to cite the passage from the Restatement set out above in support of the proposition that it would not. WW also flagged the same question in a letter of dated 10 days before the execution of the Trusts to S&C, the Settlor's other non-Bermudian attorneys, noting that it was a question that he would have to put to Bermuda counsel. However, when he came to write to Bermuda counsel a week later, he merely enclosed the trusts and asked them "to review the trusts from a Bermuda law stand-point and advise me by telephone at the earliest possible moment of your views." It seems that that did not arrive in Bermuda until, the same day the trusts were signed, and that Bermuda counsel advised by telephone that same day that "the trusts would be effective as of the execution thereof by [the Settlor] and the delivery of the corpus to himself as trustee notwithstanding the fact that he would be the sole trustee and the sole beneficiary[10]." In those circumstances it is by no means clear how the concern was raised with Bermuda counsel, or that his attention was drawn to Art. VIII H.

[10] See WW's letter of a few days after the Trusts were signed, where he asks for confirmation of that advice, and the response thereto.

25. Another important document, again authored by WW, is a memorandum also dated 10 days before the Trusts were signed, headed "Memorandum for [the Settlor]" with the sub-heading "Summary of Proposed Revocable Trust for Sons". It appears to be intended as a lay-man's explanation for the client, and in paragraph 2 it states:

> "2. Dispositions During Your Lifetime. You will be the sole trustee of the trust and you are given the unlimited power to revoke or amend the trust during your lifetime (Article I). All of the income of the trust and so much of the principal as you may wish to have must be paid to you (Article II)." [The emphasis on the word 'unlimited' is in the original.]

There is a similar document of even date for the Grandchildren's trust[11]. The plaintiffs place great weight on this, contending that it shows that the Settlor was being told that all the property, including capital, would be his, without regard to his fiduciary duties in respect of capital.

26. The evidence also suggests that the Sons' and Grandchildren's' Trusts were conceived as part of a larger exercise in estate planning. This appears from a file note as to what needed to be done at closing, which refers to a general review of the Settlor's will and estate plan[12]. There is also a subsequent organization chart, headed "Current Estate Plan", which shows how these Trusts fitted into the overall Scheme of the Settlor's estate plan. The chart bears a date in 1978 several weeks prior to the Settlor's marriage to F, and so seems to go with a file note[13] dated a few days later which records that the Trusts "are to be reviewed and, if necessary, the whole estate plan is to be snugged up under the new Will".

27. For the first six years after the constitution of the Trusts there is nothing in the corporate documentation of the holding companies, the shares of which formed the corpus

[11] Although the operative phrase there has become: "As in the case of the "Sons' Trust", you . . . will be entitled to all of the income and as much of the principal as you may wish to have".
[12] See p. 84 of the Core Bundle. Someone has added the date that the Trusts were signed in 1976 to it, but I am not clear who or when that was done, but the document appears to be an aide memoire which from its contents was composed on or immediately before that date.
[13] See p. 105 of the Core Bundle. This seems to have been made by the Settlor's lawyer,at S&C to record a meeting between the Settlor and his various lawyers in the US in 1978 to discuss the consequences of his imminent marriage to F.

of the trusts, to indicate that the Settlor thought he was acting as trustee, or held his shares in that capacity. Nor is there any other trust documentation, such as accounts or minutes or memoranda of meetings with professional advisors. Once F was appointed as co-trustee in 1982 the shares in the two main holding companies were transferred into the joint names of herself and the Settlor as Trustees, but the shares of a relatively minor third company were overlooked, and remained in the Settlor's sole name. After the transfer into joint names the corporate documents are inconsistent in their recognition of the status of the trustees. Apart from that there is nothing to show that the Settlor and his wife consciously acted as trustees, and in particular there are no minutes of trustees' meetings, no trust accounts and no documentation such as correspondence, minutes or memoranda to show them taking financial or legal advice as trustees.

28. The plaintiffs also rely on one instance in which the Settlor acted in a manner inconsistent with the existence of the Trusts, in that as Director and sole signatory of one of the holding companies he advanced $627,924 in four tranches late in 1978 to a company in which he held 99.5% of the shares (the other 0.5% being held by the holding company concerned). The loan was interest free and repayable on demand. It was ratified by the Board shortly thereafter in 1978, but was not repaid until 1992 when it was immediately re-advanced to another company wholly-owned by the Settlor and otherwise unconnected with the Trusts. In none of this was there any recognition of the Settlor's duties as a trustee, and it is an example of his continuing to exercise what was essentially sole and unfettered dominion over his business affairs.

Conclusions

29. Applying the law as set out above to the facts, my primary conclusion is that the concatenation of rights and powers in the Settlor, when coupled with the fact that he was the sole trustee at the time of the constitution of the Trusts, rendered this trust illusory during his lifetime. In coming to that conclusion I have borne very much in mind the distinction between a power and property upon which the Amicus relies. However, I accept Mr. Hinks's submission that the cumulative effect of the trust documents, when taken with

the *de facto* situation, means that the Settlor as Trustee could not effectively be called to account during his lifetime. Crucial to this conclusion is Art. VIII H, which allows the Settlor to absolve himself as Trustee from any and all breaches of trust. While it may be that I would not have come to that conclusion had Art. VIII H been coupled with a distinct and independent trustee, in this case it is the combination which pushes it over the top. Given that the Trust Agreements are constituted on their face with the Settlor as sole trustee, and that no further appointment was made at the time, I consider that Arts. I and II were void on the face of the documents at the inception of the Trust Agreements, and that the remaining trusts created by the Agreements were therefore testamentary in nature.

30. I also find as a fact that it was not the intention of the Settlor to fetter his unhindered control and enjoyment of the settled assets during his life-time. Rather, I find that when the Settlor executed the Trust Agreements he believed and understood that he would retain effective sole dominion over the settled assets during his life-time, and that that is borne out by the advice that he was receiving. In particular WW's memorandum referenced in paragraph 24 hereof must have conveyed to the Settlor that he had an unimpeded right to do what he wanted with the principal without accountability or control. That the Settlor's intention at the time was inimicable to the creation of a lifetime trust is further demonstrated by the informality of his subsequent administration of the assets, and by the way he treated them as his own, as in the case of the loan. There is nothing to suggest that he thought he could be held to account in any way, and everything to suggest to the contrary. I therefore consider, even were I wrong that the lifetime Trusts were bad on their face, that they were in fact invalid as the Settlor did not have the necessary intent to create a trust during his lifetime, but rather only intended the settlement to take effect upon his demise as part of his estate plan.

31. In the circumstances I find that Articles I and II of the Trusts did not create valid trusts during the life-time of the Settlor, and that the Trusts only came into real force and effect upon his death. They were, therefore, revoked by the Settlor's marriage to F in 1978, and had they not been they would have been revoked by the recitals of his subsequent Will of that same year. If it were to be suggested that the formal appointments of F and JJH as

trustees, in 1982 respectively, in some way revived the trusts, in each case the Settlor's signature has only one witness, so they do not comply with the formal requirements for a testamentary document.

32. In the circumstances I grant the relief sought. Although I heard argument on the form of the relief, I now wonder whether it is in fact appropriate to declare that the Trusts have been void at all times since their purported constitution. It seems to me that that only applies to the lifetime trusts constituted by Arts. I and II, and that the declaration of invalidity should be limited to those articles. As I understood it, the plaintiffs' case was that the testamentary trusts were not void at their inception, but have since been revoked, and I would be prepared to make a declaration to that effect also. The result is that all the property held upon those trusts has, upon and as a consequence of the death of the Settlor formed part of the residuary assets of his Estate, and so been subject to the Testamentary Trust and held for all purposes by the trustees thereof as one fund with the other residuary assets of his Estate. But I will hear further argument upon the exact wording if necessary.

33. Various consequential relief is also sought. I make the representation order at paragraph 3(a) of the prayer to the Originating Summons. Paragraph 3(b) has fallen away, and I make no order on that. Having heard the plaintiffs in their representative capacity I grant the Trustees the discharge and release sought in paragraph 2 of the Originating Summons. I also give a liberty to apply.

34. As to costs, I understand that the basic principle that all parties' costs of the Originating Summons should come out of the Testamentary Trust has been agreed, and I leave it to counsel to settle an appropriate form of words.

Dated this 16 day of April 2010

Richard Ground
Chief Justice