In The Supreme Court of Bermuda

CIVIL JURISDICTION

Consolidated actions 2012: 32 and 348

IN THE MATTER THE XYZ TRUSTS

RULING

Discretionary Trusts - Application for approval of Trustees' implementation of a Proposed Restructuring - Objections to Trustees' proposals on grounds of irrationality - Question as to whether the Proposed Restructuring constitutes new trust settlements - Rule against Perpetuities

Dates of Hearing:	26-27 January 2022
Date of Ruling:	16 February 2022
Plaintiff Trustees	Mr Robert Ham QC (Wilberforce Chambers) of Counsel and Mr Keith Robinson (Carey Olsen (Bermuda) Limited)
First Family Defendants (First Branch) (Adult Beneficiaries: (4th, 5th, 7th, 8th and10th Defendants)	Mr. Ben Adamson and Ms. Judith Roche (Conyers Dill & Pearman Limited)
First Family Defendants (First Branch) (Adult Beneficiary: 6th Defendant)	Mr. Scott Pearman and Ms. Bailey Munroe (Conyers Dill & Pearman Limited)
First Family Defendants (First Branch) (Minor Beneficiary: 9th Defendant through her Guardian Ad Litem and Unborn	Mr. Jeffrey Elkinson and Ms. Britt Smith (Conyers Dill & Pearman Limited)

Issue[1] of the 4th Defendant's Widower)	
First Family Defendants (Second Branch) (Adult Beneficiaries: 11th, 12th, 13th, 14th, 16th, 17th, 19th, 20th and 24th Defendants)	Mr. Dakis Steven Hagen QC (Serle Court) of Counsel and Mr. Matthew Watson (Cox Hallett Wilkinson Limited)
First Family Defendants (Second Branch) (Minor Beneficiaries: 15th, 18th, 22nd, 23rd, 25th, 29th and 31st Defendants and Unborn Issue of 11th Defendant, all by their Guardian Ad Litem)	Mr. Craig Rothwell and Mr. Warren Bank (Cox Hallett Wilkinson Limited)
Second Family Defendants (Third Branch) (Adult Beneficiaries: 1st, 3rd and 26th Defendants)	Mr. Stephen Moverley Smith QC (XXIV Old Buildings) of Counsel and Ms. Fozeia Rana-Fahy (MJM Limited)
Second Family Defendants (Third Branch) (Minor Beneficiary: 28th Defendant represented by 3rd Defendant as his Guardian Ad Litem and his Unborn Issue, future spouses, widows and widowers and those of the 28th Defendant)	Mr. Delroy Duncan QC (Trott & Duncan Limited)
Second Family Defendants (Third Branch) (Adult Beneficiary: 2nd Defendant)	Mr. Michael Furness QC (Wilberforce Chambers) of Counsel and Ms. Katie Tornari (Marshall Diel & Myers Limited)
Second Family Defendants (Third Branch) (Minor Beneficiaries: 21st, 27th and 30th Defendants represented by their Guardian Ad Litem) and the 2nd Defendant's Unborn Issue and their future spouses, widows and widowers	Mr. Thomas Seymour of Counsel and Mr. Jai Pachai (Wakefield Quin Limited) as Guardian Ad Litem

[1] The term "Unborn Issue" in this Ruling means all future born persons and persons in existence but unascertained.

RULING of Shade Subair Williams J

Introduction

1. The Trustees have come before this Court on a summons application for the Court's sanction of blessing of a proposal to restructure 23 trust settlements ("the Proposed Restructuring" / "the Restructuring Proposal" / "Restructuring") to which three distinguishable branches of a family are beneficially interested.

2. The hearing of the application was contentious on account of objections made by one limb of the third family branch. That is to say that out of the 31 Defendant beneficiaries in these proceedings, only the 2nd Defendant and her three minor children, the 21st, the 27th and the 30th Defendants dissented to the Proposed Restructuring. At the close of the hearing, having heard all of the parties on the oral and written submissions made by a fortress of top chancery and commercial lawyers from near and far, I advised that I would reserve my decision, which I now provide with the reasons outlined below.

The Family Structure

3. As is the tale of a number of other family dynasties who have appeared in this jurisdiction of Court, substantial wealth was generated by a patriarch (the "Patriarch") who established a booming business. The Patriarch had two successive marriages, under which two distinct sides of the family (collectively the "Family") were created. I shall refer to those two sides as the "First Family" and the "Second Family".

4. The Proposed Restructuring effectively divides the children of the two marriages into three branches by way of asset allocation to three sub-funds (the "Sub-Funds"). The First Family for the purpose of the restructuring proposal is to be divided into two branches. The Second Family constitutes the third branch.

<u>The First Branch of the Family (The First Family)</u>

5. The 4th Defendant is the living matriarch of the first branch of the family (the "First Family Matriarch[2]"). The First Family Matriarch has two adult daughters. The younger daughter is the 10th Defendant. The elder daughter, the 5th Defendant, is married to the 6th Defendant, with whom they have three children (the 7th, 8th and 9th Defendants). The 9th Defendant is the

[2] The term "First Family Matriarch" was not used during the hearing but is employed in this Ruling only to describe the living spouse of the eldest child of the Patriarch.

only child of minor age. These are the family members to whom the Proposed Restructuring refers to as the first branch.

The Second Branch of the Family (The First Family)

6. The second branch of the restructuring proposal applies to the part of the First Family which is headed by the First Family Matriarch's sister in law, the 12th Defendant. She and her late husband (the First Family Matriarch's deceased brother) had four children, three of whom are married and have their own children. Those children total seven in number, all of whom are minors.

The Third Branch of the Family (The Second Family)

7. The matriarch of the Second Family is the 1st Defendant (the "Second Family Matriarch")[3]. She has an adult son and daughter, both of whom have their own children totaling five in number. The son of the Second Family Matriarch is the 3rd Defendant. He is married to the 26th Defendant and together they have a young child who is the 28th Defendant and another child more newly born. The Second Family Matriarch's daughter is the 2nd Defendant. The 2nd Defendant is the principal objector to the Proposed Restructuring. Her three children, through their Guardian Ad Litem, also oppose the Restructuring.

The Trust Settlements and the Proposed Restructuring

8. Over a 24 year period, between April 1965 and April 1989, there were 23 trust settlements (collectively the "settlements" or the "structure") established by deed to which the Trustees' plan for a restructuring applies. The assets of those settlements fall into two categories, namely core assets (the "Core Assets") and (the "Non-Core Assets").

The Core Assets:

9. The Core Assets comprise shareholdings in limited liability companies which are referred to as the "Core Companies". One of the Core Companies is "Company M". Company M has the majority shareholding in two other Core Companies, namely "Company D" and "F Holdings". Company D wholly owns the principal operating company ("the principal operating company"). F Holdings has 100% ownership of what may be termed "F Estates", the principal property holding company within the settlements.

[3] The Second Family Matriarch is in fact the second wife of the Patriarch, whereas the First Family Matriarch is the daughter in law of the Patriarch under the First Family. No discourtesy is intended by the use of the terms 'First Family Matriarch' and 'Second Family Matriarch'.

The Non-Core Assets:

10. The Non-Core Assets comprise four residential properties in England and seven investment properties in Ireland. Additionally, the Non-Core Assets refer to various investment portfolios and loan receivables.

The Proposed Trust Structure upon Implementation of Phases 1 and 2 of the Restructuring:

11. The Trustees propose to liquidate a significant number of the settlements for the assets to be transferred to the CMM 2060 Settlement for allocation to the Sub-Funds, which total three in number. Each of the Sub-Funds, namely the 'D Fund', the 'B Fund' and the 'S Fund' is to be assigned its respective branch of the Family. This is intended to enable the separate branches of the Family to be somewhat financially independent from the other. Each Sub-Fund will own 33.3% of Company M which in turn will have 100% ownership of Company D and F Holdings. Company D will continue to have direct ownership of all the shares in the principal operating company and indirect ownership of other subsidiaries in the group of companies. F Holdings will also continue to wholly own F Estates and its subsidiaries.

The Development of the Restructuring Proposal:

12. The plan for restructuring was kick-started by years of informal discussions between the First and Second Family and their legal representatives. By November 2009, the discussions took the form of a mediation followed by another mediation in April 2010. On 6 May 2010 a non-binding document described "Heads of Terms" recording the accord of the family members was signed and later supplemented on 1 July 2013.

13. The Heads of Terms provided for an agreement that the assets of the settlements would be divided into thirds for allocation to the three branches of the Family, so long as none of the real property in Ireland, constituting the Non-Core Assets, would be vested in any members of the Second Family. Amongst various other items of accord, a "hotchpot" type adjustment was agreed in that previous distributions to the Family would be taken into account in determining the allocation of assets going forward. These hotchpot clauses provided [9.1-9.2]:

"*9.1 Prior to the allocation of assets described at paragraph 3 above, the total value of all distributions from 1 January 2000 to date shall be added back to the total value of Assets for the purposes of such asset allocation.*

9.2 Following such allocation of assets, distributions shall be deducted from the respective funds for [each of the three branches of the Family] *... and...* [the 1st Defendant's] *Fund, on the basis of the individuals who originally received such distribution.*"

14. The Trustees were not signatories to the Heads of Terms nor were they privy to the preparatory discussions. Their active involvement in any plan for the restructuring of the

settlements began at a stage when it was determined that a Proposed Asset Allocation would be prepared. The joint efforts of the Trustees and an independent Council of Protectors culminated in the production of the Initial Detailed Proposals and thereafter the Final Detailed Proposals.

15. By a summons issued on 9 June 2016, directions were sought for the Court's approval of the Trustees' decision to develop a comprehensive plan for the restructuring of the settlements. On 10 October 2016 Kawaley CJ (as he then was) ordered, *inter alia*, [1(i)-(iii)] that the Trustees were at liberty to develop proposals for restructuring the trusts' assets, with the benefit of such legal and other professional advice they deemed appropriate. The Court further directed that the Trustees would be at liberty to develop alternative proposals for restructuring if the plan then outlined before the Court proved to be unrealistic.

16. The Trustees, having continually consulted with the adult beneficiaries of the Family, produced the Proposed Asset Allocation as sanctioned by Kawaley CJ's 2016 Order. This was set out in a memorandum dated 27 June 2017 from Baker & McKenzie LLP. Setting out the level of communication and consultation the Trustees had with the adult beneficiaries in preparing the Proposed Asset Allocation, the Vice President of the First Plaintiff Trustee, Mr. David Veness, stated in his seventh affidavit [para 54.1-54.6]:

"…

54.1 *The Proposed Asset Allocation became necessary because the branches of the … Family could not reach agreement with regard to asset allocation by the deadline of 7 November 2016 that the Trustees proposed. As a result, the Trustees consulted with each branch on the (relatively few) points of disagreement between November 2016 and February 2017.*

54.2. *The Trustees produced their proposals for the first time in a "without prejudice" letter from Baker McKenzie dated 7 February 2017 which were presented (together with a PowerPoint presentation) at an "all parties" meeting on 8 February 2017.*

54.3. *Each branch of the Family provided further representations during February and March 2017 on those proposals.*

54.4. *The Trustees then produced an updated set of proposals by letter dated 14 April 2017 from Baker McKenzie.*

54.5. *Each branch of the Family provided a final set of representations during May 2017.*

54.6. The Trustees produced the Proposed Asset Allocation in final form on 26 June 2017."

17. The Proposed Asset Allocation gave rise to discord from the 2nd Defendant and her children of the Second Family thereby giving the Trustees reason to issue a further summons on 31 May 2017. On this occasion the Trustees sought the Court's blessing under section 47 of the Trustee Act 1975 for development of the Detailed Proposals from the Proposed Asset Allocation. Resisting the application, Mr. Moverley Smith QC and Mr Seymour complained that the Trustees were acting prematurely in pursuing the Court's approval because insufficient time and effort had been applied to seeking a consensus from their clients on key factors about the transaction, such as issues relating to tax obligations. Further, it was argued that the corporate governance structures on which the viability of the restructuring depended was unknown. Notwithstanding, in his judgment of 12 December 2017, Kawaley CJ provided written reasons for making an Order in favour of the Trustees' pursuits. He concluded [18]:

"*It was in my judgment difficult to see any valid technical legal objection to the form of Order the Trustees sought in the context of an interlocutory application which expressly contemplates further judicial approval of more detailed proposals. The essence of the "transaction" proposed to be developed further was, after all, agreed by all concerned to be a sound one. That consensus was inconsistent with the notion that any serious doubts existed about the Trustees' legal ability to implement it. And at the end of the day the authority this Court was being asked to confirm the Trustees possessed either fell within their existing powers or required the deployment of powers which could be conferred on them under the flexible jurisdiction provided by section 47*."

18. Amongst the recitals in Kawaley CJ's 2017 Order it is said that all parties agreed that the Detailed Proposals needed "*to include corporate governance and other arrangements (whether by way of amending articles of association, shareholder agreement, tax fairness agreement or otherwise) ("Corporate Governance and Other Arrangements") in order to protect minority shareholders in the Core Companies and to secure fairness between the three branches of the Family*".

19. In the same 2017 Order, the Court stated its opinion that the Proposed Asset Allocation was 'reasonable and proper' and confirmed that the Trustees were empowered to carry out the proposed restructuring. The Court accordingly enlarged the Trustees' powers pursuant to section 47 of the 1975 Act so to give liberty to the Trustees to develop the Detailed Proposals on the basis of the Proposed Asset Allocation. Kawaley CJ also directed, *inter alia*, that the Detailed Proposals were to include such Corporate Governance and other arrangements as

the Trustees deemed fit. All of these powers were conferred on the Trustees to be exercised in consultation with the Project Manager and with the adult members of all the three branches of the Family in addition to any other appropriate professional advice.

20. Kawaley CJ also provided directions for the Defendants to state their support or objections to the Trustees within a 56 day period of being informed of the Detailed Proposals and for the Trustees to review those responses, making such modifications as they would see fit. The Trustees were further directed to return to the Court for directions as to whether to implement the Detailed Proposals. In doing so, provision was made for the filing and service of evidence between the parties.

21. On 21 February 2021 the Defendants were served with the Initial Detailed Proposals and were invited to provide their comments. The 2nd Defendant did so, raising various points in respect of the drafting of the restructuring documents. Relevant to these proceedings, more key issues were raised and remain contentious between these parties as the Final Detailed Proposals did not satisfy the principal concerns raised by the 2nd Defendant and her children, the 21st, 27th and 30th Defendants and unborn issue (collectively "the Objectors").

22. This brings me to the summons application with which I am presently concerned. This Court is now asked to confirm its blessing for the Trustees to implement the Final Detailed Proposals developed from the Proposed Asset Allocation and the Initial Detailed Proposals. The Final Detailed Proposals is what I have been referring to as the Proposed Restructuring. In his evidence Mr. Veness contends that the Final Detailed Proposals substantially incorporated the Proposed Asset Allocation and that extensive consultation with each branch of the Family and professional advisors as directed by the Court in 2017 was carried out. Without exhausting the list of professional advice obtained by the Trustees, English lawyers of Baker McKenzie LLP ("Baker McKenzie") were retained to advise on the proposed restructuring as a whole and PricewaterhouseCoopers LLP ("PwC") and O'Connell Brennan Solicitors were engaged to provide advice on issues of UK and Irish tax law arising from the proposed restructuring.

23. The Objectors continued to press for various changes and modifications. In these proceedings the Objectors have pursued only their overarching complaints related to the immediate and long-term distributions which will be made available to the beneficiaries.

The Objections to the Restructuring Proposal

24. The Objectors' opposition to the Final Detailed Proposals are principally supported by the evidence of Ms. Janet Keeley, a solicitor and partner of a London law firm, Fladgate LLP ("Fladgate"), instructed by the 2nd Defendant. Additionally, affidavit evidence by Mr. Jairaj Pachai of Wakefield Quin was filed on behalf of the 2nd Defendant's children appearing through their Guardian Ad Litem.

25. The Objectors say that it is not good enough for the Trustees to claim that they have taken account of all relevant factors because their decision, having purportedly done so, is simply irrational, whether it was built on a misunderstanding of the circumstances pertinent to their assessment or whether they, in reality, failed to properly consider the relevant factors. Prominently featured in the Objectors' sketch of the factual background was a narrative about their financial dependence on the liquid distributions from the trusts.

26. Mr. Furness QC flagged that at the time of the Patriarch's death, the 2nd Defendant was a Vice Chief Executive of one of the Core Companies while holding directorships in other Core Companies. Mr. Furness QC pointed out that in 2017 she was made to relinquish those roles (pursuant to the 2017 Order) and that she now suffers from health issues rendering her unable to work, as per medical advice received. Seeking to distinguish the 2nd Defendant from the other members of the Family, Mr. Furness QC said that those other family members have the privilege of taking a more relaxed attitude about their trust distributions since they have other sources of income, or other assets or simply more liquid in their Sub-Funds.

27. On Mr. Pachai's evidence, the Court was informed that the 2nd Defendant has no realistic prospect of being in a position to take up remunerative employment within the foreseeable future. Another component adding to financial pressures to which the 2nd Defendant is impregnable, on Mr. Furness QC's submissions, is the pressure of being a single parent raising three young children. The thrust of this aspect of the 2nd Defendant's case is that these factors leave her and her children vulnerable and particularly dependent on their share of the distributions. It was further pointed out that the 2nd Defendant, being in her late thirties, may possibly go on to have more children. Mr. Seymour pointed out that a new grandchild of the Second family was recently born in October 2021 and that the growing class of minor beneficiaries further impacts on the needs of the Second Family. For example, the Second Family will have to undergo the expense of primary and secondary private education and possibly tertiary education.

28. The Objectors say that they need the assurance of an adequate and steady flow of distributions for them to live on. Contrasting the Objectors' lack of financial protection against the other branches of the Family, Mr. Pachai deposed [10(b)]:

"*The* [second branch of the First] *Family and* [first branch of the First] *Family derive income as family directors from the Core Companies and other … companies, as does* [first] *branch of the Second Family. In contrast* [the 2nd Defendant's] *branch derives no such income. Indeed* [the 2nd Defendant] *is debarred from serving as a director. She has no spouse or partner who could be eligible to serve and, of course the children will not be eligible, or in a position to earn any remuneration, for many years to come.*"

29. In Mr. Pachai's affidavit evidence [10(b)] he suggested that the 2nd Defendant's "uniquely exposed and vulnerable position" is distinguishable from the members of the First Family and the first limb of the Second Family, since they derive additional income from their posts as directors of the Core Companies while she, the 2nd Defendant, is debarred from serving as a director.

30. Within that context, the Objectors' assertion of irrational decision-making on the part of the Trustees is said to be evident by the uncertainty lurking over the sufficiency of cash flow remaining after the initial liquidity of the Sub-Funds. The Objectors also take issue with the corporate policies relating to the declaration of future annual dividends from the Core Assets and the allocation of payments to Qualifying Corporate Bonds ("QCBs"). In Ms Keeley's evidence [10] she sets out the objections under four main categories: (i) the initial liquidity within the structure; (ii) the security of continuing funds; (iii) the protection of minorities and (iv) the costs of the structure.

31. Mr. Pachai, in his evidence, asks this Court to assess the rationale of the Trustees' decision not to index a minimum dividend sum by (Retail Price Index) "RPI" for distribution to the beneficiaries. Challenge is also made to the Trustees' refusal to declare an extraordinary dividend to inject additional funds into the structure. Additionally, on Mr. Pachai's evidence, this Court is asked to find that the Trustees should seek strengthened dividend policies which should include procuring an agreement for a mandatory liquidity event contingent on a shortfall of cash-flow. The Objectors' financial security is said to be reliant on how these pervasive points are resolved.

The Legal Approach in cases where the Trustees do not surrender their power

32. No real controversy or time was misspent on outlining the applicable legal principles under which the Court must govern itself in deciding whether to offer or withhold its blessing of the Proposed Restructuring. The parties were all agreed that the Court's powers in this regard are exercisable only as a Category 2 classification under *Public Trustee v Cooper* [2001] WTLR 901. Expounding on this class of application in his judgment, Hart J said [923, C-F]:

> "*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. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but 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.*"

33. Hart J acknowledged [925E] that the duties of the Court in considering a Category 2 case will depend on the circumstances of each case. In posing the second of three questions for his scrupulous consideration of the evidence, Hart J asked himself [925G]; "…*was the opinion* which the *Provident Settlement trustees formed one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived?"*

34. Illustrating the general approach the Court will take in deciding whether or not to bless the trustees' decision in a Category 2 case, Hart J's ultimate findings [929F-G] were premised on his assessment that the evidence did not establish that "*there was no material on which the Provident Settlement trustees could reach their conclusion or that that conclusion was manifestly unreasonable*."

35. As to the purpose and value of applications for the Court's blessing in a Category 2 case, the learned authors of Lewin on Trusts (20th Edition) [39-092] observe that the Court's approval serves as a protective shield against a beneficiary who may later complain that the exercise of the power constituted a breach of duty on the part of the trustees.

36. In the English High Court judgment of Mrs. Justice Asplin in *Merchant Navy Ratings Pension Fund Trustees Limited v Stena Line Limited et al* [2015] EWHC 448 (Ch) the Court quoted from Vos LJ in *Cotton & Moore v Brudenell-Bruse, Earl of Cardigan & Ors* [2014] EWCA Civ 1312 where the relevant authorities were outlined. Amongst the cases cited was *Richard v Macky* [2008] WTLR 1667. There Millet J restated the parameters of the Court's approach and highlighted the need for caution, given the preemptive effect of the Court's approval on a beneficiary's claim for breach of trust. Millet J said [1671]:

"*Where, however, the transaction is proposed to be carried out by the trustees in the exercise of their own discretion, entirely out of court, the trustees retaining their discretion and merely seeking the authorization of the court for their own protection, then in my judgment the question that the court asks itself is quite different. It is concerned to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate. ...*

It must be more in mind that one consequence of authorizing the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. Accordingly, the court will act with caution in such a case…"

37. Vos LJ in *Cotton & Moore v Brudenell-Bruse* framed the pivotal question for the Court as follows [78]; "*whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question and have formed a view which, in all the circumstances, reasonable trustees could properly have formed*."

38. In previous cases before this jurisdiction of Court, the above principles which apply to a Category 2 case have been recognised and applied. Kawaley CJ in *Re ABC Trusts* [2014] Bda LR 117 observed [7-8]:

"*7. However, the Bermudian Courts have entertained 'category two' applications for many years. A prominent instance, relied upon by the Trustees' counsel, is Norma Wade-Miller's judgment approving the compromise of contentious trust litigation in Re Thyssen-Bornemisza Continuity Trust [2002] Bda LR 8. In that case, Wade-Miller J accepted the invitation of the trustees' counsel1 to approach the application for approval by reference to the following four questions:*

(1) "do the Trustees have the power to enter into the proposed compromise?";

(2) "is the Court satisfied that the Trustees have genuinely formed the view that the compromise is in the interest of the …Trust and its beneficiaries?";

(3) "is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?";

(4) "does the Court consider that any of the individual Trustees have any actual or potential conflict of interests and, if so, does it consider that this conflict of interests prevents the Court from approving the unanimous decision of the Trustees to compromise the litigation?".

8. I was guided by this analytical approach in considering the Trustees' present application."

39. More recently in *Re the R Trust* [2019] Bda LR 39 Hargun CJ employed these principles, quoting from Lewin on Trusts (19th Edition, 2018) [27-079] as "the current legal position":

"*Application without surrendering discretion - role of court*

The court's function where there is no surrender of discretion is limited. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of the beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself exercise the power in the way proposed."

40. So, as a matter of law, I must therefore ask myself whether the Trustees in this case have formed an honest and genuine view that the Proposed Restructuring, a momentous decision indeed, is in the best interests of those beneficially entitled as a whole. I must also determine whether the Trustees, in forming their decision to proceed with the restructuring, acted reasonably and lawfully, without reliance on improper or irrational factors. If this is all the case, it will not matter whether I also hold a view that the Trustees might have instead opted for a wiser or more strategic choice. This is because the Court must not trespass or usurp the first instance decision-making role of the Trustees.

41. This Court is merely being invited to make a finding as to whether the Trustees have acted irrationally. If I find in the affirmative, then I am to simply withhold the Court's blessing without seeking to compel the Trustees to decide any of these issues one way or the other. In carrying out this assessment, I must also be mindful that the Court's approval will likely prohibit any beneficiary from successfully claiming for breach of trust in respect of the decision to proceed with the Proposed Restructuring.

Analysis and Findings on the Trustees' Impugned Decisions

42. At the brass tacks of it all, the Restructuring Proposal is said to pose a real risk of milking the structure of its liquidity. The Objectors' anxiety is that the S-Fund will vacant of adequate cash for distributions to the Second Family. These objections may be bifurcated into issues of initial liquidity and long-term liquidity.

Initial liquidity

43. Baker McKenzie circulated a schedule of the cash and portfolio balances for the structure of the settlements as at 26 November 2021. This schedule reported a total of £7,194,490.55 (together with US $0.60 and EUR €37,379.05).

44. In a covering email to the Defendants, Baker McKenzie pointed out that the total cash balance sum included a sum of £5,500,000.00 currently held by Company D which is to be paid up by way of dividend to Company M in order to source repayment of the QCBs once Phase 1 of the restructuring. These dividends to Company M will also be applied to the continuing costs of the restructuring project. Ms. Keeley's analysis in her affidavit evidence was given on her understanding that the £5,500,000.00 sum is part of the dividends of £8,000,000.00 declared for 2021, leaving only circa £1,700,000.00 held within the structure. On this calculation, she expressed concern that the structure would be unable to meet its expenses, taking into account the costs necessary for completing the restructuring. Ms. Keeley suggests that this demonstrates the importance of an 'extraordinary' dividend at the outset for the sake of the immediate and future viability of the new trust structure.

45. Mr. Furness QC submitted that the Second Family's Sub-Fund is illiquid in the sense that it is funded only by the 1st Defendant's Fund (the Patriarch's second wife), the QCBs and shares in Company M. He argued that the absence of any other cash to pick up the shortfall makes it all the more important to his client that the Trustees ensure that the £8,000,000.00 minimum dividend is delivered as reliably and as reasonably as can be devised.

46. Responding to these concerns, Mr. Veness explained in his ninth affidavit that the implementation of Phase 1 of the Restructuring was completed by the end of December 2021 in accordance with an "Intermediate Step Paper" and the Consolidation Proposal. The carrying out of Phase 1 saw, *inter alia*, that the minority shareholdings in Company D and F Holdings were transferred to Company M in consideration for the QCBs issued by Company M pursuant to share purchase agreements. Of note, the £5,500,000.00 sum held by Company D is now in the process of being paid to Company M. Mr. Veness deposed that this amount is to be included in any calculation of the current liquidity of the structure, which as at 30 December 2021 totals £6,104,797.35 plus €30,884.87.

47. Additionally, the evidence put forth by the Trustees is that further dividends totaling at least £4,000,000.00 will have been received by the second quarter of 2022 when it is hoped that the Proposed Restructuring would be fully implemented with the Court's blessing. Mr. Veness stated in his ninth affidavit that by this time, it is anticipated that the vast majority of the legal costs associated with these proceedings will have already been paid. Mr. Ham QC clarified that this means that the £4,000,000.00 would be available to meet the other costs and needs of the beneficiaries and that in all likelihood the dividends which will be paid will total circa £9,800,000.00. The Trustees thus reject any suggestion that the trust structure is starved of liquidity.

48. Notwithstanding, on the written arguments of Mr. Furness QC, he submitted that the Trustees are committed to discharging other liabilities; so any such increases in capital will do nothing to improve the liquidity of the structure. It seemed, however, that Mr. Furness QC's devotion to this argument plummeted at the hearing once Mr. Ham QC clarified that the £4,000,000.00 would not likely be disturbed by the Trustees in their settlement of a significant portion of the legal costs of the Restructuring.

49. In my judgment, these facts sufficiently undermine the notion that the Proposed Restructuring will drag the trust structure into a starting period of illiquidity. I am therefore bound to reject any case on which it is argued that the Trustee's proposals are irrational on the grounds that the execution of the plan for restructuring would instantly strip the structure of its reserves. On the evidence before me, the Trustees have discredited the Objectors' complaint that once the plan is completed, an immediate cash-flow issue will follow.

Long-term Liquidity

Discretionary Powers in the Dividend Policies

50. On behalf of the 2nd Defendant's children, Mr. Pachai deposed in his evidence that the basis on which the Trustees satisfied themselves that a headline figure of £8,000,000.00 per annum is adequate to meet the beneficiaries' needs is not readily apparent. He said [20]: "*The*

arrangements in the proposed restructuring are being set up on a permanent basis. It cannot, I suggest, realistically be supposed that the sum of £ 8 million, even were it adequate in year 1, will hold good, as the impact of costs, fees and taxes increase over time."

51. However, at the hearing both Mr. Furness QC and Mr. Seymour confirmed their respective clients' acceptance that the minimum annual dividend sum will be £8,000,000.00. I therefore proceed on the basis that it is agreed by all parties that this figure is reasonably sufficient to cover the expense of the post-restructuring funding requirements which entail payment for the proper administration of the Sub-Funds and payment of the distributions to the beneficiaries across the three branches of the Family. Notwithstanding, the Objectors' pursuit of dividend policies which guarantee future declarations of a sum of no less than the desired £8,000,000.00 per annum has provoked a divergence of views.

52. The controversy on this point is onset by the discretionary language employed in the Final Detailed Proposals for determining the dividend sums to be declared. As raised on the affidavit evidence of Ms. Keeley [25], the Objectors consider this to be a problem heightened by the fact that they, together with all other minor and unborn beneficiaries, have no corporate influence over the level of dividends to be declared by the Core Companies. They say that for this reason, the Trustees' have an increased responsibility, as the current legal owner of all of the Core Asset shares, to ensure that their minority rights are protected. This means that the Trustees should be concerned to make decisions which benefit the Family as a whole instead of allowing any one smaller part of the Family to be "starved of funds". Mr. Furness QC robustly argued that the Trustees, as the sole shareholders of the trust companies, have an obligation to stronghold the companies by insisting on more rigorous dividend policies to guarantee payment of the £8,000,000.00 minimum.

53. In lieu of amending the relevant Articles of Association, a draft shareholders' agreement (the "Shareholders' Agreement") containing the corporate governance arrangements for Company M and the other Core Companies was adopted as a star constituent of the scheme for restructuring. Thus, the Shareholders' Agreement is to be executed by Company M, F Holdings, F Estates, Company D and the principal operating company. Additionally, the signatories comprise each of the Sub-Fund Trustees and the personal representatives of the estate of the 11th Defendant of the second branch of the First Family (the First Family Matriarch's deceased brother).

54. Mounting this picture at the top of the list of reasons as to why the Trustees say the Objectors are flirting with the risk of dismantling the entire scheme, Mr. Ham QC pointed out that effecting the sought-after changes to the Dividend Policies is not a simple matter of the Trustees saying; "*This is what we want*…". It would entail a real possibility of undoing the unified position obtained between multiple parties who have hiked a long and bumpy road

before reaching a common and sensible accord. In a hypothesis of an alternative and arbitrary approach whereby the Trustees assume the full force of its powers to change the composition of the Boards for the appointment of more agreeable and compliant directors, Mr. Ham QC submitted that therein would lie a clear and ironic example of irrational decision-making on the part of the Trustees. He said that if the Trustees ever proceeded in this way, they would be guilty of disregarding the ultimate responsibility of any director to properly carry out his or her fiduciary duties to the company in question.

55. Turning to the policies under fire, the Dividend Policies provides that the principal operating company and F Estates "*shall … use all reasonable endeavours to distribute not less than the higher of …* [£5,000,000.00 / £3,000,000.00, respectively] *or 50% of its operating profit after tax in each Financial Year*".

56. Quarrel is also made of Appendix 32 [para 3(b)] where it is provided that the Board of Directors, in determining the amount of any distribution, may have regard to, *inter alia*:

"*…the level of cash reserves which are required to cover the working capital, future capital expenditure requirements and all liabilities of* [the principal operating company] *(including accrued, contingent and prospective), including but not limited to adequate cash reserves to fund the projected costs of any projects, investments or other activities set out in* [the principal operating company's] *Business Plan for the relevant Financial Year*.."

57. This clause is perceived by the Objectors as an overly broad opportunity for the Board of Directors to deplete the sums otherwise payable to the Trustees in dividends. Mr. Veness stated in his ninth affidavit [60] that in all practical likelihood "*the projected costs of any projects, investments or other activities"* will be formulated around the Dividend Policies and the annual minimum dividend amount. Mr. Veness deposed that the Trustees consider it very unlikely that the Directors would decline to pay the annual minimum dividend for the sake of funding any particular project or investment. In any case, Mr. Veness contends it would be wrong to compel the companies to declare dividend payments, no matter what their financial circumstances may be.

58. The Trustees also pointed out that clause 9.2 of the Shareholders' Agreement specifically requires the Core Companies to review the Dividend Policies at regular intervals and that any reduction of the dividends will require the support of the shareholders.

59. In my judgment, the Trustees have achieved through these impugned clauses a reasonable balance between corporate growth and sustainability and the distributions to the beneficiaries. This balancing exercise requires a keen sense of awareness that the viability and success of the Core companies is necessary for the security of the distributions to the

beneficiaries. The higher the Core Companies' net profits prove to be, the more likely the higher dividend sum for the beneficiaries will be 50% of their profits. I can therefore see no reason to characterise this aspect of the Proposed Restructuring as irrational.

Inflationary Uplifts

60. The Objectors also push for the dividend sum to be index-linked. Their concern is that inflationary factors will likely increase the costs of administering the Sub-Funds and a failure to index the minimum dividend by RPI will eventually result in the minimum dividend amount being eroded by inflation.

61. Mr. Furness QC observed that, historically speaking, there had been no need to index the £8,000,000.00 sum because the costs and taxes payable by the structure were low in the past recent years. That being said, he also opined that the minimum acceptable level of distribution for the beneficiaries would surely increase over the coming years through inflation. As Mr. Furness QC developed this point, the value of money will subside while increased proportions of the dividends will be allocated for tax payments and professional costs. By way of example, Mr. Furness QC referred to the Inheritance Tax (IHT) liabilities which are linked to the value of the real property in the UK. He envisaged the climb of IHT alongside the commensurate increases in UK property prices. It thus follows, he submitted, that these inflationary factors which will increase the costs of operating the trust structure should be addressed by indexing the £8,000,000.00.

62. Aligning himself with Mr. Furness QC's submissions that the escalation of financial advisors' and lawyers' fees will be onset by inflation, Mr. Seymour added that the effect of inflation on private school fees is another factor for consideration. Implicitly inviting me to take judicial notice that the Consumer Prices Index ("CPI") rate of inflation rose by 5.4% in the 12 months to December 2021 and that the RPI measure of inflation was last reported at 7.5%, Mr. Seymour cautioned that costs increases in the years to follow will likely be significant.

63. Both Mr. Furness QC and Mr. Seymour pitched doubt at the assumption that an index uplift would be the one string that, if pulled on, would unravel the Restructuring Proposal, given its overall complexity and its 11 year history.

64. However, Mr. Hagen QC argued that the greatest portion of the trusts' wealth is in fact in the real property assets, which are owned by the trust companies. Therefore, as inflation rises, so will the rental yield of the properties, thereby redirecting those increases into the pockets of the trust companies. Staying on this path of argument, those increases will likely travel up through the structure because the terms of the Dividend Policies require the principal operating company and F Estates to pay the higher sum between £8,000,000.00 per annum

on the one part and 50% of the companies' operating profit after tax in each financial year on the other part. On this reasoning, the beneficiaries would remain protected from inflationary increases. Further and beyond all of these points, Mr. Hagen QC further pointed out that the Dividend Policies are reviewable every three years.

65. The Trustees contend that this approach is more appropriate than the employment of an RPI uplift since the latter takes no account of the financial developments of the Core Companies. Notwithstanding, the Trustees consider that the £8,000,000.00 sum has, in Mr. Ham QC's words, "*a major contingency buffer*" built into it.

66. In my judgment, the Trustees' decision against an index link is forcefully grounded in the points made by both Mr. Ham QC and Mr. Hagen QC. The decision is ultimately rational as any inflationary uplifts would by and large be restored to the trust companies by their own corporate adjustments for parallel increases in respect of their own products and assets and the structure will inherit those increases through its receipt of dividends which may likely be 50% of the companies' operating profit after tax.

67. While I accept that a more cerebral analysis might possibly point to the wisdom of adding an index-link; however, I cannot say that a failure to impose an uplift is irrational. At the highest peak of all reproach, it could be said that the Trustee's calculation that the annual minimum dividend is sufficiently buttressed to repel adverse effects of inflation is not a certain as they may think. But what cannot be taken from that is a fair accusation that in proceeding without an index uplift, the Trustees have exhibited irrational decision-making. In the end, as Mr. Adamson put it most conveniently and plainly, I would ask myself; "*Would every rational trustee insist upon indexing the minimum to inflation?*" I say not.

Risk of Insufficient Funds

68. The Objectors are wary of the future risk of insufficient distributions for as long as the minimum annual dividend sum is not guaranteed. On the evidence of Ms. Keeley, a dim view of the profit and cash flow of the Core Companies was taken by reference to a report of the past six years of declared profits. Between 2015 and 2020 the combined dividend declared by the Core Companies for payment into the trust structure ranged from £3,000,000.00 per annum to £22,208,459.00 per annum. Ms. Keeley deposed [see chart appearing at para 20] that a declared sum of £3,000,000.00 per annum would equate to an insufficient annual distribution of £12,233.00 per adult as opposed to the £567,789.00 which would be given to each adult family member on an annual dividend declared at £8,000,000.00. Ms. Keeley added that these figures do not allow for any increases of expenses for the Sub-Funds which may come about on account of the 10 year tax charge payable as a result of the residential properties held in the Core Companies or as a result of other cost allocation adjustments.

69. Mr. Veness rejected Ms. Keeley's analysis of the significance of the financial statements of the Core Companies which pre-date the Dividend Policies proposed. He said that notwithstanding those financial reports for the past six years, the reality is that during that same period the principal operating company and F Estates have paid average dividends exceeding £8,000,000.00 per annum.

70. Maintaining the need for extra cushions of cash flow to fund the Sub-Funds and distributions, the Objectors voiced grave concerns about the dividend declared for 2021 being used to finance the costs of completing the restructuring. Additionally, Ms. Keeley estimated the future costs of administering the new structure for all three branches to be in the region of £3,000,000.00 per annum, a sum which she said seemed "extremely expensive". Boiling with anxiety, the Objectors' perceive a real risk of insufficient liquid assets in the trust structure which may be needed to subsidize any significant decline in the combined dividend declared by the Core Companies in the years to come, in order to meet the needed £8,000,000.00 annual sum for the administrative expenses of the Sub-Funds and the distributions to the beneficiaries.

71. In Ms. Keeley's evidence [17], she pointed out that the total of the shareholders' funds shown in the accounts of the Core Companies and their subsidiaries show very substantial and undistributed reserves. She said [18]:

"*That being the case, it seems reasonable to require the Core Companies' respective subsidiary undertakings to commit to declaring an annual dividend of at least £8 million between them, provided that they can lawfully do so, with such a dividend then being paid into the structure in accordance with the revised dividend policies of the Core Companies*."

72. The Trustees say that an injection of an 'extraordinary' dividend, although unquantified by the Objectors, would impact on the Core Companies and their business, assuming that the figure is one of millions. Mr. Veness deposed in his ninth affidavit that this would inevitably disturb the business plans for the principal operating company and F Estates as such an approach fails to properly recognise the exigencies of corporate growth. More so, the Trustees reassert that this is unjustified as the prospects for the initial and long-term liquidity of the structure are sound.

73. Forecasting a promising future trajectory for the principal operating company, Mr. Veness turned to a copy of a two-year business plan for the years of 2022 to 2024. This instilled the Trustees with confidence in the sufficiency of dividend flow for 2022 onwards. The Trustees have also had regard to a 9 December 2021 estimated operating profit after tax for F Estates and F Holdings which anticipates a dividend sum of £3,872,000.00 being paid in 2022. Additionally, on 31 December 2021 Mr. Veness learned that the principal operating company

will pay a higher sum in dividends for 2022 in order to balance out an extraordinary dividend paid by F Estates in 2018. Hitting the bottom line, it is said that the dividends to be declared for 2022 will amount to half of the operating profit after tax for both the principal operating company and F Estates, no matter how the adjustment is made between the two companies. That total dividend sum to be declared to the Trustees for 2022 is anticipated to be £9,800,000.00.

74. In any event, on the evidence filed by the Trustees, the Chairmen of the Core Companies have expressed a strong reluctance to amend the Dividend Policies on the basis of their assessment of the financial position of the Core Companies. This is consistent with the Trustees confidence in the Business Plan regarding dividend flow from 2022 onwards and the views expressed by the first two branches of the Family and the first limb of the Second Family. While the Trustees are not prepared to challenge that assessment and thereby risk undermining their relations with the Core Companies, the Trustees have also undertaken to keep the proposal for a cash injection and any other policy changes under review.

75. Answering to the criticisms that exorbitant costs are required to administrate the Sub-Funds, Mr. Veness spotlighted the likelihood of the legal and other professional costs decreasing once the QCBs are repaid and the original settlements in their current form are wound up and the new structure has "bedded in". Added to that, Mr. Veness posited a view that these issues of liquidity would equally arise whether or not the proposed restructuring were to be implemented.

76. The Trustees also point to their proposal for a "Liquidity Rider" clause in the Shareholders' Agreement as a means of providing comfort and security to the Defendants. This clause is designed to enable payment of any shortfall of a £40,000,000.00 distribution over a total period of 5 years (representing the £8,000,000.00 per annum target) to the structure. However, the proposed term invoked further discord from the Objectors as set out at paragraph 9.3 of Backer McKenzie's 12 October 2021 letter [7.50(c)]:

"*Clause 9.3 (Minimum Dividend Amount). In summary, this "Liquidity Rider" clause provides that if dividends totalling £40 million are not paid to* [Company M] *within 5 years from the date of the Shareholders' Agreement then shareholders holding at least 59% of* [Company M's] *shares shall be able to direct that each of* [Company M], [F Holdings] *and* [F Estates] *will procure a liquidity event to enable sums to be paid to the Sub-Fund Trustees (via* [Company M]*) representing the difference between the total sum of £40 million and the dividends paid to Maryland during the 5 year period. The Trustees proposed that the company directors be required to use their respective "best endeavours" to ensure that sufficient distributable profits and cash are generated within 6 months after being notified of a requirement to do so.* [The first branch of the First Family] *and the Second Family*

indicated that they were broadly content with this proposal, whilst [the second branch of the First Family] *expressed a strong preference for "reasonable endeavours" instead. After considering the representations, the Trustees remained of the view that "best endeavours" wording was necessary to provide them with comfort that a liquidity event will in fact take place if so directed by shareholders holding the requisite percentage of shares.*"

77. The Objectors maintain that the "best endeavours" threshold will be difficult to enforce and that the Liquidity Rider falls short of providing the security needed. By way of example, it was said that the Liquidity Rider does not offer any interim protection before the five year period. Equally, no subsequent protection is afforded following the five year mark. It is further complained that the 59% shareholding requirement allows for a blockage of the liquidity event by the Sub-Fund Trustees of the First Family, even if there is backing for the liquidity event by the Sub-Fund Trustee of the Second Family. The Objectors contend that this offends the requirement for minority protection.

78. It seems to me that the Objectors' starting position is one of real suspicion and trepidation against the Boards of Directors of the Core Companies. Their construction of these clauses appears to be from a mindset that there will be an underlying mischievous will and desire on the part of the Boards to escape liability for payment of the annual dividend sums. However, any such skepticism would also presume a resilience by the Core Companies to securing the maximum achievable level of net profit, since the beneficiaries would be entitled to 50% after tax if that figure exceeds £8,000,000.00.

79. In my judgment, the Liquidity Rider reinforces the requirement for the beneficiaries to receive no less that the annual minimum sum for the next. It would seem to be that the need for subsequent Liquidity Riders should not be assessed at this early stage. Again, it is reasonable for the Trustees to opt to review the position in the future as the relevant factors will surely depend on the continued profitability of the Core Companies. After all, it was suggested by the Objectors that the future profitability of the Core Companies is questionable. If the companies are as successful as projected by the Trustees, then the beneficiaries will receive annual sums exceeding the minimum dividend and there will be no need for a liquidity event.

80. In my judgment, the Trustees have clearly undertaken what appears to this Court to be a sincere and competent examination of the future trajectory for the Core Companies. However, if it is later shown to be the case that those companies do not yield the anticipated level of profits in the future, I cannot see how that would be attributable to the implementation of the Proposed Restructuring. The impugned clauses are drafted in such a way that the beneficiaries will receive what the Core Companies can afford to pay out, with

an assurance that it will not be less than the acceptable £8,000,000.00 annual sum. I find no fault in the Trustees' approach to this.

QCBs

81. As earlier noted, the implementation of Phase 1 of the restructuring entailed the transfer to Company M of the minority holdings in the Core Companies for market value consideration. This consideration was made in the form of QCBs which are now repayable by Company M.

82. Pursuant to clause 9.4 of the Shareholders' Agreement, it is proposed, that 70% of the Core Companies' annual distributable reserves will be used for the QCB repayments and the remaining 30% will be paid to the three branches of the Family. This decision is motivated by the Trustees endeavours for the QCBs to be repaid as soon as possible to eliminate the associated costs of winding up the Legacy Settlements, leaving the operation of remaining trust structure to be more cost-effective.

83. Although both Ms. Keeley and Mr. Pachai deposed that a 65-35 split would be a more appropriate apportionment to enable a greater flow of funds into the S Fund, the parties confirmed that this point would no longer be pursued before this Court.

Whether the Trustees' Decisions taken as a whole were Irrational

84. Mr. Furness QC asked this Court to inspect the full portrait of concerns raised by the Objectors. He cautioned that the Trustees have not only failed in meeting their objectives but have defaulted on these endeavours without any "really good or rational reasons" for doing so. Mr. Furness QC emphasised that it is the Trustees who professed to be driven to achieve sound corporate governance and fair treatment between the three branches of the Family. In doing so, he added, it is the Trustees who determined that the sum of £8,000,000.00 per annum is necessary in order to settle costs and deliver a minimum level of protection for the beneficiaries. Looked at in its totality, Mr. Furness QC contends that the trustees' position "*is not rationally defensible having regard to their own stated objectives*". Mr. Seymour weighed in to emphasis that the 2nd Defendant's children and unborn issue are not in pursuit of any preferential treatment. What is sought by them is a real commitment to deliver on these objectives by ensuring dividend security and maintenance of its value. As Mr. Seymour put it, the Trustees must be judged by the standards they set for themselves.

85. Piling together the Objectors' concerns, Mr. Furness QC listed his client's concerns about the lack of initial liquidity within the Sub-Funds, the Dividend Policies as they relate to the Liquidity Rider and the absence of an index link on the £8,000,000.00 minimum sum. These issues are said to interconnect in that a stronger dividend policy would assuage the 2nd Defendant's anxiety about the level of initial liquidity since there would be an assurance of a strong long-term cash-flow to compensate for any immediate shortages. A strong dividend

policy, Mr. Furness QC argued, would also reduce the need for a Liquidity Rider beyond the first five years.

86. The starting point to an assessment of these concerns, says Mr. Furness QC, is that these trust companies all exist for the benefit of the beneficiaries. Unlike a non-charitable purpose trust where a company might be the beneficiary of the trust, in this case we are concerned with companies whose ultimate purpose is to feed the trust structure for the benefit of the beneficiaries.

87. However, Counsel for the other beneficiaries take the view that the proposals appropriately and adequately serve to benefit them as a whole. The general view accepted by all of the members of the First Family, i.e. the first two branches, and the first limb of the Second Family is that there must be a proper balance struck to enable the trust companies to thrive for the long-term benefit of all. Mr. Hagen QC charmingly likened those companies onto Aesop's goose which laid the golden eggs, a clear warning of the importance of preserving the source of the bullion. In modern day and legal terms, directors owe a fiduciary duty, as statutorily confirmed in the UK under section 172 of the Companies Act 2006, to act in good faith in a way which the directors think will promote the success of the company. There, the company plays the role of the goose and the success of the company is analogous to the golden eggs to be enjoyed by the beneficiaries.

88. While this Court must be careful not to overlook the Objectors' concerns for minority protection, it is also the case that I cannot properly ignore the resonant voices of the majority of the beneficiary family members. Mr. Adamson correctly observed that out of the 17 adult beneficiaries of the structure, only one adult beneficiary is objecting to the proposals. I pause here only to note that the 6th Defendant, as represented by Mr. Pearman, took a neutral position. The rest of the adult beneficiaries and all of the children and unborn issue of the first two branches and the first limb of the third branch expressly support the Proposed Restructuring.

89. Mr. Duncan QC, on behalf of the guardian class of beneficiaries in the first limb of the Second Family, stated that their clients support the Proposed Restructuring provided that it remains in its present form. The same position was made on the written submissions of Mr. Stephen Moverley Smith QC on behalf of the Second Family Matriarch and the adult members of the first limb of the Second Family. That part of the Second Family expressly recognized the Trustees' entitlement to proceed with the Proposed Restructuring and accepted that there was no impediment to the Court's blessing of the proposed course.

90. Mr. Rothwell, on behalf of the minor and unborn issue of the second branch of the Family, also confirmed their support of the Trustees' proposals. Mr. Rothwell also pointed out that

the medical vulnerabilities that were said to burden the 2nd Defendant could equally apply to his own clients in the future and that, economically speaking, the 2nd Defendant was in no different position from any other family member who is not in paid employment. Both Mr. Hagen QC and Mr. Rothwell urged that the 2nd Defendant's true financial position ought not to be assumed in the absence of evidence before the Court. In the matter of her current net worth, they argued that the 2nd Defendant was loudly silent. The Objectors, on the other hand, reiterated that they do not seek special treatment. They merely want to see provisions in place which guarantee or provide better security that they will receive their annual minimum dividend, which they say should be index linked for the benefit of all beneficiaries.

91. The Objectors say that the Trustees have acted irrationally by rejecting all of their representations and objections on the subject of liquidity. In doing so, it is argued that a reasonable body of Trustees would not have acted as the Plaintiffs in this case.

92. The role of this Court is extraordinarily simple. I am to look at each objection individually and in the round before deciding whether to answer a binary question. Did the Trustees act irrationally or not? This case is not an invitation for the Court to chip in on its impressions and opinions on the best options available to the Trustees. The Court's supervisory jurisdiction in the sense of a Category 2 *Public Trustee v Cooper* application imposes an obligation on the Court to 'bless' the decisions of the Trustees unless they have acted unreasonably or unlawfully or have relied on improper or irrational factors.

93. In reaching a final decision, I take account of the reality that the settling of the Proposed Restructuring is the product of a *vieux jeu*, a truth illuminated by Mr. Elkinson who has seen clients age beyond his class of representation. With the labour of this 11 year project, Courts of this jurisdiction have seen the birth of voluminous documentation, much of which contains complex and circuitous detail. Providing an example, Mr. Ham QC described the 71 pages of the Shareholders' Agreement as 'complicated and well thought out', although not quite a bestseller-read. More importantly, the Shareholders' Agreement together with the other components of the Proposed Restructuring collectively denote over four years of active consultation and negotiations between the Trustees and the beneficiaries and the exorbitant expense of legal and other professional fees to the structure, which for 2021 alone, has thus far reportedly totaled £5,200,000.00.

94. I am mindful that the three branches of family signify no less than three different mindsets. In fact, it is my understanding that like the Second Family, different members within the First Family were once at odds during the earlier stages of the proposals. It is therefore no small achievement that the Trustees have obtained accord from over 88% of the adult beneficiaries. Otherwise assessed, over 84% of the adults together with the born issue positively support

the Proposed Restructuring. Before this Court was engaged in the process, many (although not all) points were resolved between the parties.

95. That being said, I am satisfied that the Trustees have taken adequate steps to ensure that the Shareholders' Agreement contain provisions which serve to protect the minority shareholders in the Core Companies. Mr. Ham QC underlined clause 4.3 of the Shareholders' Agreement where the unanimous vote of the Sub-Fund Trustees would be required to appoint the chairmen of Company D and F Holdings. Failing a unanimously agreed decision, an independent expert person would assume control of the decision. The power of removal of any person appointed to those posts is exercisable upon the vote of two out of three branches of the Family. This provision would estop either Chairperson from targeting the favour of one branch of the Family as a means of security of tenure. I would also note here that the Court was referred to other provisions which limit the powers of shareholders to combine their holdings. In my judgment, these provisions in addition to other control measures (eg. Topco and Holdco reserve matters) evidence that the Trustees have acted reasonably to safeguard the interests of the minority.

96. In my final analysis, I have found nothing unreasonable about the Trustees' refusal to go back to a well-scribbled drawing board to attain amendments to the Shareholders' Agreement for the sake of an index-link on the annual minimum dividend, especially since it is reasonable to for them to anticipate that the dividends will be declared at the higher sum representing 50% of the Core Companies net profits after tax. I have also found that it is reasonable for the Dividend Policies to require the Boards of Directors of those companies to apply *'all reasonable endeavours'* to distribute the higher sum between the annual minimum dividend and 50% of the Core Companies net profits. As I have adjudged these matters, the Trustees' aims and objectives to secure nothing less than an annual £8,000,000.00 sum for distribution between the three branches of the Family is reinforced by the Liquidity Rider.

97. Whether these issues are considered comprehensively or whether they are deconstructed, I arrive at the same point. The Trustees' decisions are not unreasonable; they are not unlawful nor are they irrational. For these reasons this Court is bound to sanction its approval of the Proposed Restructuring.

Analysis and Findings on other Relevant Issues of Law

Direction on the Rule against Perpetuities

98. The Trustees have also made an application to this Court pursuant to section 4(2) of the Perpetuities and Accumulations Act 2009 which provides:

"*4. (2) Subject to subsection (3), the Supreme Court may, on an application made by the trustee or trustees of an instrument to which this section applies, make an order on such terms as it thinks fit declaring that—*

(a) the rule against perpetuities; or

(b) any other similar rule of law that may limit or restrict the time under which property may be held in or subject to any trust, shall not apply to such instrument and the property held thereunder

shall not apply to such instrument and the property held thereunder."

99. Under section 4(4)(a) the Court may extend the duration of a trust.

100. The rule against perpetuities is defined under the Interpretation section of the 2009 Act as follows:

"*"the rule against perpetuities"—*

(a) means the rule of law by that name, also known as the rule against remoteness of vesting, which restricts the time within which future interests in property must either vest or take effect, or within which certain powers may be exercisable; and

(b) includes any other rule of law which limits the period during which income may be accumulated or for which capital may remain unexpended or inalienable;"

101. The request for an extension is in respect of the Core Settlement and the CMM 2061. Under the Proposed Restructuring the other settlements will be liquidated before the expiry of their existing trust periods.

102. I was referred to *Re C Trusts* [2016] Bda LR 56, per Kawaley CJ which was the first reported case in which an Order under section 4 was made. The reasoning provided in that decision is instructive and stands as the leading authoritative judgment for applications to extend the duration of a trust beyond the period which would otherwise be prohibited by the rule against perpetuities. To the extent that the trust property is not land in Bermuda, a Court of this jurisdiction is empowered with a discretion to declare that the rule does not apply to the trust in question.

103. Mr. Adamson, appearing before the Kawaley CJ in *Re C Trusts*, addressed the Court on the legislative history of the statutory provision which amended the use of the perpetuity rule. A list of Parliamentary objectives for the amendment is observed in the judgment as follows:

1 lower costs to applicants;
2 allow the courts to exercise their discretion to act in the best interest of any applicant and any other interested party;
3 establish additional legal flexibility for trusts being governed under Bermuda law and
4 enhance Bermuda's competitiveness and reputation as a quality jurisdiction for international trust business

104. I agree with Kawaley CJ's reasoning that in the absence of an expressed threshold for the exercise of the Court's discretion in granting an application under section 4, it is to be safely understood that the Court's power of discretion is unfettered and certainly less stringent than the 'expediency' test required for Orders made under section 47 of the Trustee Act 1975. Kawaley CJ rightly said, the Court should not act as a 'rubber stamp'.

105. In these proceedings I need not be concerned about the question of notice since the beneficiaries to which the new trust term would apply are all present. They are eminently represented by Counsel, none of whom have opposed the application. I would note, however, that the desired term during which the restructured settlement would be extended has not been made apparent to this Court.

106. That being the case, I would readily recognize that this is a most appropriate case to which an Order would be made to grant a new trust term unrestricted by the rule against perpetuities. In this case the trust assets are in the multi-million dollar range, consisting of land outside of Bermuda and shares in active companies registered outside of Bermuda which have been and will likely be profitable for many years to come. As was the case in C Trusts, the Settlor clearly intended for the structure to be dynastic in duration to benefit current and future generations of family. If the trust term were to be abruptly brought to an end, the Core companies would truly become analogous to the goose, which after its death, could no longer lay the golden eggs.

107. For all of these reasons, I find that an extension is clearly in the best interest of the interested parties.

108. I leave it to Counsel to specify the new term sought in the draft Order to be filed with the Court.

Finding as to whether New Settlements will be created

109. I have been asked to find, as a matter of Bermuda law, that the proposed restructuring, whereby the Trustees would have enlarged powers of the CMM 2061 Settlement, does not constitute the creation of new settlements or any consequential change in "disponer". This question of law is said to be relevant for the purposes of Capital Acquisitions Tax ("CAT").

110. These issues were not argued before me and no contention arose on the submissions made by the Trustees, which was made in the form of written opinions from Mr. Ham QC, dated 22 November 2021 and 18 April 2018.

111. In the absence of previous Bermuda case law, Mr. Ham QC cited the leading English authority, namely *Roome v Edwards* [1982] AC 279 in which Lord Wilberforce sitting in the House of Lords identified a number "obvious indicia" and added [293C]:

> "*Since "settlement" and "trusts" are legal terms, which are also used by businessmen or laymen in a business or practical sense, I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common- sense manner to the facts under examination, would conclude*."

112. I deem it right to approach this issue as the House of Lords did in *Roome v Edwards.* Hoffman J in *Swires v Renton* [1991] STC 490 approve Lord Wilberforce's recommended approach to the construction of the settlement and pointed out that the exercise is one which endeavours to ascertain the intentions of the parties. The English Court of Appeal in *Bond v Pickford* [1983] STC 517 reinforced the doctrine that limitations made under a special power of appointment will be treated as being written into the original instrument which created the power.

113. As I see it, this seemingly technical question should be treated with a high dose of common sense and practicality. Mr. Ham QC rightly pointed out that Kawaley CJ's 2017 Order described the Proposed Restructuring in the Schedule. That Order of the Court did not, in my judgment, create any new settlement. Instead, Kawaley CJ enlarged the powers of appointment pursuant to section 47 of the Trustee Act 1975 for the purpose of facilitating the eventual implementation of the phases of restructuring which would follow. Essentially, the restructuring involves the same Core Assets and Non-Core Assets and is driven primarily with a view to creating and enforcing a more convenient scheme of allocating the same trust assets between three branches of family who seek equal protection and benefit. On this reasoning and analysis of the English case law cited by Mr. Ham QC, I accept his submission as a correct statement of the Bermuda law position.

114. Accordingly, I find that no new settlement has been created by the Proposed Restructuring or any previous Order of the Court in these proceedings.

Conclusion

115. The Proposed Restructuring is approved by this Court.

116. The application for an extension of the Trust term under section 4(4)(a) is granted in principle, the term of which may be settled in a formal Order of this Court. A declaration that the rule against perpetuities does not apply is confirmed.

Dated this 16th day of February 2022

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT