

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 137 OF 2019 (ASCJ)

**IN THE MATTER OF SECTION 48 OF THE TRUSTS LAW (2018 REVISION)
AND IN THE MATTER OF THE GRAND COURT RULES, ORDER 85 RULE 8
AND IN THE MATTER OF A SETTLEMENT DATED 16 MAY 1990 (THE “1990 TRUST”)**

BETWEEN **AA** **PLAINTIFF**
(IN THE CAPACITY OF TRUSTEE OF THE 1990 TRUST)

AND

BB **1ST DEFENDANT**
(AS ATTORNEY FOR THE HEIRS OF THE 1990 TRUST)

AND

COLIN SHAW **2ND DEFENDANT**
(AS *AMICUS CURIAE*)

REPRESENTATIONS: Mr Andrew de la Rosa instructed by Mr Kai McGrielle of Bedell
Cristin for the Plaintiff.

Mr Carlos de Serpa Pimentel and Mr Esmond Brown of Appleby
for the 1st Defendant.

Mr Colin Shaw of Colin Shaw & Co as *Amicus Curiae*.

**HEARD AND JUDGMENT DELIVERED ON 11 OCTOBER 2019
DRAFT WRITTEN REASONS CIRCULATED ON 12 FEBRUARY 2020
WRITTEN REASONS DELIVERED ON 14 FEBRUARY 2020**



REASONS FOR DECISION

Trustee’s proposal for realisation and distribution of trust assets and winding up of the Trust – whether Trustee may benefit only the heirs of the Settlor rather than the wider class of discretionary beneficiaries – seeming conflict between wishes of Settlor for Shari’a-compliant distributions and typical common law classification of discretionary trust beneficiaries – whether Court should nonetheless grant approval of Trustee’s proposal if arrived at reasonably and after proper inquiries.

A. Preliminary, parties to the application and deponents, the Settlor and other relevant persons

1. The Plaintiff in this application is the current trustee (the “Trustee”) of a discretionary trust constituted by a declaration of trust dated 16 May 1990 (the “1990 Trust”)¹.
2. From its inception, the 1990 Trust has been governed by the laws of the Cayman Islands although its administration has been carried out in Guernsey, as that has been and remains the place of incorporation of the original and subsequent trustees, including the Trustee.
3. By this application, made by an anonymised originating summons dated 19 August 2019 (as permitted by a confidentiality order on 7 August 2019)², the Trustee seeks the approval or “blessing” by this Court of a proposed plan of liquidation and distribution of all of the assets of the 1990 Trust amongst certain members of the discretionary class of beneficiaries referred to below and afterwards the winding up of the 1990 Trust.



¹ The declaration of trust is copied in all three exhibits in vol. 2 of the application bundles and a complete set of copies of the Settlor’s letters of wishes and related correspondence is also included in the exhibits. I will therefore simply set out relevant extracts below.

² The Court being satisfied that disclosure of identities would be harmful to the interests of the beneficiaries while anonymisation would not, on the other hand, impede the public access to “Open Justice”, especially in light of the reasons for decision now provided. This approach to anonymisation follows the guidance given in earlier cases. See *Julius Baer Trust Co v AB* [2018 (2) CILR 1] for a comprehensive discussion of the principles.

4. This is an application brought under (a) the Court’s inherent jurisdiction, as explained in *Public Trustee v Cooper* [2001] WTLR 901³, read with Order 85 of the Grand Court Rules, and (b) section 48 of the Trusts Law (2018 Revision)⁴. It was common ground that on an application of this kind, in what is described as a “category 2” *Public Trustee v Cooper* application (meaning that the trustee is not surrendering its discretion to the Court but seeks the sanction of the Court for a “*particularly momentous*” decision), the questions for the Court will normally be as follows:

- (1) Does the trustee have power to enter into the proposed transactions?
- (2) Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?
- (3) Is the Court satisfied that this is a view that a reasonable trustee could properly have arrived at?
- (4) Has the trustee any conflict of interest, and if so, does the Court consider that the conflict prevents it from approving the trustee’s decision?

5. There was no issue between the parties as to criteria (1), (2) and (4) or as respects the “*momentous*” nature of the Trustee’s proposed course of action, involving as it would the realisation and distribution of all the 1990 Trust’s assets and thereafter the termination of the 1990 Trust. The focus at the hearing before me was on criterion (3) in the specific

³ And in several judgments of this Court applying the principles from that case. See, most recently, *Cause FSD 190 of 2017 (IKJ) In the Matter of A Trust*, 17 January 2019 (unreported), per Kawaley J. and *Cause FSD 206 of 2017 (ASCJ) In the Matter of A Settlement Known as the B Trust*, 19 August 2019 (unreported).

⁴ Section 48 in relevant part reads: “*Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards responsibility, to have discharged his duty as such trustee or personal representative in the subject matter of the said application...*”.



context of the definition of “Beneficiaries” contained in the 1990 Trust, as will be explained below.

6. There was also no issue that in considering criterion (3), the Court’s function is to apply what is referred to as the “*rationality standard*,” described as follows in *Lewin on Trusts* (19th ed.) at section 27-079- 27-080⁵:

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

The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed⁶; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees’ deliberations as they would have in such proceedings⁷. If the Court is left in doubt on the evidence as to the propriety of the trustees’ proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed)⁸.”



⁵ Sweet and Maxwell, Thomson Reuters 2015.

⁶ Citing *Richard v Mackay* (1987) [2008] W.T.L.R 1667 and as is implicitly provided by section 48 of the Trusts Law as set out above.

⁷ Citing, inter alia, *Public Trustee v Cooper* (above) at 925G-H and as was the case before me where service of the application upon the wider class of beneficiaries was not directed and so no opportunity for them to cross-examine the Trustee was afforded. As will be explained below, there was however, an appointment of an Amicus Curiae to assist the Court in relation to this very question of the right of the wider class of beneficiaries to be heard.

⁸ But, as the authors point out here, it has been held in Jersey that if the court refuses approval of a decision taken by the trustees as being unreasonable, it may direct a different exercise of the trustees’ powers: *A Trustees Ltd v W* [2008] JRC 97 at [18]. This, in effect, was the approach advised by the Amicus but which I saw no need to adopt, as will be explained.

7. Against that background, the main issue can now be stated. It is whether the Trustee, in the exercise of its discretionary powers to distribute the assets and wind up the trust, is obliged to inquire into and consider the circumstances of each and every member of the wider class of beneficiaries with a view to benefitting them or whether it could - in keeping with the afore-stated “rationality test” and compliant with the wishes of the Settlor – reasonably decide to benefit only those beneficiaries who are also his heirs under Islamic law.
8. I accepted that the Trustee could reasonably so decide and proceed to appoint the assets only to the heirs and so, at the hearing, gave the sanction of the Court to the Trustee’s decision to do so, in the following terms⁹:

“I am satisfied that the Trustee has arrived at not simply a rational decision but one which follows very careful deliberation and inquiry and, as Mr de Serpa Pimentel said, an approach which may be described as a “text book” approach to the issues. I do not think, [as has been proposed by my Amicus] that it would be appropriate for me to second guess the Trustee’s exercise of its discretion, which it indisputably has, by way of directing further inquiry (into the circumstances of the wider class of beneficiaries). I accept that such an approach could well result in the kind of invidious position (for the Trustee) described by Mr De La Rosa, by reference to the (First Defendant’s) affidavit”.

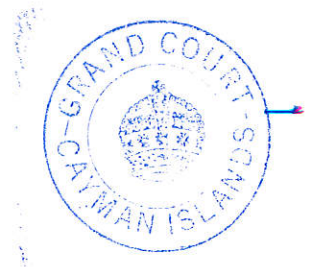
9. In order to explain my reasons for that decision, more of the background must be given.
10. By dint of changes in ownership of business, the trusteeship of the 1990 Trust has changed twice since 1990 but there has been significant continuity of involvement in its administration by certain important individuals. One of them is the First Defendant, who is referred to in more detail below.

⁹ As declared in Court at the conclusion of the hearing on 11 October 2019.



11. The Trustee is a wholly-owned subsidiary of Saffery Champness Holding Limited and is administered by Saffery Champness Management International Limited (“Saffery Management”), a Guernsey regulated fiduciary corporate services provider. The affidavit evidence on behalf of the Trustee in support of the substantive application, sworn on 7 August 2019, was given by Ms Lisa-Jayne Vizia, a director of Saffery Management and head of its family office team, who has been personally engaged in the administration of the 1990 Trust (and the administration of certain companies holding other assets comprised in the Settlor’s global free estate) since 2002. On 11 July 2019, Ms Vizia swore an earlier affidavit in support of the Trustee’s confidentiality application¹⁰. Her affidavit in support of the substantive application was her second in this matter on behalf of the Trustee and will be referred to as such.
12. The declaration of trust was made by the original trustee and related to a nominal sum of US dollars. However, it is common ground that the 1990 Trust was funded by and created on the instructions of the Settlor, who was the patriarch of a Middle Eastern Arab Muslim family and the “*Principal Beneficiary*” named in the 1990 Trust. The Settlor’s personal assets were applied in funding the 1990 Trust’s various investments and so the grant of benefit under the 1990 Trust would derive entirely from his beneficence.
13. The Settlor died some time before the making of this application and was survived by his wife and adult children. Those members of the Settlor’s family are also the Settlor’s heirs (the “Heirs”) under the Islamic law of inheritance applied in the Middle Eastern country of which they, and the other members of the Settlor’s family referred to below, are all nationals, as was the Settlor himself.

¹⁰ That which resulted in the anonymization order mentioned above.



14. All of the members of the Settlor's family who are within the discretionary beneficial class under the 1990 Trust are Muslims¹¹. The Settlor himself was a devout Muslim and was educated in and familiar with the Islamic law principles applied in his and his family's home country.
15. As mentioned above and will be explained further below, the class of discretionary beneficiaries under the 1990 Trust is significantly wider than the class of persons who constitute the Heirs, the latter being, according to the 1990 Trust records and other evidence which is before the Court, the members of the Settlor's family amongst whom he intended the whole of the 1990 Trust assets to be distributed after his death.
16. Following the Settlor's death, the identities of the Heirs, and their respective shares in the Settlor's estate, under the Islamic law applied in the country of the Settlor's and his family's nationality, was conclusively ascertained by the local *Shari'a* court of first instance under the standard process applied in that country's legal system. The *Shari'a* court duly issued what (in translation from Arabic to English) is headed an "*Heirs Determination Certificate*" (the "Certificate"). The Certificate is tendered in evidence, together with an affirmation made on 5 August 2019 from a lawyer qualified in that country explaining which school of Islamic jurisprudence is applied by that court to determine who are the heirs of a deceased Muslim, and their shares in the deceased's estate, and that court's responsibility for issuing the Certificate.
17. In connection with the issue of the Certificate, the *Shari'a* court also confirmed the grant of a power of attorney by the Heirs relating to the ascertainment and interim management of assets comprised in the Settlor's free estate. That power of attorney was granted to the

¹¹ As explained at para. 73 of the First Defendant's affirmation.



First Defendant and a descendant of the Settlor who is not one of the Heirs. Subsequently, a new power of attorney was granted by the Heirs to the First Defendant alone, conferring on him a global authority to represent and act on their behalf in all matters relating to the distribution of assets amongst them in accordance with the Islamic law of inheritance. Both powers of attorney are before the Court (in both their original Arabic text and official English translations) and are compelling evidence of the high esteem in which the First Defendant is held by the members of the Settlor's family.

18. It is against that background that the First Defendant was joined by the Trustee to this application in his capacity as the Heirs' attorney in order to represent them. In addition, prior to the Settlor's death, the First Defendant had had many years' experience of acting in the Settlor's financial affairs and as an intermediary between him and members of his family in financial matters.
19. Further, the First Defendant was directly involved in the creation of the 1990 Trust and its subsequent administration. The First Defendant has made an affirmation dated 7 August 2019 describing the history of the 1990 Trust and, in particular, (a) the Settlor's dispositive intentions regarding the assets held within the 1990 Trust structure and (b) the underlying Islamic beliefs and family traditions that are considered relevant to an understanding of those intentions and the Trustee's proposed course of liquidation and distribution of the 1990 Trust assets and afterwards the winding up of the 1990 Trust.
20. On the Trustee's application and with the Court's approval, by order dated 2 October 2019, the Second Defendant, Mr Colin Shaw, a very experienced trusts lawyer, was joined to this application in the capacity of *Amicus Curiae* to address the position of those members of the wider discretionary class under the 1990 Trust who are not the Heirs. As



already mentioned and will be further discussed below, it was Mr Shaw's advice which identified the main issue for resolution on this application, as referenced above at paragraphs 7 and 8 and as will be addressed in these reasons.

21. The terms of the 1990 Trust include provision for a Protector and a Cayman Islands company has acted in that capacity, since the 1990 Trust was constituted. However, the powers of the Protector are limited principally to the appointment of a new trustee and changing the governing law of the 1990 Trust, without powers of consent in relation to distributions from the 1990 Trust. The Protector's powers are therefore not engaged in relation to the course the Trustee proposes to take. Consequently, the Protector has not been joined as a party to this application although it has been kept informed by the Trustee of the progress of the application and the Trustee's reasons for it.
22. As disclosed in the evidence, the value of the assets comprised in the 1990 Trust is very substantial and the estimated value of the Settlor's free estate, which passes to his Heirs in accordance with the Islamic law of inheritance of his home country, is even larger. Of further relevance, it is not in dispute or doubt that the Settlor's family as a whole already holds significant wealth, apart from the assets comprised in the 1990 Trust and the Settlor's free estate.

B. Relevant terms of the 1990 Trust

23. The definition provision of the 1990 Trust is Clause 2. After defining the "*Trust Period*" by reference to alternatives of 80 years (expiring in 2070), a royal lives clause and a power of earlier termination by the Trustee (Clause 2(b)(i)-(iii)); Clause 2(d) and (e) defines the "Beneficiaries" in the following terms (so far as relevant for present purposes):

"(d) *"The Principal Beneficiary" shall mean [the Settlor] ...*



- (e) *“The Beneficiaries” shall mean the following persons (whether or not such persons are now in existence or come into existence during the Trust Period):*
- (i) *the Principal Beneficiary*
 - (ii) *the children and remoter issue of the Principal Beneficiary*
 - (iii) *the spouses widows and widowers (whether or not such widows or widowers have remarried) of the Principal Beneficiary and of such children and remoter issue*
 - (iv) *such other persons as are added under clause 4.”*

The Clause 4 power to vary Beneficiaries, by addition or removal, referred to in Clause 2(e)(iv) was only exercisable by the Trustee during the Settlor’s lifetime with his written consent and was never exercised.

24. Before considering the scope of this definition (which is plainly wider than only the Heirs) it is helpful to review the main dispositive provisions of the 1990 Trust.
25. Clause 3 provides that the Trust Fund shall be held on trust for sale with power for the Trustee

“in [its] absolute discretion to sell call in or convert into money all or any investments or property but with power to postpone such calling in or conversion and to permit the same to remain as invested . . . with power at the like discretion from time to time to vary or transpose any such investment for others so authorised.”

26. Clause 6 contains a discretionary power of appointment over income and capital on trust in the following terms (so far as relevant for present purposes):

“The Trustee shall hold the capital and income of the Trust Fund upon such trusts in favour or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares or proportions if more than one and with and subject to such powers and provisions for their respective maintenance, education or other benefit or for the accumulation of income as the Trustees shall with the written consent of the Principal Beneficiary in his lifetime or otherwise in their absolute discretion appoint...”



27. Clause 7 provides for trusts in default of such an appointment. As regards income, sub-clause (a) provides in relevant part as follows:

“The Trustees shall pay or apply the income of the Trust Fund to or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them as shall for the time being be in existence and in such shares if more than one and in such manner generally as the Trustees shall in their absolute discretion from time to time think fit.”

28. Sub-clauses (b) and (c) of Clause 7 make provision for accumulations of income and the application of income accumulated. Sub-clause (d)(i) confers a discretion over payment or application of the capital of the Trust Fund in these terms:

“(d) notwithstanding the trusts powers and provisions declared and contained in this clause the Trustees may

(i) at any time or times during the Trust Period pay or apply the whole or any part or parts of the Trust Fund to or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares if more than one and in such manner generally as the Trustees in their absolute discretion think fit . . . ”

Sub-clause (d)(ii) makes provision for discretionary transfers of trust income or capital to the trustees of any other trust in which all or any one or more of the Beneficiaries is or are interested.

29. The “ultimate default trusts” are provided for by Clause 8:

“Subject as above and if and in so far as not wholly disposed of for any reason whatever by the above provisions the capital and income of the Trust Fund shall be held in Trust for the Principal Beneficiary absolutely.”

30. It is common ground that the above dispositive provisions of the 1990 Trust are wide enough to enable the Trustee to carry into effect the realisation and distribution of trust assets that it proposes and afterwards to wind up the 1990 Trust. In particular, and of fundamental importance to the exercise of discretion here, Clause 7(d) enables the Trustee



to pay or apply the Trust Fund to or for the benefit of some members of the beneficial class to the exclusion of the other members.

31. The Trustee's case is that its decision to implement this proposal derives from the inquiries it has undertaken regarding the Settlor's dispositive intentions especially as those are expressed in his letters of wishes, the religious and family tradition background those wishes reflect and the current composition of the discretionary beneficial class. In this context, reference is also made to the Trustee's inquiries into the drafting history of the 1990 Trust and, in particular, the scope of the Clause 2(d) and (e) definition of "*Beneficiaries*", set out above.

32. Before turning to examine the drafting history as it informed the Trustee's decision, I think it would be instructive for me to comment here on the case law as it relates to the Trustee's duty of inquiry for the reasonable exercise of its wide discretionary powers.

33. The framework for the enquiry can be set by the three questions which Lord Walker, in *Pitt v Holt*¹², identified as relevant for determining whether the purported exercise by a trustee of a power of appointment or disposition is valid:

(a) Whether the way in which the power has been exercised goes beyond the scope of the power or is an "excessive execution" of the power.

(b) Whether there has been an error in failing to give proper consideration to matters which are relevant to the making of a decision which is within the scope of the power, and



¹² [2013] 2 AC 108, at 135 G -H [60] –[61].

(c) Whether a decision, although ostensibly falling within the scope of the power, is made for an improper purpose because the purpose is not one for which the power was conferred, more traditionally called a “fraud on the power.”

34. It is common ground that neither question 1 nor 3 is engaged upon this application. No one disputes that the Trustee has the power to appoint out the assets to the Heirs as members of the Beneficiary class and wind up the Trust, or that the Trustee, in doing so, would be acting for any but a proper purpose in seeking to honour the wishes of the Settlor. The issue engaged arises from question 2 –it is whether the Trustee has given adequate deliberation to the circumstances and interests of the entire beneficiary class and in that manner, has arrived at an objectively rational determination.

35. It is axiomatic that, concomitant with the duty to act reasonably, a trustee must not act irresponsibly or capriciously. As *Lewin* (above) comments¹³:

“Acting capriciously means for reasons which could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor, for example, if they chose a beneficiary by height or complexion or by the irrelevant fact that he was a resident of Greater London. Such a decision would be set aside and the trustees would be removed if the court considered that they were unable or unwilling to consider the exercise of the power properly”.

No one would seek to characterize the proposal of the Trustee in that way.

Rather, as to whether the Trustee’s proposal should be approved by the Court, the concern arises from the fiduciary nature of the Trustee’s powers, one which obliges the Trustee to



¹³ At [29-153], citing, inter alia, *Re Pauling’s Settlement Trusts* [1964] Ch 303, 333; CA, *Re Hay’s Settlement Trusts* [1982] 1 W.L.R. 202, 209 and *Re Manisty’s Settlement* [1974] Ch. 17, 26 and cf *Re Gestetner Settlement* [1953] Ch. 672, 688.

consider, for the exercise of the power, its ramifications for the entire beneficiary class, both individually and as a whole. As *Lewin* puts it¹⁴:

“The fiduciary’s duty has been said to be three-fold: he must, first, consider periodically whether or not he should exercise the power; secondly, consider the range of objects of the power; and thirdly, consider the appropriateness of individual appointments¹⁵ ...

As to the range of objects, there are considerations peculiar to special powers, at any rate where the class of objects is numerous. Where that is so- in some modern settlements the class is enormous – there is an interaction between the size of the class and the fiduciary duty of the trustees. The trustees must not simply exercise the power in favour of such of the objects as happen to be at hand or claim their attention. Nonetheless, they are not obliged “to survey the world from China to Peru”.¹⁶ They must consider what persons or categories of persons are objects of the power, not (where the number is large) in the sense of compiling a complete list but in the sense of an appreciation of the width of the field and thus whether selection is to be made from only a dozen or instead from thousands or millions; only then should they consider in individual cases whether, in relation to other claimants, a particular appointee is appropriate.”

Templeman J (as he then was) considered the manner of exercise of the special fiduciary dispositive powers in *In Re Manisty’s Settlement* (above, at 23A) and expressed his views as follows, relying on earlier dictum from Lord Wilberforce:

“In Baden (No. 1) [1971] A.C. 429, 449, Lord Wilberforce, referring to special powers, suggested that

“Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.”



¹⁴ At [30-032].

¹⁵ Citing *Re Hay’s Settlement Trusts* (above), at 210, referring to the duties of a trustee.

¹⁶ Citing the pithy comment of Harman J from *Re Gestetner* (above) at 688-689.

He added, at p. 457, referring to special powers and to discretionary trusts in favour of a class that “*in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty.*”

Here, as will become clearer below, the Trustee in fulfilling its duty of adequate deliberation for the exercise of the wide discretionary dispositive powers, did indeed make a survey of the range of objects such as, I accept, has enabled it to carry out its duty and to do so by giving effect to the wishes of the Settlor.

The duty of adequate deliberation involves, of course, taking due account of the wishes of the Settlor in deciding who among the beneficial class should receive benefit. As Templeman J also explained in *Re Manisty’s Settlement*:¹⁷

“...reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and derive that intention not from all the terms of the settlement necessarily or exclusively, but from all the surrounding circumstances and their individual knowledge acquired or inherited. ...the trustees have an absolute discretion and cannot be obliged to take any form of action, save to consider the exercise of its power and a request from a person who is within the ambit of the power”.

It is important that I also record more fully here the significance of giving effect to the wishes of the Settlor. *Lewin* provides helpful commentary on this issue, at 29-162 – 29-163:

“In a conventional family trust the funds comprised in the settlement are the settlor’s bounty. Except to the extent that he has reserved powers to himself or conferred them on third parties, the trustees are the means that he has chosen to benefit the beneficiaries out of property of his own. He could have done so by gifts made directly to them but instead has interposed a trust, so as to make continuing provision for them after his death or to give them the security of a proprietary interest, rather than a precarious dependency on him, or to take advantage of opportunities for

¹⁷ At p26 E – G.



tax planning or for a variety of other reasons. So far as the trustees are given dispositive powers, they are to make choices which the settlor could have made for himself.

Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death. Letters or memoranda of wishes from the settlor are now common place; on occasion a precatory clause is inserted in the trust instrument, for example asking the trustee to consider someone the primary beneficiary. The significance of the settlor's wishes has grown with the growth of wide discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed interests. Without some guidance from the settlor, trustees would often have difficulty in identifying who ought to benefit. "The settlor's wishes", the Supreme Court has held, "are always a material consideration in the exercise of fiduciary discretions."¹⁸ It was previously well established that the trustees are entitled to take serious account of the settlor's wishes¹⁹ and it is the better view that they are bound to do so²⁰; the notion that the trustees may be entitled to take it into account but not bound to do so is in our view wrong, for it is either a relevant consideration which in view of its importance ought to be taken into account or an irrelevant one which should not. The trustees may properly be led by the settlor's wishes to take a decision which they would not otherwise have taken."²¹



C. The Settlor's dispositive intentions

36. With the foregoing principles in mind, I now turn to examine the history and significance of the Settlor's letters of wishes.

Over the period from 25 May 1990 to 4 January 2012, a series of four letters of wishes were prepared on the Settlor's instructions, which recorded in express terms his dispositive intentions, in particular for the ultimate disposition of the 1990 Trust's assets

¹⁸ Citing *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C 108 at [66].

¹⁹ Citing among several other cases, *Re Manisty's Settlement* [1974] Ch. 17 at 26.

²⁰ Citing among other leading cases, *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 A.C. 709 where at [35] and [42] *Re Manisty's Settlement* was referred to with approval. However the authors go on at fn 557 and 558 to discuss the difference between legally binding letters of wishes and those which are expressed as imposing only a moral or non-obligatory duty to consider or give effect to the wishes of the settlor, concluding that the trust instrument could no doubt provide that the trustees should be entitled to take a letter of wishes into account but not bound to do so. In the absence of such wording from the present deed of settlement, I consider the more appropriate approach here to be that reported as expressed in *Schmidt v Rosewood* (above) and endorsed by the authors in this quoted passage.

²¹ Citing, specifically on this point, *Kain v Hutton* [2007] NZCA 199.

after his death. In addition, on two occasions when he was in failing health in the latter stages of his life, the Settlor made statements regarding his dispositive intentions to the First Defendant, which confirmed what had already been expressed in the letters of wishes regarding the ultimate disposition of 1990 Trust assets after the Settlor's death, and, in one respect, namely the timing of that disposition, also confirmed a particular reason behind the Settlor's intentions.

37. Ms Vizia's second affidavit, in particular paragraphs 37-44, and the corresponding parts of the affirmation of the First Defendant, at paragraphs 34-50, explain that the first letter of wishes, dated 23 May 1990, was prepared at the same time that the declaration of the 1990 Trust was drafted. Both the letter and the declaration of trust were prepared on the basis of Cayman Islands law legal advice. The Cayman Islands attorneys who acted in this regard were consulted in the circumstances explained below.
38. Most directly relevant for present purposes are the provisions of the first letter of wishes (the "1990 letter"), regarding dispositions out of the 1990 Trust. The 1990 letter records the following intentions on the part of the Settlor:

"I hope that you will not make any distribution of income or capital during my lifetime unless it has been approved in writing either by me or at least one of my Representatives."



In fact, during the Settlor's lifetime no distributions were made from the 1990 Trust other than to him, and out of such distributions he made financial provision for those members of his immediate family who were at various stages financially dependent on him, in particular his wives and daughters. This is confirmed by both the First Defendant in paragraph 67 of his affirmation and in paragraph 51 of Ms Vizia's second affidavit. As regards the position after the Settlor's death, the 1990 letter stated as follows:

“After my death it is my desire that the assets of the settlement should be distributed subject to its provisions and in consultation with my Representatives amongst my heirs in accordance with the rules of inheritance of Islamic law.”

39. After referring, inter alia, to an intention that the assets of the 1990 Trust should be used primarily for investments in real property in various jurisdictions, the 1990 letter states that:

“The wishes expressed above may be changed by me at any time by written notice to the Trustees and to the Protector. The wishes in effect at the time of my death shall continue to apply thereafter until the termination of the trust.”

40. The Settlor did, however, take the opportunity to revise his wishes, although he did not depart in principle from those stated above as respects the ultimate disposition of the 1990 Trust’s assets. The wishes that were in effect at the time of his death are recorded in the letters of wishes next described read with the 1990 letter, his first.

41. On 24 September 2002, the Settlor wrote his second letter of wishes to the then trustee and the Protector making a change in the identities of his Representatives. Otherwise the letter is expressed by the Settlor to *“reaffirm the wishes expressed in my letter dated 23rd May 1990.”*

42. The third letter of wishes was dated 5 January 2007 and came about by reason of an inquiry from the then trustee dated 23 August 2006 seeking an update on and clarification of the Settlor’s dispositive intentions. In particular, the then trustee’s letter noted that (a) 16 years had passed since the Settlor’s original letter of wishes and the trustee wished to have confirmation of the Settlor’s current wishes in light of the addition of significant assets to the 1990 Trust and (b) the trustee had been given legal advice that



“The provisions within the existing letter of wishes in connection with distributions in regard to the rules of inheritance in Islamic law, are not sufficiently clear for the Trustees . . . it is our legal advisors’ strong recommendation that the particular school of Sunni [Islamic jurisprudence] that applies should be referred to in the letter. I understand that there are four such schools and would appreciate your guidance as to which one is applicable.”

43. The then trustee’s letter enclosed a draft revised letter of wishes. This inquiry coincided with a period of time during which the Settlor was in ill health. Thereafter, on 5 January 2007, the First Defendant wrote to the trustee on the Settlor’s behalf referring to that draft and explaining that he had discussed it with the Settlor. The letter of 5 January 2007 continues in relevant part as follows:

“[I] can confirm that his perspective on the Trust has not altered since it was first set up, although he is fully aware that by making significant additional settlements into the Trust, the scope of its activities has been significantly broadened. In this latter respect, I can confirm that he is also satisfied with the existing advisory arrangements . . .

This being the case, he does not feel the need to amend his Letter of Wishes in any additional way. However, for the sake of clarity I am also able to confirm (that)

After the death of [the Settlor], the Trust should be wound up as soon as possible and the assets distributed amongst the beneficiaries in accordance with the same rules of inheritance of the Sunni school of Islamic law as are applicable to the devolution of [the Settlor’s] free estate in [the Settlor’s home country] and in this respect you should be guided solely by the Legal Representative charged with winding up the Estate who will be appointed by the Shar’iah court in [the Settlor’s home country].”

It is noted that in the events which have happened, the person who is in the position of the “Legal representative charged with winding up the estate” described in the 5 January 2007 letter, is the First Defendant in his capacity as the Heirs’ attorney.

44. The letter goes on to state as follows:



“[The Settlor] has always insisted on complete confidentiality with regard to the Trust and the Letter of Wishes. Accordingly you should not disclose any information with regard to the Trust or its dealings or the Letter of Wishes to any third party and for the avoidance of doubt, this includes any potential Trust beneficiaries, save with the agreement of [the Settlor], when necessary for the sound administration of the Trust, or when ordered to do so by a court of competent jurisdiction.”

45. The fourth letter of wishes dated 4 January 2012 was written in response to an inquiry by the Trustee, which wrote to the First Defendant referring to the 2006-07 correspondence explained above and requested that:

“Following on from the transfer of Trusteeship and administration of the [1990 Trust] . . . to ourselves, we would be very grateful if you could kindly arrange for the content of the letter of wishes to be reviewed to ensure it is still appropriate. Thereafter could you kindly confirm this, on behalf of [the Settlor], by signing, dating and returning a copy of this letter.”

46. The First Defendant countersigned that letter in his capacity as the Settlor’s “*Authorised Representative*” stating in relevant part that he was able to confirm on behalf of the Settlor that:

“the original letter of wishes dated 23 May 1990, as confirmed in my letter of 5 January 2007, from [the Settlor] remains unchanged and is still in accordance with his wishes.”



47. Apart from these written records of the Settlor’s dispositive intentions, the First Defendant’s affirmation also refers to verbal expressions of such intentions by the Settlor. In that context, the First Defendant notes in paragraph 45 of his affirmation that a difference between the Settlor’s 5 January 2007 letter of wishes and the two letters of wishes that preceded it:

“was the reference to the 1990 Trust being wound up as soon as possible after [the Settlor’s] death. The reason for that. . . was that [the administration of the estates of his wives who predeceased him] had been prolonged and difficult so that the distribution of their assets amongst their heirs, including [the Settlor] and certain of his children, was delayed and in fact [administration of those estates was not] completed in [the

Settlor's] lifetime. [The Settlor] did not wish his Heirs to be subject to similar delays in connection with the distribution of his estate and the 1990 Trust assets after his death."

48. Paragraph 48 of the First Defendant's affirmation refers to the Settlor being unwell prior to making of the 4 January 2007 letter of wishes. After referring again to the position described above as regards the administration of the estates of the Settlor's wives, the First Defendant explains that during this period, he expressed concern:

"that his Heirs should not have to wait as long for assets comprised in his estate and the 1990 Trust to be distributed to them. He asked me to ensure that Shari'a law was implemented as respects the shares of such assets and there should be no long delay in effecting the distribution of assets to them."

49. Further, in paragraph 49 of his affirmation, the First Defendant refers to a discussion between himself and the Settlor during the latter's final illness:

"[H]e again stated to me that he did not want the distribution of his estate and Trust assets to his Heirs to be delayed and that their shares in such assets should be determined in accordance with the Shari'a law of inheritance. He was particularly concerned at that stage that I ensure that his daughters who were financially dependent on him were provided for without delay out of the estate and Trust assets."



D. Definition of the beneficial class and the Trustee's inquiries in that regard

50. The Trustee affirms that it was against the background explained above, following the Settlor's death, that it considered the exercise of its dispositive powers under the 1990 Trust. It had regard to the record summarised above of the Settlor's consistent expression of the wish that the ultimate disposition of 1990 Trust assets be amongst his Islamic law heirs as determined by the law of his and his family's home country and also that the distribution amongst his Heirs and winding up of the 1990 Trust be carried out as soon as

possible. However, the Trustee was also conscious of the breadth of the definition of the discretionary beneficial class contained in Clause 2(d) and (e) set out above.

51. That provision defines the beneficial class in terms that extend substantially beyond the range of persons who are within the category of the Settlor's Islamic law heirs. For example, Clause 2(e)(ii) includes not only the Settlor's children but all his remoter issue who come into existence during the Trust Period, and Clause 2(e)(iii) includes not only surviving spouses of the Settlor but spouses, widows and widowers of his children and remoter issue (whether or not they have remarried).
52. At the substantive hearing of the Trustee's application before me, it was posited in common by Mr Andrew De La Rosa as counsel for the Trustee and Mr Colin Shaw as *Amicus Curiae* that, in their experience of Cayman Islands law-governed trusts drafted for Middle Eastern Arab Muslim settlors, in particular those intended to be "*Shari'a*-compliant," it was unusual for a class of discretionary beneficiaries based on family relationship to the settlor to be defined in terms that included in-laws of the settlor and spouses of the settlor's descendants. One reason is that such persons are not Islamic law heirs of the settlor under any of the main Middle Eastern *Shari'a* law systems; another reason is the possibility that if such persons are included as beneficiaries, they may become a source of discord in the settlor's family over entitlement to trust distributions or information. Nonetheless, in the present case, the definition in the 1990 Trust was recognised by the Trustee to be potentially inclusive of a large number of persons apart from the Settlor's immediate family who are his Heirs.
53. In consequence, two main sets of inquiries have been undertaken by the Trustee in this regard. One has been into the drafting of the terms of the 1990 Trust and whether there



was any specific reason for the definition of “Beneficiaries” being framed in the terms it is, seemingly in contradiction of the Settlor’s wishes as expressed in his letters of wishes. The other has been into the numbers and identities of members of the Settlor’s family who fall within the discretionary beneficial class. In fact, the latter inquiry was begun first but as the drafting was carried out earlier in chronological sequence, it is convenient to describe the inquiries using the drafting exercise as a starting point.

54. The First Defendant, as well as the Settlor himself, was directly engaged in giving instructions and taking advice on the drafting of the 1990 Trust. The background to this, as explained in both the First Defendant’s affirmation (paragraphs 34-41) and Ms Vizia’s second affidavit (paragraph 23 and the related exhibit referred to below), is that by the late 1980’s, the Settlor was already a man of substantial personal wealth, derived in part from inheritance from his family, and was interested in expanding his personal real estate investments in the UK and possibly Europe. At that time, he tasked two of his principal advisers, the First Defendant being one of them, with obtaining specialist advice on a holding structure to be created for this purpose.
55. The upshot was the proposal that envisaged the use of a common law trust, established under Cayman Islands law, as the main vehicle for the holding structure.
56. The First Defendant reviewed this proposal and explains (in paragraph 38 of his affirmation) the Settlor’s engagement in this process as follows:

“[The Settlor] was not familiar with the concept of a common law trust but I and other advisers explained it to him, including the basic mechanism of a transfer of title to his assets to the Trustee to hold them in accordance with the terms of a deed of trust. These explanations were primarily given in Arabic with important documents such as the deed of trust and letters of wishes referred to below being translated into Arabic as [the Settlor] preferred to consider and discuss them in that language. At the time of the creation of the 1990 Trust, such discussions with [the Settlor] involved me,



[others to whom I refer anonymously for the sake of confidentiality] as R and another trusted adviser T . . . a relationship manager with [a major European Bank]. In this connection, in order to take the creation of the 1990 Trust forward, two experienced trust lawyers were consulted by R and S [another trusted adviser, both of the lawyers consulted being Cayman Islands attorneys].”

57. The Cayman Islands attorneys and S were the persons primarily engaged in the drafting of the 1990 Trust and the 1990 letter of wishes signed by the Settlor. In paragraph 39 of his affirmation, the First Defendant refers to the 16 May 1990 declaration of trust being made on that date on instructions from the Settlor:

“conveyed to his advisers through me. At the same time, a letter of wishes was prepared, which [the Settlor] signed on 23 May 1990. This letter was drafted by the [Cayman Islands] attorneys consulted in consultation with [R and S] and myself and its terms were discussed with [the Settlor] by me, [R and T] in order to ensure that it reflected his intentions for the operation of the 1990 Trust. At this and later times [the Settlor] was always very clear in his instructions to me that if he died, he insisted on the distribution of assets in accordance with Islamic law and there should be no deviation from this.”

58. Regarding the definition of “Beneficiaries” contained in the 1990 Trust, in paragraph 41 of his affirmation the First Defendant states:

“I recall discussing with [R, S, T and the Settlor] who were to be the beneficiaries of the 1990 Trust apart from [the Settlor] himself, which he ultimately decided should be his Heirs. I do not recall the exact width of the definition of “The Beneficiaries” contained in the 1990 Trust Deed being the subject of any specific advice given by the attorneys who were consulted in connection with the drafting of the 1990 Trust. In particular, I do not recall any specific reason being given to me for that definition being wider than the class of persons who would eventually be [the Settlor’s] Heirs. In any case, it was clear from the inception of the 1990 Trust that [the Settlor] intended that following his death, the 1990 Trust would be wound up and its assets distributed amongst his Heirs, as the documents I next refer to [i.e. the Settlor’s letters of wishes] record.”



59. The decision to appoint the assets only to the Heirs being so “momentous” and consequential, the Trustee’s inquiries did not end as described above. The Trustee also

ascertained that S, the person who was responsible for the original concept of a Cayman Islands law-governed trust structure and for arranging consultation with attorneys experienced in Cayman Islands trust law for the purpose of creating such a structure, was willing to discuss with the Trustee's representatives his recollection of the relevant events.

60. Ms Vizia's second affidavit exhibits an attendance note of a meeting held on 21 March 2019 between S, representatives of the Trustee and the London family office of the Settlor, and the Trustee's London Solicitors, Macfarlanes LLP. In essence, this records S's account of (a) how he first became involved in the Settlor's financial affairs on being introduced to the First Defendant by R and thereafter developed the trust structure proposal, and (b) how the declaration of the 1990 Trust and the 23 May 1990 letter of wishes were drafted.

61. Paragraphs 4 and 7-13 of the attendance note record that S confirmed that he had suggested a Cayman Islands law-governed trust for reasons which included the Settlor's concerns over privacy and wish to be involved in selecting and monitoring trust investments. S noted that the Settlor's concerns "*appeared to [S] to be similar to many other. . . Middle- Eastern individuals, both for historical and cultural reasons.*"

62. The same point is touched upon in the First Defendant's affirmation at paragraph 67 in which he explains that the Settlor:

"did not wish the 1990 Trust to become a source of friction within the family, such as might arise from dispositions to certain members of the family rather than others . . . [T]he only distributions made from the 1990 Trust during [the Settlor's] lifetime were to him and he personally made dispositions to family members when he thought it appropriate to do so. He did not discuss such distributions with other members of his family specifically because he did not wish them to become a source of friction between family members."



63. In paragraphs 9-11 of the attendance note, S is recorded to have stated that:

“9. [The First Defendant] quickly grasped the idea of a trust and [S] understood that he and [R] took time to explain it and the documents carefully to [the Settlor] in Arabic. [The Settlor] often insisted on the translation of documents into Arabic prior to signature. Nothing any of the advisers did was without instruction at some level from [the Settlor].

10. [The Settlor] himself was unfamiliar with the trust concept but [S] understood that [the Settlor] wanted the Trust to have maximum flexibility, including the ability to transfer it to another jurisdiction and terminate it if he so wished. In drafting the Trust widely, the advisers were therefore trying not to tie the Settlor in to something that was overly rigid.

11. [S] recalled a discussion with [the First Defendant] as to who the beneficiaries of the Trust should be. During his lifetime, [the Settlor] was to be the principal (and indeed for practical purposes the sole) beneficiary and consultations took place concerning the ultimate beneficiaries of the Trust after [the Settlor’s] death . . . [S’s] understanding was that a Shari’a law division of the assets comprised in the Trust after [the Settlor’s] death was contemplated from the time the 1990 LOW was written, that is a division of the Trust assets amongst those members of [the Settlor’s] family who would be his Shari’a law heirs. Ultimately, [S’s] understanding was that [the Settlor] would not wish to disregard Shari’a principles or be perceived to have disregarded them.”

64. The Settlor’s wish to adhere to *Shari’a* law principles is also the subject of evidence on behalf of the Trustee and from the First Defendant, particularly the latter based on his long involvement in the Settlor’s financial and family affairs.
65. Paragraph 32 of the First Defendant’s affirmation states that “*throughout the period that I knew him, [the Settlor] was a devout Muslim and applied Islamic Shari’a law in the conduct of [his] affairs.*” In this and paragraph 33 of his affirmation, the First Defendant explains that the Settlor had in fact studied *Shari’a* law under the instruction of a *Shari’a* scholar and amongst other things “*was familiar with the Islamic rules of inheritance and made it clear on many occasions that he wished those rules to govern how his personal and Trust assets were distributed among family members.*”



66. The above is supplemented by the concluding part of the First Defendant's affirmation (paragraphs 71-77), which deals with the wider family and religious/cultural context of the Settlor's beliefs and conduct of his financial and family affairs:

"72. It was entirely consistent with his personal beliefs that [the Settlor] wished to see the Islamic law of inheritance followed in relation to the disposition of the wealth he accumulated during his lifetime. The Islamic rules of inheritance are based on the Holy Quran itself. For [the Settlor], and members of his family, the rules of Islamic inheritance are a "given" in the sense that they are part of basic Islamic religious teaching and well known."

67. This aspect of the background is also relevant in connection with the position the Trustee has taken with respect to ascertaining the numbers and identities of the Settlor's family members who are within the beneficial class of the 1990 Trust. This forms the second main set of inquiries the Trustee has undertaken, which will be described before considering further evidence concerning the wider family and religious/cultural dimension.

68. I am told that the Trustee approached these inquiries on the basis described as follows in paragraph 71 of Ms Vizia's second affidavit filed in the substantive application:

"The Trustee has overriding obligations: (i) to administer the 1990 Trust in accordance with its terms having due regard to [the Settlor's] intentions; and (ii) to act in the best interests of the beneficiaries of the 1990 Trust as a whole. In so doing, the Trustee has undertaken to ascertain and take account of all relevant circumstances, including not only [the Settlor's] wishes but the financial and family circumstances of all the beneficiaries and the wishes of the beneficiaries themselves."



69. What followed, in terms of the Trustee's inquiries into the composition and circumstances of the discretionary beneficial class, was what was described at the substantive hearing by Mr de Serpa Pimentel as counsel for the First Defendant as a "textbook approach" by a trustee of a discretionary trust. The starting point for considering it is that prior to the

Settlor's death, and consistent with his concerns as to confidentiality described above, including in his 5 January 2007 letter of wishes, no detailed information concerning the 1990 Trust was disclosed by the Settlor to any other discretionary beneficiaries of it (as explained by the First Defendant in paragraph 64 of his affirmation).

70. However, since the Settlor's death, the existence of the 1990 Trust, its terms, the assets within it and the Trustee's proposals for asset realisations, distributions and winding up have been disclosed to the Heirs by the Trustee. Nonetheless, because of the potential breadth of the Clause 2 discretionary class, the Trustee took legal advice on its legal (including regulatory) responsibilities from Macfarlanes LLP and Mr Andrew De La Rosa, and concluded that it was obliged to inquire into the numbers and identities of the individuals within the class, advice which, in light of the case law principles identified above, may now be recognised as sound. In this connection, paragraph 72 of Ms Vizia's second affidavit states as follows:

"The Trustee has always been aware that given the number of Heirs and, amongst other things, their ages and their marital status, the size of the beneficial class was likely to run to hundreds of individuals and include numerous minors."

71. The following paragraphs 74-76 of Ms Vizia's second affidavit set out the steps taken by the Trustee to establish what is the size and composition of the discretionary beneficial class. In summary these were:

71.1. obtaining personal information forms from each of the Heirs;

71.2. reviewing such publicly available information on the Settlor and his family as could be obtained (although, in the event, in important respects this was found to be inaccurate or incomplete); and



71.3. arranging for Ms Vizia to meet Heirs in individual meetings in January 2019 and to confirm details of the members of their respective families with them or their representatives.

The meetings referred to were arranged in connection with a proposal by the Trustee to make an interim distribution to the Heirs in their individual Islamic law inheritance shares.

72. On the basis of this exercise, the Trustee has compiled detailed statements of the members of each Heir's own family. These were completed up to April 2019, by which time the Trustee considered it had carried out thorough and proportionate inquiries, and disclose that the beneficial class, as a whole, is very substantial and further that (a) nearly half of it comprises minors; and (b) a very significant number of members of the beneficial class are not Heirs.

73. The evidence submitted on the Trustee's substantive application shows that going beyond inquiries of this nature, in particular to delve into the individual financial circumstances of Heirs and the members of their respective families, is impracticable and would raise a considerable risk of putting the Trustee in an invidious position. Paragraph 73 of Ms Vizia's second affidavit explains that

"it is not practicable for the Trustee to consult to any meaningful degree with the Heirs to establish definitively the individual circumstances and wishes of all of their families (as the remaining members of the beneficial class). [The First Defendant] has explained to me that it would be regarded by the Heirs themselves as an affront, and therefore damaging to the Trustee/beneficiary relationship, if the Trustee were to require information from the Heirs as to their respective family's personal circumstances and wishes."

74. The cultural and religious obligations referred to have been explained by the First Defendant in his affirmation, based on his long experience of dealing with members of the Settlor's family. Apart from the fact that, as the First Defendant put it (see paragraph



64 above), the rules of Islamic inheritance are a “given” for all members of the Settlor’s family, including the Heirs, as they were for the Settlor himself, he notes the following in paragraph 73 of his affirmation:

“I think that all of the Heirs recognise the depth of [the Settlor’s] beliefs and would wish to honour them as he did. In addition, all of the Heirs and members of their respective families are Muslims and are bound by the Islamic inheritance rules as a basic religious obligation. This is a fundamental part of religious belief and tradition amongst members of the [Settlor’s] family. Deviation from this obligation and tradition would not be permissible and I do not believe that any of the Heirs or members of their families would regard it as consistent with their Islamic faith to do so.”

75. In paragraph 75 of his affirmation, the First Defendant refers to the inquiries undertaken by the Trustee and explains as follows:

“The Trustee has undertaken inquiries into the numbers of family members who are within the category of beneficiaries under the 1990 Trust, a large proportion of whom are minors. It was only with difficulty (both in understanding the purpose of the inquiries and in disclosing the information that was sought) that family members agreed to provide such information. It would simply not be regarded as appropriate by family members that these inquiries be extended to include detailed financial information.”

76. However, an important factor that both the Trustee and the First Defendant have referred to, and which the Trustee has taken into account in resolving to carry out the proposed realisation and distribution of the 1990 Trust’s assets, is the practical effect these measures would have in the context of the specific religious and cultural beliefs and practices of the Settlor’s family. The First Defendant refers to this in paragraph 77 of his affirmation:

“In practical terms, the extent of the assets that will be distributed to the Heirs (for the greater part from [the Settlor’s] free estate) is such that there will be substantial financial provision to all of the Heirs. The operation of the Islamic inheritance rules means that the ultimate disposition of the Heirs’ own wealth will be such that [the Settlor’s] remoter descendants stand to benefit from the same rules he and his Heirs have.”



77. The above is reflected in paragraph 54 of Ms Vizia's second affidavit:

"[The First Defendant] has explained in his evidence (and has previously explained to me) that the Heirs will, in accordance with Islamic culture and the rules of inheritance of Shari'a law, regard themselves as bound to make separate adequate provision for their own families (who are the other beneficiaries of the 1990 Trust) and that the Trustee therefore need not be concerned with ensuring direct financial provision for non-Heir beneficiaries from the 1990 Trust."



E. Trustee's proposed realisation and distribution of the 1990 Trust's assets and winding up of the 1990 Trust

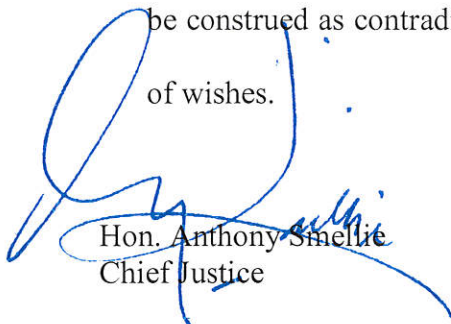
78. The Trustee's proposals for the realisation and distribution of the assets of the 1990 Trust are explained in detail in Ms Vizia's second affidavit, as is the relevant history concerning the 1990 Trust investment policies applied both prior to and after the Settlor's death. It was not in dispute that these proposals and the ultimate winding up of the 1990 Trust are in themselves within the Trustee's powers under the 1990 Trust and appropriate in commercial terms having regard to the current asset profile of the 1990 Trust.

79. The assets of the 1990 Trust currently comprise an eclectic range of international assets. A realisation of these assets by stages over a period of a number of years is proposed, over which time interim distributions to the Heirs are proposed to be made on receipt of indemnities from each Heir. As at the date of the substantive hearing, one such distribution had, in fact, been made.

80. The Trustee has ascertained that none of the Heirs wishes to have an *in specie* distribution of any of the 1990 Trust's assets and a realisation by sales of all of such assets is proposed. The Trustee formally considered the proposal and resolved to carry it out on 19 July 2019, subject to the blessing of this Court. The resolution and a joint memorandum of Macfarlanes LLP and Mr Andrew De La Rosa advising on it are referred to in paragraph

88 of Ms Vizia's second affidavit and the relevant copies of these documents are exhibited.

81. In considering the reasonableness of the Trustee's decision to appoint and distribute the assets only to his Heirs, I needed to be satisfied, from an examination of the factual background and legal context, that the inquiries undertaken were appropriate to inform the Trustee's decision to do so in keeping with the wishes of the Settlor, rather than more widely among the beneficial class. From the foregoing extensive discussion of the attendant circumstances, enabled by the very helpful submissions of counsel on all sides, I was satisfied that the Trustee had, indeed, undertaken the proper inquiries and could quite properly have arrived at its decision to benefit the Heirs. In particular, I accept that it was well within the bounds of rationality for the Trustee to have concluded that the wider ambit of the beneficial class as defined was simply to allow for flexibility of dispositive intent to be informed by his wishes during the Settlor's lifetime and should not be construed as contradicting his intentions as amply and clearly expressed in his letters of wishes.


Hon. Anthony Smellie
Chief Justice

