

Judgment 15/2010

**In re the Mischca Trust and the International Foundation for
Arts and Sciences [IFAS] - Royal Court (Civil Action file 1041)
- 18 March 2010**

The Trusts (Guernsey) Law, 2007 – trustee’s application to sanction settlement of actions – application of the principles in Public Trustee v Cooper – creation of IFAS declared to be a valid exercise of the trustee’s powers. (See also Judgment 10/2010).

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1332/1041

The 18th day of March 2010 before Richard John Collas Esquire, Deputy Bailiff and Alan Cecil Bisson, The Reverend Peter Gerald Lane and John Ferguson, Esquires, Jurats

**IN THE MATTER OF THE MISCHCA TRUST
AND
IN THE MATTER OF THE INTERNATIONAL FOUNDATION FOR ARTS
AND SCIENCES**

**AND IN PROCEEDINGS BETWEEN:
Butterfield Trust (Guernsey) Limited
As Trustee of the Mischca Trust**

**Butterfield Trust (Guernsey) Limited
As Trustee of the International Foundation for Arts and Sciences**

-v-

**Olaf Michael Lie Thommessen
International Committee of the Red Cross**

**AND IN PROCEEDINGS BETWEEN:
Christopher Moore
As Administrator of the Estate of Maria Bjornson**

-v-

Mischca Limited

Whereas on 8th March the Court, having heard Advocate C H Edwards Advocate for Butterfield Trust (Guernsey) Limited; Advocate J P Greenfield, Advocate for Mr Olaf Michael Lie Thommessen and Crown Advocate W P T Nicol-Gent, Advocate for the Partie Publique, made various orders in the terms attached hereto, the Court this day handed down the reasons for the said orders also in the terms attached hereto.

**S M D ROSS
H M Deputy Greffier**

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

IN THE MATTER OF THE MISCHCA TRUST

**AND IN THE MATTER OF THE INTERNATIONAL FOUNDATION FOR
ARTS AND SCIENCES**

AND IN PROCEEDINGS BETWEEN:

**Butterfield Trust (Guernsey) Limited
as Trustee of the Mischca Trust**

(the “**Mischca Trustee**”)

**Butterfield Trust (Guernsey) Limited
as Trustee of the International Foundation for Arts and Sciences**

(the “**IFAS Trustee**”)

v

Olaf Michael Lie Thommessen

(“**Mr Thommessen**”)

International Committee of the Red Cross

**ORDERS MADE ON 8TH MARCH 2010
SANCTIONING SETTLEMENT AGREEMENT**

UPON THE APPLICATION of the Mischca Trustee and the IFAS Trustee

AND UPON HEARING Advocate C. H. Edwards for the Mischca Trustee and the IFAS Trustee, Advocate J. P. Greenfield for Mr Thommessen, the named settlor of the Mischca Trust, and Advocate P. T. Nicol-Gent as Partie Publique

AND UPON THE COURT having satisfied itself that the International Committee of the Red Cross received notice of this Application at its address for service but failed to appear

IT IS HEREBY DECLARED THAT:

1. The following decisions shall be and are approved and ratified:
 - (a) the decision of the Mischca Trustee to enter into the settlement agreement dated 3 March 2010 between the Mischca Trustee, the IFAS Trustee and Mr Thommessen (the “**Settlement Agreement**”);

- (b) the decision of the Mischca Trustee to agree to perform and to perform all its obligations contained in the Settlement Agreement, including, without prejudice to the generality of the foregoing, the contingent obligation to liquidate the remaining assets of the Mischca Trust and to distribute the balance as follows:
 - i. two thirds to the Maria Bjornson Memorial Fund, a Charity registered with the UK Charity Commission with registered number 1126096; and
 - ii. one third to a Jersey charitable trust to be established by Mr Thommessen in accordance with the provisions of clause 10 of the Settlement Agreement.
 - (c) the decision of the IFAS Trustee to enter into the Settlement Agreement;
 - (d) the decision of the IFAS Trustee to agree to perform and to perform all its obligations contained in the Settlement Agreement, including, without prejudice to the generality of the foregoing, the contingent obligation to liquidate the remaining assets of the International Foundation for Arts and Science and to distribute the balance in the same manner as paragraph 1(b) above.
2. The actions of the Mischca Trustee and the IFAS Trustee in entering into the Settlement Agreement shall be and are ratified and approved.
 3. The costs of the Mischca Trustee, the IFAS Trustee and Mr Thommessen that are occasioned by this application shall be paid from the assets of the Mischca Trust on a full indemnity basis.
 4. The parties shall have liberty to apply.

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Deputy Bailiff

IN THE MATTER OF THE MISCHCA TRUST

**AND IN THE MATTER OF THE INTERNATIONAL FOUNDATION FOR
ARTS AND SCIENCES**

AND IN PROCEEDINGS BETWEEN:

**Butterfield Trust (Guernsey) Limited
as Trustee of the Mischca Trust**

(the “Mischca Trustee”)

**Butterfield Trust (Guernsey) Limited
as Trustee of the International Foundation for Arts and Sciences**

(the “IFAS Trustee”)

v

Olaf Michael Lie Thommessen

(“Mr Thommessen”)

International Committee of the Red Cross

(“ICRC”)

ORDERS MADE ON 8TH MARCH 2010

UPON THE APPLICATION of the International Committee of the Red Cross (“ICRC”) for leave to withdraw as a party from the proceedings

AND UPON HEARING Advocate J. P. Greenfield for ICRC and Mr Thommessen, Advocate C. H. Edwards for the Mischca Trustee and the IFAS Trustee, and Advocate P. T. Nicol-Gent as Partie Publique

IT IS HEREBY ORDERED THAT:

5. ICRC has leave to withdraw as a party to the proceedings and is hereby withdrawn as a party;
6. There is no order as to costs.

.....
Deputy Bailiff

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

BETWEEN:

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
AS TRUSTEE OF THE MISCHCA TRUST**

First Applicant

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
AS TRUSTEE OF THE INTERNATIONAL FOUNDATION FOR ARTS AND SCIENCES**

Second Applicant

v

OLAF MICHAEL LIE THOMMESSEN

Respondent

ORDERS MADE ON 8TH MARCH 2010

UPON THE APPLICATION of the First and Second Applicants and the Respondent

AND UPON HEARING Advocate C. H. Edwards for the First and Second Applicants, Advocate J. P. Greenfield for the Respondent and Advocate P. T. Nicol-Gent as Partie Publique

AND UPON the withdrawal of the International Committee of the Red Cross as a party to these proceedings

IT IS HEREBY DECLARED THAT:

7. The creation of the International Foundation for Arts and Sciences (“**IFAS**”) was a valid exercise of the First Applicant’s powers as trustee of the Mischca Trust.
8. The payments made by the First Applicant to the Second Applicant in its capacity as Trustee of IFAS which in turn were paid out as follows:

21 December 1995	Individual designers	£250,000
13 December 1996	Individual designer	£25,000

14 May 1997	Child Health Research Appeal	£200,000
28 September 2001	Mia Trust	£75,000
6 December 2002	Mia Trust	£25,000
4 February 2003	Mia Trust	£10,000
27 May 2003	Musica Nel Chioistro Limited	EUR10,000
22 December 2003	Mia Trust	£250,000
9 September 2004	Mia Trust	£20,000
14 February 2005	Mia Trust	£240,000
3 August 2005	Mia Trust	£60,000
10 January 2006	Mia Trust	£170,000

(“the Specified Distributions”)

were lawfully made by the First Applicant through the agency or otherwise of the Second Applicant to the recipients thereof.

9. The Specified Distributions were made by the First Applicant in exercise of the powers contained in Clause 6 of the Mischca Trust and under all other powers enabling it.
10. The First Applicant and the Second Applicant have released all powers for claims to recover the Specified Distributions and are absolved in relation thereto.
11. The Second Applicant’s costs of acting as trustee of IFAS from IFAS’ inception to the date of this Application are hereby ratified and approved.

AND IT IS FURTHER ORDERED THAT:

12. Save as aforesaid, the First and Second Applicants’ application dated 21 August 2009 be and hereby is dismissed.
13. There be no order as to costs.

.....
Deputy Bailiff

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

BETWEEN:

OLAF MICHAEL LIE THOMMESSEN

Applicant

v

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
AS TRUSTEE OF THE MISCHCA TRUST**

First Respondent

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
AS TRUSTEE OF THE INTERNATIONAL FOUNDATION FOR ARTS AND SCIENCES**

Second Respondent

ORDERS MADE ON 8TH MARCH 2010

UPON THE APPLICATION of the Applicant and the First and Second Respondents

AND UPON HEARING Advocate J. P. Greenfield for the Applicant, Advocate C. H. Edwards for the First and Second Respondents and Advocate P. T. Nicol-Gent as Partie Publique

AND UPON the withdrawal of the International Committee of the Red Cross as a party to these proceedings

BY CONSENT IT IS HEREBY ORDERED THAT:

14. The Applicant's application dated 18 September 2009 be and hereby is dismissed.
15. There be no order as to costs.

.....
Deputy Bailiff

Approved Judgment
18 March 2010

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

**IN THE MATTER OF THE MISCHCA TRUST
AND
IN THE MATTER OF THE INTERNATIONAL FOUNDATION FOR ARTS
AND SCIENCES**

**AND IN PROCEEDINGS BETWEEN:
Butterfield Trust (Guernsey) Limited
As Trustee of the Mischca Trust**

**Butterfield Trust (Guernsey) Limited
As Trustee of the International Foundation for Arts and Sciences**

-v-

**Olaf Michael Lie Thommessen
International Committee of the Red Cross**

**AND IN PROCEEDINGS BETWEEN:
Christopher Moore
As Administrator of the Estate of Maria Bjornson**

-v-

Mischca Limited

**Date of Hearing: 8th March 2010
Judgment handed down: 18th March 2010**

**Before: Richard John COLLAS Esq., Deputy-Bailiff and
Jurats: A C Bisson, The Reverend P G Lane and J Ferguson**

Advocate for Butterfield Trust (Guernsey) Limited:	Advocate C H Edwards
Advocate for Mr Olaf Michael Lie Thommessen:	Advocate J P Greenfield
Advocate for the Partie Publique:	Crown Advocate W P T Nicol-Gent

Cases and texts referred to:

The Trusts (Guernsey) Law 2007 Sections 55, 68 and 69

Public Trustee v Cooper [2001] WTLR 901

Re: The Z Trust (Royal Court, Lieutenant-Bailiff Talbot QC)

HSBC Trustee (Guernsey) Limited v King & Others (Royal Court, Lieutenant-Bailiff Southwell QC)

Introduction

1. At a hearing on the 8th March 2010, the Court considered a number of applications relating to the Mischca Trust. Each application was approved at that hearing and we said we would hand down a judgment at a later date recording the reasons for our decisions. All the applications, save for the application by the International Committee of the Red Cross (“ICRC”) were presented by Advocate Edwards on behalf of Butterfield Trust (Guernsey) Limited

(“Butterfield”). None of the applications was opposed either by Advocate Greenfield on behalf of Mr Olaf Thommessen or by Crown Advocate Nicol-Gent on behalf of the *partie publique*. The evidence in support of the applications was presented in affidavits and none of it was challenged.

2. The Deputy-Bailiff retired with the Jurats, as he is permitted to do under the provisions of The Royal Court (Reform) (Guernsey) Law, 2008. Matters of law were decided by the Deputy-Bailiff and questions of fact were decided unanimously by the Jurats. In this judgment, references to “the Court” are to be interpreted as referring to the Deputy-Bailiff, or to the Jurats, or to all of us, according to the context.
3. The factual and procedural backgrounds set out below are based upon summaries contained in legal opinions of Robert Ham QC which were produced to the Court.

Background

4. These proceedings concern the affairs of Maria Bjornson, a successful stage set and costume designer whose work included the staging and sets for the musical Phantom of the Opera.
5. The Mischca Trust is a discretionary trust created by deed dated 29 December 1987. The proper law of the Mischca Trust is Guernsey law, Guernsey is specified to be the forum for its administration and its named beneficiaries were Miss Bjornson, her mother Maria Prodan and the ICRC. The named settlor of the Mischca Trust was Olaf Thommessen (“Mr Thommessen”). The sole trustee of the Mischca Trust was Butterfield’s predecessor, Canadian Imperial Bank of Commerce Trust Company (Channel Islands) Limited.
6. The assets of the Mischca Trust include:
 - a. the shares in Mischca Limited, a company incorporated in Guernsey which between 1987 and 2001 received the non-UK royalty income of Miss Bjornson, and
 - b. the shares in Mischca Investment Limited, a company incorporated in the BVI which holds an investment portfolio.
7. By a declaration of trust dated 20 December 1995 made in purported exercise of its powers under the Mischca Trust deed, Butterfield created a new discretionary trust known as the International Foundation for Arts and Sciences (“IFAS”), principally to give effect to Miss Bjornson’s charitable wishes in the field of the arts, science and medicine. The proper law of IFAS is Guernsey law, Guernsey is specified to be the forum for its administration and its initial named beneficiary was the ICRC. Again, Butterfield was the sole trustee of IFAS.
8. On the same day, Butterfield as trustee of the Mischca Trust added IFAS as a beneficiary of the Mischca Trust and made an appointment of capital to IFAS.
9. From 20 December 1995, Butterfield as trustee of IFAS added further beneficiaries to IFAS and made appointments to them.
10. On 27 July 2001, Miss Bjornson caused the Mia Trust to be incorporated under English law as a company limited by guarantee in order to enable Miss Bjornson to play a more active role in making charitable donations (on 3 February 2003, the Mia Trust became a registered charity).
11. On 10 September 2001, Butterfield as the IFAS Trustee added the Mia Trust as a beneficiary of IFAS and thereafter appointed sums from IFAS to the Mia Trust.
12. Miss Bjornson died suddenly on 13 December 2002. She was intestate. Following her death, Butterfield found itself in a difficult position because until then:
 - a. Butterfield took all its decisions regarding appointments out of the Mischca Trust and IFAS in close consultation with Miss Bjornson;

- b. The only other living individual beneficiary under the Mischca Trust, Miss Bjornson’s mother, was too unwell to provide any advice to Butterfield as to what appointments should be made from the Mischca Trust or IFAS, and indeed she had not done so at any stage previously. Miss Bjornson’s mother died on 9 June 2004;
 - c. During her lifetime, Miss Bjornson gave Butterfield no indication that distributions should be made to the ICRC out of the Mischca Trust or IFAS. Instead, Butterfield believed that the ICRC had been included only as a ‘longstop’ beneficiary as a matter of standard industry practice at the time; and
 - d. The nominal settlor Mr Thommessen had played no part in the running of the Mischca Trust or IFAS beyond agreeing to act as settlor of the Mischca Trust.
13. It therefore now fell to Butterfield to decide for itself how to continue to operate the Mischca Trust and IFAS, without the benefit of Miss Bjornson’s guidance. In the exercise of its duties under the Mischca Trust, Butterfield appointed various sums from the Mischca Trust to IFAS. Butterfield in its capacity as trustee of IFAS thereafter appointed various sums from IFAS to the Mia Trust.
 14. Since the charities and individuals to which appointments were to be made were mostly in the UK, Butterfield considered that Miss Bjornson’s charitable wishes could now more efficiently be met if the funds in the Mischca Trust were transferred to a new UK charity, named in Miss Bjornson’s memory. For this purpose, Butterfield engaged English solicitors Bircham Dyson Bell (“BDB”).
 15. BDB has now established a charitable trust, named the Maria Bjornson Memorial Fund (the “Memorial Fund”), which was entered in the central register of charities with effect from 29 September 2008.

The Proceedings in the Royal Court concerning Mischca Trust

16. In around February 2006, Butterfield was informed that Mr Thommessen was challenging the distribution made by the Mischca Trust and the establishment of IFAS.
17. On 16 August 2006, Butterfield as trustee of the Mischca Trust lodged an application to the Royal Court of Guernsey for orders *inter alia* approving the creation of IFAS and the transfer of the Mischca Trust’s funds to the Memorial Fund (the “Butterfield Application”).
18. On 21 December 2006, Mr Thommessen lodged an application to the Royal Court seeking *inter alia* directions that the addition of IFAS as a beneficiary of the Mischca Trust was unlawful and in breach of trust, that all payments by the Mischca Trust to IFAS were made in breach of trust and that Butterfield should be removed as trustee of the Mischca Trust (the “Thommessen Application” and, together with the Butterfield Application, the “Guernsey Proceedings”).
19. Both applications, although not formally joined, were heard together by the Royal Court. The Crown Advocate is a party to both applications, in its role as *partie publique*. It has not adopted any particular stance behind one or other party in the Guernsey Proceedings.
20. In March 2008, the ICRC on its own application (unopposed by Butterfield) was joined as a party to both applications. Since then, the ICRC has on its own admission adopted a passive stance in the Guernsey Proceedings.
21. Pursuant to the Court’s order, on 21 August 2009 Butterfield revised and re-filed the Butterfield Application, now in its capacities as trustees for the Mischca Trust and IFAS, seeking (*inter alia*):
 - a. An order that the creation of IFAS was a valid exercise of Butterfield’s powers as trustee of the Mischca Trust;

- b. An order that specified payments made by the Mischca Trust to IFAS were lawfully made;
 - c. An order confirming the transfer of all the assets of the Mischca Trust and IFAS to the Memorial Fund and confirming that Butterfield as trustee of the Mischca Trust and Butterfield as trustee of IFAS may deal with the assets of each trust in such manner as it thinks fit.
22. Pursuant to the same Court Order, on 18 September 2009, Mr Thommessen revised and re-filed the Thommessen Application, seeking (*inter alia*):
 - a. A declaration that IFAS was unlawfully added as a beneficiary of the Mischca Trust;
 - b. A direction that Butterfield be removed as trustee of the Mischca Trust and replaced by EFGCI Trust Company Limited.
23. On 27 November 2009, Mr Thommessen filed a Response to the revised Butterfield Application and Butterfield filed a Response to the revised Thommessen Application.
24. A mediation was held between Butterfield, Mr Thommessen and the ICRC in London on 5 February 2010. Although no settlement was reached that day, those without prejudice discussions have formed the basis for the agreement to settle the Butterfield Application and the Thommessen Application referred to below.
25. Following a hearing on 9 February 2010, an application made by the ICRC (dated 25 September 2009) seeking a prospective costs order was refused. On 19 February 2010, lawyers for the ICRC wrote to their Guernsey Advocates stating that the ICRC wished to withdraw as a party from the Guernsey Proceedings with no order as to costs.
26. The hearing of the Butterfield Application and the Thommessen Application was due to commence on 8 March 2010.

The Mischca Limited Action

27. Proceedings (“the Mischca Limited Action”) were commenced in December 2008 by the Administrator of Miss Bjornson’s estate concerning the remuneration clauses of an agreement made on or around 14 August 1988 between the Company and Miss Bjornson whereby Miss Bjornson was employed by the Company to conduct work outside the UK (the “Mischca Agreement”). In essence, the Administrator’s claim relies upon what is said to have been a slip at clause 6(b) of the Mischca Agreement where the level of remuneration Miss Bjornson was to receive was expressed to be 90%. The Court was told that in fact the parties intended for the figure to be 10% with the balance retained in Guernsey. The parties performed the Mischca Agreement without complying at any stage with the 90% figure in clause 6(b).
28. The total value claimed by the Administrator represents a large proportion of the value of the assets in the Mischca and IFAS Trusts.
29. The Company filed defences on 18 March 2009 and the Administrator filed a repique on 14 September 2009. A trial date has been set in June 2010.

Application to sanction settlement of the Mischca Limited Action

30. The first application before the Court was an application by Butterfield, pursuant to sections 68 and 69 of the Trusts (Guernsey) Law 2007, to sanction an agreement between the Administrator of Miss Bjornson’s estate and Mischca Limited to settle the Mischca Limited Action. One of the provisions of the agreement is that the terms of the settlement are to be kept confidential. The terms have been disclosed to the Court but to preserve their confidentiality, they are not set out in this judgment.
31. In support of the application, Butterfield relied upon an affidavit sworn on 4th March 2010 by Paul Hodgson, the managing director of Butterfield. The exhibits to the Affidavit are the Deed of Settlement of the Mischca Trust; the pleadings filed by both parties in the Mischca

Limited Action; a copy of the proposed settlement agreement; and an opinion from Robert Ham QC dated 3 March 2010.

32. On behalf of Butterfield, Mr Edwards produced a written skeleton argument in which he referred to three judgments: *Public Trustee v Cooper* [2001] WTLR 901, *Re: The Z Trust* (Royal Court, Lieutenant-Bailiff Talbot QC) and *HSBC Trustee (Guernsey) Limited v King & Others* (Royal Court, Lieutenant-Bailiff Southwell QC).
33. The Court accepts that the basis for this application is to be found in the second of the grounds identified by Robert Walker J (as he then was) in the judgment cited by Hart J in *Public Trustee v Cooper*, at page 30 of the extract produced to the Court:

“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 for 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.”

34. The Royal Court has previously accepted, in a number of cases, that the *Public Trustee v Cooper* principles form part of the law of Guernsey. Advocate Edwards referred to two such cases by way of example. In *Re: the Z Trust*, the Court was asked to sanction the settlement of litigation concerning the trust. In *HSBC v King*, the Court was asked to approve the terms of an agreement that had been reached between the South African Revenue Service, the trustee and others.
35. The jurisdiction is only to be invoked where the decision is momentous. There are many difficult decisions that trustees are expected to make and which professional trustees are paid to make without involving the Court. In the present application, the Court is satisfied that the decision to settle the Mischca Limited Action is sufficiently momentous to justify an application to the Court for its blessing. The sum of money to be paid out of the trust funds under the terms of the settlement does not, by itself, require the approval of the Court. However, the settlement of the Mischca Limited Action is relevant to the settlement of the Butterfield Application and the Thommessen Application and for that reason, it is appropriate for Butterfield to apply to the Court to sanction the decision.
36. Advocate Edwards identified the questions that the Court must ask:
- i) Does the trustee have the power to make this ‘momentous’ decision?
 - ii) Is the Court satisfied that the trustee formed the opinion in good faith that it was desirable and proper for them to enter into the settlement agreement?
 - iii) Is the Court satisfied that the opinion formed by the trustee is one which a reasonable trustee in its position properly instructed could have arrived at?
 - iv) Is the Court satisfied that the opinion arrived at by the trustee has not been vitiated by any actual or potential conflict of interests which either had or might have affected its decision?

37. The Court accepts those are the relevant issues and in relation to the settlement of the Mischca Limited Action, it answers the questions as follows.
38. Question (i). Butterfield has the power to compromise any claim relating to the trust fund. Such power is conferred upon it by virtue of clause 17 of the Settlement Deed that established the Mischca Trust and paragraph 22 of the First Schedule to that Deed.
39. Question (ii). There is no evidence, and no suggestion by any party, that Butterfield was not acting in good faith. Accordingly, the Court is satisfied that Butterfield has acted in good faith in entering into the settlement agreement.
40. Question (iii). Paul Hodgson explained the reasons why the decision was taken to enter into the settlement agreement at paragraphs 12 to 14 of his Affidavit. Robert Ham QC, in his opinion, also explained the principal reasons for which the settlement was made. He concluded, at paragraph 19 of his opinion:

“All of the reasons set out above appear to me to make perfect sense ... and to justify the conclusion that Butterfield has reached. Butterfield appears to me to have considered all the relevant considerations, and to have reached a conclusion that is well within their margin of discretion.”

41. The Court examined the reasons that were put forward and is satisfied that the decision to enter into the settlement agreement is one which a reasonable trustee properly instructed could have arrived at.
42. Question (iv). The Court accepts that Butterfield was not acting under any conflict of interest.
43. In the circumstances, the Court is persuaded that it is appropriate to approve and ratify the decision of Butterfield to cause Mischca Limited to enter into the agreement to settle the Mischca Limited Action and to ratify its decision to perform the obligations contained therein.
44. The application to sanction the settlement agreement in respect of the Mischca Limited Action is approved in the terms sought.

Application to sanction settlement of the Butterfield Application and the Thommessen Application

45. The next application the Court was asked to consider was to approve and ratify the decision of Butterfield to enter into the settlement agreement between Mr Thommessen and Butterfield as trustee of both the Mischca Trust and IFAS and to perform the obligations contained in the agreement. If it was approved, the Butterfield Application and the Thommessen Application were to be dismissed with no order as to costs.
46. The ICRC is a party to both those applications, having been joined as such at its own request. The Court was told that the ICRC was a party to the mediation that took place on 5th February this year but the ICRC is not a party to the settlement agreement, the terms of which were agreed after the mediation had concluded. The ICRC indicated its wish to withdraw from the proceedings after the Deputy-Bailiff refused the ICRC’s application to have its costs paid out of the trust fund. The ICRC lodged an application to be given leave to withdraw from the proceedings which is before the Court but which the Court decided it would consider after deciding the present application.
47. Butterfield served a copy of the application to sanction the settlement agreement on the ICRC at its address for service in Guernsey but the ICRC did not appear. Advocate Greenfield had appeared on behalf of the ICRC at earlier hearings but had no instructions to do so on this occasion. In the circumstances the Court was satisfied that the ICRC had received notice of the application and that it was appropriate to proceed in its absence.

48. In support of the application to sanction the settlement, Butterfield relied upon an affidavit sworn on 4th March 2010 by Paul Hodgson, the managing director of Butterfield. The exhibits to the Affidavit are the Deed of Settlement of the Mischca Trust; the Declaration of Trust in respect of IFAS; the Butterfield Application; the Thommessen Application; a witness statement by Peter Twiddy, a consultant with BDB describing the discussions with HMRC; a copy of the proposed settlement agreement; and an opinion from Robert Ham QC dated 3 March 2010.
49. In a written skeleton argument, Advocate Edwards relied upon the same authorities as in the application to sanction the settlement of the Mischca Limited Action: *Public Trustee v Cooper*; *Re: the Z Trust*; and *HSBC v King*.
50. The Court's jurisdiction to hear this application again derives from the second category of applications identified in *Public Trustee v Cooper*.
51. There is no doubt that what is proposed is a 'momentous' decision. The result will be that all the funds in the Mischca Trust and IFAS will be paid away and the two trusts will be dissolved.
52. Question (i). The settlement requires the trust funds to be distributed between the Memorial Fund and a new charity to be established by Mr Thommessen.
53. The Settlement Deed that established the Mischca Trust and the Declaration of Trust that established IFAS both contain wide discretionary powers enabling the trustees thereof to appoint new trusts concerning the trust funds, to pay capital and income to charity, and to effect compromises relating to the trust funds.
54. The Court is satisfied that such powers are sufficiently wide to empower Butterfield to make the distributions proposed and also that it has the power to pay the costs incurred by all parties in the proceedings by all parties, as envisaged in the Settlement Agreement.
55. Question (ii). The Court is satisfied that Butterfield has acted in good faith in reaching the decision to enter into the Settlement Agreement. The proceedings have been ongoing for some time and, on a number of occasions, the Deputy-Bailiff had encouraged counsel to recommend to their respective clients that they engage in mediation with a view to settling their differences. The proceedings have been hard-fought, a number of serious allegations had been made, the trustee and Mr Thommessen each held strident but genuine views as to what Miss Bjornson would have wanted. They were not able to agree a common view and consequently the agreement represents an agreement to disagree. The disagreement is reflected in the objects of the Memorial Fund and the objects of the new trust to be created by Mr Thommessen both of which are different. However, neither set of objects is inconsistent with what the Court understands to have been the wishes and intentions of Miss Bjornson.
56. Through the two charities, her charitable work will be continued and her memory will be commemorated. The parties are to be congratulated on achieving an agreement that respects the views of each other whilst avoiding the need for, and costs of, a lengthy hearing.
57. Question (iii). Butterfield's reasons for entering into the settlement agreement are explained by Mr Hodgson at paragraph 24 of his Affidavit filed in support of this application. They are also considered by Robert Ham QC in his advice to Butterfield. In Mr Ham's conclusion, he said that, in his opinion, it was entirely reasonable and proper for Butterfield to decide to enter into the settlement agreement and to resolve to carry out the terms of the agreement.
58. The Court considered the reasons for which the decision was taken by Butterfield and is satisfied it was a decision that a reasonable trustee properly instructed could have arrived at.
59. Question (iv). The litigation between Butterfield and Mr Thommessen has been hard fought and some serious allegations have been made. It might be suggested that the existence of such allegations would have influenced Butterfield to settle the proceedings in order to avoid a

public hearing. However, Butterfield believes it could have defended and answered such allegations and says that, if anything, it would have had an interest in taking the case to trial in order to resolve such matters.

60. The Court accepts that there was no conflict of interest that would vitiate Butterfield's decision.
61. In conclusion, having considered all the relevant issues and having thus answered the questions that the Court was required to consider, the Court approves and ratifies Butterfield's decision to enter into the settlement agreement and to perform the obligations contained therein in its capacities as trustee of both the Mischca Trust and IFAS.
62. The application is granted in the terms sought, subject to one amendment (proposed during the course of the hearing) giving liberty to either party to apply to the Court for further orders. Such provision was requested in case the discussions with Her Majesty's Revenue and Customs do not proceed smoothly. Those discussions must be concluded, and any tax that is found to be due must be paid, before the funds are distributed.

The ICRC's application to withdraw

63. Next, the Court considered the application by the ICRC pursuant to Rule 61 of the Royal Court Civil Rules 2008 that it be granted leave to withdraw as a party from the Butterfield Application and the Thommessen Application with no order as to costs. The application was not opposed by the other parties.
64. The Court noted that the objects of the new trust to be created by Mr Thommessen are wide enough to allow the ICRC to benefit from it and Advocate Greenfield confirmed they had been carefully drafted with the ICRC in mind. The objects of the Memorial Fund are less favourable to the ICRC although they appear to be wide enough to include at least some of the work carried out by it.
65. In all the circumstances, the Court granted the ICRC's application to withdraw from the two applications.

Application concerning IFAS

66. Next, the Court was asked to consider an application by Butterfield and Mr Thommessen to approve that the creation of IFAS was a valid exercise of Butterfield's powers as trustee of the Mischca Trust and to approve certain payments made by it from the Mischca Trust to IFAS and thence to a number of parties including the trustees of the Mia Trust, a trust created by Miss Bjornson during her lifetime.
67. In his oral submissions, Advocate Edwards explained that the application was brought under section 55 of The Trusts (Guernsey) Law 2007 which provides:

“55. The Royal Court may relieve a trustee wholly or partly of liability for a breach of trust, whether committed before or after the commencement of this Law, where it appears to the court that the trustee-

(a) has acted honestly and reasonably, and

(b) ought fairly to be excused –

(i) for the breach of trust,

(ii) for omitting to obtain the directions of the court in the matter in which the breach arose.

68. Advocate Edwards submitted, and the Court accepts, that all the actions to which this application relates were done during the lifetime of Miss Bjornson and at her request or under her guidance.
69. He submitted that the creation of IFAS and the payments made to it were breaches of trust of a purely technical nature. Under the terms of the Mischca Trust, Butterfield was an

‘Excluded Person’, excluded from benefitting from the trust whilst it remained a trustee thereof. Despite that, it appointed itself as the trustee of IFAS and made payments to itself in that capacity for onward payment to others in accordance with the terms of the IFAS Declaration of Trust.

70. The payments made by IFAS could all have been made directly from the Mischca Trust, either directly to the charities or, where they were payments to individuals, if those individuals had been added as beneficiaries of the Mischca Trust.
71. Advocate Edwards submitted that the principal mischief that was intended to be prohibited when the trustee was made an excluded person was to prevent it from benefitting itself from the trust funds. Significantly, no payments were made to Butterfield for its own benefit.
72. In those circumstances, the Court accepts that the decisions to create IFAS and to make the payments concerned were all made honestly and reasonably by Butterfield. The Court is satisfied that the breaches of trust ought fairly to be excused because the decisions were made at the request of Miss Bjornson and with her knowledge.
73. Accordingly, the Court is minded to make the orders sought in the application.

Dismissal of the Butterfield and Thommessen Applications

74. Having made orders that deal with the substance of the disputes underlying the applications made by Butterfield and Mr Thommessen and with the consent of Advocates Edwards and Greenfield and Crown Advocate Nicol-Gent, the Court orders that the Thommessen Application and the Butterfield Application be dismissed with no orders as to costs.
75. The court wishes to express its thanks to all counsel for their assistance.