Judgment 17/2013

T – In the matter of the C Trust and in the matter of Section 69 of The Trusts (Guernsey) Law, 2007
Royal Court
21st March, 2013

Application for relief pursuant to section 69(1)(a)(i) and (iv) and (2) (b) of the Trusts (Guernsey) Law, 2007, and/or the inherent jurisdiction of the Court.

Approved Text
21.03.2013

IN THE ROYAL COURT OF GUERNSEY

(CIVIL DIVISION)

T **Applicant**

IN THE MATTER OF THE C TRUST AND

IN THE MATTER OF

SECTION 69 OF THE TRUSTS (GUERNSEY) LAW, 2007

Hearing date: **22nd February 2013**

Judgment handed down: **21st March 2013**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Applicant: **Advocate N Kapp**

Cases, Texts & legislation referred to:

The Trusts (Guernsey) Law, 2007
IFS Investments Limited v Manor Park (Guernsey) Limited [2003-04] GLR 77
In re Mr and Mrs W's 1966 Settlement (1998) 25.GLJ.46
Jersey Evening Post Limited v Al Thani [2002] JLR 542
In re The Colour Trusts (unreported, 24 May 2012)
In the matter of the Sanne Trust Company Limited [2009] JRC 25B
The Royal Court Civil Rules, 2007
In the matter of the Internine and the Intertraders Trusts [2005] JLR 236
In the matter of the Representation of BBB Limited [2011] JRC 240
Investors Compensation Scheme Ltd. v West Bromwich Building Society [1998] 1 All ER 98
British Airways Pension Trustee Ltd v British Airways plc [2002] EWCA Civ 672

W.T. Ramsay v IRC [1982] AC 300
Arbuthnott v Fagan [1995] CLC 1396
Gartside v Silkstone and Dodworth Coal and Iron Company (1882) 21 Ch D 762
Lewison, *The Interpretation of Contracts*, 5th ed.
Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511
Sugden on Powers, 7th ed.
Commissioners of Inland Revenue v Botnar [1999] STC 711

Introduction

1. By an application dated 13 February 2013, T, as trustee of a settlement to which I will refer as "The C Trust" (hereafter referred to as "the Trustee"), has sought relief pursuant to section 69(1)(a)(i) and (iv) and (2)(b) of the Trusts (Guernsey) Law, 2007 and/or the inherent jurisdiction of the Court. The principal relief sought is declaratory in nature or, in the alternative, for rectification of a Declaration of Exclusion made on 21 October 1997.

2. At the first appointment on 15 February 2013, Advocate Kapp, on behalf of the Trustee, applied for the proceedings to be heard *in camera*. After considering the submissions set out in her Skeleton Argument dated 13 February 2013, as expanded upon at the hearing, as requested, I made that order, at least insofar as it attached to the first stage of the proceedings dealing with the construction point on which this judgment focuses. In doing so, I was mindful of the helpful general guidance about the presumption in favour of open justice set out in the judgment of Lieutenant-Bailiff Day in *IFS Investments Limited v Manor Park (Guernsey) Limited* [2003-04] GLR 77 and the position often adopted in trusts cases involving the private affairs of individuals, as exemplified by *In re Mr and Mrs W's 1966 Settlement* (1998) 25.GLJ.46. I expressly reserved the position if the alternative basis of the Application needed to be pursued, recognising that the public interest in rectification proceedings might outweigh any private sensitivities that confidential information would be disclosed (see, e.g., *Jersey Evening Post Limited v Al Thani* [2002] JLR 542, as well as the approach adopted in *In re The Colour Trusts* (unreported, 24 May 2012) and *In the matter of the Sanne Trust Company Limited* [2009] JRC 25B).

3. The second issue considered at that first hearing was whether any other persons needed to be convened. In particular, two questions arose about the potential interests of unascertained beneficiaries and the position of the "Reserve Beneficiary", a well-known international charity (hereafter referred to as "the Charity"). I took the view that the interests of the unascertained beneficiaries were already adequately protected because the Application had the support of a foundation (hereafter referred to as "The C Foundation"). I also took the view that the nature of the principal relief sought, being declarations to be made as a result of construing some documentation, meant that the arguments that might be advanced on behalf of the persons potentially affected would not provide any further assistance to the Court. The construction issues would, in my view, be capable of being canvassed adequately by considering the material put before the Court and through Advocate Kapp reviewing all the possible outcomes, in accordance with her duty as an officer of the Court. Moreover, whether or not the declarations sought are made, the Charity will continue to be the Reserve Beneficiary under the settlement. I also took into account that rule 35 of the Royal Court Civil Rules, 2007 provides that beneficiaries are bound by the outcome of proceedings, even if they have not been made parties, unless the Court directs otherwise. Accordingly, whilst reserving the position if the rectification aspect of the Application needed to be pursued, I decided that the construction arguments could be made without the need to convene any other party.

4. Finally, in terms of case management, I directed that the questions of law arising from the construction of the documentation should be heard by me sitting unaccompanied by Jurats and that the Court should then only convene with Jurats if the declaratory relief sought did not

resolve the matter in a manner acceptable to the Trustee. Although section 79 of the 2007 Law permits the Court to be properly constituted by a judge alone, in my view, in rectification cases (as indeed in other situations relating to trusts) it is desirable, unless it is impracticable to do so for whatever valid reason, for the Jurats to participate.

5. This judgment, therefore, deals with the declaratory relief sought at para. 4 of the Application, which is in the following terms:

> "*on a proper construction of the Trust, Clause 4.9(d) of the Trust does not prohibit the Trustee from exercising a power or discretion in favour of a Beneficiary if an Excluded Person is intended to or might otherwise benefit indirectly therefrom; and*
>
> *the declaration of exclusion made by the Trustee on 21 October 1997 (the "**1997 Exclusion**") did not preclude the Trustee from exercising its powers under the Trust to add the [C] Foundation (the "**Foundation**") as a beneficiary of the Trust in accordance with the deed of appointment made by the Trustee on 21 October 1997 even though the persons who were declared Excluded Persons under the 1997 Exclusion were intended or might otherwise benefit under the [C] Foundation, nor precludes the Trustee for exercising any dispositive powers in favour of the Foundation or any other beneficiary of the Trust if an Excluded Person is intended to or might otherwise benefit indirectly therefrom*".

The Evidence

6. In support of the Application, four Affidavits have been filed. They are from A, a former director of the Trustee who was responsible for the C Trust at the relevant time, sworn on 25 January 2013, B, an executive manager of the C Foundation, also sworn on 25 January 2013, the Settlor, sworn on 7 February 2013, and D, a director of the Trustee, sworn on 12 February 2013. The material facts relevant for the purposes of the construction issues are taken from those Affidavits and the exhibits thereto.

7. The C Trust was declared by the Trustee on 3 February 1993. The Settlor is an extremely successful and driven businessman. The assets of the Trust have become, and are at present, very significant. The Settlor is divorced and has two sons and one adopted daughter. His daughter has three minor children. Sadly, the Settlor does not enjoy good health. In 2012, his health deteriorated further. He has realised that, rather than leaving it until after his death for his children to benefit from the fruits of his endeavours, he would derive pleasure from seeing them enjoy those fruits during his lifetime.

8. Shortly after the Trust was established, consideration was given to it being restructured. This was a consequence of plans for the Settlor to change where he lived. The Trustee dealt with F, the Settlor's South African in-house legal adviser, in relation to this. It was suggested that it might be beneficial for the Settlor to be excluded as a beneficiary of the C Trust. The proposal was to make use of a new trust in Liechtenstein, although in due course this was modified so that it was a Liechtenstein foundation that was being thought about.

9. Progress in relation to these proposals was intermittent over the next few years. The Trustee took advice as to the legal status of a Liechtenstein foundation, receiving confirmation that it is "*an asset holding body, … a legal entity fully capable to obligate itself towards third parties and to be the holder of legal rights and titles*". The Trustee did not wish simply to exclude the Settlor's linear descendants from a fairly substantial trust fund (although the assets then were many times smaller than they are now) unless satisfied it was in their best interests. F confirmed that the Settlor's lawful linear descendants were fully eligible to benefit under the C Foundation, which had been established in Liechtenstein. F also commented on and revised the draft documentation prepared by the Trustee to give effect to

the proposal to appoint the C Foundation as a beneficiary and to exclude the Settlor and his linear descendants as beneficiaries.

10. The Trustee took the precaution of seeking confirmation from the Settlor, with one of his closest friends and colleagues acting as witness, that he supported the proposed changes to the C Trust. By signing the document on 13 May 1997, the Settlor confirmed his opinion that he considered it to be in the best interests of his lawful linear and adopted descendants "*who are beneficiaries of the [C] Foundation of Liechtenstein*" for the changes to be made.

11. Once the position had been checked once more with B, the Trustee convened a meeting of its directors on 21 October 1997. The minutes of that meeting recorded, under appropriate headings:

> "***IT WAS NOTED*** *that the Trustees had received a recommendation from [the Settlor] regarding the beneficiaries of the trust. The recommendation refers to the addition of the [C] Foundation of Liechtenstein as a beneficiary of the trust and the exclusion of the lawful linear and adopted descendants of [the Settlor] as beneficiaries of the trust. A copy of the recommendation is attached hereto and forms part of these minutes.* ***IT WAS FURTHER NOTED*** *that the aforementioned recommendation is dated 13 May 1997 and the Trustees wish to record the fact that the time span between that date and this has occurred because the Trustees have wished to consider all aspects of the recommendation which has involved consulting with [the Settlor] and his legal advisers.*
>
> ***IT WAS NOTED*** *the administrators of the [C] Foundation, … had confirmed in writing (copy attached) that the beneficiaries of the [C] Foundation include the lawful linear and adopted descendants of [the Settlor], including adopted children.*
>
> ***IT WAS RESOLVED*** *that, in accordance with the terms of Clause 4.9(b) of the [C]Trust deed, the lawful linear and adopted descendants of [the Settlor] shall henceforth be Excluded Persons for all the intents and purposes of the Trust so that none of them shall be eligible to benefit from the Trust.*
>
> ***IT WAS RESOLVED*** *that, in accordance with the terms of Clause 4.8(a) of the [C] Trust deed, The [C] Foundation of Vaduz be and is hereby irrevocably nominated to be a members of the Appointed Class for all the intents and purposes of the Trust.*"

A and the corporate company secretary were authorised to seal and sign the necessary documents, which they then did.

12. B has exhibited a copy of the Regulations and Supplementary Regulations of the C Foundation and confirmed that it was established for the benefit of the Settlor's lawful linear descendants, including adopted children, and whether born or unborn. They have no vested right or interest in the Foundation but only a contingent interest in it.

13. The Trustee became aware of the Settlor's desire to see various distributions made for the benefit of his family and some other associates in September 2012. The Trustee has been liaising since that time in relation to the most appropriate ways in which to achieve the Settlor's desired outcomes. In doing so, the possibility that the terms of the Declaration of Exclusion executed in 1997 (hereafter referred to as "the Deed of Exclusion") prevent the C Trust being used to benefit the Settlor's linear descendants has arisen.

14. On behalf of the Trustee, Carey Olsen sought advice from English Counsel, Judith Bryant. Her Opinion dated 6 December 2012 is exhibited to A's Affidavit. She has identified that the extremely wide wording used in the Deed of Exclusion would, in her view, be construed in

such a way as to exclude the Settlor's linear descendants "*from all future benefit under the Trust*". Nicholas Le Poidevin QC was also instructed to advise. His Opinion dated 28 January 2013 is exhibited to D's Affidavit. Whilst agreeing in principle with Ms Bryant's conclusion, he noted that her conclusion assumed "*an intention to effect the sweeping exclusion*" and that such an outcome "*would plainly be incorrect*" because the Deed of Exclusion "*must have been intended to be consistent with*" the Deed of Addition. It is fair to note that the advice sought from Nicholas Le Poidevin QC was specific to this issue, whereas Judith Bryant was apparently instructed to advise more generally about a proposal to establish a new trust to which part of the trust fund of the C Trust could be transferred and without the benefit of a full explanation of the background to events in 1997.

15. Because of the difference of Opinion between Counsel and the fact that confirmation one way or the other is certainly desirable for the Trustee before such a momentous decision as will be called for by the Trustee is taken the present Application has been made.

The Documents

16. The Deed of Exclusion provides:

> "*Under the terms of Clause 4.9(b) of the Declaration of Trust whereby The [C] Trust ("the Trust") was brought into being we the Trustees do hereby declare that the undermentioned shall henceforth be Excluded Persons for all the intents and purposes of the Trust so that none of them shall be eligible to benefit in any way from the Trust, namely*
>
> > *The lawful linear descendants of [the Settlor] whether now alive or yet to be born (including persons lawfully adopted as his children or as the children of his lawful linear descendants as here defined)*
>
> *This declaration is irrevocable and applies to the whole Trust Fund*".

The Deed of Addition executed the same day simply provides:

> "*Under the terms of Clause 4.8(a) of the Declaration of Trust whereby The [C] Trust ("the Trust") was brought into being we the Trustees do hereby irrevocably nominate THE [C] FOUNDATION Vaduz to be a member of the Appointed Class for all the intents and purposes of the Trust*".

17. The Declaration of Trust of the C Trust provides that the settlement is irrevocable (clause 1.3) and established under the laws of Guernsey (clause 2.2(a)). The Trust Period was 100 years unless declared by the Trustee to end earlier (clause 2.1). It is a discretionary trust of income and capital (clause 3.1). In Schedule One, the expression "Beneficiaries" was originally defined as the Settlor (who was also declared to be the Primary Beneficiary by Schedule Two), "*His lawful linear descendants whether now alive or yet to be born (including persons lawfully adopted as his children or as the children of his lawful linear descendants, as here defined)*", "*All persons who are for the time being members of the Appointed Class*", any charity selected by the Trustee with the consent of the Primary Beneficiary, and the Reserve Beneficiary, the Charity.

18. Clause 4.9 of the Declaration of Trust on exclusion of persons as beneficiaries provides:

> "*a) Notwithstanding anything herein contained any of the Beneficiaries (being of full age) shall have the power at any time or times during the Trust Period by instrument or instruments in writing to declare that he is no longer to be a Beneficiary (an Excluded Person).*

b) Notwithstanding anything herein contained and without prejudice to the power of any Beneficiary to declare that he shall be an Excluded Person the Trustees shall also have power at any time or times during the Trust Period to declare that any person is thenceforth to be an Excluded Person.

c) Any such declaration made pursuant hereto may

i) be either revocable or be made so that it shall not under any circumstances be revoked,

ii) be either in respect of the whole of the Trust Fund or any specified part or parts thereof, and

iii) be in respect of income alone or capital alone or both income and capital.

d) As from the date hereof or of any such declaration as the case may be (and in the case of a revocable declaration until such time if at all at which it shall be revoked) the Trustees shall be absolutely prohibited from exercising in favour of the person who is or thereby becomes an Excluded Person (or as the case may be his personal representatives) any power or discretion conferred on appropriation or application of the income or capital of the Trust Fund or of the part or parts thereof to which such declaration may relate but the Trustee shall not be liable in respect of any such payment appropriation or application which may be made by them before receiving notice of such declaration."

By clause 1.1.8, the term "Excluded Persons" is defined as "*The persons (if any) declared to be Excluded Persons pursuant to the provisions of Part 4 hereof*".

19. Clause 4.8 of the Declaration of Trust deals with the appointed class as follows:

"*a) The Trustees may at any time and from time to time before the termination of the Trust Period by deed or deeds revocable or irrevocable nominate one or more individuals charities or corporations (none of whom is an Excluded Person) to be a member of the Appointed Class.*

b) If the Trustees shall revocably nominate a person to be a member of the Appointed Class the Trustees may revoke that nomination and upon such revocation the person nominated shall cease to be a member of the Appointed Class.

c) The Trustees shall have the power to renominate (on any number of occasions) any person who has ceased to be a member of the Appointed Class by virtue of the revocation of a previous nomination.

d) No beneficiary may prevent the nomination of new members of the Appointed Class."

By clause 1.1.3, the term "Appointed Class" is defined as "*Such persons (not being Excluded Persons) as are for the time being the subject of a nomination duly made according to the provisions of the section hereof entitled Trustees' Powers of Appointment*", that section being Part 4. "Corporation" is defined in clause 1.1.5 as "*Any corporate body (of whatsoever kind) incorporated or otherwise brought into existence in any part of the world*".

20. Although not expressly referred to in the Deed of Exclusion, Judith Bryant's Opinion refers to a number of other provisions in Part 4 that the Trustee may be taken to have exercised. Clause 4.1(a) (power of appointment) provides:

> "*Notwithstanding the provisions of Part 3 the Trustees shall have power at any time and from time to time during the Trust Period to appoint that they shall hold the whole or any part or parts of the Trust Fund Upon Trust for all or such one or more exclusively of the other or others of the Beneficiaries at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective advancement maintenance and education as they shall think fit*".

Clause 4.4 (powers of revocation and declaration of new trusts) provides:

> "*a) The Trustees shall have power at any time or times before the expiration of the Trust Period in their absolute discretion by deed or deeds revocable or irrevocable wholly or partially to revoke or otherwise vary all or any of the trusts hereinbefore declared and to declare such other trusts as they shall think fit for the benefit of such one or more of the Beneficiaries in such manner and in all respects as they shall think fit.*
>
> *b) The Trustees shall have power to release either entirely or to such extent as they shall think fit the foregoing power and any such release shall be binding on their successors.*
>
> *c) Any such revocable deed if not revoked before the date of expiry of the Trust Period shall become irrevocable on that date.*"

The law

Interpretation guidance

21. There is helpful guidance relating to the principles for the construction of a trust instrument set out by the Royal Court of Jersey in *In the matter of the Internine and the Intertraders Trusts* [2005] JLR 236, at para. 62 *per* Commissioner Page:

> "*The correct approach to the task before the court is to a large extent the same as it is for any instrument the meaning of which is in contention:*
>
> *(i) the aim is to establish the presumed intention of the maker(s) of the document from the words used …;*
>
> *(ii) words must, however, be construed against the background of the surrounding circumstances or "matrix" of facts existing at the time when the document was executed – a principle that has been a bedrock of English law since the judgment of Lord Wilberforce in Prenn v Simmonds [1971] 1 W.L.R. 1381 and appears now to have been accepted as also properly reflecting the approach that this court should adopt in relation to such matters;*
>
> *(iii) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document and include (to use the language of Lord Hoffmann in Investors Compensation Scheme Ltd. V West Bromwich Bldg Socy ([1998] 1 W.L.R. at 913), from whose speech only Lord Lloyd of Berwick dissented) – "… absolutely anything which would have*

affected the way in which the language of the document would have been understood by a reasonable man";

(iv) evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (evidence of this kind being relevant where an estoppel is said to arise but not in this jurisdiction, unlike some others, as an aid to construing the original meaning of the document);

(v) the critical provisions …, as with all words and phrases, have to be read in the context of the document as a whole;

(vi) words should as far as possible be given their ordinary meaning: "Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation": per Lord Steyn in Society of Lloyd's v Robinson ([1999] 1 W.L.R. at 763); and

(vii) this last precept may, however, have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion: "common sense" in the context being best reflected by the passage from the speech of Lord Reid in Schuler (L.) A.G. v Wickman Machine Tool Sales Ltd. ([1974] A.C. at 251) in which he observed:

> *"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."*

(See also Lord Steyn, again in Society of Lloyd's v Robinson ([1999] 1 W.L.R. at 763), and Lord Hoffmann's observations in the Investors Compensation Scheme case concerning the need, on occasion, for a court to accept that the parties must have used the wrong words or syntax.)"

The learned Commissioner continued in paragraph 63:

> "*It is also elementary, first, that when attempting to discern the true meaning of a power conferred in a trust deed or other instrument the court must have regard to the nature of the deed and the purpose for which the power appears to have been granted – though this will depend to a large extent on the terms of the instrument itself; and secondly, that a power of amendment reserved in a trust must be exercised for the purpose for which it was granted and not for one beyond the contemplation of the makers of the original instrument (Lord Steyn (ibid.), citing Hole v Garnsey [1930] A.C. 472).*"

This guidance was adopted and applied in *In the matter of the Representation of BBB Limited* [2011] JRC 240 and I propose to adopt it in the present case as being equally useful under the laws of Guernsey.

22. In many respects, that guidance explains and elaborates on the summary of the principles given by Lord Hoffmann in his speech in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 All ER 98, at 114g, which has been accepted and applied by this Court previously:

> "*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce [in Prenn v Simmonds] as the 'matrix of fact', but the phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] 2 WLR 945).*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*"

Further, in the context of construing a trust deed, in *British Airways Pension Trustee Ltd v British Airways plc* [2002] EWCA Civ 672 it was noted that "*a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created*" (para. [30]).

23. In *W.T. Ramsay v IRC* [1982] AC 300, Lord Wilberforce also commented on the need to ascertain the true intention from the document, adding (at p. 323):

> "*This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions found to be genuine, as such, it does not compel the court to look at a document or transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form …*".

Further general guidance is found at the end of the judgment of Sir Thomas Bingham MR in *Arbuthnott v Fagan* [1995] CLC 1396:

> "*Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.*"

Contemporaneity

24. The fact that the Deed of Exclusion and the Deed of Addition were so closely related is also relevant. In *Gartside v Silkstone and Dodworth Coal and Iron Company* (1882) 21 Ch D 762, Fry J (at p. 767) stated:

> "*I think the law stands in this way, that when two deeds are executed on the same day, the Court must enquire which was in fact executed first, but that if there is anything in the deeds themselves to shew an intention, either that they shall take effect pari passu or even that the later deed shall take effect in priority to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties.*"

The inference from the minutes of the meeting of the directors of the Trustee held on 21 October 1997 is that the business conducted first was to exclude the Settlor's linear descendants and the business conducted second was to add the C Foundation as an Appointed Class. In any event, the two transactions are clearly so inter-related that the Deed of Addition is relevant background for the purposes of the proper construction of the Deed of Exclusion. Indeed, the precise order in which they were executed is probably irrelevant because they were being treated almost as if they were equal and opposite elements of a combined transaction. This approach is also consistent with general contractual principles: "*A document executed contemporaneously with, or shortly after, the primary document to be construed may be relied upon as an aid to construction, if it forms part of the same transaction as the primary document*" (Lewison, *The Interpretation of Contracts*, 5th ed., para. 3.03).

Imputed exercise of power

25. Under English law, the imputation to a trustee of an intention to exercise a power available to him to achieve the desired result unless it can be inferred that there was an intention not to exercise it, to which Judith Bryant referred, derives from *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511. The analysis of Scott J (on p. 1530) begins by referring to *Sugden on Powers*, 7th ed. (1845), vol. 1, p. 356:

> "*A donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears.*"

to which was added (at p. 421):

> "*It is intention then that in these cases governs: therefore, where it can be inferred that the power was not meant to be exercised, the court cannot consider it as executed.*"

Scott J then states (at p. 1530F):

> "*A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and the cases to which I have referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that not to exercise the power cannot be inferred. If the requisite intention [sic] can be imputed, the court will treat the disposition as an exercise of the power. In the present case, Industries purported, in conjunction with Mr. Davis and Mr. Wardle, to bring into effect valid rules for the pension scheme. It was objected that Mr. Parsons was a trustee whose concurrence was necessary. But Industries had power to remove Mr. Parsons as a trustee and could properly have exercised that power in order to bring the rules into effect. I can see no difference in principle between the position of A in my example and the position of Industries, nor any reason why the courts should be prepared to apply an ameliorating principle of equity only to disposition of property. In my judgment, the principle is applicable in the present case, unless an intention on Industries' part not to exercise its power of removal can be inferred.*"

I have quoted the application of the principle in that case as well as the bare principle in order to explain that it was used to render effective what would otherwise have been an ineffective act. I also note that it is referred to as "*an ameliorating principle of equity*", whereas the effect of applying it without more ado in the present case might arguably produce an outcome that is adverse to the interests of everyone concerned.

Direct or indirect benefit

26. The main case, however, to which reference has been made is *Commissioners of Inland Revenue v Botnar* [1999] STC 711, but also bearing the reference "1999 WL 477359". It is a judgment of the English Court of Appeal dated 23 June 1999. Mr Botnar and his wife had been excluded as beneficiaries under the settlement in question, which contained the following provision at clause 23:

> "*NO Excluded Person shall be capable of taking any benefit in accordance with the terms of this Settlement and in particular but without prejudice to the generality of the foregoing provisions of this Clause:-*
>
> *(a) The Trust Fund shall henceforth be possessed and enjoyed to the entire exclusion of any such Excluded Person and of any benefit to him by contract or otherwise*
>
> *(b) No part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit of any such Excluded Person*".

The Settlement also contained a power (in clause 3(c)) for the trustees to pay or transfer the whole or any part of the capital to the trustees of another trust, the only restriction being that at least one of the Appointed Class must be interested in the transferee trust. The question was whether the possibility of Mr Botnar being a beneficiary of such a transferee trust meant that, in the words of section 478(1) of the Income and Corporation Taxes Act 1970, he had

"*power to enjoy, whether forthwith or in the future, any income of*" a company that was resident or domiciled out of the United Kingdom, that income being accumulated in the transferor trust. If the trust documentation had been construed so that Mr Botnar could never benefit from such a transferee trust, then such a "*power to enjoy*" could not be shown.

27. Mance LJ (as he then was) drew a distinction between a payment or transfer "*between*" trusts and a payment, application or appointment "*under*" the trust. In relation to clause 23, he highlighted the words "*in accordance with the terms of this Settlement*". Accordingly, when read as a whole, the powers in the Settlement enabled the trustees to make a payment or transfer to a transferee trust from which Mr Botnar might benefit and there was nothing within the Settlement prohibiting the trustees from conferring such a benefit indirectly, meaning he had a "*power to enjoy*", even though they could not confer a direct benefit on an Excluded Person such as Mr Botnar. That conclusion was shared by Aldous LJ:

> "*… clause 23 does not prevent the trustees settling capital under the terms of another settlement. Thus clause 23 does not prevent the trustees settling capital under clause 3(c) so long as the restrictions imposed by clause 3(c) are complied with. Mr Botnar, an excluded person under this settlement, can be a potential beneficiary under another settlement to which capital could be transferred under clause 3(c).*"

Accordingly, a trustee decision to pay or transfer to another settlement from which Mr Botnar might benefit would not contravene the doctrine of fraud on the power, which "*invalidates the exercise of a power which appears to be in conformity with its terms but is in fact made for some collateral purpose not within its proper scope*". Morritt LJ, however, took the view that it was not permissible to exercise the power if the purpose of doing so (as opposed to any incidental effect) was to benefit an excluded person.

Discussion

28. With those principles in mind, I turn to consider what construction to give to the Deed of Exclusion, bearing in mind the powers in the Declaration of Trust. I take the view that the principles of English law to which I was referred (and on which Judith Bryant and Nicholas Le Poidevin QC relied when giving their respective Opinions) are equally applicable as a matter of Guernsey law. The principal exercise in this case is to construe the relevant documents and I am not aware of anything in Guernsey law that would lead to a different approach being required to that to which I have already referred set out in the English law authorities.

29. The power in clause 4.9(b) is "*to declare that any person is thenceforth to be an Excluded Person*". The Deed of Exclusion does not name any person or persons but refers to a class of person. I consider that this is permissible under the terms of clause 4.9(b) because the wording used for the class in the Deed of Exclusion means the persons to be included were capable of being ascertained. It was also a means by which any future persons coming within the definition were covered. In effect, the Deed of Exclusion removed (a)(ii) from Schedule One to the Declaration of Trust as if it had been capable of being excised through amendment.

30. The first significant thing to note is the final sentence of the Deed of Exclusion ("*This declaration is irrevocable and applies to the whole Trust Fund*"). In my view, this wording accurately reflects the powers of the Trustee under clause 4.9(c). The Trustee chose to make the declaration irrevocable rather than revocable and applied it to the entirety of the Trust Fund rather than specifying a part only. By choosing not to refer to just income or just capital, the declaration must be taken to cover both income and capital. The effect of the exclusion of the Settlor's linear descendants was, therefore, as complete as it could be under clause 4.9.

31. Because of the inclusion of those words, the issue for determination is what meaning to give to the words earlier in the Deed of Exclusion: "*for all the intents and purposes of the Trust so that none of them shall be eligible to benefit in any way from the Trust*". Taking those words at face value, my immediate reaction to them is that declaring the class of the lawful linear descendants of the Settlor to be "*Excluded Persons for all intents and purposes of the Trust*" offers a similar focus to the words "*in accordance with the terms of this Settlement*" in clause 23 of the Settlement in the *Botnar* case. If the final sentence of the Deed of Exclusion had not been inserted, these words would have been indicative of the Trustee wishing to exercise the power to exclude the class of persons from the whole of the Trust Fund. To that extent, the words "*for all the intents and purposes of the Trust*" appear to do no more than duplicate, rather than add to, what the Trustee was permitted to do. However, the addition of the words "*so that none of them shall be eligible to benefit in any way from the Trust*" may be construed as meaning something over and above that or they may be yet another way of saying exactly the same thing. The latter construction is possible because of the benefit being confined to being a benefit "*from the Trust*", but the words "*in any way*" might point to a broader meaning.

32. I note that in Judith Bryant's Opinion she concludes that clause 4.4(a) of the Declaration of Trust "*is sufficiently widely drafted to have enabled the Trustee to vary the trusts of the Trust so as to exclude the Linear Descendants from all future benefit from under the Trust, such a variation being for the benefit of the Beneficiaries other than the Linear Descendants*" (para. 11) and that (at para. 12):

> "*… there is nothing in the Declaration of Exclusion to suggest that the Trustee did not intend to exercise the power conferred on it by clause 4.4(a) to exclude the Linear Descendants from future benefit under the Trust. On that basis, there would appear to be nothing to prevent the Court from imputing to the Trustee an intention to exercise the power conferred on it by clause 4.4(a) to bring about the result intended in the Declaration of Exclusion, and on that basis, it seems most likely that the Court would decide that the Declaration of Exclusion was effective to exclude the Linear Descendants from being eligible to benefit from the Trust Fund in any way whatsoever*".

Looking at the Deed of Exclusion, I accept that that is one possible construction of the document and, if looking solely at that document, the conclusion that can properly be reached.

33. As I have already indicated, though, it is not the only possible construction of the document. Further, it relies on imputing to the Trustee an intention to exercise the power conferred on it by clause 4.4(a) when to do so would be contrary to what appear to be the interests and intention of the Primary Beneficiary. As such, applying the principle of imputation would also potentially lead to an outcome not desired by the Trustee, which took care to ensure that the Deed of Exclusion and Deed of Addition produced an effect that was not automatically disadvantageous to that class of persons. Having regard to the steps taken by the Trustee, on a balance of probabilities, I consider that the evidence supports the inference that the Trustee did not intend to exercise any power under clause 4.4(a).

34. Moreover, unlike in *Davis v Richards & Wallington Industries Ltd* (*supra*), the imputation of an intention to exercise the power in clause 4.4(a) would not result in a transaction that might otherwise fail being saved, but rather might produce the opposite outcome. As it was put by Nicholas Le Poidevin QC (at para. 19 of his Opinion), "*Despite the wide words of the deed of exclusion, the inference that the descendants were meant to be excluded from benefit via the Foundation would be plainly incorrect: that deed must have been intended to be consistent with the deed of addition*".

35. I am satisfied that this is the proper conclusion to reach as to the meaning of the words in the Deed of Exclusion. It is consistent with the approach of the English Court of Appeal in the

Botnar case to have regard to what it means for a Beneficiary to be declared to be an Excluded Person. This prohibits the Trustee from conferring a direct benefit on such a person under the Trust. It should not, and in my view does not, prohibit the Trustee from conferring a direct benefit on a person in the Appointed Class which may have the incidental effect of conferring a benefit on a person who has been declared to be an Excluded Person. If that were the consequence of the Deed of Exclusion, it would mean that the Deed of Addition was entered into in error and the precautions taken by the Trustee back in the run-up to 1997 would all have been for nothing.

36. In reaching this conclusion, I have paid particular attention to the minutes of the meeting of the directors of the Trustee on 21 October 1997 and the inter-connection between the Deed of Exclusion and the Deed of Appointment. In my view, they cannot be regarded as anything other than part of the overall transaction to be effected in these two documents. Looked at in the round, "*the surrounding circumstances or "matrix" of facts existing at the time*" were that those concerned in considering the re-structuring of the C Trust wanted to interpose the C Foundation above the Settlor's descendants, thereby enabling them to benefit directly from that Foundation rather than directly from the C Trust. I note the need to be careful to distinguish here between the Trustee's subjective intent and the surrounding background. None of the evidence indicates that it is a proper inference that the power in clause 4.4(a) was to be executed by the Trustee, but rather that it was not to be executed despite the wording contained in the Deed of Exclusion. As Mance LJ noted in the *Botnar* case, "*the court should eschew remote hypotheses of unlikely fact*". I think that it would be a remote hypothesis of unlikely fact to suggest that it was the presumed intention of the Trustee, or of anyone corresponding with the Trustee in the 1990s, to exclude the Settlor's linear descendants from any benefit, direct or indirect, and at the same time to add the C Foundation in the Appointed Class.

37. As regards the words "*for all the intents and purposes of the Trust*", I further note that they were also included in the Deed of Addition. I consider that their use in both documents supports the conclusion that these words mean that the Trustee was doing no more than clarifying that the exclusion or addition, as the case may be, was to be effective in respect of the entirety of the Trust. I further consider that it is significant that the words that follow in the Deed of Exclusion commence with "*so that*". Those two words, in my view, provide a clear link with the preceding words, demonstrating that the proper meaning of the following words ("*none of them shall be eligible to benefit in any way from the Trust*") arises from the context of a further explanation of the generality of the exclusion. In giving the Deed of Exclusion this construction, I have sought to identify the presumed intention of its maker, namely the Trustee, from the words actually used, construing the document as a whole, and the background of the surrounding circumstances at the time in 1997 and for the years since 1993.

38. This interpretation is also consistent with the meaning of clause 4.9(d) of the Declaration of Trust. As was noted in both Opinions from Counsel, something has gone wrong with the wording of this paragraph. The final words refer to "*the Trustee [not being liable] in respect of any such payment appropriation or application which may be made by them before receiving notice of such declaration*", whereas the preceding words refer to "*any power or discretion conferred on appropriation or application*" but without referring to "*payment*". The omission of some words, "on the Trustees to effect any payment" possibly being needed immediately after "*conferred*", does not make any difference for the purposes of determining this case. This is because the operative words are the absolute prohibition on the Trustee "*exercising in favour of the person who is or thereby becomes an Excluded Person … any power or discretion conferred*" (emphasis added).

39. As in the *Botnar* case, the Trustee acts within the confines of the powers or discretions contained in the C Trust. In my judgment, use of "*in favour of*" indicates that the paragraph relates to direct benefits under the C Trust rather than indirect benefits obtained more broadly

as a result of it. If, contrary to the conclusion I have reached, the imputation of intention principle were applicable, it would mean that clause 4.9(d) would have to be modified to make it accord with the wider exclusion suggested in Judith Bryant's Opinion. Because the Deed of Exclusion is completely silent about such a modification and how it would operate, I regard this as a further reason why the Trustee should not be treated as purporting to exercise the power conferred by clause 4.4(a). In my view, it is simply asking too much to introduce into the Deed of Exclusion this much wider construction of the wording. I therefore agree with the Trustee's contention (at para. 44 of its Skeleton Argument) "*that the prohibition in Clause 4.9(d) simply prevents the Trustee exercising a power or discretion to make a payment, appropriation or application of the trust fund directly in favour of an Excluded Person but it would not prevent the Trustee exercising a power or discretion in favour of a beneficiary who was not an Excluded Person in circumstances where there was either the intention or a possibility that an Excluded Person or Excluded Persons could also benefit indirectly.*"

Conclusion

40. For the reasons given, I will grant the relief sought by the Trustee at paragraph 4 of its Application. The interpretation I have given to the documentation leads to the result that the Deed of Addition has not been rendered invalid and confirms that the Trustee is free, as appears to have been the presumed intention of all those concerned, to treat the C Foundation as a Beneficiary, even if the consequences of doing so may be that one or more of the Settlor's linear descendants, who have been declared to be Excluded Persons, take an indirect benefit. As a result, the alternative relief pursued in para. 5 of the Application falls away and the hearing with Jurats provisionally scheduled can be vacated.

41. In accordance with paragraph 6 of the Application, I am also content to make the customary order that "*all the costs of the Application … be paid from the funds of the Trust on an indemnity basis*". As a final note, I should also record my gratitude to Advocate Kapp for her helpful written and oral submissions.

