Appeal concerning the construction of the R Trust, on the ground that it was not open to the Appellant to increase from one to three the number of persons holding the office of the Protector in relation to the Trust as constituted by the Declaration of Trust.

[2020]GCA065

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 539

23 July 2020

Before:

Clare Montgomery QC, President
George Bompas QC
Helen Mountfield QC

Between:

A **Appellant**

-v-

THE TRUSTEES

("Applicants" or "Trustees")

-and-

(2) B
(3) C
(4) D
(5) – (12); (15)-(19) THE MINOR AND UNBORN BENEFICIARIES AND THEIR REPRESENTATIVES
(13) THE INCUMBENT PROTECTOR

("Respondents")

IN THE MATTER OF
THE TRUSTS (GUERNSEY) LAW 2007 (AS AMENDED)

-and-

IN THE MATTER OF THE R TRUST

Advocate Simon Davies for the Appellant A and the Respondent B
Advocate A D Laws for the Second Respondent's Minor and Unborn Beneficiaries
Advocate Jeremy Wessels for the Respondent C
Advocate Paul Richardson for the Respondent D
Advocate C J Hay for the Fourth Respondent's Minor and Unborn Beneficiaries
Advocate Alison Ozanne for the trustee Respondents
Advocate Konrad Freidlander for the Respondent The Incumbent Protector

JUDGMENT OF THE COURT
(in camera)

HELEN MOUNTFIELD JA:

The issue in this appeal

1 This appeal concerns the construction of the R Trust, one of a number of trusts for the benefit of the family, referred to in these proceedings as "the R Trust". It is an appeal from the Order made by the Royal Court (Richard McMahon Esq, then the Deputy Bailiff and now the Bailiff of Guernsey) on 29 January 2020, when he gave a judgment deciding that, on the true construction of the deed establishing the RA Trust executed in 2003 ("the Declaration of Trust"), it was not open to the Appellant, A, to increase from one to three the number of persons holding office as the Protector in relation to the trust constituted by the Declaration of Trust.

2 The question of construction in this appeal does not turn on contested facts. It is a pure point of law, namely, whether or not the Deputy Bailiff was correct in construing the Declaration of Trust so as to find that the Appellant lacked the power she had purported to exercise to appoint further persons to the office of the Protector jointly with the Incumbent Protector, the Thirteenth Respondent. This turns on the meaning of paragraph 1 of Schedule C to the Declaration of Trust.

The central provisions of the Declaration of Trust and the central contentions of the parties upon them.

3 The Declaration of Trust established a trust of certain property governed by Guernsey law. Provision was made for "*the Protector*" to have various functions, including giving or refusing consent to certain appointments (clause 3) and appointing or removing trustees (paragraphs 11 and 13 of Schedule B).

4 Clause 1 of the Declaration of Trust defines the expression "*the Protector*" as meaning "*the person or persons for the time being occupying the office of the Protector pursuant to the provisions of Schedule C*". That Schedule is headed "*the Office of the Protector*", and contains a number of provisions concerning the Protector's appointment, powers and so forth. We consider further the material provisions of Schedule C later in this judgment.

5 Paragraph 1 of Schedule C to the Declaration of Trust is central to this appeal and starts with the words "*Identity of the Protector*" and continues "*The Protector in relation to the Trust Fund shall be ...*". There is then a series of five immediately relevant sub-paragraphs, each but the last ending with the words "*and subject thereto*", listing in turn various persons or categories of persons who might be appointed as the Protector.

6 Paragraph 1 reads as follows:

> ***1 Identity of the Protector***
>
> *The Protector in relation to the Trust Fund shall be:*
>
> *1.1* The Incumbent Protector *for so long as he has not resigned and is able to act as the Protector and subject thereto*
>
> *1.2 such person or persons (either jointly or in succession) as A may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated*

are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector and subject thereto

1.3 such person or persons (either jointly or in succession) as the person or persons for the time being in office as the Protector under an appointment made under the paragraph above may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector (and if the appointment made under paragraph 1.2 above provided for successive Protectors then any exercise of this power by an earlier Protector in the succession shall exclude any exercise of this power by a later Protector in the succession) and subject thereto

1.4 such person or persons (either jointly or in succession) as the person or persons for the time being in office as the Protector under paragraph 1.3 above may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector (and any exercise of this power by an earlier Protector in the succession set out in paragraphs 1.3 shall exclude any exercise of this power by a later Protector in the succession) and subject thereto

1.5 such person or persons (either jointly or in succession) as the Trustees may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector.

1.6 Any statement in a deed appointing the Protector that any person is no longer in office as the Protector no longer living or no longer capable of acting shall be conclusive in favour of any person dealing with the Trustees.

7 It is notable that each of paragraphs 1.1 to 1.5 sets out a person or persons who may be nominated as Protector and the person or persons who may appoint them and specifies in such circumstances whether the appointment is revocable or irrevocable. It is also notable that paragraphs 1.1 to 1.4 all conclude with the words "and subject thereto": in other words, each of paragraphs 1.2 to 1.5 is "subject to" something which precedes them. The issue before the parties is, subject to what?

8 The Appellant, supported by the Second and Fourth Respondents, B and D, submits (in summary) that 'subject thereto' means 'subject to there being, for the time being, fewer than three persons together holding office as the Protector': in other words, all powers of appointment in paragraphs 1.2 to 1.5 are available to be put into effect at any time to add to the number of persons holding office, unless for the time being there is already the maximum number of three holding office.

9 The Third Respondent, C, the Incumbent Protector and the Trustees all submit (in effect) that the words "subject thereto" mean "subject to the conditions which precede them in the sub-clause not being satisfied", or, in other words subject to there being no such person or persons in office, not having resigned and being able to act. Thus, so it is submitted, paragraph 1 of Schedule C contains a cascade of appointment mechanisms, and only if a method of appointment in one

subparagraph has not been exercised, or the appointment made thereunder has terminated in accordance with the terms of the Declaration of Trust, can a power of appointment in a subsequent sub-paragraph be exercised effectively so as to appoint a person to hold office currently.

The purported exercise by the Appellant of the power of appointment under paragraph 1.2 of Schedule C to the Declaration of Trust

10 When the Declaration of Trust was made in 2003, the Incumbent Protector was appointed as the Protector *"... for so long as he has not resigned and is able to act as the Protector and subject thereto ... [persons in subsequent subclauses]*". The Incumbent Protector is thus named in paragraph 1.1 of Schedule C, as the first person in the paragraph 1 list of prospective Protectors. He is alive, he has not resigned and he is able to act.

11 However, on 18 December 2019 the Appellant executed a deed ("the December 2019 Deed") in which she was expressed to have appointed two companies, the Purported Additional Protectors "*as Protectors of the Trust acting with the current Protector [i.e. the Incumbent Protector]*" with immediate effect.

12 The question on this appeal is whether on true construction, paragraph 1 of Schedule C of the Declaration of Trust gave the Appellant power, by appointing the Purported Additional Protectors to add to the number of persons currently holding office as the Protector so that the Incumbent Protector was not alone in holding that office.

13 It is relevant that where more than one person is in office as the Protector, the powers of the Protector may be exercised by a majority. This is provided in paragraph 3 of Schedule C to the Declaration of Trust, set out in full later in this judgment. It is also relevant to note that by paragraph 11.1 of Schedule B to the Declaration of Trust, the power of appointment of new trustees is vested in the Protector (and subject thereto shall be vested in the Trustees).

14 On 14 January 2020 the Purported Additional Protectors executed a deed of appointment and retirement, expressed to be in exercise their powers as a majority of the persons holding office as the Protector, to change the trustees of the trust constituted by the Deed of Trust. Obviously, if the appointment of the Purported Additional Protectors was ineffective to make the Purported Additional Protectors a majority of those holding office as the Protector, that deed executed on 14 January 2020 was also of no effect.

15 The Appellant's claim is, however, that the powers given to her in relation to the appointment of the Protector did enable her have the trustees changed by the expedient of appointing additional persons to the office of the Protector so as to bypass the Incumbent Protector, the additional persons constituting a majority and thus denying him the ability to determine the decisions to be made by the Protector.

16 In this regard Advocate Simon Davies on behalf of the Appellant has submitted that there is a presumption of validity as to the acts of the Appellant and of the Purported Additional Protectors when making respectively the documents of 18 December 2019 and 14 January 2020, which would lead to the Appellant's suggested interpretation of paragraph 1 of Schedule C to the Declaration of Trust being presumed to be correct unless the contrary were shown. We return to this later. He has also submitted that the ultimate economic settlor must be taken to have intended the Appellant's suggested interpretation of that paragraph because, after all, the

Appellant was his wife and the Incumbent Protector not a member of his family but a professional man.

The first instance judgment

17 In his judgment, given ex tempore but nevertheless long, detailed and careful, the Deputy Bailiff held that the Appellant did not have the power contended for, so that the December 2019 Deed was not effective to add the Purported Additional Protectors to the number of persons for the time being occupying the office of the Protector; and accordingly, the Incumbent Protector remains, and has at all times remained, the only person occupying that office.

18 On this appeal Advocate Davies (who appears for both the Appellant and B), and Advocate Paul Richardson who appears for D, contend that Appellant does have the power to appoint additional persons to hold office as the Protector alongside the Incumbent Protector, as she professed to do in December 2019, and that the Deputy Bailiff was mistaken in finding that the Declaration of Trust did not give her that power. Advocate Davies submits, correctly, that the Appellant's appeal on this point is an appeal on a pure point of interpretation.

The principles to be applied

19 The principles to be applied in interpreting the Declaration of Trust are familiar, not in dispute and, at any rate for the appeal before us, need little elaboration or reference to authority. The aim is to arrive at the meaning which a reader of the Declaration of Trust would understand to have been intended by the settlors (the relevant trustees of various predecessor trusts). It is common ground that the Court's task is to identify the objective meaning of the language of the Declaration of Trust, and not to speculate on the subjective intentions of persons involved in drawing it up. But a reader's understanding of what is meant by provisions in an instrument is not formed simply by considering literal meanings of words. Words and phrases derive meanings from the way they are used, and so this construction exercise requires attention to be paid to the words used in the context in which they have been used. And considering the context in which words are used and trying to find the sense to be given to the words involves an appreciation of the impact of alternative interpretations, where alternative interpretations are available.

20 In paragraph [10] of a judgment given by Sir Richard Collas, Bailiff, in the matter of *K Trust* (unreported, [2019] GRC089), upon which the Appellants relied, the position we have just described was summarised for the purposes of that case as follows:

> "*... The aim is to establish the presumed intention of the Settlor from the words used in the Trust Instrument, construed against the background of the surrounding circumstances or matrix of facts existing at the time the [K Trust] was created, the critical provisions being read in the context of the document as a whole, giving words their ordinary meaning as far as possible. When comparing different constructions, a construction that leads to a very unreasonable result would be relevant; the more unreasonable the result, the less likely it would represent the Settlor's intention. In looking at the matrix of facts, evidence of subjective intention, drafts and other matters extrinsic to the Trust Instrument is inadmissible.*"

21 In arriving at his summary of the applicable principles Sir Richard Collas drew attention to, and quoted extensively and with approval from, a judgment given by the Deputy Bailiff in the matter of the *C Trust* [2013] GLR 105, in particular at paragraphs [21] and [22] of that judgment. Advocate Davies set out these passages in full in his written contentions in support of this appeal;

and he referred also to, and quoted from, others of the many well-known decisions of the United Kingdom House of Lords and Supreme Court dealing with questions of contractual interpretation, including *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. The thrust of his written submission was that language should have primacy in the interpretation of contracts, his contention being that in the present case, the words used in the Declaration of Trust, and in particular the words used in paragraph 1 of Schedule C, given their ordinary or natural meaning, result in the construction of the Declaration of Trust contended for by the Appellant. We note in passing, and agree with, Advocate Davies' invitation to recognise that the essential principles are the same whether the instrument is contract or a declaration of trust.

22 We fully accept that ordinarily the words used in a legal instrument are approached as being those which the maker has chosen to use to convey the intended meaning; and that determining the meaning of words used is an objective, not subjective exercise. But the exercise of finding the intended meaning, when the instrument is to be construed, also requires the words to be considered in the context of the instrument, and the setting in which the instrument has been made. Quite properly Advocate Davies drew our attention to the guidance given by Sir Thomas Bingham MR (as he then was) in *Arbuthnott v Fagan* [1995] CLC 1396, where at 1400 he said "*to my mind construction is a composite exercise neither uncompromisingly literal nor unswervingly purposive*". That approach was further explained by Lord Hodge (with whom all the other Supreme Court Justices agreed) in the *Wood* case, above, in a lengthy passage from his judgment at paragraphs [10] to [13]: he described the approach as "*a unitary exercise*", involving an "*iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated*". That approach, applicable as it is to legal instruments such as the Declaration of Trust, is as appropriate in Guernsey as in England and Wales.

Analysis

23 There is little if any legal dispute as to the approach to be adopted. Nevertheless, however uncompromisingly literal the appropriate interpretation of the Declaration of Trust is to be, in our judgment the words used in the Declaration of Trust do not have the meaning contended for by the Appellant. Their plain meaning is that given by the Deputy Bailiff. In our judgment the meaning that the Appellant contends for is implausible. It is both linguistically strained, being contrary to an ordinary understanding of the words 'subject to' or 'subject thereto' and has an obviously unintended and unreasonable result. This we now explain.

24 We start with the text of paragraph 1 of Schedule C to the Declaration of Trust. It starts with the words "*the Protector in relation to the Trust Fund shall be …*". The purpose of this paragraph is, therefore, as the learned Deputy Bailiff correctly observed, to enable a reader to answer the question, as to who is the Protector of the Trust, at any point in time.

25 The focus in paragraph 1 of Schedule C is on the expression "*and subject thereto*" at the end of each of sub-paragraphs 1.1 to 1.4.

26 The Deputy Bailiff concluded that the words 'subject thereto' in these sub-paragraphs are used in their ordinary sense of meaning that whatever immediately precedes them – in paragraph 1.1 the Incumbent Protector while willing and able to act – takes priority over what follows. This construction takes the words "*and subject thereto*" as excluding anyone appointed pursuant to a later sub-paragraph where there is someone from an earlier one holding office. Thus, the words "*and subject thereto*" mean "*and absent any such person"* or quite simply "*and if not that person*

(or persons) then". In other words, the powers of appointment in sub-paragraphs 1.2-1.5 are all contingent on ("subject to") the appointment under an earlier sub-paragraph having never been made or having lapsed: persons identified by deeds of appointment under the second, third, fourth and fifth sub-paragraphs can only qualify for the office of (and consequently be) the Protector if there is no-one appointed under a previous sub-paragraph who is or remains the Protector for the time being. The alternative appointment mechanism in each sub-paragraph can only operate to constitute someone to be the Protector if an appointment made under a previous paragraph is no longer in place for a specified reason, namely resignation or inability to act; the appointment not having been made, or having been revoked, in subsequent sub-paragraphs.

27 It is worth pointing out, we think, that the arrangement in paragraph 1 is not directed so much at the exercise of powers of appointment, that is the time when powers are exercisable, but at the effect of their exercise. The use of the words "*subject thereto*", divide appointees into successive pools of prospective appointees. The question is not whether, say, the Appellant has a power at all under paragraph 1.2; it is the range of the power and in particular whether that power can be exercised so as to enable other persons to be appointed to the office of Protector (jointly) at a time when the Incumbent Protector holds office, or whether it can only be exercised 'subject' to his resignation or inability to act. Can someone from the paragraph 1.2 pool, as it were, be added to join with the Incumbent Protector? Or can someone from the paragraph 1.3 pool be added to join with the Incumbent Protector or, (it may be) someone from the paragraph 1.2 pool?

28 In his judgment the Deputy Bailiff drew attention to paragraphs 3 and 4 of Schedule C. Paragraphs 3 and 4 are in the following terms:

> *"3. Number of Protectors*
> *The number of persons entitled to exercise the powers of the Protector in relation to the Trust Fund at any given time shall not exceed three and in any case where there is more than one person entitled to exercise such powers at a given time the powers shall be exercisable by a majority of such persons.*
>
> *4. Resignation and Death*
> *The Protector:*
> *4.1 shall resign (if at all) by executing a deed to that effect which deed may be executed in advance of assuming office as the Protector;*
> *4.2 shall as soon as is practicable supply the Trustees with any deed of resignation executed by him;*
> *4.3 shall in the case of any prospective resignation as soon as is practicable supply A (if living) and any other Protector then in office with a copy of any deed of resignation executed by him;*
> *4.4 shall (if an individual) inform his personal representatives (in the body of any will made by him or otherwise) and/or his lawyer or any other responsible person or persons of the necessity of informing A (if living) any other Protector then in office and the Trustees as soon as practicable of his death."*

29 The Appellant by Advocate Davies suggested that her power of appointment in sub-paragraph 1.2 is available to add to the number of persons who are for the time being the Protector, while the Incumbent Protector is still the Protector pursuant to his appointment by the settlors in paragraph 1.1, until the maximum of three persons permitted by paragraph 3 has been reached. But if that were correct, one would expect the words "subject thereto" to have been used in relation to that

maximum. If this had been the intended meaning of "subject thereto" in sub-paragraph 1.2, the obvious way to achieve this would have been to place a reference to the maximum number of persons holding office after the terms of appointment of the Incumbent Protector and before the words "subject thereto" in sub-paragraph 1. It strains the meaning of "subject thereto" to presume that the powers of appointment in paragraphs 1.2 and following are "subject to" both to the terms of 1.1 (ie the precedent matters set out), but (sub silentio) also subject to the subsequent terms of the later paragraph 3 of Schedule C. As Stroud's Judicial Dictionary of Words and Phrases 9th ed states, by reference to *Gray v Goulding* (1860) 2 LT 198 and other cases, the "*ordinary and grammatical construction of 'and subject to' is that it refers to the immediate antecedent in the same sentence*" (emphasis added).

30 As the Deputy Bailiff also observed, the Declaration of Trust uses the expression "*subject thereto*" in a number of other provisions besides paragraph 1 of Schedule C, such as paragraph 11.1 of Schedule B, dealing with the appointment of Trustees. The paragraph reads: "*The power of appointing new trustees of this Trust shall be exercisable by deed and shall be vested in the Protector and, subject thereto, shall be vested in the Trustees*". Paragraph 13 in Schedule B is also relevant, in that paragraph 13.1 gives to "*The person or (as the case may be persons) for the time being having power to appoint new trustees under paragraph 11.1 of this Schedule*" power to direct the immediate or future retirement of the Trustees (provided, however, that various conditions specified in paragraph 13.2 are satisfied).

31 It seems to us clear beyond argument that in paragraph 11.1 of Schedule B the force of the expression, "*subject thereto*", is to establish a hierarchy of powers of appointment, and to tell the reader of the paragraph that the power of appointment lies with ("*shall be vested in*") the Protector if there is one, and otherwise lies with ("*shall be vested in*") the Trustees. The paragraph cannot sensibly be read as giving the Trustees a power to be exercised jointly, or in parallel, with a power lying with the Protector; and the paragraph cannot even be read as giving a power to be exercised if the Protector chooses not to exercise the power. The words have been used to explain where "*the power of appointing*" is vested at any time: it is vested in the Protector, if there is one. If there is no Protector, the power lies with the Trustees. In short, in paragraph 11.1 the words "*subject thereto*" have been used with an exclusionary effect: what follows the words "*subject to"* is excluded where what precedes them describes a satisfied condition (there being someone who is the Protector).

32 Since words are generally used in the same sense throughout a document, this lends support to the proposition that the successive appointment mechanisms in paragraph 1 of Schedule C is each "subject to" the operation of that in an earlier subparagraph – ie that the phrase "subject thereto" is used in paragraph 1 of Schedule C to establish a hierarchy of appointment mechanisms. The relevance of paragraph 11.1 of Schedule B is that it is an example of the maker of the Declaration of Trust using the words "*subject thereto*" with precisely the force which the Deputy Bailiff took them to have in paragraph 1 of Schedule C. Only if the circumstance described before the words is null does what follow the words obtain.

33 In this connection, the use of the definite article in paragraph 1 is instructive. In each of sub-paragraphs 1.2 to 1.5, the description of the process by which someone is to become identified is by the execution by a relevant person of a deed to "*appoint*" that someone be "*the Protector*" (emphasis added). If the paragraph did indeed contemplate additions being made, under different sub-paragraphs, to the persons for the time being occupying the office of the Protector, so that for example the Appellant might add persons to join with the Incumbent Protector under sub-paragraph 1.2, or persons appointed by the Appellant under sub-paragraph 1.2 might under sub-paragraph 1.3 appoint persons to join with them as Protectors, the natural way of expressing the

appointment required under the subsequent sub-paragraph would be to say that the person was to be appointed to be *a* Protector, not *the* Protector. That would show that the person was not necessarily to fill the office, but could be joining with someone else from a previous sub-paragraph to fill the office.

34 It can be seen from numerous provisions in the Declaration of Trust that the maker understood that a person who was for the time being occupying the office of the Protector might simply and appropriately be referred to as "a Protector". So, for example, paragraph 2 of Schedule C explained that a person could be "*a Protector*" although neither resident nor domiciled in the place of the Trust's governing law (ie Guernsey). Other similar examples of the use of the expression "*a Protector*" are to be found in paragraphs 8, 11 and 12 of Schedule C. In every case the use is apt to refer to a person who for the time being is, or a person (or persons) consisting of one or more of those comprising, the Protector (in the sense of the office of Protector).

35 Finally, when looking at the language of paragraph 1 of Schedule C, we agree with the Deputy Bailiff that a natural way of reading the words "*subject thereto*" at the end of each sub-paragraph is to connect them, to take them as referring to, the circumstance of the person or persons indicated in the sub-paragraph as being the Protector not having resigned or becoming unable to act. In each case what immediately precedes the words (ignoring text set out in brackets) are the words "*... for so long as [he] [such person (or as the case may be persons) is in being] has not resigned and is able to act as the Protector ...*".

36 We consider the description of paragraph 1 of Schedule C as a waterfall or cascade is an apt one, even on the Appellant's proposed construction of the provision. The case advanced by the Appellant is that paragraph 3 of the Schedule contemplates that there may be at any time, including where the Incumbent Protector is still the Protector, up to three persons qualifying as holders of the office. But the Appellant must acknowledge that the paragraph is designed to set out a series in which candidates for the three places are prioritised. To take an obvious point, if the Appellant is correct, and chooses to appoint under sub-paragraph 1.2 one other person to act with the Incumbent Protector, that person could on her case appoint a third person under sub-paragraph 1.3. Suppose then the Appellant's appointee resigns so there are now only two persons (the Incumbent Protector and the sub-paragraph 1.3 appointee). The sub-paragraph 1.3 appointee could effect a replacement under sub-paragraph 1.4 without the Incumbent Protector's participation or the participation of the Appellant. But one would suppose that, should the Appellant appoint a replacement under sub-paragraph 1.2, that appointee would take priority, that being the force of the words "*subject thereto*".

37 Describing the sequence of possible appointments as we just have done exposes two difficulties arising with the Appellant's construction.

38 First, take a situation where – as the Appellant contends could be the case - for the time being, the office of Protector is constituted by three people: the Incumbent Protector, an appointee under sub-paragraph 1.3 and a further appointee under sub-paragraph 1.4. Would the Appellant be able to make an appointment so as to displace one of the appointees other than the Incumbent Protector? The paragraph is silent on the point, unless the words "*subject thereto*" are effective to ensure that an appointment under a previous paragraph displaces a subsequent one. But if that were the case, one would expect the language to say so clearly; and if it were, what then would be the case where the Protector is constituted for the time being by three appointees all appointed under sub-paragraph 1.3? On the appointment by the Appellant of a further appointee under sub-paragraph 1.2, which of the appointees under paragraph 1.3 would have to vacate office? The

paragraph certainly does not address such a possibility, and we conclude that this is because that is an untenable reading of the words "*subject thereto*".

39 Second, it is noticeable that each of sub-paragraphs 1.3 and 1.4 gives the power of appointment under the sub-paragraph to persons appointed to office under the immediately previous sub-paragraph, just as sub-paragraph 1.2 gives a power exclusively to the Appellant and not to be exercised jointly with the Protector. In other words, the expectation apparent in the drafting of sub-paragraphs 1.3 and 1.4 is that the Protector at a time when power can be exercised effectively under the sub-paragraph is constituted exclusively by persons appointed under the previous sub-paragraph. But there can be no reason why, in a case where the office of Protector is constituted by two persons, a person appointed under sub-paragraph 1.2 and a person appointed under sub-paragraph 1.3, each of the two persons should have a separate and individual power to appoint, without any indicator of which person would have priority in doing so; with the effect that it would simply be the first power to have been exercised which would fill up the vacant third place in the office of the Protector. This would make no sense. It would lead to unattractive uncertainty. It cannot have been the intention of the settlors that the method of determining the identity of the (maximum) of three persons capable of being appointed to the office of Protector would be to give a number of persons competing, but simultaneous powers of appointment. If that were the case, the identity of the person or persons validly appointed would depend simply on the happenstance of which of a number of prospective persons with a power of appointment happened to exercise the power first. This would be a recipe for chaos.

40 The Appellant has advanced, by Advocate Davies, five arguments in support of her construction of paragraph 1 of Schedule C. They can be taken briefly.

41 The first argument focuses on the fact that under each of sub-paragraphs 1.2 to 1.5 of Schedule C an appointment of a person or persons to be the Protector may be made "*either jointly or in succession*". The argument is that those words indicate that the appointee may be appointed to the office jointly with someone appointed under a previous sub-paragraph. However, "jointly" is not a natural reading of the words "subject thereto"; and provision for a joint appointment does not require that the appointment must be understood as providing for appointment jointly with an appointee under a previous sub-paragraph. Each of paragraphs 1.2 to 1.5 deals in terms with the possibility of there being more than one person appointed concurrently under the sub-paragraph. The word "jointly" as used in each case is perfectly apt in confirming the possibility of having more than one concurrent appointee under the sub-paragraph. It is not necessary, to give force to the word, to read it as referring to appointees being appointed jointly with persons in office under a previous sub-paragraph.

42 Related to this argument, the Appellant seeks to emphasise that paragraph 3 of Schedule C limits to three the number of persons for the time being holding office as the Protector. The argument is that the force of the words "*at any given time*" must be to refer to all times, contemplating a time therefore when the Incumbent Protector is the Protector. We disagree. The paragraph does nothing more than to explain that even when there may be more than one appointee (and on any view of paragraph 1, including the Deputy Bailiff's interpretation, the Declaration of Trust does provide for there to be such times), the number is limited to three; and it explains how at such times the persons constituting the Protector are to act (that is, by a majority). Paragraph 3 is entirely neutral on the question of whether a time when there are to be joint appointees includes a time when the Incumbent Protector is the Protector. For reasons we have set out at paragraph 29, if the Appellant's power of appointment in paragraph 1.2 had been intended to be always available, subject only to a maximum number of trustees not already having been appointed, it would have been linguistically possible for the Declaration of Trust to have been drafted in that

way. It was not. The powers of appointment in paragraph 1.2 are expressed to be "subject to" the preceding powers in 1.1, not the succeeding limit in paragraph 3 of Schedule C.

43 The second argument seeks to draw out some special meaning from the words "*subject thereto*". We do not believe any of the various English cases to which Advocate Davies has drawn our attention gives any assistance. Each is a case decided on the provisions of a different instrument, in each case the instrument, provisions and context being quite different from the present. The words are not terms of art, either in England or, more relevantly, in Guernsey: they take colour from their context and the meaning of the word or words which precede the phrase in the instrument in question. The question in the present case is simple. The words used in paragraph 1 of Schedule C to the Trust plainly make what follows subject to something which has gone before the words. The question is, subject to what? As to this:

43.1 We consider it is obvious that the provisions of sub-paragraphs 1.2 and following are subject to the facts set out in the preceding subparagraph ("thereto" relating to the things which precede that word).

43.2 The construction which the Deputy Bailiff found, and which is in our judgement correct, is that the Appellant's contention fails to give sufficient weight to what stands before the words "*and subject thereto*", and instead requires those words to be understood as reading "*and if there are not already three persons holding office*". But what stands before the words "*subject thereto*" is a reference to the circumstance of the person or persons referred to not having retired and still being able to act. A new person may become the Protector under what follows the words when the circumstance no longer obtains.

43.3 In our judgment, it is obvious that the provisions of Schedule C paragraphs 1.2 and following are "subject to" the preceding facts there set out – ie the Incumbent Protector being the Protector, having neither resigned nor being unable to act as the Protector.

43.4 The case of the Appellant, that an ability to fill up the office of the Protector with appointees provided that the number taken with anyone appointed under a previous sub-paragraph or sub-paragraphs is limited to three, does violence to the word "thereto" and its placement at the end of the sentence in paragraph 1.1 of Schedule C.

44 The third argument advanced on the Appellant's behalf is that the interpretation accepted by the Deputy Bailiff would give rise to unfortunate consequences and therefore cannot be correct. We disagree. We think the Deputy Bailiff was correct in saying that the Appellant's construction would lead to what cannot have reasonably been expected: the power of appointing or removing trustees would be removed from the Incumbent Protector's hands, while he remains in office, if (as has happened) the Appellant should ever appoint two additional persons to join him and to form a majority. That would (in truth) render the Appellant rather than the person or persons appointed under Schedule C paragraph 1 "the Protector" of the operation of the Declaration of Trust. In our view, that is not what is meant by the language, and we do not accept that this must have been the settlors' intention merely because the Appellant was the wife of the person referred to by Advocate Davies as "the economic settlor". Even without going to this extreme, the Appellant's contention is that the Incumbent Protector might always find himself in a minority, because the Appellant would in practice be able to appoint others who could always outvote him, so (in effect) requiring him to cede the powers initially given to him as the Protector. Further, for reasons we have set out in paragraph 29, we consider it is the Appellant's construction which could give rise to undesirable and absurd consequences, if competing powers of appointment to populate the office of Protector were purportedly exercised nearly simultaneously.

45 The fourth argument seeks to draw from past conduct of parties in relation to the Declaration of Trust, support for the Appellant's interpretation of paragraph 1 of Schedule C. It is sufficient to note that past conduct cannot affect the interpretation of a contract or instrument such as the Declaration of Trust. Of course, in appropriate circumstances there may be a variation of the provisions of the relevant contract or instrument, or some question of estoppel or waiver. But nothing of that kind is contended for in the present case.

46 The fifth and last argument is founded on paragraph 4 in Schedule C, quoted above. The paragraph is designed, broadly, to facilitate appointments and retirements of persons from office as the Protector, enabling those with a power of appointing to know when it may be appropriate to make an immediate exercise. There is a curious feature of the provision, which is immaterial for present purposes, that while sub-paragraph 4.2 applies to any deed of resignation, immediate or prospective, to be given to the Trustees, sub-paragraph 4.3 applies only to prospective deeds of resignation.

47 The argument on behalf of the Appellant, shortly stated, is that sub-paragraphs 4.3 and 4.4 require notification to the Appellant if alive, even where the relevant appointment is under paragraphs 1.3 or 1.4 (or, for that matter, under 1.5), or where it is the Incumbent Protector who is making the prospective resignation or who is the maker of a will. From this it is deduced that notice must be given so that the Appellant can decide whether or not to exercise the powers given to her; and it is then argued that for some reason the inference is that her power extends to appointing someone to the office of the Protector along with the Incumbent Protector.

48 This final argument is difficult to articulate coherently, much less to accept as correct. Quite simply the conclusion does not follow from the premise. Paragraph 4 in Schedule C casts no light on the question whether or not a person may be appointed under one of paragraphs 1.2 to 1.5 of paragraph 1 in Schedule C so as to become jointly the Protector with someone appointed under a previous sub-paragraph. The paragraph is equally consistent with either construction contended for on this appeal, and therefore cannot be inconsistent with the construction place on paragraph 1 by the Deputy Bailiff.

49 The short point is that the successive sub-paragraphs of paragraph 1 prescribe the identity of the Protector at any time. If there is someone from a previous paragraph holding office, there cannot be someone from a subsequent one. Consistently with this, a prospective appointment of the kind contemplated by sub-paragraph 4.3 may be made of someone from a subsequent sub-paragraph; but the appointment itself will be of no effect while there is someone from a previous sub-paragraph holding office.

50 Finally, the Appellant advances a second ground of appeal, namely, that the Deputy Bailiff failed to give sufficient weight to the presumption of validity, so ought to have treated A's deed appointing the Purported Additional Protectors to hold office with the Incumbent Protector, and to have treated the Purported Additional Protectors' deed changing the trustees, as valid. But this submission goes nowhere. The objections to the two deeds are advanced not on the basis of some possible want of evidence or formality surrounding their making, but on the basis that in each case, the relevant deed was made by someone wholly lacking in the capacity to bring about the result which the deed professed to achieve. The presumption of validity has no role to play in the interpretation of the Declaration of Trust.

51 We should add in conclusion that in our judgment the correct interpretation of the Declaration of Trust admits of no real doubt, notwithstanding the brave efforts of Advocates Davies and Richardson to advance what we consider to be an impossible argument.

52 The difficulty with the Appellant's case is demonstrated by the fundamental shift in approach adopted by the Appellant: at the outset of his oral presentation of the Appellant's case Advocate Davies changed his ground from an argument that the paramount tool for interpreting the Declaration of Trust is a focus on the literal meanings of the words used (the argument stressed in his written submissions), to an argument that we should approach the question of interpretation by taking an almost blank sheet of paper, as it were, asking ourselves what it would have been reasonable for the economic settlor (not a party to the Declaration of Trust) to wish to secure as regards the identity of the Protector, and answering that this would be to have the office filled by persons appointed by his wife to act as a majority controlling the non-family member named in the Declaration of Trust to be the first Protector. However, this speculative subjective approach is not an appropriate way of interpreting a Declaration of Trust.

53 Accordingly, we dismiss the Appellant's appeal.