

Appeal by a Beneficiary of the Trust, against the decision of the Court as to the true construction of the Trust Instrument.

[2020]GCA080

**IN THE COURT OF APPEAL OF
GUERNSEY**

CIVIL DIVISION – APPEAL NO. 537

19th August 2020

(IN PRIVATE)

Before:

**The Bailiff of Guernsey
James McNeill QC, and
Sir Michael Birt**

**IN THE MATTER OF THE K TRUST
AND IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007, AS AMENDED**

For the Appellant, the “A” Beneficiary: Advocate J T Le Tissier

For the First Respondent, the Trustee: Advocate M C Newman

For the Second Respondent, the “B” Beneficiary: Advocate A M Davidson

For the Third Respondent, the Unborn and Unascertained Beneficiaries: Advocate M D P Jones

JUDGMENT

McNeill JA:

1. This is the judgment of the Court, to which we have all contributed.
2. This appeal arises out of the application of the Trustee of a Guernsey trust, referred to in these proceedings as the “K” trust (the “Trust”), for directions as to the true construction of the Declaration of Trust by which the Trust was constituted (the “Trust Instrument”) and for ancillary directions pursuant to sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007, as amended and to the Court’s inherent jurisdiction.
3. Judgment, in private, was handed down by the Royal Court (Sir Richard Collas, Bailiff, sitting alone) on 18 November 2019 and the beneficiary known as Beneficiary “A” now appeals that decision.

Background

4. The Trust is of relatively recent origin. The (effective) Settlor, shortly after a diagnosis of a terminal illness, gave instructions for the creation of two trusts (the Trust and another referred to in these proceedings as the “A” Trust) which, between them, would make provision for the surviving spouse (who is Beneficiary “A” in these proceedings) and for the then infant twin daughters of the marriage (the “Daughters” and each a “Daughter”) (Beneficiary “B” in these proceedings and the twin (“C”) who, sadly, died some years ago before reaching the age of majority). Those instructions were carried out by the relevant trustees.
5. Insofar as it may be of relevance to know, the beneficiaries of the “A” Trust are (i) the surviving spouse, A, (ii) the surviving Daughter, B, (iii) any persons added to the class by the Trustees under their powers and (iv) charities. The principal beneficiary of the “A” Trust is A.
6. The untimely death of C has given rise to the construction issue which was brought before the Royal Court and is now under appeal. It is only fair to state at the outset that this is not one of those trust litigations where family estrangement or difficulties have given rise to disputes as part of which one or more parties put forward arguments on construction which are often characterised by the courts as ‘strained’ or ‘only just stateable’. Here, the Declaration establishing the Trust is in numerous respects very badly drafted and displays an exceptional lack of care in checking whether words have been used appropriately, whether they have been used consistently, and how various provisions interact. Faced with such difficulties, the Trustee sought the advice of English Counsel and of Leading Counsel, each of whom, quite understandably, recommended that the only proper course was to seek the views of the Court.
7. Against that background we would record that each counsel presenting matters before us did so in a measured fashion, recognising both that the interests of the individual beneficiaries and potential beneficiaries had to be supported and that an application of this nature is not adversarial litigation.

Trust Provisions

8. The construction issue arises in respect of the principal provisions for the interests in income and capital, especially those applicable on the death, as has occurred, of one of the Daughters. These, which need to be considered in the context of the instrument itself as a whole, state:

“7. TRUSTS OF CAPITAL AND INCOME

The Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following that is to say:

7.1 The Trustees shall during the Trust Period stand possessed of the capital and income of the Trust Fund upon trust to pay or apply the Trust Fund with the consent of the Protector and the income therefrom without such consent to or for the benefit of [B and C] (jointly referred to as “the Daughters” or singly as a “Daughter”) and in determining the amount or amounts to pay or apply the Trustees shall consider the Settlor’s wishes in relation to [B and C] as set out in the Memorandum at the Eighth Schedule.

7.2 To the extent appropriate and practicable, the Trustees will apply a notional split of the Trust Fund, in line with the Settlor’s wish to maintain the application of equal benefits to the Daughters as far as possible. This, however, should be applied at the discretion of the Trustees, in consultation with the Protector and, in respect to the realisation of investments, the Investment Committee.

7.3 If a Daughter dies without children prior to a Termination Event the Trustees shall transfer her share of the Trust Fund as determined under clause 7.2 (or whatever part of her share which at the time had not been distributed to her) as to one half to [the A trust], and the other half to the surviving Daughter's share of this Trust Fund but if such Daughter's death without children is after a Termination Event the full amount of the deceased Daughter's share will be transferred to the surviving Daughter's share of this Trust Fund.

7.4 If a Daughter dies leaving children the Trustees shall during the Trust Period hold the deceased Daughter's share to pay or apply the Trust Fund with the consent of the Protector and the income therefrom without such consent to or for the benefit of her children and issue and in determining the amounts to pay or apply the Trustees shall consider the Settlor's wishes as set out in the Memorandum at the Eighth Schedule.

7.5 The word "benefit" is to be interpreted with the widest possible meaning... .."

9. The Trust Period can be as long as the maximum period permitted by the Proper Law of the Settlement from time to time, or otherwise at the discretion of the Trustees. The Termination Event is the first to occur of the death of A, and A's cohabitation or re-marriage prior to the completion of the education of both Daughters.
10. The Eighth Schedule is an unusual provision to find in a Declaration of Trust as it is the Memorandum of Wishes reflecting the wishes communicated by the Settlor prior to his death. It records that the Memorandum is not intended to create any binding trust or obligation or to fetter in any way the exercise of discretions vested in the Trustees or Protectors (paragraph 1.1). That said, the following provisions relating directly to the Daughters and their issue are of interest.
 - a. Whilst differing educational requirements might result in different costs, the Settlor did not require monetary equalisation but had in mind a division of benefits as equally as possible (paragraph 5.1).
 - b. After attaining the age of 30 years, each Daughter may receive one third of her share of the relevant income of the Settlement up to a specified limit; and at age 35, two thirds of their respective shares of the income up to a specified limit (paragraph 5.7).
 - c. It is specifically provided that, in using the word "share" in the Memorandum, "it is intended to reflect the approximately equal treatment desired by the Settlor...but is not intended to mean a "fixed share" in the legal sense of that term." (paragraph 5.8).
 - d. The word "share" is used in relation to capital distributions after age 40 (paragraph 5.9).
 - e. Paragraph 5.12 then provides:

"All the provisions of the Memorandum concerning the payment of income and capital to the Daughters ... are similarly intended to apply to the Settlor's grandchildren. If, as envisaged, any such grandchildren become entitled to their mother's share ... by reason of their mother dying before receiving such share, the Settlor wishes that each grandchild should receive payment of his or her complete share as and when he or she turns 40. The provisions of sub-paragraph 5.9 are not intended to extend to the Settlor's great-grandchildren."
 - f. Paragraph 5.13, after indicating that the Settlor wishes each Daughter to receive the income of 50% of the balance of a Remainder Fund for the whole of their lifetime, then states:

“On the death of each of the Daughters, the Settlor wishes that one-half of the Remainder Fund should be made available to the deceased Daughter’s children, if any, on the same terms as applied to her mother including those relating to increasing income..... and to the payment of capital as they each attain the age of 40 years.....”

The Judgment below

11. Before the learned Bailiff, the parties identified four possible constructions:

“Construction A”: Beneficiary C did not have a ‘share’ of the Trust Fund, and therefore the Trustee is not required to make any transfer from the Trust to the A Trust.

"Construction B1": Beneficiary C did have a ‘share’ of the Trust Fund to the extent of one half, and therefore the Trustee must transfer one quarter of the Trust Fund to the A Trust.

"Construction B2": Beneficiary C did have a ‘share’ of the Trust Fund to the extent of one third of the Trust Fund, and therefore the Trustee must transfer one sixth of the Trust Fund to the A Trust.

"Construction B3": Beneficiary C did have a ‘share’ of the Trust Fund, which falls to be determined at the discretion of the Trustee.

12. For Beneficiary A, it was contended that Construction B1 should be adopted. For Beneficiary B it was argued that Construction A should be adopted. For the Unborn and Unascertained Beneficiaries, it was submitted that the court should adopt either Construction A or, in the alternative, Construction B3. The Trustee adopted a neutral stance but made submissions regarding the alternative constructions.

13. The parties were agreed that the legal principles applicable to the construction of trust instruments were those set out in *in the Matter of the C Trust* [2013] GLR 105, adopting the guidance set out in the Jersey authority of *in the Matter of the Internine and Intertraders Trusts* [2005] JLR 236 (Page, Commissioner), especially at paragraph 62. From those two decisions, the learned Bailiff summarised the guidance in this way:

"10. ... 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."

14. The learned Bailiff noted that it was not in dispute that Clause 7.1 created a discretionary trust; albeit, unusually, it was expressed to be exercisable for the benefit of B and C and not for the benefit of a class of discretionary beneficiaries as a whole. The fundamental difference between Construction A and Construction B was that Construction A proceeded on the basis that Clause 7.3 is not engaged because the Clause 7.2 discretion had not been exercised and C did not have an identified ‘share’ to transfer to others. Construction B assumed that there must now be a mandatory split, even though the trust fund may not have been split whilst C was alive.

15. Bailiff Collas then noted that he was concerned with the construction of Clause 7.3. Ignoring the inadmissible material and applying the legal principles which he had set out, he interpreted the phrase "C's share ... as determined ..." with the word 'as' meaning 'to the extent' and the word 'determined' in the past sense. Accordingly, the reference was to something which had happened in the past and not a reference to a share that was to be determined now or at some future time: paragraph 29.
16. He rejected the argument that the final phrase of Clause 7.3 (the event of a Daughter's death without children after a Termination Event) displayed no clear intention on the part of the Settlor that the surviving Daughter should take the entire trust fund. The Bailiff considered that argument to be speculative whereas it appeared clear that the Settlor did not expressly provide for the eventuality of a Daughter dying without children before the occurrence of a Termination Event: paragraph 31.
17. In the judgment of the learned Bailiff, the opening words of Clause 7.2 "*To the extent appropriate and practicable ...*" supported his construction; as it would be neither appropriate nor practicable to allocate a notional share of the trust fund to a deceased Daughter "to maintain the application of equal benefits to the Daughter as far as possible" when the deceased child would receive no further benefit from the Trust Fund: paragraph 32. It was also noted that elsewhere in the Trust Instrument and in the Memorandum of Wishes there were provisions suggesting that Beneficiary A was not to receive benefit other than under Clause 7.6: paragraph 33.
18. In conclusion, the learned Bailiff found that there was little or no assistance to be gained from the matrix of facts, that none of the suggested Constructions would lead to an unreasonable result, and therefore concluded that Construction A was the proper construction: paragraphs 34 to 36.

Contentions on Appeal

19. Before us the Trustee again maintained a position of neutrality and, having heard the other parties, we found that we did not require any additional assistance from Advocate Newman.
20. For the Appellant, A, developing the grounds set out in the Supplementary Notice of Appeal dated 8 July 2020, Advocate Le Tissier submitted that the learned Bailiff had fallen into error in the following respects.
21. As regards concerns expressed regarding restrictions in the Trust Instrument on benefit to Beneficiary A, Beneficiary A would not be given a 'notional share' under Clause 7.3 as the transfer would be made to the A Trust.
22. Clause 7.3 was mandatory whereas the Memorandum of Wishes was not binding on the Trustee.
23. Clause 7.3 did in fact expressly provide for the eventuality of a child dying without children before the occurrence of a Termination Event.
24. It was an error simply to say that none of the Constructions would lead to an unreasonable result as the appropriate approach was to consider whether one result was more unreasonable than another, in which case it was less likely that the parties could have intended it absent an abundantly clear intention.
25. The matrix of facts did indeed provide considerable assistance and supported Construction B1.

26. Although this point had not been taken before the Bailiff, the Court should find that a notional split of the Trust Fund had in fact been applied by the Trustee. Each child had been treated equally prior to C's death and this inferred a notional split.
27. The learned Bailiff had adopted too literal an approach to construction and had failed to recognise adequately or at all that Clause 7.3 had been poorly drafted and that the adoption of Construction A failed to provide for all eventualities.
28. The proper construction of Clause 7.3 was that it specified what must take place should a child die without issue. Where there had been a Termination Event, the Clause provided that the whole of the deceased child's share is transferred to the surviving child; but where no Termination Event had taken place, the child's share should be equally split between the A Trust and the surviving child's share of the Trust Fund. Further, if there had been a Termination Event, it would have resulted in the assets of the A Trust being transferred to the Trust and the A Trust no longer existing.
29. Advocate Davidson for Beneficiary B and Advocate Jones for the Unborn and Unascertained Beneficiaries, supported the views expressed by the Royal Court.

Discussion

30. As to the applicable principles on the construction of trust instruments, the clarity and precision of the guidance given by Commissioner Page in *in the Matter of the Internine and Intertraders Trusts* remains entirely apposite. As set out in paragraphs 62 and 63 of that judgment, the learned Commissioner stated:

“62. 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: in the present case, there being no settlor-signatory, the maker must be taken in each case to be the trustee or possibly the trustee and Sheikh Abdullah as the parties to the letters of instruction which conferred authority on the trustees to execute the declarations of trust (it makes little difference which in the present case);

(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 WLR 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 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. 896, 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, cll. 2(b), 6(c) and 6(f), 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. 756, 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 this 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. 235, 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. 756, 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.)

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.)”

31. The learned Bailiff was quite correct to follow that guidance, which had been approved in this jurisdiction in *in the Matter of the C Trust*.
32. For present purposes, the critical words requiring construction are those in the phrase "*the Trustees shall transfer her share of the Trust Fund as determined under Clause 7.2*"; and within this phrase, the critical word is ‘share’.
33. The word ‘share’ is not a term of art in trust law, albeit not infrequently found in trust instruments. When used, it often denotes a present interest in the trust estate, even if terminable on the occurrence of certain events, or a future interest which may be contingent on attaining a specified age or on the termination of another interest. It may be fixed at a given amount, at a given percentage of the estate or in respect of specified assets. But it is not used to denote the interest of members of a class which is the object of discretionary trusts: the members of that class may have an expectation that their interests will be properly considered, but they have no interest in the trust estate itself. The proper construction of the word ‘share’ will therefore depend upon the terms of the deed in question, the phrase or phrases within which it is used and the overall context. It is the use of the word ‘share’ in the context of a discretionary trust which has caused much of the difficulty in this case.
34. In the Trust Instrument, the word ‘share’ is not a defined term. Clause 7, as has been seen, contains the principal set of dispositions. Clause 7.1 which, as has been agreed, is discretionary, allows the Trustee to determine "the amount or amounts to pay or apply".

Clause 7.2 permits the Trustee to "apply a notional split of the Trust Fund". Clause 7.3, as has been seen, refers back to Clause 7.2. Clause 7.4, providing for the death of a Daughter leaving children, directs the trustee to hold "the deceased Daughter's share" for the benefit of that Daughter's children and issue. Clause 7.5 allows the word 'benefit' to be interpreted with the widest possible meaning. Clause 7.6, which makes ancillary provisions, refers back to the preceding provisions of Clause 7 as "providing for the Daughters". Clause 7.7 permits accumulation. Clause 7.8 makes provision for the failure of the principal trusts in the event of both Daughters having died leaving no children who attain the age of 40 years. It provides for one third to be distributed to charities, and two separate thirds each to the issue of a specified individual "and if more than one in equal shares absolutely per stirpes". Clause 7.9 then provides that if any of the Clause 7.8 trusts fail then "that share shall accrue to the other shares and if more than one in the proportions which they bear to one another ...".

35. It can therefore be seen that language has on occasion been used somewhat loosely and not always consistently. For example, if one considers Clauses 7.8 and 7.9, in the event of the failure of one or other of the two specified families at the expiration of the trust period or earlier, there will not have been a share of the trust estate divided for and applied to that family. The use of the word 'share' is inept and should perhaps have been "the portion of the Trust Fund which would otherwise have fallen to the potential beneficiary ...". Furthermore, 'share' is used in Clause 7.8 to refer to an absolute and quantified interest whereas in Clauses 7.3 and 7.4 it refers to a discretionary interest.
36. Referring back, then, to Clauses 7.3 and 7.4, the former provides for death of a Daughter without children and the latter for the death of a Daughter leaving children. Perhaps surprisingly, the references in each to 'share' are expressed differently. Clause 7.3 refers to the Daughter's "share of the Trust Fund as determined under Clause 7.2 (or whatever part of her share which at the time had not been distributed ...)"; whereas Clause 7.4 merely refers to "the deceased Daughter's share". That said, there could be no rationale in the draftsman having intended the two clauses to refer to a different interest or an interest differently calculated. Each, quite simply, makes provision for the death of the Daughter and for the interest of the Daughter in the Trust Fund to pass to those contingently interested. It is of course possible that the draftsman considered that, having given greater specification in Clause 7.3, the more shorthand "share" could be used in Clause 7.4. Whether or not that speculation is made, the reference in Clause 7.4 to an existing incorporeal asset (the "deceased Daughter's share") must refer to something which the Trustee can identify on the child's death. It is, therefore, something ascertainable. But it is not merely something ascertainable. It is something which must be quantified. A 'share' is merely an interest of a particular portion or percentage and one is therefore driven to find in the Trust Instrument the instructions being given to the Trustee as to how the Trust Fund is to be divided for the relevant purpose. Clause 7 is the only relevant clause and Clause 7.2 the only provision which identifies something in the nature of a division. It therefore seems inevitable that in each of Clauses 7.3 and 7.4, the process of ascertainment must use Clause 7.2. Two questions therefore arise. First, has there been a "notional split" of the Trust Fund prior to the death of C? Second, if not, can the provisions of Clause 7.2 be used after the death of C for the purposes of Clause 7.3 or Clause 7.4?
37. As to the first question, there was no evidence that the Trustee had at any time applied its mind to such an exercise; on the contrary, it said that it did not think it had. Put simply, the twin Daughters, during the years between the death of the Settlor and the death of C, were at an educational stage and living with the surviving spouse. No issues had arisen which might require consideration of a different treatment of one Daughter as compared with the other, and funds were simply transferred to the surviving spouse for ongoing maintenance, education and general benefit. It is open to argument, however, as it was before us, that the Trustee had indeed, albeit perhaps unwittingly, applied the terms of Clause 7.2 in that it had

always treated the two Daughters equally and, in that way, had acted to "apply a notional split of the Trust Fund, in line with the Settlor's wish to maintain the application of equal benefits to the Daughters as far as possible."

38. It is the use of the word 'notional' in this context which causes difficulty. The dictionary definition of 'notional' is that of 'existing only as an idea, not as something real'. It is hard to apply such a concept to a split in a trust fund. But one cannot ignore that the word has been used to qualify the term 'split'. Furthermore Clause 7.2 states that the Trustee will 'to the extent appropriate and practicable...apply a notional split.....to maintain the application of equal benefits to the Daughters as far as possible'. In our judgment, by following the course it has, the Trustee can properly be said to have 'notionally' split the trust fund in accordance with the Settlor's wishes: that is the split to achieve equal benefit does exist as an idea, even if not as something real.
39. But if we are wrong about this, and Clause 7.2 requires some form of juristic act or active intention, the second question arises. The learned Bailiff took the view that the words "as determined" in Clause 7.3 referred to a past event. Upon that construction, and assuming that no past event can be identified, the result is that neither for Clause 7.3 nor for Clause 7.4 can there be identified a 'share' which can be in some way related to the Daughter who has died either childless or with children surviving. The bizarre result, therefore, would be that, whether dying childless or with issue, there is no provision within the Trust which deals with the event of the death of a Daughter absent a Clause 7.2 determination during life. Put bluntly, this cannot have been the rational intention of the Settlor. It can be seen from Clause 7.8 that the Settlor, in the ancillary provisions, had in mind the concept of representation and stirpital division. Having had representation in mind for the contingent interests, it would be bizarre for the Settlor not to have provided for the issue of a deceasing Daughter, or to have left the issue of the deceased Daughter dependent upon an action which the Trustee may have considered not yet to have been "appropriate and practicable".
40. It therefore follows, in our judgment, that the proper construction is one of the Construction B constructions and, as no party contends for Construction B2, it will be either Construction B1 or Construction B3.
41. What Clause 7.3 makes clear is that, on the relevant event, the surviving Daughter does not simply become the sole beneficiary. In making provision for a different outcome, the provision both looks at the deceased Daughter's former interest in the Trust Fund and recognises that regard might be required as to what had already been "distributed" to the child. In using the words "share of the Trust Fund as determined under Clause 7.2" the draftsman has used inept wording as Clause 7.2 does not empower the determination of a fixed share. Rather, during the deceased Daughter's life, she was entitled to participate in the Trust Fund on broadly equal terms with the twin. That was the 'share' in colloquial terms. Clause 7.3 provides that, on the death without issue, that interest is to pass to others and Clause 7.4 provides that, in the event of a Daughter dying leaving children, that interest is to pass to her issue. There being no fixed fund, it will have to be calculated and the obvious mechanism is that provided for in Clause 7.2.
42. Whether working upon the basis that there has been a notional split or that the 'share' is still to be determined, it would appear that Construction B1 is the correct construction. The Daughters were treated equally while both were alive and that approach should now be maintained for the purposes of Clause 7.3. As it happens, that approach would be entirely consistent with the non-binding Memorandum of Wishes in the Eighth Schedule, where paragraph 5.8 provides:

"It should be noted that in using the term "share" in this Memorandum, it is intended to reflect the approximately equal treatment desired by the Settlor (as referenced in

paragraph 5.1) but is not intended to mean a “fixed share” in the legal sense of that term.

Decision

43. For all these reasons, we allow the appeal and hold that Construction B1 is the correct construction of the Trust Instrument.
44. As to costs, we are minded to order that the costs of each participant in the litigation should be met from the Trust Fund; but we shall entertain any contrary representations, which should be made within three days of the handing down of this judgment.