

Application seeking an order that the legal costs of defending allegations made against the two Former Trustees of the Interim Executives Group of pension schemes, should be regarded as an expense of each applicable Scheme and paid out of the assets of said Scheme.

[2021]GRC013

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

Between:

SHERBORNE CORPORATE SERVICES LIMITED

KENILWORTH CONSULTANTS INC.

Applicants

-and-

THE PUBLIC TRUSTEE

Respondent

Decision taken on papers handed down: 17th May 2021

Before: Richard James McMahon, Esq., Bailiff

**The Applicants' written submissions were signed by an Authorised Signatory
Counsel for the Respondent: Advocate S H Davies**

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007
In the Matter of the C Trust [2013] GLR 105
In re Internine Trust 2005 JLR 236
Society of Lloyd's v Robinson [1999] 1 WLR 756
Hole v Garnsey [1930] AC 472
Lewin on Trusts (20th ed.)
Re Buckton [1907] 2 Ch 406

Introduction

1. By an Application dated 17 December 2020, the two Former Trustees of the Interim Executives Group of pension schemes, Sherborne Corporate Services Limited and Kenilworth Consultants Inc., both of which are registered in the Seychelles, have applied for relief in relation to the entitlement they claim to enjoy the benefit of arising from some provisions of the trust instruments, as amended, relating to these schemes. Each of the schemes is a Guernsey law trust.
2. In particular, they seek an order that the legal costs of defending allegations made against them should be regarded as an expense of each applicable Scheme to be paid out of the assets of the Scheme, relying on Clauses 3(C)(3) and 15A. This Application has come to be referred to as "the Clause 3(C)(3) application". If that primary order is made, the Applicants seek an

order that invoices for the legal fees they incur be settled within 14 days of being submitted. They also seek that the effect of such an order should be operative from 22 December 2016. However, as this raises a construction point, if they are correct, then it would have operated in this manner since the variation to the trust instruments was made anyway.

3. The context within which this Clause 3(C)(3) application is made is proceedings brought by the Public Trustee against both Applicants, the Former Trustees, as well as three other corporate entities and Roger and Vaughan Mewis by way of an application dated 24 June 2020. Some of the relief sought by that application has already been granted, eg, in terms of convening the parties as Respondents to it, where leave to serve outside the jurisdiction was needed, but the remainder of this application is yet to be determined and has been separated into more than one phase. This application has been referred to as “the Account Application”.
4. The Public Trustee was appointed in place of the two Former Trustees by an order of this Court dated 29 March 2017. Since that time, the Public Trustee has been engaged in an information-gathering exercise. The paragraphs of the Account Application the Public Trustee is currently pursuing relate to that exercise and the progress of that aspect of the Account Application led to a hearing commencing on 9 December 2020. During the course of submissions made to the Court on the morning of the first day of that hearing by Roger Mewis, who I understand has authority to speak on behalf of all seven Respondents to the Account Application, he mentioned that the two Former Trustees felt that the Public Trustee had denied them the opportunity to have legal representation because of not complying with Clauses 3(C)(3) and 15A in the trust instruments. Mr Mewis did not, however, want to delay matters and so no adjournment of the Account Application was sought. However, Mr Mewis indicated that an application in respect of these provisions could be submitted within the following couple of weeks. In the event, the Application was submitted just over a week later, but the Account Application hearing still proceeded, although the seven Respondents did not appear after the first day of the hearing. The paragraphs of that application being pursued by the Public Trustee have not yet been determined because I considered that I should deal with the Clause 3(C)(3) application first.
5. Between the hearing on 9 and 10 December 2020 and the submission of the Clause 3(C)(3) application, e-mail correspondence was sent by the first-named of the two Former Trustees, with occasional responses on behalf of the Public Trustee coming from Advocate Davies, who appears on his behalf. Some of the correspondence from the Former Trustees related to the process that was being followed. At that time, Mr Mewis was suffering the ill-effects of attending the hearing on 9 December 2020 and staying seated for longer than may have been wise whilst he was appearing remotely from a location in England. This remote attendance was an understandable consequence of the travel restrictions resulting from the Covid-19 pandemic. From that correspondence, there was some apparent misunderstanding as to what would happen in relation to this Clause 3(C)(3) application, but that was resolved by the set of directions I gave on 22 December 2020. Having clarified that what had been received on behalf of the Former Trustees on 17 December 2020 constituted what they wished to advance in support of the application, I gave the Public Trustee until 15 January 2021 to respond to this application with his materials. Thereafter, I gave the Former Trustees a week in which to reply, subject always to varying that period if it were necessary to do so depending on other developments.
6. In accordance with those directions, the Court received a bundle containing *inter alia* the Public Trustee’s Fourth Affidavit, sworn on 15 January 2021, along with the written submissions prepared by Advocate Davies bearing the same date. In the event, the Former Trustees submitted a witness statement from Mr Mewis in his capacity as a director of IXG Services Limited, in which he explains that he had been authorised by the Former Trustees to do so, on 25 January 2021. No issue is taken over the short delay in taking this step. There followed some correspondence on behalf of the Former Trustees with Advocate Davies at the

end of January, the last item of which was a query from Advocate Davies as to how the Court was minded to deal with the Clause 3(C)(3) application.

7. The material from the Former Trustees in support of their Clause 3(C)(3) application and in rebuttal to the Public Trustee's Fourth Affidavit arrived at the start of Guernsey re-entering a lockdown related to Covid-19. It had always been my intention to consider the material relating to this application to see if I could properly resolve the issues raised by it on the papers. It has taken me much longer to reach the stage of being able to consider the material submitted on behalf of the Public Trustee and the rebuttal of the Former Trustees than I had envisaged, for which I apologise, but I am now satisfied that I can properly determine the application without needing to convene the parties to a hearing. As will become apparent, this application principally raises a question of how to construe the trust instruments. There are some other matters raised, but all of them can, in my view, be resolved from the written materials the parties have supplied.

Preliminary matters

8. On behalf of the Public Trustee, Advocate Davies had questioned whether the Clause 3(C)(3) application should even be entertained by the Court when there had been an order made by me on 9 October 2020 requiring the Respondents to the Account Application to serve and file any applications they wished to make by 16 October 2020 so that they could be considered at or before the hearing listed to commence on 9 December 2020. Whilst it would clearly have been preferable for the application that has now been made to have been made much earlier and in accordance with this order, I have been prepared to deal with it in the manner I have because it is important to the Former Trustees that they understand their position under the terms of the trusts instruments enabling them to decide how they wish to proceed, both in relation to the Account Application and generally. In my view, it would not be helpful if the substance of the Clause 3(C)(3) application remained unresolved.
9. On behalf of the Former Trustees and in support of this Clause 3(C)(3) application, the material submitted has not always focused on the construction point that falls to be determined. In particular, the witness statement of Mr Mewis dated 25 January 2021 is structured in such a way that it attempts to respond to every factual point set out in the Public Trustee's Fourth Affidavit to which exception is taken. As a result, it is a much longer reply than the materials on which the Former Trustees have relied in support of this application. That is never the intention of providing an opportunity of a party to reply. As such, it becomes difficult to extract from it what might be a relevant point and the tone used is frequently, in my view, unnecessarily combative. I say that, even allowing a greater degree of latitude than would be the case if the Former Trustees had the benefit of legal representation, to explain why so little of the reply has any relevance to the issues falling to be determined. By way of example, in para. 68, the witness purports to reject what had been set out in one sub-paragraph of that Fourth Affidavit "*as being a falsehood, a fabrication, nonsensical, vacuous, without merit and unfounded*". The passage in the Fourth Affidavit to which this responds did no more than explain that one consequence of meeting the legal expenses incurred by the Former Trustees would be that Scheme assets would be deployed towards paying legal advisers to prevent the provision of documents and information to the new trustee. There is nothing contentious in that statement because outgoing trustees are expected to assist incoming trustees and not to be obstructive. However, despite the language in which the materials submitted on behalf of the Former Trustees are couched, I have read those materials carefully several times to ensure that I have not missed anything being advanced that properly needs to be taken into account. If I do not deal with each point made, it does not mean that I have overlooked anything relevant and any such omission results from that material being considered by me to raise nothing of relevance.

The trust instruments

10. The provisions that are in issue were inserted into the Second Trust Instrument dated 11 February 2008 by instruments of variation in 2011 and 2013. Although the Public Trustee has questioned whether these variations have been made to all five Schemes, I will concentrate on what has happened in relation to the Interim Executives (Guernsey) Limited Occupational Pension Scheme and treat the position in respect of that Scheme as if it applied to the rest of them. There had been an earlier trust instrument and rules, dated 2 June 2006, when this Scheme was first established with Heritage Corporate Trustees Limited as the trustee, but the Second Trust Instrument replaced that First Trust Instrument and the rules in their entirety with immediate effect. By this time, Century Trustees Limited was the trustee. The Principal Employer throughout has been Interim Executives (Guernsey) Limited.
11. There is a Conformed Copy of the Governing Provisions of this Scheme bearing the date June 2016. I accept that this document has been produced to assist those dealing with the Scheme to see the effect of the instruments of variation that the Public Trustee has exhibited to his Fourth Affidavit. In other words, the definitive provisions can be found in the Second Trust Instrument, as varied from time to time, and this document is for ease of reference. In my view, there is nothing unusual about having such a consolidated version of the operative provisions. I have also noted that the Public Trustee has exhibited a letter dated 25 November 2013 sent to an officer at the Income Tax office, which provided copies of the instruments of variation in respect of four of the Schemes. I infer that this is the covering letter for the later of the two Instruments of Variation to which I will now refer.
12. Clause 12 of the Second Trust Instrument contains a power enabling that instrument and the rules to be altered or modified:

“Subject always to the terms of sections 52 to 56, The Trusts (Guernsey) Law, 1989, as amended by The Trusts (Amendment) (Guernsey) Law, 1990, the Trustee may at any time and from time to time, with the consent of the Principal Employer, by an instrument of variation executed by the Trustee and the Principal Employer alter or modify any of the Trustee’s powers or provisions of this Second Trust Instrument and Rules, and any subsequent instrument or rules adopted to govern the Scheme, PROVIDED THAT no such alteration or modification shall:

- (a) change the main purpose of the Scheme;*
- (b) take effect if it shall, in the opinion of an actuary, adversely affect or prejudice the rights or interest of any pension already being paid to a Pensioner or a benefit already accrued or secured for a Member or Former Member at the date of such proposed alteration or modification without the consent in writing of the beneficiary concerned;*
- (c) prejudice Approval.”*

This power is recited in each of the instruments of variation. The references to the statute should now be read as sections 57 to 61 of the Trusts (Guernsey) Law, 2007, which make like provision, although these sections are not applicable in this case. On the basis that there is no evidence that the amendments to the terms of the trust instrument prejudiced approval from the Income Tax office, I make no further comment in respect of any suggestion from the Public Trustee that there may have been no positive approval of these changes.

13. The Former Trustees were appointed as the trustees of this Scheme in place of Guinness Mahon Trust Corporation Limited by an instrument dated 27 September 2010. The first of the two relevant Instruments of Variation was executed on 7 March 2011 on behalf of the Principal Employer and the Former Trustees. Although the Public Trustee has commented

that he has not seen any document authorising those who executed this Instrument of Variation on behalf of the three corporate entities involved, I will proceed on the basis that their authority to do so has been established. It is clause 4 of this Instrument of Variation that deletes and replaces the previous Sub-Clauses A and B of Clause 15 in the Second Trust Instrument. Sub-Clause 15(C) was left unamended.

14. The new provisions in Clause 15 are as follows:

“A. Trustee’s Indemnity

Without prejudice to any right of indemnity given by law to trustees:

No trustee or member of a body corporate comprising a trustee for the time being (or former trustee or member of a body corporate) shall be liable for any act or omission not due to its own or his own wilful neglect or default and the trustees or trustees or former trustee or trustees shall be entitled to be indemnified out of the Fund. The Trustees or trustees may retain and pay out of the Fund all sums necessary to give effect to such indemnity. Where a trustee or trustees or member of a body corporate comprising a trustee for the time being (or former trustee or member of a body corporate) is not indemnified from the Fund, they shall be indemnified by the Principal Employer in respect of all such liabilities and expenses properly incurred in the execution of the trusts hereof or of any powers or authorities or discretions vested in the trustees under the Trust Instrument or the Rules.

B. Non-Liability

In the professed execution of the trusts of the Plan, no trustee shall be liable for any loss to the Scheme arising by reason of an improper investment made in good faith; provided that the trustees have taken appropriate professional advice from a fund manager appointed in accordance with Clause 5 of the Trust Instrument. No trustee shall be liable for any loss to the Scheme arising from the negligence or fraud of any agent employed by the trustees in good faith, although the employment of such agent was not strictly necessary or expedient, or by reason of any mistake or omission made in good faith by any trustee, or by reason of any other matter or thing except wilful and individual fraud or wrong doing on the part of the trustees sought to be made liable.”

15. The Sub-Clauses that were replaced in 2011 were in these terms in the original Second Trust Instrument:

“A. Trustee Indemnity

Without prejudice to any right of indemnity by law given to trustees, no trustee or member of a body corporate comprising a Trustee for the time being (or former trustee or member of a body corporate) shall be liable for any acts or omissions not due to its or his own wilful neglect or default and the Trustee or former trustee shall be entitled to be indemnified out of the Fund, and as a separate indemnity the Trustee shall be entitled to be indemnified by the Principal Employer, in respect of all such liabilities and expenses properly incurred in the execution or purported execution of the trusts hereof or of any powers authorities or discretions vested in the Trustee under this Trust Instrument or the Rules and the Trustee may retain and pay out of the Fund all sums necessary to give effect to such indemnity.

B. Non-liability

In the professed execution of the trusts of the Scheme no trustee shall be liable for any loss to the Scheme arising by reason of an improper investment made in good faith, or for the negligence or fraud of any agent employed by the Trustee although the employment of such agent was not strictly necessary or expedient, or by reason of any mistake or omission made in good faith by any trustee, or by reason of any other matter or thing except wilful and individual fraud or wrong doing on the part of the trustee sought to be made liable.”

These Sub-Clauses had also featured in the 2006 First Trust Instrument. This shows that the references to there being an indemnity in favour of a former trustee had existed from the establishment of the Scheme. Accordingly, there was nothing novel about that aspect resulting from the 2011 Instrument of Variation. The wording used, particularly in the replacement of Clause 15B, rather looks like it has been adapted from another of the Schemes, but without all the references to “the Plan” being changed, but such drafting errors do not affect my overall approach to the construction issues that matter for this application.

16. The second Instrument of Variation is dated 11 November 2013. By Clause 1, it made changes to Clause 3(C) by renumbering paragraph 2 as paragraph 5 and inserting new paragraphs 2 to 4, which are in the following terms:

“2 Where a trustee makes an application to the Royal Court for directions, the costs of such application and any actions arising from it, may be treated as an expense of the Scheme and applied in accordance with the provisions of paragraph 1 of this Clause 3C.

3 The costs of defending allegations made against trustees of fraud, wilful misconduct or gross negligence by a beneficiary or third party under the terms of Clause 15A, may continue to be paid as an expense of the Scheme in accordance with the provisions of paragraph 1 of this Clause 3C.

4 Where any allegations are made against a trustee in accordance with Clause 15A are proved in the Royal Court, the trustee may be required to reimburse the Fund in respect of any costs (referred to under paragraph 3 above) incurred by the trustee in defending such allegations.”

By clause 2, a new Sub-Clause D was added to Clause 15 as follows:

“D Where the Protector or any other person or body who is not a trustee of the Plan, is acting as a fiduciary under the terms of the Trust Instrument or the Rules, he will be indemnified against innocent breaches of trust out of the Fund, in accordance with the provisions of Clause 15A and subject to the same protection as to costs and liabilities as are provided in accordance with Clause 3C, as amended.”

17. Before these variations were made in 2013, Clause 3 of the Second Trust Instrument, under the heading “Interpretation”, contained the following provisions in Sub-Clause C (headed “Expenses”):

“1 All expenses in connection with the establishment of the Scheme were borne by the Employers. The establishment of the Scheme occurred at the point where the Scheme received full approval from the States of Guernsey Income Tax. The Trustee shall pay all costs, charges and expenses incurred in connection with the administration and management of the Scheme out of the Fund, unless the Principal Employer determines that these should be paid by the Employers, in which event they shall be paid by the Employers in such proportions as the Principal Employer shall determine PROVIDED THAT no

costs, charges and expenses incurred in connection with the establishment administration and management of the Scheme shall be paid by the Employers in respect of a Member who is an Enhanced Protected Member.

- 2 *The Employers shall, where appropriate and unless otherwise agreed with any of the Members, forward to the Trustee (or as directed by the Trustee) any additional voluntary contributions of Members.”*

Once again, Sub-Clause C of Clause 3 had been in the same terms in the First Trust Instrument.

Parties contentions

18. On behalf of the Former Trustees, it is suggested that the specific cross-reference to Clause 15A in Clause 3C means that it is clearly intended to provide protection not only to the current trustee but also to former trustees. Further, they suggest that all the hearings in which the Former Trustees have been involved stem from and are a consequence and a continuation of the original application made in *Betts v Interim Executives (Guernsey) Limited*, which were the proceedings that resulted in the order removing them as trustees of the five Schemes and appointing the Public Trustee in their stead. In those proceedings and subsequently they contend that there have been allegations of fraud made against the Former Trustees (and more widely). Various examples were given in the affidavit evidence relied on by the holder of the office of Public Trustee in 2017 and 2018. I will mention some, but not all, of them. (In each case, some of the paragraph references given by the Former Trustees in their materials have been corrected.)
19. The Former Trustees have referred to the Third Affidavit of the former holder of the office of Public Trustee, Catherine Rowe, sworn on 6 September 2017. Paragraph 7(b) refers to the Former Trustees being willing to accept that “*Any valid claims for breach of trust, fraud or negligence against the Former Trustees should be set off against the claims made by the Former Trustees in relation to purportedly outstanding Scheme fees*”, as a result of which, it was seemingly agreed, or capable of being agreed, that “*The scope of the indemnity will need to take account of the potential for the set-off of any valid claims for fraud, breach of trust or negligence against the Former Trustees*” (para. 8(c)). Being all in the context of proceedings relating to the indemnity required to be provided to the Former Trustees, at para. 59 there was a further comment that “*it appears that it is also accepted that the purportedly outstanding Scheme fees would be subject to any valid claims for breach of trust, fraud or negligence against the Former Trustees.*”
20. In the context of the case *The Public Trustee v Red River Properties Ltd*, the Former Trustees have drawn attention to what the current holder of the office, Luis Gonzalez, stated in his Third Affidavit sworn on 26 November 2018, that if monies were owed by Red River then any purported transfer of the property in question “*may have constituted a preference, which may even be a fraudulent preference, given that Red River would thereby be rendered balance sheet insolvent and unable to pay its debts as they fell due*” (para. 27).
21. The final example comes for the Public Trustee’s Third Affidavit in respect of the Account Application sworn on 27 October 2020, at para. 79 of which he states: “*It follows that Roger Mewis (on behalf of the Respondents) has not addressed any concerns as to missing money nor has he provided any explanation as to where this money is or how it has been spent.*”
22. The Former Trustees assert that the proper reading of the provisions from the trust instruments on which they rely means that they are entitled to have their legal costs of defending allegations made against them for fraud or wilful misconduct or gross negligence or

wilful neglect or default by a beneficiary or any third party treated as an expense of the Trust Fund.

23. On behalf of the Public Trustee, Advocate Davies questions whether the variations made in 2011 and particularly in 2013 are valid. It is submitted that they appear to be “self-help” clauses, and might offend against the provisions of the 2007 Law. They do not appear to be in the interests of the beneficiaries and might not have been entered into in good faith. In any event, the effect for which the Former Trustees argue equates to seeking a pre-emptive costs order, which would not usually be forthcoming in proceedings such as those to which they purport to apply. Generally, the Clause 3(C)(3) application is a further example of a disruptive application designed to deflect attention away from the Account Application.
24. In any event, the provisions in the amended Second Trust Instrument should not be construed in the manner suggested by the Former Trustees because Clause 3(C)(3) clearly only applies to the incumbent trustee and does not extend to any former trustee. When read with Clause 15A, the indemnity provided in that provision does not cover legal expenses. Further, the Account Application is not even an allegation against the Former Trustees of fraud, wilful misconduct or gross negligence. Finally, the Account Application is not being made by a beneficiary or a third party, but by the current trustee of the Schemes against the Former Trustees as part and parcel of the transfer of trusteeship.

Discussion

25. Although the parties have not referred to any previous case setting out the approach to the construction of a trust instrument, I have followed what I set out in paragraphs 21 and 22 of *In the Matter of the C Trust* [2013] GLR 105, which in turn quoted from the Jersey case referred to therein because I considered that the law of Guernsey would follow the position in Jersey:

“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 re Internine Trust 2005 JLR 236, at para 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 ...*
- (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 Hoffman 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 (ibid., at para. 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 – although 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 re BBB Ltd. ([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 Hoffman in his speech in Investors Compensation*

Scheme Ltd v. West Bromwich Bldg. Socy. ([1998] 1 W.L.R. at 912), 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* ([1971] 1 W.L.R. 1381)] 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 E.R. 352, [1997] 2 W.L.R. 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 at para.30) 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.””

26. When considering these principles, I will start from the premise that the changes made to the Second Trust Instrument by the Instruments of Variation are all valid and effective. However, I have noted further guidance referred to in para. 63 of the quotation from *In re Internine Trust* 2005 JLR 236, and what Lord Steyn had had to say in *Society of Lloyd’s v Robinson* [1999] 1 WLR 756 and the line of authority to which he referred, citing *Hole v Garnsey*

[1930] AC 472, that a power of amendment reserved in a trust must be exercised for the purpose for which it was granted. This is an issue to which I will return.

27. Applying the principles of construction, the words in the amended Second Trust Instrument should be given their ordinary meaning, but they must be placed into the context of the document read as a whole. The subjective intention of those who participated in the Instrument of Variation inserting Clause 3(C)(3) into the trust instrument is not relevant. Accordingly, what matters is the meaning to be given to the provisions in the document and not what someone such as Mr Mewis on behalf of the Former Trustees thinks they were meant to cover.
28. Looking at the amendments made by the 2013 Instrument of Variation, Clause 3(C)(3) refers to “*allegations made against trustees*”. It does not refer as well to allegations made against those who have previously held office as trustees. When read alongside inserted Clause 3(C)(2), which enables a trustee making an application to this Court for directions to treat the expenses thereof as expenses of the Schemes, I think it is permissible to read Clause 3(C)(3) in accordance with its ordinary meaning, namely that any ability to pay costs being conferred is conferred only on the trustee or trustees then in office. Clause 3(C)(2) is consistent with section 35(2) of the 2007 Law, which provides that a “*trustee may pay from trust property, and may reimburse himself from the trust himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust.*” In accordance with the generally accepted approach to a trustee seeking directions under section 68 of the 2007 Law, this is intended for the benefit of all those concerned and so is treated as an expense of the trust. The costs that are associated with such an application would properly fall within the terms of Clause 3(C)(1), to which reference is also made, as “*expenses incurred in connection with the administration and management of the Scheme*”. In reality, inserted Clause 3(C)(2) adds nothing substantive to how the expenses of such an application for directions would be resolved even if that paragraph of the Sub-Clause had not been added.
29. I take the view that the position in respect of Clause 3(C)(3) is different. The costs being covered are stated also to be paid “*as an expense of the Scheme in accordance with the provisions of paragraph 1 of this Clause 3C*”. Rather intriguingly, the words “*may continue*” are included immediately before this reference to Clause 3(C)(1). The implication from the use of those words is that “*the costs of defending allegations made against trustees of fraud, wilful misconduct or gross negligence*” were capable of falling within Clause 3(C)(1) without any express provision being inserted. However, I am not persuaded that such any such expenses could properly be said to be incurred in connection with the administration and management of the Scheme. An allegation of fraud, wilful misconduct or gross negligence against a trustee (or even, to the extent applicable, against a former trustee) is not an expense that could be said to relate to the administration or management of the trust until those proceedings have concluded and findings have been made. The addition of Clause 3(C)(4) through this 2013 Instrument of Variation may have been intended to seek to address that issue by making provision as to what happens if allegations of this nature are proved. However, this is more a question for the Court hearing the action to decide what the just order in respect of costs will be and is not a matter to be covered by a variation made through an instrument agreed by the Former Trustees and the Principal Employer.
30. It is helpful to refer at this point to a summary of the position as set out in para. 48-010 of *Lewin on Trusts* (20th ed.), simply because it sets out some basic principles about indemnities:

“It has been seen that the statutory right of indemnity under section 31(1) of the Trustee Act 2000 is not capable of being excluded or restricted by the terms of the trust, though previous rights of indemnity were capable of being excluded or restricted. The extent to which the terms of a trust may enhance the trustees’ right of

indemnity, for example by conferring a right of indemnity in respect of the defence, whether or not successful, of claims in respect of non-fraudulent breaches of trust, or claims in respect of other non-fraudulent acts or omissions of the trustees, is not clear. Given that a trust may contain an exemption clause so as to exclude a trustee's personal liability except for his own fraud, it is difficult to see why a trust should not contain a provision allowing a trustee costs in respect of non-fraudulent acts or omissions, though questions of public policy arise in relation to provisions which purport to allow costs unreasonably incurred or unreasonable in amount. Exemption clauses excluding a trustee from personal liability for breach of trust, while not directly enhancing the trustee's right of indemnity, do indirectly have that effect insofar as an action, which would have been successful apart from such a provision, fails, thereby bringing the trustee's within the right of indemnity under the general law. It is clear that, as in the case of exemption clauses, provisions in the trust instrument cannot have the effect of entitling a trustee to costs if fraud is established against him. Provisions concerning the basis of assessment of costs cannot prevent the court from assessing costs in accordance with one of the bases provided by rules of court, and any such assessment will be determinative of the costs which are recoverable. Terms of the trust entitling the trustee to indemnity in respect of costs incurred by him will be construed so as to cover only costs which are reasonably or properly incurred and so do not operate to enhance the trustee's rights of indemnity under the general law. The same applies to persons owing fiduciary obligations, such as protectors.

31. The circumstances in which Clause 3(C)(3) would operate seem to amount to hostile proceedings (adopting the terminology used in the standard classification following *Re Buckton* [1907] 2 Ch 406), where a prospective costs order (sometimes also referred to as a pre-emptive costs order) will not generally be made. Whilst prospective costs orders are generally sought to assist beneficiaries who become parties to proceedings, they are also available to trustees (see, eg, para. 48-045 in *Lewin*). However, these prospective costs orders will not normally be made unless it is clear what costs order would be made at the substantive hearing. Because the claim by a beneficiary or a third party against a trustee for fraud, wilful misconduct or gross negligence is usually intended to result in a finding of a significant breach of trust, it would be very strange for the trustee to benefit from any prospective costs order. Seeking to achieve an outcome that would not be supported by a Court order in this type of situation through amendment to the trust instrument raises serious questions as to whether that is a permissible amendment. In the context of this Clause 3(C)(3) application, I take the view that it supports a narrow rather than an expansive construction being given to the provision, even on the assumption that it is valid. This is because it purports to remove from the oversight of the Court whether a party to such proceedings is entitled in the first place to draw the costs being incurred from the trust fund. I find there is merit in the argument on behalf of the Public Trustee (as the present trustee of the Schemes) that there would be no guarantee that, in the event of Clause 3(C)(4) becoming engaged, there would be any funds left from which to seek repayment. This cannot be something that is of benefit to the beneficiaries.
32. The primary reason, therefore, for rejecting the construction of Clause 3(C)(3) as sought by the Former Trustees is that the words, being given their ordinary meaning, do not mention former trustees, so there is no obligation on the trustee, ie, the Public Trustee, to fund any costs being incurred by a former trustee at all unless and until there is some order of the Court in favour of the Former Trustees at the end of the proceedings, or on the conclusion of a stage of those proceedings. If there were such an order at that stage, then the indemnity in Clause 15A may well assist.
33. There are, however, other problems with Clause 3(C)(3) that would also mean that it does not cover the situation in which the Former Trustees find themselves. It is apparent that there has

been no allegation made against the Former Trustees in the Account Application by a beneficiary. The Applicant is the Public Trustee and so, in my view, the reference to an allegation against the trustee being made by a third party is also not engaged. I do not consider that this can be read as covering an allegation against a former trustee by someone who is not that former trustee. That would be a construction that stretches the words in Clause 3(C)(3) beyond breaking point. As a consequence, even if the words in Clause 3(C)(3) could, as the Former Trustees suggest, encompass a former trustee as well as the current trustee, the identity of the Applicant making any allegation is not covered by the other wording, because it does not involve a beneficiary or a third party. Whilst this difficulty for the Former Trustees affects the Account Application, it would not necessarily affect any other proceedings brought against them, including those since late 2016 (or even earlier), but each time the Court can make orders as to the costs of those proceedings as it sees fit.

34. The Former Trustees place great reliance on the words “*under the terms of Clause 15A*” appearing here as if the two provisions can mean that the indemnity conferred on a former trustee under Clause 15A extends to entitling any former trustee to be paid upfront the costs that will be incurred in resisting allegations of fraud, wilful misconduct or gross negligence. I do not accept that there is merit in this argument.
35. Advocate Davies points out that Clause 15A is divided into three sentences. The first provides that there is no liability on the part of the trustee, which also extends to a former trustee, for matters which are not the result of the person’s own wilful neglect or default. It provides an indemnity in respect of any such liability that might otherwise be found. It makes no express reference to the pre-payment of legal expenses. The second sentence refers to the position of the incumbent trustee being permitted to retain and pay out of the Trust Funds monies in respect of the indemnity given by the first sentence (which I consider must be the case because of the reference to “*such indemnity*”). When read with Clause 3(C)(3), this cannot create any obligation on the part of the incumbent trustee to pre-pay anything towards the costs that could be incurred by the Former Trustees if they were to engage an appropriate lawyer. Instead, it operates after something has happened. The third sentence covers the situation where a trustee or former trustee is not indemnified from the Trust Fund, in which case the obligation is passed to the Principal Employer to provide the indemnity. It is apparent that this sentence does not assist the Former Trustees in their claim against the Public Trustee to pay legal expenses that they wish to incur. For the purposes of this application, the third sentence can be ignored.
36. What this analysis of Clause 15A means is that the reference in Clause 3(C)(3) to Clause 15A does not have the effect of imposing any requirement on the incumbent trustee to make payment of legal expenses as they are incurred by any former trustee. This reference to costs being payable under clause 15A relates to confirming that the indemnity in Clause 15A could be relied upon if it is found that there was no wilful neglect or default on the part of the person who relies upon that indemnity. There is, though, a tension between the provision of the indemnity in such circumstances and the costs that would be incurred in defending an allegation of fraud, wilful misconduct or gross negligence, which would mean, if established, that the indemnity available under Clause 15A would not apply. As I have already indicated, if the combination of Clause 3(C)(3) and Clause 3(C)(4) was envisaged to cover this situation, I would find that it is contrary to public policy for those provisions to have been introduced into the trust instruments of the Schemes. If such an allegation were proved, although it is not automatic, the likelihood is that the indemnity available to any person found to have committed fraud, wilful misconduct or gross negligence would be lost, so purporting to give financial assistance without any guarantee that the monies could later be recouped would be contrary to normal principles. This would not be a situation for a prospective costs order to be granted because the normal principles of costs in hostile litigation would operate. Instead, the solution would be to afford the person against whom such an allegation is made the benefit of the indemnity in circumstances where that indemnity should be regarded as

remaining effective. That is the comfort to which a trustee, or former trustee, is entitled under the terms of the trust instrument and the 2007 Law. The subject of such proceedings should not be entitled to monies upfront as an expense to the Fund and so having a real or potential adverse impact on the beneficiaries.

37. For these reasons, the cross-reference to Clause 15A found in Clause 3(C)(3) does not somehow incorporate into Clause 3(C)(3) any obligation on the part of the current trustee of the Schemes to pay the legal expenses incurred by the Former Trustees on an ongoing basis. If the Former Trustees wish to seek legal advice and representation they may be entitled to seek to rely on the indemnity they enjoy, but that will depend on the expense to which they have been put being found to have been not unreasonably incurred. That issue is not capable of being pre-judged as they suggest, so they must reach their own decisions as to whether to take advice or be represented in the knowledge that those expenses might not be recouped by them.
38. Although it is not an argument deployed by the Former Trustees, I have also considered whether the insertion of Clause 15D by the 2013 Instrument of Variation affects my conclusion. It similarly refers to Clause 15A and also to “*the same protection as to costs and liabilities as are provided in accordance with Clause 3C*”. Whilst it may have been envisaged by those who executed this instrument that they were conferring an entitlement to take costs of defending allegations of fraud, wilful misconduct or gross negligence out of the Trust Fund as those costs arose, the reasons I have already given in respect of the Former Trustees apply equally to others in a fiduciary position. It would, in my view, be contrary to public policy to purport to give them this entitlement before the question of the costs of any proceedings is addressed by the Court.
39. I can deal comparatively quickly with the suggestion from the Former Trustees that the proceedings in which they are involved include allegations of fraud, wilful misconduct or gross negligence. The examples to which I have referred set out in the materials in support of this Clause 3(C)(3) application largely relate to proceedings that have already been concluded, with orders already having been made. It is not correct for them to characterise everything in which they have been involved as a continuation of the *Betts* proceedings. Those were the proceedings that led to the order removing the Former Trustees as trustee of each Scheme. They were the proceedings in which orders have been made appointing the Public Trustee and extending the terms of that appointment. The Account Application involves some of the same parties, but does not involve all of them. This means that the Account Application is a fresh application being brought by the Public Trustee for the relief sought therein against the seven Respondents to it. Similarly, the *Red River* proceedings arose out of the appointment of the Public Trustee, but those were also distinct proceedings. Accordingly, anything set out in the evidence in relation to those earlier proceedings is of no direct relevance to what is being sought in the Account Application. If the Former Trustees (or any other person involved) had wished to rely on these clauses in those proceedings, they should have raised these arguments at the time and not waited.
40. The focus of the Account Application at this stage is on paragraphs 5 and 6. One of the reasons why the Public Trustee seeks orders that those amongst the Respondents who can give authority to enable the Public Trustee to obtain further banking information and, in default of compliance, for someone else to be authorised to make the requests to the entities holding information is to enable the new trustee to have as full a picture as possible about what has happened to the assets that formed the Trust Funds and to be able to track what has happened to them. It is only once that level of information has been obtained that the Public Trustee will be in a position to consider what to do next, although the subsequent paragraphs of the Account Application indicate that that step will be for Accounts and Inquiries to be undertaken. At this stage, therefore, although concerns are raised that those involved with the Schemes have not been helpful in providing full information, any reference to “*missing*

money” needs to be placed into the context of wanting to know whether there has been anything untoward. This is not the same as making an allegation that there has been fraud, wilful misconduct or gross negligence, although the Account Application may subsequently develop in that way. Because there are no allegations at this stage of fraud, wilful misconduct or gross negligence, Clause 3(C)(3) is not engaged because there is nothing of that nature that the Former Trustees currently have to defend.

41. In circumstances where I have set out a number of reasons why Clause 3(C)(3) of the trust instrument of each Scheme does not bear the meaning for which the Former Trustees argue, I do not need to comment on the other bases on which the Public Trustee has opposed this application. Had I decided that the meaning advanced by the Former Trustees was the correct one on the wording used, I would have needed to consider in more detail than I have whether the changes made by the Instruments of Variation fell foul of the provision in Clause 12 (which at face value I do not think they do) or of the principle that these were for a purpose other than one for which the power to amend had been granted. In that regard, I may well have found in favour of Advocate Davies’ submission that it is difficult to see how the power to amend was being exercised consistently with the statutory duty imposed by section 22 of the 2007 Law. The original indemnity found in Clause 15A seems to me to have been perfectly adequate. One wonders what led to the 2011 Instrument of Variation, when the wording used may well be regarded as being less clear than the wording it replaced. When that is coupled with the changes made in 2013, I struggle to see how that exercise of the function conferred on the Former Trustees enabling the trust instruments to be varied can be said to have involved observing the utmost good faith and acting *en bon père de famille*. I may even have gone so far as to invite submissions on whether it amounts to a form of indirectly making a profit from the trusteeship contrary to section 24. This is because it purports to enable a person to receive the indemnity for legal expenses as they are incurred in circumstances where that step should await the outcome of any application or other proceedings before the Court. However, in the circumstances where the construction on which the Former Trustees have relied is being rejected, I will leave all these matters open.

Conclusions

42. For the reasons I have given, I will dismiss the Clause 3(C)(3) application. I do not find that there is any entitlement for the Former Trustees to be able to pass invoices for legal costs they incur for payment by the current trustee out of the assets of the Schemes. There may be some expenses that the Former Trustees have incurred or will incur to which the indemnity in Clause 15A will attach, but that is not what the Former Trustees are seeking by this application, which is why it is being dismissed.
43. In respect of the costs incurred in bringing this Clause 3(C)(3) application, the Public Trustee seeks his costs on the indemnity basis and with an order that these costs be paid forthwith. I understand why such an order is being sought. The starting point will be that costs will follow the event unless there is good reason to make some other order. The basis on which the costs could be ordered against the Former Trustees could well be on the indemnity basis so as to avoid the Scheme assets being further depleted, but I will permit the Former Trustees 14 days from the handing down of this judgment to make any submissions they wish to make in opposition to such an order, after which I will decide how to deal with the question of the costs of this application.

Way forward

44. I understand that, having now disposed of the Clause 3(C)(3) application, I can return to the Account Application. The first thing I will need to do is to consider the Public Trustee’s application dated 15 January 2021 seeking leave to re-amend that application. The Skeleton Argument that Advocate Davies provided deals with that application and makes submissions

as to why the Account Application in that amended form should be granted. The Witness statement from Mr Mewis dated 25 January 2021 is more a response to the contents of the Public Trustee's Fourth Affidavit. The Respondents to the Account Application, not all of whom have been parties to the Clause 3(C)(3) application, may not have availed themselves yet of the opportunity to respond to the application to amend and so, if only out of an abundance of caution, I will indicate to the Former Trustees and to Mr Mewis that there will be a short time in which any response to that amendment application and, so far as appropriate, the relief now being sought by the Public Trustee under the paragraphs of it he is currently pursuing. In extending that time for any further comments, I am relying on the Former Trustees and Mr Mewis on behalf of those for whom he has spoken previously, to gather together the collective comments, if any, on behalf of the seven Respondents.

45. The time I have in mind for any further submissions on behalf of the Respondents to the Account Application is also 14 days from the handing down of this judgment. However, if any Respondent indicates that a longer period is needed, and explains the reasons for that request, or asks that there be a further oral hearing, then I would certainly consider such a request favourably, provided, of course, it is a reasonable one. Ideally, there would be an indication one way or the other within those 14 days, thereby enabling me to consider my decision on the Account Application shortly thereafter.