Plaintiff's applications seeking a declaration as to the pension plan applicable to the Deceased, a declaration as to whether the Deceased had any dependants at the time of his death and for the removal of the Defendant as Trustee re the Cockle Account and for a new trustee to be appointed. By its own application the Defendant seeks a declaration that its decision to find that Deceased was survived by one or more dependants is a momentous one and to bless its decision in that regard.

[2021]GRC058

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:	**KIM NICOLINA ATTARD**	**Plaintiff**
	-and-	
	OVERSEAS TRUST AND PENSION LIMITED	**Defendant**

Hearing dates: 15th and 16th March 2021

Judgment handed down: 27th October 2021

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Plaintiff: **Advocate P Richardson**
Counsel for the Defendant: **Advocate A D Laws**

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007
The Royal Court Civil Rules, 2007
Re F 2013 GLR 388
Dundee General Hospitals Board of Management v Walker [1952] 1 All ER 896

Introduction

1. Arnold Cockle died on 1 December 2016. At the date of his death, he was a member of a pension plan of which the Defendant, Overseas Trust and Pension Limited, is the trustee. Mr Cockle's daughter, the Plaintiff, Kim Attard, commenced proceedings against the Defendant in early 2019. The Cause, which was tabled on 25 January 2019, referred to Mr Cockle being a member of the Opes International Pension Plan (Spain). She sought a declaration that she is the sole remaining Life Assured under the terms of an associated bond with Old Mutual International Ireland Limited ("OMI") and/or that she is the sole beneficiary of the trust relating to Mr Cockle's interest in the Plan, as well as damages for breach of fiduciary and/or other duties. The Defendant's Defences acknowledged that the Plaintiff is the sole Life Assured

under the OMI bond, but denied that she is the sole beneficiary with whom it has to deal, because the Plaintiff's daughter, Karista Williams, is also a beneficiary. It further denied that there had been any breach of duty.

2. A hearing took place on 2 December 2019 when both parties were proceeding on the basis that Mr Cockle had, as both parties pleaded, been a member of the Opes International Pension Plan (Spain), which is governed by a deed dated 2 September 2014 ("the 2014 plan"). The Court was invited to determine as a question of construction of that trust instrument whether, as the Plaintiff alleged, she was the only person entitled to take any benefit from Mr Cockle's member's account, the consequence of which would be that Karista would have no such entitlement. The conclusion I reached, as outlined in the decision I explained at the end of that hearing, was that I could not reach that conclusion, as a pure paper exercise, as to whether the Plaintiff alone, or with Karista, formed the class of beneficiaries under the terms of that instrument. This was my conclusion because, once there was a decision that Mr Cockle had died with dependants, it meant it was possible that Karista could benefit and further information was needed before the question I have been asked to answer could properly be dealt with. I reserved the giving of fuller reasons in writing.

3. Events overtook the preparation of those reasons. One of the documents to which reference had been made during that hearing in 2019 was the certificate of nominated beneficiaries, which referred to "*the terms of the Master Trust Deed and Scheme Rules issued on 19th May 2011*". This led to further consideration as to the pension plan to which Mr Cockle had been admitted as a member, because the Defendant acknowledged that there was also a separate scheme, the Close OPES International Retirement and Savings Plan, with a trust instrument dated 19 May 2011 ("the 2011 plan"). There are four appendices, of which one relates to Spain. The Defendant has been unable to state definitively to which of these two plans Mr Cockle was admitted as a member.

4. As a result, the Plaintiff made an application dated 21 August 2020 seeking a declaration as to which of these two plans is applicable to Mr Cockle, which in turn will identify which of the trust instruments and rules applies. Further, she seeks a declaration as to whether Mr Cockle had any dependants at the time of his death. The other relief she seeks is for the Defendant's removal as trustee of whatever is in her late father's member's account and for a new trustee to be appointed.

5. The Plaintiff contends that it is the 2011 plan that is applicable. For its part, the Defendant contends that it is the 2014 plan that applies and it has taken a decision under the terms of that 2014 plan, as recorded in its minutes of 6 November 2020, that both the Plaintiff and Karista are dependants and so beneficiaries and the net balance of Mr Cockle's member's account should be divided equally between them, leaving to each their election as to how the funds to be distributed should be dealt with. By its own application dated 13 November 2020, the Defendant seeks a declaration that its decision to find that Mr Cockle was survived by one or more dependants is a momentous one and to bless its decision in that regard. In any event, it seeks a declaration as to whether Mr Cockle was survived by one or more dependants.

Procedural matters

6. The evidence adduced has all been in the form of witness statements. There has been no oral evidence and so the contents of the written statements have not been tested at all. Because the applications are brought under the Trusts (Guernsey) Law, 2007, this is not unusual. Those applications are made against the backdrop of the action commenced by the Plaintiff in 2019, but matters have clearly moved on since then. I will, though, continue to refer to the parties as Plaintiff and Defendant rather than switching to Applicant and Respondent, if only because each side has its own application to be determined.

7. The witness statements begin with the Plaintiff's statement dated 18 July 2019, which was prepared for the hearing in 2019. The Defendant's managing director, Robert Banfield, similarly prepared his first statement dated 19 July 2019 for that hearing. In support of her application, the Plaintiff has produced a second witness statement dated 19 August 2020. Mr Banfield's second witness statement, both in support of the Defendant's application and responding to the Plaintiff's evidence, is dated 11 November 2020. The Plaintiff's third witness statement is dated 8 January 2021 and Mr Banfield's third witness statement is dated 22 January 2021.
8. Karista has not sought to become a party to these proceedings. She has not provided any direct evidence. Both the Plaintiff and Mr Banfield refer to what Karista has provided indirectly by way of correspondence and other information. Had Karista wished to be heard, she would have been entitled to have made representations, but she has chosen not to do so. Accordingly, the decisions I have reached have followed the materials and submissions on behalf of the Plaintiff and the Defendant only. Although Karista has not participated in these applications, under rule 35(2) of the Royal Court Civil Rules, 2007, this decision will still be binding on her.

9. The final item of evidence is a fourth witness statement of the Plaintiff dated 11 February 2021. There was no prior permission allowing her to rely on this evidence, hence the application dated 4 March 2021 by which she applies to have this witness statement admitted into evidence. On behalf of the Defendant, Advocate Laws did not strenuously oppose this witness statement being considered, recognising that it purports to offer the Plaintiff's commentary on material already exhibited to earlier witness statements.

10. In my view, this witness statement contains explanations that could have been included by the Plaintiff in her third witness statement because Mr Banfield's third witness statement did not exhibit any new material. Further, it really is little more than an analysis that Advocate Paul Richardson could have made in his oral submissions on behalf of the Plaintiff. In those circumstances, it would be open to me to disregard the entirety of that fourth witness statement. However, I have chosen not to do so on the basis that many of the points made in it could have been addressed in oral argument on the basis that the documents being analysed speak for themselves and there is no dispute that the Plaintiff was present when Mr Cockle was completing some of the forms with assistance from his financial adviser, Andrew Oliver. Mr Oliver might have been a witness directly but, similarly to the approach with Karista, what he has to say has been exhibited by others. Further, as Advocate Laws pointed out, there are no allegations of fraud being levelled against the Defendant, but rather concerns being expressed by the Plaintiff as to how different versions of the same document appear to exist. Each of those concerns can be dealt with when I consider the material in question. Accordingly, I am prepared to take into account the contents of the Plaintiff's fourth witness statement and so her application dated 4 March 2021 is granted.

11. At the conclusion of the hearing on 16 March 2021, I reserved judgment. Both parties had expressed the desire to get as much clarity and certainty as possible as a result of that hearing, and so I will endeavour to set out how I think matters should now proceed in light of my conclusion that it is the 2011 plan that applies.

Facts

12. Mr Cockle was born on 2 September 1934. He married Audrey in 1954. The Plaintiff is their only child. She was born in 1956. In turn, Karista, who was born in 1994, is the Plaintiff's only child. Both the Plaintiff and Karista have issues with their health, the details of which are set out in the Plaintiff's witness statements, but which are not directly relevant to the issues I have to determine. The Plaintiff has been unable to work for many years and has been in receipt of benefits in Australia. Karista's previous assistance as her carer also meant additional benefits were payable to the family. Karista moved in with Nick, who is now her husband, in 2012.

They became engaged in November 2015 and were due to marry a year later, but Mr Cockle's illness and death meant the wedding was delayed until 22 December 2016.

13. Mr Cockle worked as an electrician, switching to being self-employed in around 1963. He began wiring factories. By the early 1970s, Mr Cockle has set up his own company, Electrical Industrial Power Installations Limited. He found that significant money could be made from building marine generators. By the late 1970s, the company had offices owned by Mr Cockle in Epsom. Mrs Cockle also worked in the company, but they decided to retire in 1996, from which time those offices were rented out to produce some income.
14. The Plaintiff's parents bought a holiday home in Menorca in 1977. In 1999, they decided to relocate to Australia and moved to the Gold Coast, about 45 minutes' drive away from where the Plaintiff lived. She had moved to Australia some years previously. The Cockles split where they lived each year between Australia and Menorca, mostly choosing to spend the European summer months from May to October in Menorca.

15. The Defendant was incorporated in 2012. It holds a fiduciary licence issued by the Guernsey Financial Services Commission. Mr Banfield became the Defendant's managing director in 2017. On 2 September 2014, the Defendant established a retirement annuity trust known as "The OPES International Pension Plan – Spain", which is governed by a trust deed and rules.

16. Mr Banfield has also referred to two earlier plans. Close Trustees Guernsey Limited ("Close") declared the first trust on 20 December 2005. The plan is titled "The Close OPES International Pension Plan – Spain" ("the 2005 plan"). During the course of the following year, a number of other plans were established by Close, a couple of which were jurisdiction-specific. The one established on 25 May 2005 is called "The OPES International Retirement and Savings Plan". On 19 May 2011, Close established "The Close OPES International Retirement and Savings Plan". There are four appendices to the applicable rules, to which a person could be assigned as a member.

17. There is an instrument dated 7 September 2011 executed by Close showing that, with effect from 1 June 2011, the assets of Close in the Crown Dependencies and South Africa were acquired by Kleinwort Benson Channel Islands Fund Services Limited ("Kleinwort Benson"). As a result, Kleinwort Benson assumed the trusteeship of the Close plans from 2005 and 2011, although this instrument is supplemental to the 2005 plan that had been established by Close. It further formally changes the name of the plan by omitting the word "Close", so that in future it would be known as "The Opes International Pension Plan – Spain". This is consistent with the stated desire that references throughout the plan to any Close entity be read as if referring to an equivalent Kleinwort Benson entity.

18. The Defendant purchased this trust business from Kleinwort Benson under the terms of two instruments of resignation and appointment of trustee dated 20 November 2012. The instrument relating to the plan established in 2005 refers to the changed name of that plan. The instrument relating to the plan established in 2011 refers to it being known as "The Close Opes International Retirement and Savings Plan". It was made between Kleinwort Benson (Guernsey) Trustees Limited and the Defendant and, under its terms, the Defendant became the new trustee and agreed to be bound by the terms of the trust.

19. The Defendant introduced the 2014 plan to replace the Spanish variant of the Close plans it had acquired. It had taken advice on the Spanish tax position and so decided to establish a new product for the Spanish market. Mr Banfield further explains that the Defendant continues to administer the two Close plans for those members who remain, being six in each, but has not since 2014 accepted new members to either plan. There are significantly more members of the Defendant's own 2014 plan.

20. Mr Banfield has highlighted the marketing material used by the Defendant, including in presentations by those working on behalf of the Defendant, such as DeVere Spain. This material refers only to "OPES", without any further distinction. In one of those presentations, one of the key benefits described is that the full fund is available from age 50 and benefits must commence by 80. Further, it states that, because OPES is Guernsey-based, it is not deemed to be a Spanish asset on the death of the member and refers to a letter of wishes with the trustees avoiding Spanish forced heirship rules specifying who is to benefit on the death of the member. In another document, the background is stated to be that "*OPES Spain, is an international pension plan established in Guernsey in 2005 … In 2013 Overseas Trust and Pension decided, as a result of an increasing worldwide emphasis on tax reporting and collection, that a strategic review should be undertaken of the arrangement to ensure that it continued to meet its objectives as originally set out. We are pleased to confirm that following a detailed review and updated legal opinion together with modernisation of the plan in several key areas to conform with new Spanish reporting requirements, OPES Spain continues to offer a robust solution for client needs*." Another document headed "*OPES International Pension Plan Spain*", which Mr Banfield explains could be downloaded from the Defendant's website in either an English or Spanish version, refers to OPES Spain being established in Guernsey on 19 May 2011 as a multi-member personal pension scheme. This document also states that, on the death of the member, "*any unused funds may be distributed to the member's chosen beneficiaries or are paid to their estate*", referring to providing the trustee with a letter of wishes regarding those who should benefit on death.

21. Audrey died in Menorca on 13 November 2014. The Plaintiff had travelled to be with her parents and she and Mr Cockle then returned to Australia. The Plaintiff's evidence also explains that both her parents had various health problems. In December 2014, Mr Cockle was rushed to hospital, but recovered sufficiently well to be able to travel to Menorca in April 2015 with the Plaintiff to sort out Mrs Cockle's affairs and to put his own affairs into some order as well.

22. Before he left Australia, on 20 April 2015, Mr Cockle executed a Will under the law of Queensland. Probate was granted to the Plaintiff and Mr Cockle's solicitor, John Fradgley, in the Supreme Court of Queensland on 29 May 2017. Mr Cockle left his estate to his Trustee to hold his personal property for the Plaintiff, unless she pre-deceased him, in which case it was held for Karista, with the residue to be held on the terms in the Schedule, under which Karista was named the Primary Beneficiary. If Karista has children and grandchildren, they are the Secondary and Tertiary Beneficiaries respectively. The Plaintiff is also named as a Secondary Beneficiary. The spouses of the Primary, Secondary and Tertiary Beneficiaries are the General Beneficiaries. In the event that the Plaintiff and Karista did not survive Mr Cockle, which clearly became inapplicable at the time of his death, charitable gifts were to follow.

23. There is a statement of testamentary wishes of Mr Cockle bearing the same date as his Australian will. This appears to be a formal document declared under oath under legislation applicable in Queensland. At the end of it there are some explanatory paragraphs:

> "*8. I advise that my intention in setting up this trust is:*
>
> *(a) Whilst assets are maintained within a testamentary trust, they should be safe from attack by any unexpected claims such as creditors, bankruptcy or a property claim arising out of a matrimonial dispute; and*
>
> *(b) A testamentary discretionary trust allows discretion to allocate income to the various classes of beneficiary under the trust and in particular special tax advantages if income is allocated to an infant beneficiary. The tax advantages of allocating income to an infant beneficiary are significantly greater than those which would normally*

be available in allocating income to an infant beneficiary under a family trust.

9. A general explanation of a testamentary trust is outlined in the attached Information Sheet on Testamentary Trusts, prepared by my lawyers Bell Legal Group. I ask my Trustee to ensure that, at the appropriate time, Kim is provided with a copy of this document so that she can better understand why her inheritance has been left to her in the form of a Testamentary Trust.

*10. I also ask that my Trustee explains to **Kim** the potential asset protection advantages [of] a testamentary trust, so that she is aware that she should liaise with the Appointor if any difficult situation arose for her in the future (such as divorce or separation), so that the trust can be placed in independent hands and hopefully thereby protected.*"

This puts into context the preceding paragraphs of this statement of wishes:

"*3. While my daughter **KIM NICOLINA ATTARD (Kim)** is alive, it is my intention that she should have exclusive benefit of my estate during her lifetime, notwithstanding the manner in which the beneficiaries of the Trust have been formally structured. In particular, although **Kim's** daughter **KARISTA AUDREARNA MARIA ATTARD (Karista)** is named as the Primary Beneficiary of the Testamentary Trust and **Kim** is named as a Secondary Beneficiary, this should not be construed as an intention that **Karista** is to benefit in priority to **Kim** whilst **Kim** is alive.*

*4. Notwithstanding the above, I direct that the Testamentary Trust should also be administered for the benefit of **Karista** where my Trustees deem appropriate, with any allocation of income and/or capital to **Karista** to be at the absolute discretion of my Trustees.*

*5. Upon **Kim's** death, the Testamentary Trust is thereafter to be managed for the Primary Benefit of **Karista** and her family. In this respect, in the event that **Kim** dies prior to **Karista** attaining the age of thirty (30) years, then I express the desire that my Trustees (subject to taxation and any other adverse consequences that may arise) to distribute 50% of the remaining capital in the Trust (if any) to **Karista** upon her attaining the age of thirty (30) years should she so desire and to distribute the balance of the capital of the trust then remaining (if any) to **Karista** upon her attaining the age of forty (40) years, provided my Trustees are of the opinion that **Karista** would not benefit from the continuing asset protection qualities the Testamentary Trust may offer.*

*6. Further, on the death of **Kim** it is my wish that, in the absence of any compelling reason why she should not be so appointed, once **Karista** attains the age of 30 years, she should be appointed as co-Trustee of the Testamentary Trust (to act jointly with any continuing Trustee). In this respect, I direct the Appointor of the Testamentary Trust to ensure that they use their power of removal and appointment to achieve this outcome provided they are of the view that **Karista** is of sufficient maturity.*

7. When making any significant distribution of capital or income to any beneficiary, I ask that my trustees ensure that the beneficiary concerned is not at such time undergoing divorce proceedings, bankruptcy, in the prospect of being declared bankrupt, suffering mental problems or any addiction which may result in the loss or squandering of his or her benefit. I also would like

the trustees to ensure that the beneficiary concerned is mature enough to reasonably benefit from the funds received and not highly likely to waste them in imprudent pursuits."

24. On 4 May 2015, in Mahon, Mr Cockle executed his Spanish will before a Notary, which is stated to be valid only for his assets situated in Spain. He appointed the Plaintiff as his universal heiress but, if she predeceased him or was unwilling or unable to accept the inheritance, his estate was to be taken by her children.

25. In Spain, Mr Cockle was being advised by Mr Oliver of DeVere Spain SL. The address stamp used by him shows an address in Malaga. There were several meetings, also attended by the Plaintiff, before Mr Cockle decided to proceed.

26. A form dated 15 June 2015 has been signed by Mr Cockle. It is a printed pro forma form of the Defendant and it is headed "*OPES International Pension Plan Spain*". Some of it has been completed in black ink and some in blue, seemingly in a different hand. There are stamps added throughout it reading "*RECEIVED AS ORIGINAL*".

27. In relation to the first section containing personal details, it indicates that Mr Cockle is resident in Spain for tax purposes and gives a tax information number along with his address in Menorca. The e-mail address, however, has the "*.au*" ending. It shows Mr Cockle's British passport number. The reason stated for establishing the OPES plan is "*long-term financial planning to ensure funds readily available for himself and to give to daughter and granddaughter in event of illness*". The source of funds is stated to be "*savings accumulated over a lifetime of investing and accruing excess income. Current funds with Barclays and Banca March*". As regards the source of this wealth, the form states: "*largely winning major contracts to supply generators to large industrials and hospitals, deriving profit and saving*".

28. The second section of the form deals with product details. The first box deals with retirement age, explaining that "*Retirement Benefits must be taken after the age of 50 and prior to the age of 80*". The box seeking to take benefits from the OPES plan immediately has been crossed. At this time, Mr Cockle had already attained the age of 80. He could choose between investment selections named "*OPES ADVANCED*" or "*OPES ADVANCED PLUS*" and the form shows the former being selected. The nature of Mr Cockle's contribution was a single payment of £1.65 million. He wished to establish his plan in sterling and, in respect of risk profile, indicated that he was looking to take a lump sum withdrawal and/or income within the next 3 to 7 years and had a Low-Medium risk attitude. Box G in this section deals with the investment adviser appointment, being "*the person who is advising/managing the investment inside the OPES*". Mr Oliver is appointed.

29. Section 3 of the form relates only to OPES Advanced investing via a life company bond. A choice between UCITS funds only and UCITS funds plus other investments is given, and Mr Cockle opted for the latter, indicating Old Mutual International. This box also states: "*The latest legal opinion obtained by OTAP recommends that the underlying investments held in OPES Spain are UCITS compliant funds to ensure that OPES Spain is as robust as possible.*" Mr Cockle has also signed the declaration confirming he has read, understood and accepted the charges in the fee schedule within the application form. It appears that the Plaintiff has also signed and someone has written in the client name of Mr Cockle. The fee schedule is said to be effective August 2014.

30. Section 5 of the form, dealing with beneficiaries, is struck through and, at the end, in one hand "*Letters of wishes attached*" and then in another (and in a different colour, and not that seemingly used by Mr Oliver) is added "*(to follow)*". Four boxes were given by which the applicant could list the beneficiaries the applicant wished to receive benefits from the OPES

plan after the person's death. There was a reminder that the nominations made should add up to a total of 100%.

31. Section 6 of the form is headed "*Appointment of Professional Adviser*". Mr Oliver has been appointed and he signed the declaration and dated it 14 May 2015. That declaration includes: "*I confirm that I have arranged or provided appropriate financial, pension transfer and tax advice with regards to the suitability of the OPES Plan, together with the implications of becoming a Member, for the named applicant. … I confirm that I have carried out the required analysis of the applicant's circumstances, and have satisfied myself that the Plan is both cost effective and appropriate for the applicant.*"

32. Mr Cockle signed and dated the declaration in Section 7. In doing so, he agreed to be bound by the rules in the Deed establishing the Plan and agreed that such rules shall be the basis of the contract between him and the Defendant as the Trustee and Plan Administrator of the OPES Deed. The second declaration is: "*I understand and accept the terms of the OPES International Pension Plan Spain and the OPES International Pension Investment Plan Spain and the benefits provided thereunder.*" The sixth declaration is: "*I confirm that I am aware that where my Investment Choice is held via a policy issued by a life company or via a fund platform, OTAP are bound by the terms and conditions of that policy or platform. I confirm that I am aware that my Investment Choice is to be managed by an Investment Adviser (who may also be my PA [ie, Professional Adviser]) who is to be nominated and appointed by me. I agree that all communications are to be directed through OTAP.*"

33. Also on 15 June 2015, Mr Cockle and the Plaintiff completed and signed an application form for OMI. Mr Cockle was the applicant and the Plaintiff has been included as a further life assured. Mr Oliver has signed the declaration of the financial adviser, explaining that Mr Cockle had been introduced to him as a seminar attendee and that he had known him for three years. There is a personal illustration for Mr Cockle, bearing the date 19 May 2015, of an investment of £1.6 million into a European Executive Investment Bond. It indicates that the applicant is habitually resident in Spain.

34. By a letter dated 23 July 2015 from Mr Cockle to the Defendant, he set out how he wished the Defendant to deal with the payment and distribution of death benefit. This is also stamped "*RECEIVED AS ORIGINAL*". He indicated that he wished these benefits to be settled into a discretionary trust, asking the Defendant to act as trustee and for the Plaintiff to be the protector of the trust. He added:

> "*Upon death, I wish for the bond to stay intact and for the assets to be transferred into a discretionary trust assigned to Kim Nicolina Attard, and Karista Audrearna Attard and any great grandchildren, whether living now or born after. Should these fail, I would like the proceeds to be distributed equally between the: Australian Flying Doctor, and the French Doctors without Frontiers. With regard to the collapse of the trust, Kim should have no reason to terminate. Karista should not do so either, but should it be necessary then she should attain the age of 31 years before half of the trust can be liquidated, and 41 years of age before the total collapse is allowed. There could be exceptional circumstances in which you may determine otherwise of course, but hopefully it will remain intact for the benefit of my great grandchildren.*"

35. On or about 28 July 2015, the Defendant submitted its application form to OMI, with a view to establishing a bond. Mr Cockle and the Plaintiff have both signed parts of the form and added 15 June 2015 as the date, as has Mr Oliver himself. I infer, therefore, that the form was started with assistance from Mr Oliver before being supplied to the Defendant for completion and submission. However, somewhat strangely, that application form also refers to the trust name as the corporate name of the Defendant adding "OPES04/3233", stating that this trust was created on 7 July 2014. In an associated document submitted to OMI, the name of the trust is

stated to be the Defendant "as trustees of OPES04/3233". Mr Oliver's details are given in the section about to whom to refer if clarification was needed about the asset choice within the bond. The amount to be withdrawn on a quarterly basis was indicated to be €24,000 each year.

36. On 30 July 2015, OMI pointed out to Mr Oliver and to the Defendant that the application form for the bond had been completed inaccurately. The applicant should be the Defendant with both Mr Cockle and the Plaintiff being the lives assured. It was suggested that this could be addressed in one of two ways. Mr Cockle chose to send a letter dated 31 July 2015 by which he acknowledged he had signed in the wrong place and confirmed that he understood the Defendant to be the policy holder and that he is a beneficiary and life assured. I infer that this error arose because of the way Mr Oliver was acting, when he should have known better how to assist Mr Cockle with the application.

37. The certification provided later indicates that on or about 27 August 2015 Mr Cockle was accepted as a Member by the Defendant.

38. The contributions made by Mr Cockle to the Defendant were a mixture of sterling and US dollars, the earliest of which was made on 24 July 2015, with the larger amounts being paid across on 27 and 28 August 2015. In turn, after deductions of some fees, the Defendant paid these amounts to OMI as the premium for the bond. This happened on 27 and 28 August and 1 September 2015. The bond was issued by OMI on 16 September 2015 in favour of the Defendant as the policyholder, where the initial premium paid is recorded at just over £1.2 million, with the lives assured being Mr Cockle and the Plaintiff.

39. The Plaintiff has also produced a document signed by Mr Oliver on 3 September 2015, which is an Elderly & Vulnerable Clients Policy Checklist, internal to DeVere, that has been completed because Mr Cockle was over the age of 75. Everything required is checked as having been covered and he has noted: "*Arnold's daughter Kim, who has POA, was present at all of the meetings. Arnold has a further $2m in Australia. His main concern is medical + IHT for daughter*."

40. On 7 September 2015, Mr Cockle completed and submitted a written benefit application form, again with assistance from Mr Oliver, who has counter-signed it, requesting a lifetime annuity of £10,000 per annum, payable on a quarterly basis. Accordingly, the Defendant made a partial surrender request to OMI on 21 September 2015 for £10,150 to be able to make the annuity payments to Mr Cockle for the year to follow. The OMI form has been completed by Nicky Jehan, who had acted on behalf of the Defendant when completing the original application. It has been counter-signed by one of her colleagues. In the section relating to the policy from which payments will be made, this form states that the trust name is "*OPES Int Ret + Savings Plan Re. OPES04/3233*" and that this trust was created on 19 May 2011. The request was approved and the first quarterly payment was made to Mr Cockle on 25 September 2015. The Defendant accepts that it overlooked making the payments requested by Mr Cockle in December 2015 and March and June 2016, but that a payment representing those three quarterly payments was made in August 2016, with a further single quarterly payment being made on 1 November 2016.

41. The Defendant provided a welcome pack to Mr Cockle, which was sent under cover of a letter dated 7 October 2015, signed by Nicky Jehan by way of an e-mail from the Defendant to DeVere Spain on 22 October 2015. It was sent again on 3 November 2015 and, it seems, a third time on 9 February 2016. That letter is headed "*OPES International Retirement and Savings Plan (Spain)*", which is the plan to which Mr Cockle was apparently being admitted as a member, because that is what the letter then says. It included a certificate of Nominated Beneficiaries. This is the document that was central to the hearing in 2019. It is headed "*OPES International Retirement and Savings Plan (Spain)*" and refers to a trust deed dated 19 May 2011. It records Mr Cockle's membership number as OPES04/3233. This is the same reference

as had been given on the application form submitted to OMI. Mr Banfield explains that the use of "04" within this is a reference to membership of the plan governed by the 2014 trust instrument and rules. It states that the Plaintiff has a 100% entitlement as beneficiary. The Defendant has indicated to the Plaintiff that the details on this certificate are clearly incorrect, referring to the letters of wishes received, which indicate the preference of Mr Cockle to establish a discretionary trust after his death. It also included a certificate of membership and interest, referring to the OMI European Executive Bond, which similarly states that this certificate, "*provided as evidence of membership in respect of the OPES International Retirement and Savings Plan*", is governed by the trust deed dated 19 May 2011.

42. A second withdrawal request was made to OMI by the Defendant dated 30 November 2015 for £975 per annum to cover fees. This document refers to the name of the trust as "*OPES Int'l Retirement + Savings Plan – A Cockle*". The date that this trust was created is given as 30 November 2012.

43. On 21 April 2016, Mr Cockle wrote in his diary "*Karista called. Nail in*". The Plaintiff suggests this is an abbreviation for "nail in the heart", referring to the pressure Mr Cockle had told the Plaintiff that Karista was exerting to provide benefit for her upon his death. She states that Mr Cockle was not keen to do so.

44. By a letter dated 8 June 2016, Mr Cockle added to the letter of wishes he had provided to the Defendant. This time it includes a reference to his Member No. OPES04/3233. It is in the same terms as the letter dated 23 July 2015, save that it adds a sentence at the end of the passage quoted above: "*I would suggest, if possible, keep the percentage of inflation within the trust, and distribute the balance of the increased value, ensuring the trust remains a viable growth product for future years.*"

45. Mr Cockle executed a will relating to his property in the United Kingdom on 7 July 2016. Mr Oliver was one of the witnesses. Mr Cockle's address was given as being in Epsom. He appointed Karista as his executor and bequeathed to Karista all his UK property and, in default, left that property to the Plaintiff and, if everything else failed, left it in equal parts to the same two charities as under his Australian will. Karista obtained probate on 23 November 2017. The grant from the District Registry at Brighton records that Mr Cockle had died domiciled in the State of Queensland, Australia. The Plaintiff says that Mr Cockle had asked her to destroy this English will, but the Plaintiff chose not to do so because it is an official document. Mr Cockle had hoped that Karista would retain the offices and benefit from the income, but she has since sold them.

46. Mr Cockle also signed in July 2016 some OMI material relating to a further contribution of £700,000 and the estimate of what that would produce, similar to the material for the initial contribution expected at the time to be £1.6 million. This estimate was prepared on 4 June 2016 and his signature is dated 7 July 2016. The Defendant's standard form has been used and refers to being available for several retirement plans, including OPES (but without any further detail, although there is a reference to "*OPES Spain*" as one of the plans for which a regular annual contribution could not be made in this fashion). Section 3 of this form refers to three retirement plans and asks that one be ticked. It includes "*OPES ADVANCED*" and "*OPES ADVANCED PLUS*", as well as "*OPES*", which is the box that has been ticked, where there is a note stating that this is "*Not available for OPES Spain*". In Section 8 of this form, dealing with the investment selection, there is a tick against "*OPES Spain: Spanish compliant life company bonds investing in UCITS funds*". Mr Cockle has signed, but not dated, this form. According to Mr Banfield, this additional contribution form was provided to the Defendant in September 2016 and payments totalling that amount were made in sterling and euros during that month.

47. The Defendant submitted the appropriate application form to OMI under cover of a letter dated 16 November 2016. The form used, appearing to have been completed by Simon Charlwood,

also refers to the trust name being the corporate name of the Defendant, this time having used a stamp for that purpose rather than completing it in manuscript, but adding "*OPES 04/3233*", and stating this trust was created on 7 July 2014. Mr Cockle had signed the declaration on 6 July 2016. This has been crossed out to enable Mr Charlwood and one of his colleagues to sign it on 16 November 2016. The declaration of each life assured has been signed by Mr Cockle and also dated 6 July 2016. This form does not appear to have been signed by the Plaintiff, despite her being another life assured. Mr Oliver has also signed the declaration of the financial adviser and dated it 6 July 2016.

48. Mr Cockle fell ill in Menorca in the autumn of 2016. He was hospitalised in both October and November. He was kept in isolation between 1 October and 28 November 2016. He died on 1 December 2016.

49. Since Mr Cockle's death, the Plaintiff has engaged in a lot of correspondence with the Defendant. She has made several complaints, including to the Channel Islands Financial Ombudsman, and she is clearly unhappy with the responses she has received. The relationship between the parties appears to have broken down. The Plaintiff has been critical of those involved in dealing with her late father's affairs. Mr Banfield's evidence attempts to address these criticisms, but his comments were not really relevant to the issues that were in issue at the time the Plaintiff's action was underway and they appeared to me in December 2019 and still appear today to be unduly defensive, especially now that there is acknowledged confusion as to the pension plan to which Mr Cockle was admitted as a Member. However, aside from supporting a finding that the relationship between the parties has broken down to such an extent that it cannot continue, to the extent that that becomes relevant, this post-death correspondence and the commentary thereon serves little purpose. Indeed, and by way of example, there is some justification to the Plaintiff's criticism about documents produced from close to the time of her father's death. For example, she states that Mr Cockle was too ill to have completed a form from OMI shown as dated 29 November 2016, which Mr Cockle appears to have signed. There is also a document sent to him, which he has signed and Mr Oliver has counter-signed, which begins "*Further to our meeting on the Tuesday 06th of December 2016*", which would be difficult given that he died on 1 December 2016. Because very little from these exchanges assists in how to resolve the main issues in this case, I will confine myself to referring only to those aspects of this post-death correspondence that I consider to be relevant.

50. It appears that the Defendant was only informed of Mr Cockle's death by a telephone call from Mr Oliver in December 2017. By early 2018, the Plaintiff was asking the Defendant to bring about the wishes of her late father by establishing the discretionary trust to which he had referred. The Defendant did not wish to do so. Its approach to discretionary trusts at that time was apparently not the same as it had been or now is. Instead, the Defendant treated both the Plaintiff and Karista as beneficiaries under the plan and started corresponding with Karista, including with a firm of Advocates which was instructed by Karista. The tenor of the Plaintiff's correspondence shows increasing frustration with what she regarded as the Defendant's obstructive and unhelpful position.

51. By a letter dated 17 December 2018, Karista provided the Defendant with some details of her financial circumstances. In doing so, she explained that she and her husband might lose the benefits paid under the Australian welfare system but set out what she roughly envisaged would be available by way of income from a trust structure, including paying taxes. She expressed her preference to receive capital directly, though, rather than it being settled into a trust. It is apparent she has taken advice from financial and legal professionals. On 14 January 2019, Karista provided some further details about her circumstances by e-mail to the Defendant, in which she also suggested the Plaintiff would only countenance an outcome with which she agreed.

52. The Plaintiff accepts that Mr Cockle paid Karista's BUPA insurance cover. She says this was to expedite some medical treatment and that her father had paid similar medical insurance for her during 2016 as well.

53. A statement account produced by the Defendant, bearing the date 2 October 2019, refers to Mr Cockle's Member Number as 3233, in respect of Scheme Number 50004, indicating that he joined on 24 July 2015. This document is headed "*OPES Int'l Retirement & Savings Plan (Spain)*". The valuation given is a little over £2 million, principally held in the OMI bond.

54. On 25 February 2020, the Defendant wrote to the Plaintiff and to Karista in relation to the issue of who was a dependant for the purposes of the plan's rules (although Mr Banfield did not spell the word accurately). This letter indicated that the Defendant was minded to treat the 12 months immediately preceding Mr Cockle's death as being the period "*immediately before the relevant time*" for the purposes of the definition found in the rules. It further indicated that the "*necessities of life*" was to be construed as including, but not being limited to, "*such things as food, shelter, clothing, sanitation, education, healthcare, essential transport and internet*". The letter invited the Plaintiff and Karista to identify whether they each fell into this category and asked them whether anyone else might be a potential dependant.

55. The Plaintiff's Advocates responded on 4 March 2020 disagreeing with the approach being taken by the Defendant. Further correspondence on behalf of the parties has aired the issues that fall to be determined on these applications, during the course of which the Defendant was invited to retire as trustee and indicated that it was not minded to do so.

56. Karista replied on 27 March 2020. She indicated that she understood both her mother (the Applicant) and her were benefiting from Mr Cockle by way of paying for health insurance. She explained further that she was reliant on Mr Cockle paying for medical expenses due to the mounting costs as her health began to fail. She attached 20 documents. She stated that she would not be able to maintain the extensive medical costs without assistance from Mr Cockle and referred to a cheque he wrote to enable her to pay for further medical aid during 2017. She calculated her medical expenses from 1 December 2015 to 15 August 2016 as AUS$4,187.65, which included one year of BUPA health insurance payments. She also refers to cash deposits made into her Suncorp account between 7 January and 23 June 2016 totalling AUS$4,680, which she says came by way of cash provided to her by Mr Cockle. She indicated that Mr Cockle would "*leave enough until he returned at the end of the year*", noting that this did not happen. She refers to a cheque for AUS$3,000, which was deposited on 28 December 2016, but dated 24 November 2016 as going towards paying for her medical needs and other expenses until Mr Cockle's estate could be finalised. She pointed out that there would have been an annual deficit of expenses over income of just over AUS$2,000 without Mr Cockle's assistance. By way of context, she highlighted what had been paid into her bank account the previous year in cash, noting that it was a similar amount (AUS$4,005) to the subsequent year. She expressed the view that, due to the little contact she had with Mr Oliver, she did not consider that he had any proper understanding of her dependency on Mr Cockle.

57. The decisions that the Defendant took on 6 November 2020, and for which it now seeks the Court's blessing, are set out in the minutes of that date. The approach taken is predicated on the Defendant being the trustee of the OPES International Pension Plan – Spain, as governed by the 2014 deed and rules. The Defendant has concluded that both the Applicant and Karista were dependents of Mr Cockle at the time of his death, which means rule 31.4 applies. In reaching that conclusion, the Defendant records that "*Karista's explanation of the pattern of cash deposits however is compelling in that it explains a significant number of transactions, some of which appear to be closely linked to medical expenses*". The Defendant has rejected the information provided by Mr Oliver in an e-mail sent on 4 June 2020, in which he wrote that "*There were no direct financially dependent people at the time of Arnold Cockles death. He had however chosen to fund Superannuation contributions for his daughter Kim, and always*

ensured he would have sufficient funds available for the medical care, if necessary, for his granddaughter."

58. As a result, rule 31.2 gives various options for how to distribute the amount in Mr Cockle's member's account. The Defendant considered a distribution to his estate (or estates), but was concerned about the time and expense of following this option, where tax advice might be needed. It noted the letter of wishes provided, but felt it was inappropriate to follow this approach because of the breakdown in relations between the Applicant and Karista, where Karista had expressed concerns about the possible implications of such a trust being established. She had expressed a preference for a cash distribution to her. Whilst the Defendant felt that setting up two discretionary trusts, as it had proposed in 2018, was the closest to Mr Cockle's letter of wishes, it was now aware that Karista considered any trust may prejudice her Australian state benefits. The Defendant decided to follow rule 31.2.1(a) on the basis that Mr Cockle died leaving at least two dependants and his letter of wishes demonstrated he had intended to benefit both the Applicant and Karista, so the Defendant would apply 50% of the net proceeds, after deduction of its fees and expenses, to the Applicant and Karista and proposed to give each an election as to whether to receive this amount by way of a lump sum cash payment or through settlement into a trust with a person other than the Defendant being the trustee. Although the deadline for making an election was originally stated to be the end of 2020, through subsequent correspondence the Defendant has now accepted that both should not be required to make an election until after the conclusion of these proceedings.

Which plan applies?

59. Although in the Defendant's evidence it has suggested that it may not be necessary to resolve the question about which plan Mr Cockle joined in 2015, I consider that this is the first step in resolving what should properly happen to his member's account (or, as the case may be, his sub-fund). In 2019, both parties proceeded on the basis that the 2014 Deed and Rules operated and so my comments at the conclusion of that hearing have to be read in that context. Since then, the 2011 Deed and Rules have been disclosed by the Defendant, as well as explaining the history of how it acquired the previous Opes plans. As a result, the Defendant maintains its position that the 2014 Deed and Rules was operating, whereas the Applicant has now suggested that the 2011 Deed and Rules govern the relationship. Both Advocate Richardson and Advocate Laws raised the theoretical possibility that neither plan might have been applicable, in which case some form of constructive trust of the assets provided to it by Mr Cockle might have arisen. However, that is very much a position of last resort.

60. In order to determine which of the two plans Mr Cockle had joined, I have had to consider the factors that exist in favour and against each of those plans operating. It is most unfortunate that there is no clarity as to which plan had been joined, but the fact that the Defendant is unsure of the position is no more than a factor to take into account. Similarly, the fact that the material completed by Mr Cockle with assistance from Mr Oliver is not explicit as to which plan Mr Cockle was seeking to join does not mean that it necessarily follows that either plan governed the relationship between him and the Defendant. However, what does seem reasonably clear from all the material provided to the Court is that that relationship was governed by one of these plans. It is apparent that Mr Cockle was seeking to become a Member of a plan offered by the Defendant and that the Defendant accepted him as a Member. I will start by referring to the relevant provisions of each plan and then draw some conclusions from those terms and the other material passing between Mr Cockle and the Defendant.

The 2011 Deed and Rules

61. When Close declared the 2011 plan, for identification purposes, the plan was to be known as "The Close OPES International Retirement and Savings Plan". This is a different name from that used in 2005 under the earlier deed for what was "The Close Opes International Pension

Plan – Spain". Although the name of this earlier 2005 plan was formally changed on 7 September 2011 to omit the reference to "Close" in it, which it seems was not replicated for the 2011 plan, and the deed of retirement and appointment dated 30 November 2012 by which the Defendant became the new trustee uses its full original name, it is understandable that there may have been some internal confusion among the Defendant's staff, who might have thought "Close" had been removed from all those earlier products. As such, referring to the 2011 plan as the "Opes International Retirement and Savings Plan" distinguishes the 2011 plan from the 2005 plan and the 2014 because it includes "Retirement and Savings" rather than just "Pension Plan".

62. There are four appendices to this 2011 Deed. Within the definitions found in clause 1, it is clear that the trustee could determine that one of those appendices applies to a given Member: Appendix 1 relates to Savings; Appendix 2 to Portugal; Appendix 3 to Spain; and Appendix 4 to South Africa. In respect of Appendix 1, "Member's Benefit Age" is substituted for "Normal Retirement Age" wherever it appears and references in the Rules to "retirement benefit" or "retirement income" are instead construed as a reference to "savings or retirement benefit" or "savings or retirement income".

63. In respect of Appendix 3 (Spain), the definition of "Normal Retirement Age" is modified so that it "*means such date being before the seventy-fifth birthday of a Member as may be determined by the Trustees*" and para. 3 provides that:

> "*Clause 4.8 of the Deed to the extent that it purports to give a Member a power to direct investments or investment strategy shall not apply to Appendix 3 Members but Clause 4.8 shall continue to apply and give such powers to the Investment Adviser or Investment Manager or Introducing Adviser of the Appendix 3 Member.*"

Rule 4 is also substituted in its entirety, requiring the Appendix 3 Member to make an election prior to the Normal Retirement Age by giving one month's written notice as to how to make payment under the terms of the Plan. The addition of the word "Spain" when referring to Mr Cockle's membership may indicate that this Appendix 3 was applicable.

64. Returning to the body of the 2011 Deed, a number of definitions found in clause 1 appear to be of relevance:

> "*1.1.9 "**Beneficiary**" means (subject to sub-Clauses 1.3.6 and 1.3.7) in respect of each Member*
>
> *(a) the spouse (which term shall include a widow or widower) of that Member;*
>
> *(b) any child or relative of that Member who is dependent for the ordinary necessities of life at the date of the Member's death (every child of a Member shall be deemed to be dependent upon the Member for the ordinary necessities of life unless the Member or his spouse provides evidence to the satisfaction of the Trustees that such child was not in fact dependent upon such Member);*
>
> *(c) any other person who in the opinion of the Trustees, which may be exercised with or without requiring proof, is dependent upon that Member for the ordinary necessities of life at the date of the Member's death;*
>
> *(d) any person who is a beneficiary under the Member's will or upon intestacy; or*

(e) any person nominated as a beneficiary by the Member in writing to the Trustees including (without limitation) any trustee of a trust under which any one or more of the persons listed under (a) to (d) above are beneficiaries,

provided that no person who is resident either in the Island of Guernsey (including Herm) within the meaning of section 3(1) of the Guernsey Tax Law or resident within the Bailiwick of Jersey for the purposes of the Jersey Tax Law shall be a Beneficiary …

*1.1.30 "**Introducing Adviser**" means in respect of each Member a person who is suitably qualified in the Member's home jurisdiction both to advise the Member on the suitability (including the tax efficiency) of the Plan as a retirement benefit plan or savings vehicle for the Member and his or her Beneficiaries and (where the Member appoints him as Investment Adviser and/or Investment Manager under Clauses 5.2.1 and/or 5.2.2) on the investment of the Member's Sub-Fund and to represent that Member in all his dealings with the Trustees in respect of the Plan and who is appointed by the Member for those purposes; …*

*1.1.33 "**Member**" means a person who has attained age 18 and who is neither resident in the Island of Guernsey (including Herm) within the meaning of section 3(1) of the Guernsey Tax Law or resident within the Bailiwick of Jersey for the purposes of the Jersey Tax Law, and is either a Transfer Member or who has been accepted in writing by the Trustees as a Member of the Plan and each Member may be identified by the Trustees as an Appendix 1 Member, or an Appendix 2 Member or an Appendix 3 Member or an Appendix 4 Member as the case may be. For the avoidance of doubt if any Member is not identified as linked to an Appendix, then no Appendix shall be relevant to such Member's membership;*

*1.1.34 "**Member's Sub-Fund**" means the proportion of the Fund which in accordance with Clause 3.4.1 and (based upon the contributions made by or on behalf of a Member under Rule 2 and any investment return on those contributions and taking account of any benefits payable) the Trustees determine from time to time that they hold on behalf of that Member; …*

*1.3.38 "**Normal Retirement Age**" means, except as otherwise provided in the Appendices, such age or ages being no later than age 90 as may be agreed at the Effective Time or agreed or varied thereafter in writing between a Member and the Trustees as the date on which benefits under the Member's Sub-Fund or any part thereof become payable under Rule 3 provided that where no such age has been agreed between a Member and the Trustees, such age shall be 65*".

65. The sole purpose of the 2011 plan is stated in clause 2.3 to be "*to pay annuities and lump sums by way of retirement and other benefits for the Members and Beneficiaries and the Trustees shall at all times administer the Plan in a manner which is consistent with that purpose and as a retirement annuity trust scheme within the meaning of section 40(ee)(ii) of the Guernsey Tax Law.*" By clause 3.4, the trustee is required to maintain a separate Member's Sub-Fund for each Member, where the value of each Member's Sub-Fund and the part of the Fund comprising it can be readily ascertained by the trustee at any time and the assets within it are ring-fenced for the benefit of that Member and no other Member.

66. As regards investing a Member's Sub-Fund, the trustee is obliged to "*Comply with any written directions as to investments or changes in investments or investment strategy given to them from time to time in writing by the Member or his Investment Adviser or Investment Manager or Introducing Adviser*" (clause 4.8.1). Further, where any benefit is being paid to a Member or any other person from the Fund, when investing the balance of the Member's Sub-Fund, the trustee must have regard to the need to retain sufficient cash or other realisable investments to maintain payment of benefits as they fall due (clause 4.12).

67. Clause 5.2 enables a Member to appoint a person to act as an investment manager to advise the Member in relation to the property or assets comprising the Member's Sub-Fund and also a person to act as investment manager. In each case, this person can be the Member's Introducing Adviser and, for an investment manager, may be the Member's Investment Adviser. Such appointments terminate on the death of the Member. In the absence of an appointment being made as Investment Manager, or after the death of a Member, the trustee may make a suitable appointment (clause 5.3).

68. Rule 1 sets out eligibility for membership. The person must not be resident in the Channel Islands, be aged 18 or over but under the age of 90 and comply with the admission procedure in Rule 1.3, where the date of admission cannot be before compliance with these requirements but can be a later date agreed between the trustee and Member. These eligibility criteria can be waived or modified by the trustee. Rule 1.3 provides that:

> "*Admission to Membership is subject to the person concerned having first completed and submitted to the Trustees an application in such form as the Trustees may prescribe having provided such evidence (including evidence of age, health, marital status and residence) as the Trustees may reasonably require and such person having been accepted in writing as a Member by the Trustees.*"

Rule 1.4 enables the trustee to categorise the Member according to an applicable Appendix., meaning that the terms of that Appendix prevail over the terms of the Deed and Rules that are inconsistent.

69. By Rule 2.4, the trustee is obliged to allocate to each member a Member's number allocated to the Member's Sub-Fund.

70. In accordance with Rule 3.2:

> "*On a Member attaining Normal Retirement Age the Trustees shall use the Member's Sub-Fund to provide the Member with a retirement benefit either by:*
>
> *3.2.1 (subject to Sub-Rule 3.4.4) using the Member's Sub-Fund to pay a retirement income in regular annual instalments (or at such other times or on such other regular dates as the Trustees and the Member shall agree) (a "**Fund Pension**") of an initial value agreed by the Trustees with the Member's Introducing Adviser or failing that with the Member; or*
>
> *3.2.2 if the Member shall so request of the Trustees in writing using the Member's Sub-Fund (subject to sub Rule 3.4.4) to provide lump sums payable to the Member at such times and of such value as the Trustees and the Member may agree; or*
>
> *3.2.3 if the Member shall so request of the Trustees in writing (or if exceptionally the Trustees so determine) transferring the Member's Sub-Fund to an Approved Insurer to purchase an annuity (an "**Insured Pension**")*

but at all times subject to the Member's entitlement to elect a lump sum payment under Rule 5.3."

71. By virtue of Rule 6.4:

> "*If a Member who is survived by one or more Beneficiaries dies whilst in receipt of a Fund Pension (or a Fund Early Retirement or Incapacity Pension) or any other benefit payable under these Rules and if the Member had previously so elected pursuant to Rule 7.1 the Trustees shall pay any balance of the Member's Sub-Fund then remaining in their hands to provide either a cash lump sum or annuity retirement benefit for a fixed term or for life for one or more Beneficiaries in such manner and on such terms as the Trustees shall decide.*"

The alternative position is found in rule 6.5:

> "*If a Member dies whilst in receipt of a Fund Pension or a Fund Early Retirement or Incapacity Pension or any other benefit payable under these Rules without being survived by any Beneficiaries the Trustees shall apply any balance of the Member's Sub-Fund then remaining in their hands in accordance with Rule 10.*"

Rule 7.1 then provides:

> "*Any election made by a Member pursuant to sub-Rule 6.2.3 or Rules 6.4 or 6.6 may specify which of his or her Beneficiaries are to receive a benefit and the intended value of any benefit and shall be made by the Member giving notice in writing to the Trustees before either:*
>
> *7.1.1 (in the case of an election under sub-Rule 6.2.3) the date on which the Member dies; or*
>
> *7.1.2 (in the case of an election under Rules 6.4 or 6.6) the date on which the benefit first becomes payable.*"

Rule 7.3 adds:

> "*For the avoidance of doubt the Trustees may when paying a Beneficiary's Fund Pension from a Member's Sub-Fund under either sub-Rule 6.2.3(b) or Rule 6.4 and if in their absolute discretion they see fit depart from the wishes of the Member expressed in any election made by the Member under Rule 7.1 with regard to payment of Beneficiaries' benefits under those Rules and without prejudice to the generality of Clause 10 (fraud wilful misconduct and gross negligence being absent) shall not be liable in any way for so doing.*"

72. By Rule 9.1, provision is made for payment of periodic pensions:

> "*Payment of a pension under the Plan shall be made by the Trustees monthly with the first payment being due on the date on which a Member first becomes eligible to receive the annuity. Alternatively a pension may be payable either quarterly half yearly or annually if the Member and the Trustees so agree.*"

73. Rule 10.1 provides:

> "*On the occurrence of the following events namely:*
>
> *10.1.1 in respect of any Member's Sub-Fund;*

(a) *a lump sum representing the whole of the Sub-Fund (less any amount retained by the Trustees by way of reasonable security for any liabilities) being paid under sub-Rules 5.3, 5.4 or sub-Rule 6.2.1;*

(b) *a Member dying in circumstances described in sub-Rules 6.3 or 6.5; or*

(c) *the death or other change in circumstances of a Beneficiary as described in sub-Rule 7.5 or the remarriage of a Member's surviving spouse whilst in receipt of an annuity payable under Rule 6 where the beneficiary or spouse is survived by no other Beneficiary (or where the Trustees exercise their discretion under sub-Rules 7.5.3 or 7.6); …*

the Member's Sub-Fund … shall terminate and the Trustees shall hold any remaining assets of … any Member's Sub-Fund … on trust to pay or apply those assets (less an amount by way of reasonable security for any existing future or contingent liabilities or taxes pursuant to section 53(2) of the Trust Law) in such manner as the Members may have directed during their lifetime or (failing such a direction) in such manner and (net of any tax payable) to such persons or charities as they think fit."

2014 Deed and Rules

74. The Definitive Trust Instrument for the 2014 plan is much shorter. It simply establishes the plan, to be known as "The Opes International Pension Plan – Spain", to be effective from 24 February 2014, to be administered in accordance with the Rules. The instrument and Rules were made on 2 September 2014. In the first recital, it records that the Defendant had resolved to establish a retirement annuity fund under irrevocable trusts for the sole purpose of providing pensions on retirement and other benefits for and in respect of persons who are resident outside of the Bailiwick of Guernsey.

75. In respect of the 2014 plan, it is the Rules that contain the vast majority of the applicable provisions, with rule 1 containing the following relevant definitions:

"*1.1.5 "**Beneficiary**" means the Member and his or her Dependants;*

*1.1.6 "**Benefit Date**" means a date or dates (no earlier than the date on which a Member attains age 50) as shall be determined before Normal Retirement Date and as the Member shall irrevocably appoint by notice in writing to the Trustees; …*

*1.1.9 "**Dependant**" means, in respect of a Member, any person or persons whom the Trustees in their sole and absolute discretion shall decide is or was at the relevant time dependent upon the Member for all or part of the necessities of life or whose maintenance and support the Member had undertaken immediately before the relevant time, and the term "**Dependent**" shall be construed accordingly; …*

*1.1.19 "**Member**" means any person accepted in writing by the Trustees as a member of the Plan and to or in respect of whom benefits remain payable or prospectively payable and "**Membership**" shall have a corresponding meaning;*

*1.1.20 "**Member's Account**" has the meaning given to it in sub-Rule 3.3.1; …*

*1.1.24 "**Normal Retirement Date**" means in relation to each Member, the date upon which the member attain such age (not being greater than age 80) as shall be determined by the Trustees; …*

*1.1.26 "**Security Deduction**" means an amount as determined by the Trustees representing reasonable security for any existing, future, contingent or other liabilities (including, without limitation, any liability to tax) which are referable to the assets from which the Security Deduction is made*".

76. By Rule 3.3:

"*The Trustees shall administer the Fund so that:*

*3.3.1 a separate account (a "**Member's Account**") is maintained for each member, the value of each such Member's Account being the aggregate for the time being, as determined by the Trustees, of:*

(a) the contributions paid in respect of the Member under Rule 27 and any assets (or proportionate or part interests in any assets) from time to time representing those contributions; and

(b) the proportion of the Fund's investment return which the Trustees from time to time determine is referable to the contributions paid under (a) above; and

(c) any transfer payment (and investment return earned thereon) received by the Trustees as an accretion to the Fund in respect of the Member under Rule 33; and

(d) any other sums which the Trustees allocate to the Member's Account in accordance with these Rules;

3.3.2 no property in any one Member's Account is capable of use for the benefit of any other Member or may be transferred to the Member's Account maintained for any other Member; and

3.3.3 the value of each Member's Account can readily be ascertained by the Trustees at any time, for instance, on the Member retiring or on his or her death."

By Rule 4.7, where any benefit is being paid out of a Member's Account, when investing it, the trustee must have regard to the need to retain sufficient cash or other realisable investments to maintain payments of the benefits as they fall due.

77. The provisions in relation to the appointment of an Investment Manager are noticeably different from the 2011 plan. By Rule 5.2:

"*The Trustees may at any time appoint one or more persons ("**the Investment Manager**") (other than a Member) whom they reasonably consider to be suitably qualified and competent to advise on or manage the investment of part or all of the assets comprising the Fund. The Trustees may empower any Investment Manager appointed under this Rule 5.2 either unconditionally or subject to such terms conditions and provisions as the Trustees think fit to exercise all or any of the powers and discretions of the Trustees in regard to the selecting making changing and realising of investments or arising from or in connection with the holding of investments.*"

78. Although it has not been relied upon particularly, in respect of certain aspects of dispute resolution, rule 9.1 provides:

> "*Any case of doubt or dispute about the meaning and the effect of any word phrase or provision in these Rules shall be referred for interpretation to the Trustees whose decision shall be final and conclusive. In addition the Trustees may determine all questions and matters of doubt in connection with the Plan whether relating to the contributions payable or the benefits hereunder or otherwise, and may settle compromise or submit to arbitration any claims relating to the Plan or to the rights of any of Members or any person claiming through a Member. Any submission to arbitration shall be conducted in accordance with the laws of Guernsey.*"

79. Rule 12 deals with the recording of decisions by the trustee and provides first that "*The Trustees may make whatever arrangements they consider appropriate for the making and recording of their decisions*" (rule 12.1) and then in rule 12.4:

> "*The Trustees shall not be obliged to notify any person that he or she has an interest under the Plan, except upon the death of the Member, when the Trustees shall notify any person who shall then become entitled to a benefit under these Rules, and shall thereafter provide the person with any accounting and other information relating to the plan to which the Member would have been entitled.*"

80. Membership is dealt with in Rule 26:

> "*26.1 Subject to Rule 26.4, a person who:*
>
> *26.1.1 has attained the age of 18 but is under the age of 80; and*
>
> *26.1.2 has complied with the admission procedure under Rule 26.3,*
>
> *shall be admitted to the Plan as a Member on the first date on which he or she first satisfies both conditions in sub-Rules 26.1.1 and 26.1.2 above, unless an alternative date is agreed between the Member and the Trustees.*
>
> *26.2 The Trustees may, in individual cases or in relation to any category of persons:*
>
> *26.2.1 waive or modify either of the criteria in Rule 26.1; or*
>
> *26.2.2 impose as a condition of Membership such further requirements (including the provision of information regarding health) as the Trustees may see fit,*
>
> *and in such a case any person affected shall be admitted to Membership on the date on which he or she first satisfies the eligibility criteria as apply and/or the conditions and requirements imposed or on such other date as the Trustees decide.*
>
> *26.3 Admission to Membership under Membership under Rule 26.1 is subject to the person concerned having first completed and submitted to the Trustees an application in such form as the Trustees may prescribe and having provided such evidence (including evidence of age, health and marital status) as the Trustees may reasonably require.*

26.4 Notwithstanding Rules 26.1 and 26.2, the Trustees may if, after admitting a Member, they find that there was (in their opinion) a material inaccuracy in, or omission from any information provided by the Member in connection with his or her admission, on notifying the Member in writing, take whatever steps they consider appropriate, including reducing or varying the Member's benefits or expelling the individual from Membership of the Plan and having their Member's Account compulsorily transferred out under Rule 34."

81. Rule 28.1 deals with the payment to a Member of an annuity benefit:

> "*On the Member reaching the Benefit Date, the Trustees shall use the balance of the Member's Account then remaining (less a Security Deduction) to provide an Annuity for the Member for life of an initial annual value determined by the Trustees and agreed by the Member.*"

The amount payable can be increased or decreased having regard to the investment return being earned on the balance of the Member's Account (rule 28.4)

82. Rule 31 covers death benefits. Given that Mr Cockle was already in receipt of an annuity at the time of his death, it is common ground that this means that rule 31.4 or 31.5 would apply:

> "*31.4 If a Member dies whilst in receipt of an Annuity and is survived by one or more Dependants the Trustees shall apply the balance of the Member's Account then remaining in their hands in accordance with Rules 31.1 and 31.2 above.*
>
> *31.5 If a Member dies whilst in receipt of an Annuity without being survived by one or more Dependants, the Trustees shall transfer the balance of the Member's Account then remaining (less a Security Deduction) to the Member's legal personal representatives net of any tax due.*"

If Rule 31.4 applies, the relevant sub-rules mentioned are as follows:

> "*31.1 If a Member dies before being in receipt of an Annuity, the Trustees shall apply the Member's Account at the date of death in one or both of the ways permitted under Rule 31.2.*
>
> *31.2 The two permitted ways in Rule 31.1 are either:*
>
> *31.2.1 to provide at the Trustees' discretion an immediate cash lump sum (being the value of the Member's Account less a Security Deduction) payable either:*
>
> *(a) to or for the benefit of such persons or bodies whom the Member may have notified to the Trustees in writing as being persons or bodies whom the Member wishes the Trustees to consider as possible recipients of any benefit payable from the Member's Account on the Member's death in such shares and in such manner as the Trustees shall decide; or*
>
> *(b) to any one or more of the Member's Dependants; or*
>
> *31.2.2 to pay a cash lump sum calculated as under sub-Rule 31.2.1 above to the Member's estate.*"

Sub-rule 31.6 further clarifies that "*For the avoidance of doubt, when exercising their powers under this Rule 31 the Trustees may have regard for but shall not be bound by any wishes notified to them by the Member.*"

83. In sub-Rule 35.1 there is the following provision about the payment of benefits:

> "*Payment of any benefit under the Plan which is not a lump sum shall be made by the Trustees monthly with the first payment being due on the date on which a Member first becomes eligible to receive the benefit, which shall be no later than 80. Alternatively the benefit may be payable, quarterly, half yearly or annually or at any other time during the benefit's currency, if the Member and the Trustees so agree. The Trustees and the Member may also at any time agree to change the dates on which the benefit is paid. All benefits payable under these Rules other than lump sums shall be payable up to the date of the Member's or a Dependant's death or shall terminate on the exhaustion of the Member's Account, whichever first shall occur.*"
>
> *Discussion*

84. When considering these two sets of Deed and Rules, the position is not assisted by what I consider to be the Defendant's poor record-keeping. Those dealing with Mr Cockle do not appear to have grasped the need to set out any decisions relating to his application to become a member of a plan clearly. As a consequence, there is an inference that no such decisions were actually made. In addition, Mr Oliver does not appear to have set out clearly which plan he thinks Mr Cockle was seeking to join. It may not have been all that important to him on the basis that he was using the forms provided by the Defendant, but my overall impression is that he was acting on behalf of the Defendant as much, if not more, than he was acting to assist Mr Cockle.

85. In some respects, the application form submitted looks as though it is the form associated with the 2014 plan, but in others it does not appear to relate to that plan, but rather the 2011 plan. Because it is given the name "OPES International Pension Plan Spain", it is closer to the name used in the 2014 Definitive Trust Instrument than the 2011 plan's name, "The Close OPES International Retirement and Savings Plan", with the possibility that Appendix 3 might be applied, thereby referring to Spain. Similarly, the form itself clarifies that "*Retirement Benefits must be taken after the age of 50 and prior to the age 80*", which is again consistent with the 2014 plan. However, the section of the form dealing with the appointment of an investment adviser, where Mr Oliver's details are given, states: "*I hereby appoint the following as my Investment Adviser*", which is something that can be done under the 2011 plan but not under the 2014 plan. Mr Oliver has also signed the professional adviser declaration (which is dated as early as 14 May 2015) confirming that he had explained to Mr Cockle "*the key features, all costs and risks associated with the Plan*" and one of those risks appears now to have been that Mr Cockle was already too old to be admitted to the 2014 plan. The section enabling an applicant to name beneficiaries who the applicant wishes to receive benefits from the plan after death is also more consistent with the 2011 plan than the 2014 plan. This is because a beneficiary under the 2014 Plan is limited to "*the Member and his or her Dependants*" whereas under the 2011 plan the term "Beneficiary" is given a broad meaning and includes "*(e) any person nominated as a beneficiary by the Member in writing to the Trustees*". The declaration signed by Mr Cockle can also be viewed as more consistent with the 2011 plan than the 2014 plan because of the number of references to having to rely upon the person appointed by the applicant as an Investment Adviser. However, it does refer to understanding and accepting "*the terms of the OPES International Pension Plan Spain*", although reference is also made in that context to "*the OPES Investment Plan Spain*", the former of which may indicate that the applicant is also agreeing to be "*bound by the rules in the Deed establishing the Plan*".

86. As a result, I cannot find that the application form points definitively in either direction. I suspect that it was intended to be the form prescribed by the Defendant for the purposes of the 2014 plan but it has retained a number of features that are only applicable under the 2011 plan and so it can also be regarded as being a form prescribed for the purposes of that plan. I fear that insufficient attention has been given within the Defendant's personnel to the need to have re-drafted more of the form once the 2014 plan came into operation. In short, having regard to the application form completed does not in itself provide the answer to which plan applied to Mr Cockle.

87. Turning to what happened within the Defendant upon receipt of Mr Cockle's application, it seems quite clear to me that Mr Cockle was being admitted as a Member of the 2011 plan, because that is what the documents in the welcome pack sent to him all say. Under the definition of "Member" in the 2014 plan, the person must be accepted in writing by the Defendant as trustee as a member of the plan. That has not happened, despite Mr Banfield contending that the documents sent on the Defendant's behalf were in error. As far as Mr Cockle was concerned, the written material he received from the Defendant, viewed objectively, showed that he had been admitted as a member of the 2011 plan. There is no express indication in that material to him being admitted by reference to any of the Appendices, although the certificates do have that reference to "*(Spain)*" in them.

88. By virtue of his age, Mr Cockle could only have been eligible for membership of the 2014 plan if the Defendant had waived the upper limit of 80 found in sub-rule 26.1.1 by reason of a decision taken in accordance with sub-rule 26.2. The Defendant has not produced any record of any decision it has taken, whether generally or in Mr Cockle's individual case. Even allowing for the freedom found in rule 12.1 for the manner of making and recording decisions, I would have expected there to be some express decision taken to which it could refer. In any event, it is apparent from rule 12.1 that such a decision should be recorded in some format. By comparison, Mr Cockle was eligible for membership under the general terms of the 2011 plan because he was under 90 (rule 1.1.2). Had he been considered for admission as an Appendix 3 Member, being by then above the upper age of 75, this would also have required a decision pursuant to rule 1.2 to modify the eligibility criteria. However, the only possible indication that Appendix 3 was being applied arises from the use of "*(Spain)*" on the certificates, but that is not necessarily the same as identifying him as an Appendix 3 Member. Further, the final sentence of the definition of "Member" in clause 1.1.33 clarifies that "*if any Member is not identified as linked to an Appendix, then no Appendix shall be relevant to such Member's membership*". Accordingly, because there is nothing explicit identifying Mr Cockle as an Appendix 3 Member, the absence of such a decision modifying the criteria is not, in my view, as significant as it would be for the 2014 plan.

89. I have also considered what Mr Cockle expected to achieve, with Mr Oliver's assistance, by providing the letters of wishes that he did. Within the context of the 2014 plan, such a letter of wishes seeking that the remaining funds be settled into a discretionary trust can be viewed as an indication that rule 31.2.1(a) can be used to provide those funds to a person (and Mr Cockle envisaged that that person would be the Defendant) to hold for the benefit of those other persons, being the Plaintiff and Karista, to whom he referred in each letter of wishes. Such an outcome is necessarily dependent upon a finding that, when Mr Cockle died, he was survived by one or more Dependants (rule 31.5). Within the context of the 2011 plan, the letter of wishes could be regarded as nominating the trustee of the proposed discretionary trust as a Beneficiary, although the Plaintiff qualified, and probably also Karista would qualify, as Beneficiaries because of their positions of being beneficiaries under Mr Cockle's wills, but each letter of wishes can also be treated as containing the election made by Mr Cockle for the purposes of rule 7.1. In addition, there is reference in the 2011 plan to the Defendant having regard to, but not being bound by, any wishes notified to it by a Member (rule 6.2.2: "*where the Member during his lifetime has notified the Trustees in writing of such Beneficiaries as the Member identified as being persons whom the Member wishes the Trustees to consider as recipients of*

death benefits in such shares and in such manner and whether by way of annuities or lump sum payment or otherwise as the Trustees may decide. In exercising this power the Trustees may have regard to but shall not be bound by any wishes notified to the Trustees by the Member"). Although both plans make these references to the use of the wishes expressed by a Member, the continuation in the application form used by Mr Cockle of the opportunity to name beneficiaries points more towards the letter of wishes he provided and then updated being in respect of the 2011 plan rather than the 2014 plan. This arises because the ability to nominate beneficiaries is a general one rather than being limited to identifying those who were at any time Mr Cockle's Dependants.

90. Balancing the factors that point towards the 2011 plan or the 2014 plan, I am satisfied that more of them lead to the conclusion that the Defendant did admit Mr Cockle to membership of the 2011 plan. Whilst I acknowledge that Mr Banfield has stated that the Defendant was not admitting new members to that plan once the 2014 plan became available, he has not produced anything definitive indicating that the Defendant had actually closed the 2011 plan to such new members. As a result, because Mr Cockle was eligible for the 2011 plan, but not for the 2014 plan, I take the view that it is more likely than not that the certificates issued to him demonstrated the plan to which he had been admitted as a Member. For these reasons, I find that Mr Cockle was a Member of the 2011 plan.

91. In respect of the Plaintiff's application, I would, therefore, decide para. 3 through making that finding, which means that the contract governing the relationship when Mr Cockle was alive and which now deals with how to manage his Member's Sub-Fund is the Deed and Rules dated 19 May 2011.

The Defendant's application

92. As a result of that conclusion, it necessarily follows that I am not in a position to consider further the Defendant's application so far as it relates to the decision to allocate the balance of the Member's Account under the 2014 plan in the manner the Defendant decided on 6 November 2020. That decision may well have been a momentous one worthy of consideration under the usual approach this Court takes when a trustee seeks approval of a momentous decision it has taken (eg, by reference to the ***Public Trustee v Cooper*** jurisdiction, as explained in ***Re F*** 2013 GLR 388), but it is predicated on the 2014 plan Deed and, in particular, its Rules applying, which is not the case. However, I will comment briefly on the competing arguments as to whether, had the 2014 plan operated, the Defendant's decision about Mr Cockle having died leaving one or more Dependants is a tenable conclusion. In doing so, I do not need to rehearse the legal principles the Advocates have set out in some detail but can confirm that I would have followed them in the usual manner had they been relevant to the decision.

93. The key provisions that would apply are to be found in the Rules of the 2014 plan. On the facts, Mr Cockle was in receipt of an Annuity, even if it was paid more erratically than should have been the case. Accordingly, the destination of the death benefits falls under either rule 31.4 or rule 31.5. This was an issue that I dealt with at the December 2019 hearing. The difference between the two sub-rules is whether Mr Cockle was survived at the date of his death by one or more Dependants. If he died without being survived by any Dependant then rule 31.5 left the Defendant with no option because the balance of his Member's Account needed to be transferred to his legal personal representatives. If he died leaving at least one Dependant, then the routes available under rule 31.2 became applicable. That is why determining the question of whether there was at least one Dependant was so crucial. Given the absence of relevant material at the time of the December 2019 hearing, I was unable to reach any conclusion as to which of these routes for applying the balance of Mr Cockle's Member's Account applied

94. Although I have already quoted its terms, it is worth repeating that rule 1.1.9 defines "*Dependant*" as being, "*in respect of a Member, any person or persons whom the Trustees in*

their sole and absolute discretion shall decide is or was at the relevant time dependent upon the Member for all or part of the necessities of life or whose maintenance and support the Member had undertaken immediately before the relevant time". As is apparent, there are a number of inter-related elements of this definition that can apply from time to time.

95. The first question to resolve, though, relates to the inclusion of the words "*whom the Trustees in their sole and absolute discretion shall decide*" because they appear to confer upon the Defendant the function of making an unchallengeable determination. Although there is some English authority that these words mean the Defendant's decision is final and conclusive and not subject to correction by a court (*Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896), I prefer the approach that requires consideration of whether the decision-maker acted in good faith, asked itself the correct question, reached a decision that is not perverse and took into account only relevant matters. In the context of the *Public Trustee v Cooper* jurisdiction that was being relied upon by the Defendant, it would seem rather odd if it could assert that its decision was one that the Rules had enabled it to reach in a manner that was final and conclusive and not subject to the usual considerations of rationality. Indeed, it is arguable that such an outcome would render its own application entirely academic.

96. On this basis, the Defendant's own decision sets out the manner in which it set about determining whether Mr Cockle had been survived by at least one Dependant. This also involves a question of how to construe the wording in rule 1.1.9. The approach the Defendant has set out refers to its decision that the relevant time was the date of Mr Cockle's death (which should have referred to 1 December 2016 and not the next day as set out in its decision minute) and that "*immediately before the relevant time*" meant the preceding 12 months and it considered the "*necessities of life*" to include, but not be limited to, "*such things as food, shelter, clothing, sanitation, education, healthcare, essential transport and internet*". As a result of this, it concluded that the proper meaning of "Dependant" in the 2014 Rules, in relation to Mr Cockle, is "*any person whom the Trustee in its sole discretion shall decide was, between 2 December 2015 and 2 December 2016 [sic], dependent upon AC for, amongst other things, all or part of their food, shelter, clothing, sanitation, education, healthcare, essential transport or internet*".

97. Whilst I understand why the Defendant decided to afford the word "Dependant" a broad meaning, I think it has misdirected itself in respect of rule 1.1.9. As a result, even if the 2014 plan applied, I would have struggled to have approved the decision that the Defendant has taken.

98. I appreciate that the reference to "*the relevant time*" in the definition necessarily has to be fluid. This is clear from the use of "*Dependant*" elsewhere in the Rules and I offer, as an example, its use in rule 29. One of the ways in which a Member's Account could be split into two or more parts is to enable a Member to give notice to the Defendant that the Annuity under that part "*shall be exchanged for a reversionary Annuity payable to a specified Dependant of the Member*" (rule 29.2.4) or "*in part to be exchanged for a temporary Annuity payable to a specified Dependant of the Member or to the Member's estate should the Member predecease the named Dependant*" rule 29.2.5). Of necessity, the Member would have needed to have identified someone meeting the definition of "Dependant" during his or her lifetime to have made the election to split the Member's Account before Normal Retirement Date. Accordingly, when considering the meaning of Dependant for the purposes of rule 31, I agree that the Defendant could take this to be the date of Mr Cockle's death.

99. The problem with the approach taken by the Defendant is that I take the view it has conflated two different parts of the definition in rule 1.1.9. In each case it is a person "*who is or was at the relevant time dependent upon the Member*" because that then accords with the manner in which the word "dependent" is to be construed (although it may not have needed to begin with a capital letter) The dependency on the Member in question is either "*for all or part of the necessities of life*" or involves a person "*whose maintenance and support the Member had*

undertaken immediately before the relevant time". In other words, I do not consider that the extension of the period to "*immediately before the relevant time*" relates to anything other than a person who the Member was maintaining and supporting and, in particular, it does not operate in respect of the provision of all or part of the necessities of life. It would appear to be arbitrary to focus on someone who was not being maintained and supported, but who had been provided by the Member concerned with a part of the necessities of life (however that term is to be construed) at some point in time earlier that the relevant time. This is because what is under consideration is the issue of dependency. In simple terms, a Dependant is someone who depended upon the Member and the means for the Defendant to assess that dependency was to consider maintenance and support or being dependent by reference to a fixed point in time, either in the present or in the past. For the purposes of rule 31, I think it would always be a point in the past, namely the Member's date of death. Because maintenance and support is something readily associated with a minor child, although I recognise it can be wider, the timing issue is about the provision of that maintenance and support in the run-up to the relevant time, hence the use of "*immediately before*".

100. Whilst the 2014 plan was at the time a new pension scheme to which persons could seek to become Members, the material of the Defendant is such that one can see the origins of this plan in the earlier plans, which includes the 2011 plan. In the 2014 plan, the term "Beneficiary" simply includes the Member and his or her Dependants, whereas the 2011 plan had a wider definition of Beneficiary, which included children or relatives of the Member "*dependent for the ordinary necessities of life at the date of the Member's death*", where there was a presumption that every child would be deemed to be so dependent. It extended to other persons also "*dependent upon that Member for the ordinary necessities of life at the date of the Member's death*". The intention of the Defendant in changing from this form of definition to what is found in rule 1.1.9 of the 2014 plan may have been intentional. There may have been a wish to broaden the aspects of the necessities of life by removing the word "ordinary", but whether it is included or not seems to me to make little or no difference. That is because the "*necessities of life*" should mean something that a person needs in order to survive. Clearly, this covers food, clothing and some suitable accommodation and would, I think, extend to other things that can be described as necessary to existence. Whilst a child's compulsory education is necessary, I do not consider that education is a necessity for an adult. Instead, it is a matter of choice. I also question, even in the 2020s, whether it can properly be said that an internet connection is a necessity. Survival as a human is possible even without access to the internet. As far as healthcare is concerned, this would require an assessment of what levels of care are available without someone else providing them. It might only be in the absence of adequate State-sponsored healthcare, that additional provision through private healthcare arrangements would fall within the ordinary meaning of the words "*necessities of life*". Again, this may well engage whether it is a matter of choice.

101. For these reasons, I do not think that the approach the Defendant took in reaching its decision on 6 November 2020 involved it asking itself the correct question. I take the view that the Defendant has broadened the definition found in rule 1.1.9 beyond its proper bounds. I do not need to determine whether it has done that in order to justify its apparent decision to treat Karista as someone who can benefit under the 2014 plan in the manner the Defendant appears to have thought it should. It suffices that, even if I had decided that the 2014 plan applied, I would not have been persuaded that its decision on 6 November 2020 could be blessed.

102. I have also considered whether, if the Defendant had actually asked itself the correct question, its decision that both the Plaintiff and Karista were Mr Cockle's Dependants could be maintained. This is necessarily harder when the material provided by Karista has concentrated on aspects that were not, in my view, directly relevant to the decision the Defendant had to reach. There may be gaps in what has been provided. In this regard, I think it is important to bear in mind that the issue is one of dependency and that both the Plaintiff and Karista were by this time adults. There is a distinction between the presumption in favour of the dependency of

a minor with that of an adult. In both cases, the Defendant does not seem to have taken any account of the fact that the Plaintiff was living with her husband and Karista was co-habited with Nick, who shortly thereafter became her husband. As a result, any dependency would, in my view, relate to their partners first and foremost. When one considers the extent of the dependency found, the Defendant accepted that Karista was supported with her medical expenses by Mr Cockle. It paid particular attention to the cheque that was banked by her on 28 December 2016. However, I consider that the explanation offered by the Plaintiff demonstrates that this was not future provision against medical expenses, but rather a wedding gift. I take the view that the Defendant has taken into account something it was not entitled to take into account in relation to the support of Karista. Even broadening the issues to what was being paid into her bank account from time to time, I think the Defendant has not scrutinised the pattern of payments sufficiently, which does not strike me as compelling evidence, and, even then, it has not asked itself whether this amounts to dependency or whether it was, what I suggest it could well be, a matter of choice for Mr Cockle to make gifts to Karista because it pleased him to do so. Similarly, in relation to the Plaintiff, whilst it is accepted that she has received financial support to assist her with her medical conditions, the Defendant has not considered whether this was something being done through choice rather than because there was any relationship of dependency. Disregarding what Mr Oliver had written on the basis that he may not have fully appreciated the Defendant's approach to the definition of Dependant, which I have already decided is flawed, is a further error. At least Mr Oliver had had some direct personal contact with Mr Cockle, which no one within the Defendant's personnel seems to have had, and his views should not have been dismissed as summarily as they seem to have been.

103. Although it is no more than a provisional view, had the 2014 plan applied, because Mr Cockle died without being survived by one or more Dependants, it would follow that the balance of his Member's Account then remaining in the Defendant's hands fell to be transferred to his legal personal representatives. Although this is an issue that would have required further submissions, on the basis that the probate taken out by Karista referred to him being domiciled in Queensland and similarly his Spanish estate was more to do with the real property located there, it seems most likely that this would have entailed making a transfer to those who were appointed by Mr Cockle to administer his Australian estate, being the Plaintiff and his solicitor, John Fradgley.

The way forward

104. As became clear at the hearing, the Plaintiff's application to remove the Defendant is not something that can be readily achieved because what happens to the balance of the Sub-Fund is dictated by the terms of Mr Cockle's membership of the 2011 plan. Accordingly, now that I have made a finding as to the applicable plan, the Defendant is obliged to act under those terms.

105. Advocate Richardson has suggested that it is possible that rule 6.6 applies. This can only be correct if Mr Cockle were in receipt of an Insured Pension, an Insured Early Retirement or Incapacity Pension, rather than being in receipt of a Fund Pension, in which case rule 6.4 would apply. I am not persuaded that Mr Cockle was in receipt of an Insured Pension. The definition of such a pension is found in clause 1.1.28, cross-referring to rule 3.2, to which reference has already been made. There is no evidence that Mr Cockle requested the Defendant in writing to transfer his Sub-Fund to an Approved Insurer to purchase an annuity. Instead, the evidence points to Mr Cockle being in receipt of a Fund Pension, because the amount payable was agreed by the Defendant with Mr Oliver, as the Introducing Adviser, or directly with Mr Cockle. As such, I am satisfied that rule 6.4 operates.

106. I have reached that conclusion because I am satisfied that Mr Cockle was survived by one or more Beneficiaries whilst in receipt of a Fund Pension. Although his spouse had died before Mr Cockle, meaning that para. (a) of the definition in clause 1.1.9 could not apply, and I would,

for similar reasons to those given when considering the Defendant's application, not necessarily be satisfied that para. (b) on dependency, or para. (c), could apply, I do take the view that the Plaintiff and Karista are both beneficiaries under Mr Cockle's wills (with clause 1.3.3 confirming that the singular incudes the plural). Even if the Australian will of Mr Cockle makes those holding on the trust created by it beneficiaries, Mr Cockle's English will made Karista the beneficiary and his Spanish will made the Plaintiff a beneficiary. In relation to para. (e), Mr Cockle's letters of wishes also nominated the Defendant as a beneficiary on the basis that he wished the Defendant to become the trustee of a discretionary trust of which the Plaintiff and Karista would be beneficiaries. The group who, in my view, were properly to be regarded as Beneficiaries for the purpose of rule 6.4 included all of these persons.

107. As a result, rule 6.4 of the 2011 plan required the Defendant to "*pay any balance of the Member's Sub-Fund then remaining in their hands to provide either a cash lump sum or annuity retirement benefit for a fixed term or for life for one or more Beneficiaries in such manner and on such terms as the Trustees shall decide.*" This provision gives the Defendant a wide discretion. However, a reasonable trustee would, without being bound by it, have regard to the manner in which the Member had made an election pursuant to rule 7.1, by which the Member can "*specify which of his or her Beneficiaries are to receive a benefit*".

108. Given the acknowledgement by the Defendant that the relationship between it and the Plaintiff has broken down, even if it were now in a position to accept the trusteeship of the discretionary trust that Mr Cockle wished to create, as set out in both his letters of wishes, it would not make sense for that to happen. The relief sought by the Plaintiff of removing the Defendant would most likely then be resurrected and the evidence of the breakdown in relations that I am satisfied would otherwise give grounds for removing a trustee would again be deployed. In other words, taking that course of action would not be the step a reasonable trustee would wish to follow.

109. The next question, therefore, is to consider the most appropriate alternative manner of proceeding. One option would be for the Defendant to seek to pay away the cash lump sums that it has already determined, albeit pursuant to the 2014 plan, that it would make at the election of both the Plaintiff and Karista. Whilst there is nothing wrong with the Defendant following that course, it seems to me that this would still result in the Plaintiff feeling aggrieved that her late father's wishes were not being followed. This would be quite a significant departure from the framework for what should happen to his assets that Mr Cockle seems to have had in mind.

110. The starting point is that he understood that he had assets in a number of jurisdictions. Following his late wife's death, Mr Cockle chose to execute a new will in Queensland in 2015. Shortly thereafter, he executed his Spanish will. He then applied to become a member of a plan provided by the Defendant and gave the Defendant a letter of wishes as to how he wished any balance remaining to be dealt with. Finally, at around the time of re-confirming those wishes to the Defendant, Mr Cockle executed his English will, making particular provision for Karista. By taking a step back from these arrangements, I suggest that the Defendant is in a position to consider that Mr Cockle would not have welcomed his Sub-Fund being divided into two and one half of it being offered to Karista by way of a lump sum. If one views his Australian estate as his primary estate, it is clear that he wished for there to be an inter-generational testamentary trust. The underlying intention was to provide for Karista and any children she may have, whilst recognising that there might be circumstances where the Plaintiff would need financial assistance. In relation to his assets in Spain and in England, he made separate direct provision for the Plaintiff and Karista respectively. What he envisaged for the balance of his Sub-Fund was that it would similarly be settled into a discretionary trust. Indeed, the underlying rationale for applying to the Defendant to join a plan was "*long-term financial planning to ensure funds readily available for himself and to give to daughter and granddaughter in event of illness*". It was a means of avoiding the amounts contributed forming part of his personal estate in the event of his death.

111. For these reasons, I have formed the view that the Defendant should be looking for an appropriate way in which to align what happens as closely as possible to what Mr Cockle had asked it to do. If he had wanted to benefit the Plaintiff and Karista directly, he would not have needed to apply to join the plan offered by the Defendant. Instead, he could have made appropriate provision by whichever will was the vehicle by which to make such testamentary gifts. Indeed, it seems clear that, aside from the terms of his English will, Mr Cockle did not intend that Karista should receive any part of his assets directly. His intention was to vest the balance of his Sub-Fund in a third party to hold on terms that would enable the Plaintiff to benefit, should that need arise, but more particularly to create a further discretionary trust for the benefit of Karista and any children she may have. Having regard to that intention, the Defendant could now seek to identify some appropriate trustee to which to transfer the balance of the Sub-Fund. Alternatively, rather than passing that balance to such a trustee, and bearing in mind that the clearest indication from the material is that Mr Cockle had acquired a domicile of choice in Queensland, being consistent with the probate Karista obtained in England and following the probate granted to the Plaintiff and Mr Fradgley in Queensland, the Defendant might instead consider whether the more pragmatic outcome would be to make that transfer to the trustees of the will trust created in Queensland. In this manner, there might be a single Australian trust, effectively consolidating Mr Cockle's assets other than those bequeathed by him under his English and Spanish wills for the benefit of his heirs, and from which both the Plaintiff and Karista could benefit rather, than the separate discretionary trust envisaged by Mr Cockle's letter of wishes needing to be established. I recognise that such a course of action would not accord exactly with the wishes expressed by Mr Cockle, but it would enable Karista, as the Primary Beneficiary under the terms of the will trust, to have a direct relationship with those holding this fund. Under either option, the Defendant would also need to consider whether the OMI bond should be surrendered and its cash value transferred or whether to transfer the bond *in specie*. Before any step is taken, those involved might wish to consider whether there is any option that is more tax-efficient than others that could be considered, but still adhering as closely as possible to Mr Cockle's wishes. Under both of the options I have mentioned, there would be a trust arrangement under which both the Plaintiff and Karista, plus any future generations, would be beneficiaries rather than the balance of Mr Cockle's Sub-Fund being split into two portions, as the Defendant has suggested, with each half being distributed in the manner the Plaintiff and Karista each elects, which I think is a departure from the wishes that Mr Cockle had expressed when applying to join the Defendant's plan.

112. In those circumstances, I am not persuaded that I can determine paragraphs 1 and 2 of the Plaintiff's application. I have offered some guidance as to how further discussions might be had now that I have found that the terms of the 2011 plan apply. Those comments are meant to assist the parties but they should not be regarded by either as prescribing what is to happen. I wished to be helpful on the basis that I suspect that neither party will relish further litigation.

Costs

113. Both parties have sought orders in respect of costs. The Defendant's application seeks costs on the indemnity basis, although it is not entirely clear whether that is an order sought as against the Plaintiff. The Plaintiff's application seeks an order that the Defendant pays the costs of her application on the indemnity basis out of its personal assets and not out of the balance of the Member's Sub-Fund (or Account). That application also seeks an order that the Defendant pay costs on the indemnity basis in respect of the hearing in December 2019 and that, to the extent that the Defendant has taken any costs out of the Sub-Fund to date, that those amounts be refunded.

114. The incidence of costs of these proceedings was not fully argued at the hearing on the basis that it was better to await the outcome. Subject to hearing any further representations, I think the Plaintiff has had the better of the arguments and so is more likely than not to be treated as the successful party. In respect of the Defendant's application, it has not obtained any relief. As

such, its application for its costs of that application is unlikely to be granted, but there is the remaining question about whether it has still been acting in accordance with the indemnity otherwise available to it. As regards the Plaintiff's application for costs orders, there is clearly scope for making a costs order against the Defendant in respect of this application on the basis that the Plaintiff has asserted that the 2011 plan applied, whereas the Defendant asserted it was the 2014 plan, and that decision has gone in favour of the Plaintiff. What will no doubt be a key issue is whether, in these circumstances, the Defendant should be deprived of its indemnity and the further question as to what the appropriate basis for making any costs order should be. It is not immediately apparent to me that this is a case in which an order for costs on the indemnity basis should be made, although I understand that the Plaintiff feels aggrieved that the Defendant did not know which plan applied, which may suffice to take this out of the norm.

115. In relation to the hearing in December 2019, I similarly understand that the Plaintiff will regard that hearing as being ineffective because it proceeded on the basis that the 2014 plan was operative. I think it worth noting that this arose because of the manner in which the Plaintiff's Cause was pleaded. Looking behind that Cause, the Plaintiff will argue that this arose because of the inadequate record-keeping of the Defendant. I have some sympathy with that submission. It strikes me that the pleaded case arose from what the Defendant had intimated in the previous correspondence. If the possibility of Mr Cockle being a member of a different plan had been aired, I doubt that this action would have been pleaded as it was. Indeed, it is entirely possible that the Defendant would have chosen to seek the Court's assistance (and in that regard, I further note that the Defendant chose not to do so, but rather reached a decision on the basis that the 2014 plan must apply, which is a further factor to bear in mind when considering where the costs properly should lie).

116. Because of all these uncertainties, I will formally reserve the costs. I have made the comments I have in the hope that they will give some indication of what the ultimate outcome will be because it will be preferable if the parties can reach some agreement as to what the proper approach to all the costs that have been incurred should be. In this manner, if an agreement can be reached, then it can be put into effect without incurring additional costs. However, if no satisfactory agreement can be reached, then the matter can be re-listed through liaising with the Greffe.

Conclusions

117. For the reasons I have given, I find that Mr Cockle was admitted as a Member of the 2011 plan. To the extent necessary, I can so declare. Because I do not need to decide whether Mr Cockle was survived by any Dependants at the time of his death, I will not make the declaration sought by either party. I have indicated that I would have been unlikely to give the decision of the Defendant on that question under the 2014 plan, had it applied, the Court's blessing, so the strong inference is that I am not persuaded that there was anyone in a state of dependency at the time of his death, but the question is of less relevance now that it is the 2011 plan applying because of the broader definition of Beneficiary. I have decided that the costs should be reserved in the hope that the parties can reach agreement on the most appropriate order.