The Royal Court of Guernsey approved the removal of paragraph 3 of the Fourth Schedule to the Z Trust, resolving uncertainty caused by recent UK tax legislation and confirming that the Second and Third Respondents are not Excluded Persons, thereby restoring their status as beneficiaries. All parties' costs were ordered to be paid from the trust on the indemnity basis.

[2025]GRC099

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **A TRUST COMPANY**
(in its capacity as trustee of the Z Trust)

Applicant

-and-

(1) SETTLOR
(2) BENEFICIARY A
(3) BENEFICIARY B

Respondents

Hearing date: 29 July 2025

Reasons handed down: 29 August 2025

Before: Sir Richard McMahon, Bailiff

Counsel for the Applicant: **Advocate C H Edwards**
Counsel for the First Respondent: **Advocate A M Davidson**
Counsel for the Second Respondent: **Advocate N J Robison**
Counsel for the Third Respondent: **Advocate B S Havard**

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
Fisher v Commissioners for His Majesty's Revenue and Customs [2024] AC 1150, [2023] UKSC 44
The Finance (No. 2) Act 2024
The Income Tax Act 2007
The Income and Corporation Taxes Act 1988
The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016
Mubarik v Mubarak 2008 JLR 430
Re Osias Settlements 1987-88 JLR 389
Trustee 'T' v Five Respondents (unreported, 25 July 2011)
In re the X Trust, the Y Trust and the Z Trust (unreported, 21 November 2014).
Re A Settlement (unreported, 28 June 2011)
The Corporation Taxes Act 2010
In the matter of the R Trust [2020] GCA 065
In the matter of the K Trust 2020 GLR 312)
Lewin on Trusts, 20th ed.
Re Holt's Settlement [1969] 1 Ch 100
A Trust Company v F, M and Cs (unreported, 5 February 2014)

Introduction

1. At the conclusion of the hearing on 29 July 2025, I announced that I had been persuaded that on para. 6 of the Re-Amended Application from the Applicant, in its capacity as the trustee of a settlement to which I will refer as "the Z Trust", originally dated 25 October 2024 and amended first on 9 November 2024 and then on 28 May 2025, where this element of the relief sought was termed "*the Beneficiary Reinstatement Application*", the better solution was to delete in its entirety para. 3 of the Fourth Schedule to the trust instrument. I outlined my reasons

for reaching that conclusion and indicated that fuller reasons would be provided as soon as I was in a position to do so. This judgment contains those reasons and I have prepared it in an anonymised form so that it can be published.

2. Paragraph 6 of the Re-Amended Application sought an order:

> "*Pursuant to sections 57 and/or 69 of the [Trusts] Law and/or the Court's inherent jurisdiction, whether or not the Second and/or the Third Respondent are Excluded Persons:*
>
> *a) an order, pursuant to the Court's inherent jurisdiction and/or its powers under the Law that the 1992 Settlement be varied so that either the Second and/or the Third Respondent are no longer 'Excluded Persons' or alternatively that the Second and/or the Third Respondent are expressly added as beneficiaries of the [Z] Trust and expressly excluded from the class of 'Excluded Persons'; and/or*
>
> *b) such further order(s) as the Court thinks fit*".

Although there are references in the relief sought to the possibility of dealing with the Second and Third Respondents differently, no one suggested that this should happen and the approach taken throughout was that this paragraph applied to both of them equally.

Background

3. There were various Affidavits before the Court at the hearing. The first was an Affidavit sworn by a director of the Applicant on 25 October 2024. The second was an Affidavit sworn by another director of the Applicant on 14 November 2024, which exhibits some tax advice from Deloitte LLP. The first director swore a Second Affidavit on 18 June 2025. On behalf of the Second Respondent, there was an Affidavit sworn on 4 July 2025, which exhibits some advice the Second Respondent had obtained from Rory Mullan KC. The Third Respondent swore a First Affidavit on 7 July 2025, which exhibits advice that had been taken from James Rivett KC. The Third Respondent swore a Second Affidavit on 22 July 2025, which exhibits a Supplementary Opinion from Mr Rivett.

4. When I summarise the facts that are relevant to para. 6 of the Re-Amended Application, I do so by reference to this Affidavit evidence. I will also comment, as appropriate, on the legal opinions that have been exhibited.

5. The Z Trust was established by the First Respondent on 8 May 1992 (see clause 33 for the reference to the name). The First Respondent is described as "the Settlor". At that time, its proper law was the law of Liechtenstein. The original trustees of the Z Trust were two individuals and a corporate entity. The first two of these original trustees were based in Jersey, and the third original trustee was based in Vaduz, Liechtenstein. It will be helpful to set out some of the provisions in the trust instrument from the outset.

6. Clause 1 of the instrument contains the definitions. By clause 1(a), "*"Beneficiaries" means (i) All and any of the persons specified in the Third Schedule hereto, (ii) Such other persons as are added to the class of Beneficiaries in exercise of the power conferred upon the Trustees by Clause 10 hereof*". The Third Schedule identifies the Second and Third Respondents by their respective names. No one else is mentioned therein. Although there was no suggestion that the Trustees had exercised the power conferred by clause 10, this provides that:

"*(a) The Trustees shall have power at any time or times during the Trust Period to add to the class of Beneficiaries such one or more persons or class of persons (not being (or in the case of a class of persons including) an Excluded Person or Excluded Persons) as the Trustees shall in their absolute discretion determine*

(b) Any such addition shall be made by declaration in writing signed by the Trustees and:

(i) Naming or describing the person or persons to be thereby added to the class of Beneficiaries; and

(ii) Specifying the date (not being earlier than the date of the declaration but during the Trust Period) from which such person or persons shall be so added".

7. There is a definition of "*the Trust Period"* in clause 1(m) referring to clause 31, which provides:

> "*For so long as Liechtenstein law shall be the law governing this Settlement this Settlement may continue indefinitely (and the words "the Trust Period" shall be construed accordingly) PROVIDED HOWEVER THAT the Trustees may at any time (with the prior written consent of the Protector) by written instrument appoint a date, (not being earlier than the date of such instrument) upon which this Settlement shall terminate and such date shall be the end of the Trust Period"*.

By a deed dated 2 May 2018, the proper law of the Z Trust was changed to Guernsey law. (I will return to this issue later in these reasons, but the change of proper law potentially engages section 16(2) of the Trusts (Guernsey) Law, 2007, as amended.)

8. By clause 1(d), "*"Excluded Persons" means: (i) All and any of the persons specified in the Fourth Schedule hereto, (ii) Any person constituted an Excluded Person pursuant to Clause 9 hereof"*. The Fourth Schedule sets out the following categories of Excluded Persons:

"*1. The Settlor and any spouse of the Settlor*

2. The Trustees and any employee thereof

3. (i) Any person (here called a "Fiscal Settlor") who for the time being is resident in the United Kingdom for the purposes of United Kingdom income tax and who under the Income and Corporation Taxes Act 1988 (being an Act of Parliament of the United Kingdom) or any statutory modification or re-enactment thereof for the time being in force (hereafter referred to as "The Act") either falls to be treated as a Settlor of this Settlement for the purposes of United Kingdom income tax by virtue of Part XV of The Act or is such an individual as is referred to in the provisions of Section 739 of The Act

(ii) Any person for the time being the spouse of a Fiscal Settlor and

(iii) Any person (and also the spouse of such person) for the time being ordinarily resident in the United Kingdom for the purposes of United Kingdom tax who falls or has at any time fallen to be treated as a transferor or an associate of a transferor or for the purposes of United Kingdom income tax by virtue of section 739 of the Income and

Corporation Taxes Act aforesaid or of any such re-enactment or modification as aforesaid

and so that "Excluded Person" means the only or any one of the Excluded Persons".

In para. 3(iii) of this Fourth Schedule the words "*(and also the spouse of such person)*" have been added in manuscript and initialled.

9. Clause 9 provides:

"*(a) The Trustees may be declaration in writing made at any time or times during the Trust Period declare that the person or persons or members of a class named or specified (whether or not ascertained) in such declaration who is are would or might but for this Clause be or become a Beneficiary or Beneficiaries or be otherwise able to benefit hereunder as the case may be:*

(i) Shall be wholly or partially excluded from future benefit hereunder; or

(ii) Shall cease to be a Beneficiary or Beneficiaries; or

(iii) Shall be an Excluded Person or Persons and any such declaration may be irrevocable or revocable during the Trust Period and shall have effect from the date specified in the said declaration provided that this power shall not be capable of being exercised so as to derogate from any interest to which any Beneficiary has previously become indefeasibly entitled whether in possession or in reversion of otherwise

(b) Any person of full age to whom or for whose benefit any capital or income of the Trust Fund may be liable whether directly or indirectly to be appointed transferred or applied in any manner whatsoever by or in consequence of an exercise of any trust power or discretion vested in the Trustees or in any person may by declaration in writing received by the Trustees during the Trust Period either revocably (but revocable during the Trust Period only) or irrevocably:

(i) Disclaim his interest as an object of such trust power or discretion either wholly or with respect to any specified part or share of such capital or income; or

(ii) Cease to be a Beneficiary; or

(iii) Declare that he shall be an Excluded Person;

and such declaration shall have effect from the date that the same is received by the Trustees".

10. Clause 27 expands upon the position of Excluded Persons and provides:

"*Subject only to Clause 23 hereof no Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement and in particular without prejudice to the generality of the foregoing provisions of this Clause:*

(a) *The Trust Fund and the income thereof shall henceforth be possessed and enjoyed to the entire exclusion of any such Excluded Person and of any benefit to him by contract or otherwise;*

(b) *No part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit either directly or indirectly of any such Excluded Person in any manner or in any circumstances whatsoever; and*

(c) *No power or discretion hereby or by any appointment made hereunder or by law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that any such Excluded Person will or may become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever*".

Clause 23 deals with the remuneration of the Trustees, who by para. 2 of the Fourth Schedule are Excluded Persons. The effect of clause 27 is to enable a Trustee to be paid despite otherwise being an Excluded Person.

11. In clause 1(l) there is a definition of *"the Trust Fund"*, which starts with the property specified in the Second Schedule (£10,000), plus "*(ii) All money investments or other property hereafter paid or transferred by any person or persons to or so as to be under the control of and (in either case) accepted by the Trustees as additions to the Trust Fund and all accumulations of income*" and "*(iii) The money investments and property from time to time representing the said money additions and accumulations*".

12. By clause 1(i), "*"the Protector" means the person for the time being constituted as the Protector pursuant to Clause 24 hereof"*, which provided in its original form (and may have been re-numbered as Clause 24.2 if an instrument dated 18 November 2010 is effective, which I will mention shortly):

"*(a) The Protector shall be an individual or a corporate body. Neither any Beneficiary nor any Trustee nor any Excluded Person shall be qualified to act as Protector and any purported appointment of any such person shall be void. The first Protector shall be the Settlor*

(b) A new Protector shall be appointed whenever the Protector for the time being (being an individual) dies or is desirous of being discharged from the position of Protector or (being a company) is put into liquidation (whether voluntary or compulsory) or otherwise ceases to exist or passes a resolution to the effect that it desires to be discharged from the position of Protector provided that a Protector wishing to be discharged shall not be discharged unless he contemporaneously appoints a new Protector

(c) Every Protector appointed hereafter being an individual shall on his appointment sign a written acceptance which shall contain a nomination of his successor. Such nomination may not be revoked by him unless such revocation contains a further nomination of the Protector's successor

(d) All appointments of a Protector shall be in writing and notice thereof containing the acceptance of the appointment shall be forthwith delivered to the Trustees and shall be effective when the document or a certified copy thereof is received by the Trustees who shall cause a memorandum of such appointment to be endorsed on this Settlement

> *(e) On the death of a sole Protector being an individual his successor shall be such person as he shall previously have nominated in writing*
>
> *(f) If at any time there shall be for any reason during a period of three months no successor Protector then the power of appointing a new Protector shall be vested in such persons as are specified in the Sixth Schedule hereto in the order of priority therein specified".*

The printed version of clause 24(a) shows that the words "*the Settlor nor*" have been crossed out and seemingly initialled by the parties to the instrument. The order of priority set out in the Sixth Schedule starts with the Settlor, then the Trustees or if none the personal representatives or liquidator of the last surviving Trustee.

13. There is an issue about whether the First Respondent, in the capacity as Settlor, was validly appointed as the initial Protector of the Z Trust. This does not fall to be determined at this stage when dealing just with para. 6 of the Re-Amended Application. As shown in para. 1 of the Fourth Schedule, the Settlor is an Excluded Person. Whilst it was spotted that in clause 24(a) the words referring to "*the Settlor*" needed to be omitted, no one seems to have realised on the execution of the instrument (and possibly subsequently) that the Settlor is an Excluded Person under the terms of the instrument and clause 24(a) appears to indicate that the purported appointment of an Excluded Person to the office of Protector would be void. However, this is not an issue that I need to address to determine para. 6, as I will explain shortly, despite it being stated at para. 31 of the director's First Affidavit that if the First Respondent "*was not the validly appointed protector, then the Deed of Change of Proper Law was ineffective*".

14. The powers of the Protector are set out in clause 25:

> "*Notwithstanding anything herein contained and in particular anything conferring an absolute or uncontrolled discretion on the Trustees hereof if and for so long as there shall be a Protector of this Settlement all and every power and discretion vested in the Trustees by such provisions of the Settlement as are specified in the Seventh Schedule hereto shall only be exercisable by them with the prior or simultaneous written consent of the Protector*".

By the Seventh Schedule, "*The following powers are subject to the provisions of clause 25: Clauses 5, 7, 9, 10, 12, 15 and 16 and Schedule 1 Regulations 7, 8, 9, 14, 16 and 24*". I have already quoted Clauses 9 and 10. Clause 5 relates to the powers of appointment and advancement and clause 7 relates to payments to charity. Clause 12 is the power to change the proper law, clause 15 enables the Trustees to delegate their powers and clause 16 relates to the restriction and release of powers. The Regulations listed in the First Schedule relate to the power to lend or hire trust property, the power to borrow money, the power to permit occupation of property by Beneficiaries, the power to engage in trade, the power to guarantee debts and the power to change administrative provisions respectively.

15. Whilst clause 12 in principle requires the consent of the Protector (and the First Respondent was a party to the deed dated 2 May 2018), if the First Respondent had not been validly appointed, it follows that there was no Protector in office, so clause 25 was ineffective, but, if the First Respondent had been validly appointed in 1992, participation in that deed constitutes the simultaneous written consent, as required. This was sufficient for me to be satisfied that the proper law had been changed in 2018 and so Part II of the 2007 Law, in which section 57 appears, can apply.

16. The director also exhibits the other instruments applicable to the Z Trust. For the purposes of determining para. 6 of the Re-Amended Application, I do not need to mention most of them in detail. Some relate to the changes of Trustee. However, there was a deed of exclusion of

Beneficiaries executed on 20 August 2009 pursuant to clause 9 (which is said to be subject to Liechtenstein law) and which relates to the persons specified in the Schedule who cannot benefit from the Z Trust and are described as "*Excluded Persons*":

> "*(i) [the First Respondent, whose address is given];*
>
> *(ii) The spouse of the person mentioned at (i) above;*
>
> *(iii) The Family of the persons mentioned at (i) or (ii) above;*
>
> *(iv) Any child of the [sic] any of the persons mentioned at (i), (ii) or (iii) above;*
>
> *(v) The spouse of any such child mentioned at (iv) above;*
>
> *(vi) The grandchild of any of the persons mentioned at (i), (ii) or (iii) above;*
>
> *(vii) The spouse of any such grandchild mentioned at (vi) above;*
>
> *(viii) A company controlled by one or more persons falling within (i) to (vii) above;*
>
> *(ix) A company associated with a company falling within (viii) above); and*
>
> *(x) Any person who is a "defined person", as defined within Schedule 5, TCGA 1992 (a statute of the United Kingdom).*
>
> *For the purpose of this Schedule the term spouse includes a former spouse and any person who is or was a civil partner as that term is defined in the Civil Partnerships Act 2004 (a statute of the United Kingdom) or a widow, widower or a surviving civil partner.*
>
> *For the purposes of (iii) above, the Family means the brother or sister, parents, aunts, uncles, nephews and nieces and includes dependants.*
>
> *For the purpose of the above, child and grandchild includes stepchild and stepgrandchild respectively.*
>
> *For the purposes of (viii) and (ix) above, the question of whether a company is controlled by a person or persons or whether one Company is associated with another company shall be determined in accordance with section 416 of the Income and Corporation Taxes Act 1988 (a statute of the United Kingdom).*"

Given the terms of para. 1 of the Fourth Schedule, the inclusion of the Settlor and the Settlor's spouse as paragraphs (i) and (ii) in this Schedule appears unnecessary. (It may, however, indicate why para. 1 in the Fourth Schedule should be disregarded.) The other exclusions set out in the Schedule make more sense.

17. There was a further instrument of exclusion of Beneficiaries executed on 29 January 2020, also pursuant to clause 9(a) as a means of clarifying the definitions to which I have just referred, by reference to what is found in Schedule 2 to it:

> "*In respect of all those persons or classes of persons listed at points (i) – (x) (inclusive) in the Schedule to a Deed of Exclusion of Beneficiaries dated 26th August 2009 (the "2009 Exclusion Deed"), the term "spouse" shall, for the avoidance of any doubt, be*

> *treated as including persons who have married who are same-sex couples as it has in relation to opposite-sex couples.*
>
> *For the purposes of point (viii) in the Schedule to the 2009 Exclusion Deed the question of whether a Company is controlled by a person shall be determined in accordance with section 450 and 451 of the Corporation Tax Act 2010 (a statute of the United Kingdom) and for the purposes of (ix) in the Schedule to the 2009 Exclusion Deed the question of whether one Company is associated with another company shall be determined in accordance with section 449 of the Corporation Tax Act 2010 (a statute of the United Kingdom).*"

18. The final instrument to which I will refer is that of 2 May 2018, which relates to the retirement of one of the Trustees, simply because in Schedule 2 to it there is a list of assets, although in recital (F) it states that this list is "*for the purposes of identification but not limitation*". The assets of the Z Trust listed in Schedule 2 are: 1 ordinary share in A Limited; 10 ordinary shares in B Limited; 1 D share in C Limited; 1,000 Y shares in C Limited; 1,000 N shares in C Limited; and a loan receivable from A Limited.

19. I believe that this completes the summary of the most relevant provisions found in the original trust instrument and since then, at least for the purpose of determining para. 6 of the Re-Amended Application. Indeed, some of the provisions to which I have referred are not directly engaged but place the key provisions into a better context.

20. Against that summary of the trust instruments, Part 4 of the director's First Affidavit explains that the Applicant has been aware for a while that there may be issues of UK tax liabilities arising. This relates to what has been termed the deferred share scheme. This stems from receipt of a letter from HMRC in 2021. That letter made a set of requests for further information from the Applicant as the current trustee of the Z Trust, indicating that the sender of the letter was "*enquiring into the trust and whether it has any UK tax liabilities*". As a result, the Applicant engaged the services of Deloitte LLP. Upon receipt of three documents from Deloitte LLP, the Applicant then instructed Kevin Prosser KC. (I will deal with the advice received once I have finished setting out the background facts.)

21. A further development arose with the decision of the Supreme Court in *Fisher v Commissioners for His Majesty's Revenue and Customs* [2024] AC 1150, [2023] UKSC 44 and the subsequent enactment of the Finance (No. 2) Act 2024 (which I will also address separately). Even prior to this, the Applicant had contacted Edward Magrin, who had provided the initial tax advice about the deferred share scheme, who *inter alia* advised that:

> "*… all the individual beneficiaries per the Trust Deed, [the Second and Third Respondents], are UK tax resident. Turning to the Fourth Schedule 3(iii): it states that if the circumstances specified therein have occurred then, [the Second and Third Respondents], would be excluded persons whilst UK tax resident. The circumstances include anyone who at any time has been a "transferor" as defined therein: read literally this would seem to include any transfer, however small, which would therefore cause the beneficiary identified to be excluded whilst that beneficiary is UK tax resident. My recollection was that given the inherent uncertainties of the relevant legislation/case law, (as emphasised in recent case law), it would be prudent for the parties to consider that the Schedule applies.*"

22. Deloite LLP has identified a particular concern relating to a subscription in 1994 for Y shares in C Limited. There is an explanation in its first memorandum dated 6 December 2021. B Limited was established in Jersey in 1993. It subscribed for a share in C Limited, which was also incorporated in Jersey, with its shares held by another family settlement, to which I will refer as the "Y Settlement". C Limited offered to its shareholders a new class of shares, Y

shares, in 1994. Although the Y Settlement was the majority shareholder in C Limited, it chose not to subscribe for any of the Y shares, meaning that all 1,000 of them could be acquired by B Limited. Those Y shares had no dividend rights and no voting rights for 30 years running from 1 May 1994. If C Limited were to be wound up, the Y shares would obtain a value increasing from 1.51% in 1994 to 100% in 2024. B Limited migrated to Gibraltar in 2008. A month later C Limited also migrated to Gibraltar. B Limited was then dissolved in 2018. Its shares were acquired by the trustee and are now held by the Applicant. The permitted conversion of shares took place in 2019.

23. In the Third Respondent's two Affidavits, the Third Respondent explains a little about what is said to be a letter seen, and which may have been signed, relating to a meeting held on 19 July 1994. In particular, at para. 7 of the Second Affidavit, it is stated that the Third Respondent does "*not recall seeing this letter previously, nor do I recall signing it, nor do I recall attending the meeting held on 19 July 1994 referred to therein.*" Further, the text of the letter is set out at para. 5 of Mr Rivett's Supplementary Opinion:

> "*Dear [trustees of the [Y] Settlement]*
>
> *I address this letter to you in your capacity as trustees of the [Y] Settlement and to the directors of [C] Limited.*
>
> *I refer to our meeting in Jersey on 19th July 1994 concerning the creation of deferred shares by [C] Limited.*
>
> *I write to confirm that I have no objection to the proposed creation of these deferred shares. I further confirm that I have no objections should the trustees decline to apply for their entitlement to the issue of such deferred shares and thus for [B] Limited to acquire the total of the deferred shares to be issued.*
>
> *I furthermore indemnify yourselves against any breach of trust that may be construed to have occurred in respect of such actions.*"

It is understood that a similar letter was provided to and also signed by the Second Respondent.

24. Turning next to the various Opinions exhibited, whilst I have looked at those included in the exhibit to the director's First Affidavit for background, I have concentrated on the Opinions of Leading Counsel. I have also looked at the most up-to-date material from Deloitte LLP dated 5 November 2024, which is exhibited to the other director's Affidavit, noting particularly the summary set out in para. 2.1, which reflects the advice given by Mr Prosser.

25. Mr Prosser's Supplemental Opinion is exhibited to the principal director's Second Affidavit. In para. 3 of that document, Mr Prosser summarises the issue about which he was advising:

> "*…clause 27 of the Deed provides that no Excluded Person shall be capable of taking any benefit of any kind from the Trust, and for this purpose paragraph 3 of schedule 4 to the Deed ("Paragraph 3") defines "Excluded Person" to include any person who for the time being is UK resident for the purpose of UK income tax and who under the Income and Corporation Taxes Act 1988 ("ICTA 1988") or any statutory modification or re-enactment thereof for the time being in force is such an individual as is referred to in s.739 of ICTA 1988.*"

He then notes that the "*current statutory re-enactment and modification of s.739 ICTA 1988 is ss.720-723 of the Income Tax Act 2007*".

26. He next explains that an additional section, section 720A, was inserted into the Income Tax Act 2007 by the Finance (No. 2) Act 2024. (It became common ground that in this Opinion Mr Prosser incorrectly stated that this took effect from 5 April 2025, when the correct date should have been around a year earlier.) This new section "*applies to an individual in respect of a transfer of assets by a closely held company if (i) the individual is a "participator" in the company, (ii) the individual is unable to satisfy an officer of HMRC that he or she did not have any direct or indirect involvement in the decision-making of the company, (iii) the individual did not object to the company's transfer, and (iv) it is reasonable to conclude that the individual was aware, or ought reasonably to have been aware, that one of the direct or indirect consequences of the company's transfer is the avoidance of liability to UK taxation.*" Mr Prosser had previously advised that he was of the view that there was a substantial risk that section 720A applied to both the Second and Third Respondents. At para. 9, he stated:

> "*It appears to me that the thinking behind Paragraph 3 must have been (i) that by making [the Second and Third Respondents] Excluded Persons while they are UK resident they would not have "power to enjoy" income of the Trust within the meaning of s.739 of ICTA 1988 (or its statutory re-enactment) and therefore (ii) s.739 would not apply to charge them to tax; but (iii) they would still be able to benefit from the Trust in future if and when they become non-UK resident (when s.739 would not apply anyway).*"

27. He describes that approach as "*fundamentally misconceived"*. As such, he was of the view that "*Paragraph 3 serves no useful purpose*", hence para. 6 of the Re-Amended Application being pursued, and he went on to advise whether or not deleting Paragraph 3 would create a separate settlement. All I need to do is quote the summary at para. 15:

> "*In summary, in my opinion (i) there is no material risk that the effect of the deletion of Paragraph 3 will be to create a separate settlement for UK tax purposes of any of the property comprised in the trust fund of the Trust, (ii) the wording of the draft Order does not need to be altered, and (iii) there is no advantage to be gained from writing to HMRC in advance.*"

He then elaborated on these matters but, because there is general agreement that there is no separate settlement, I do not need to explain further the reasons for that conclusion. The reference to the draft Order reflects a document exhibited to the director's Second Affidavit.

28. Mr Mullan's advice is exhibited to the Affidavit on behalf of the Second Respondent. In it, he agrees that the provisions that now apply are those in the 2007 Act, as amended. He explains that these are often referred to as the "*transfer of assets abroad code*", which "*are a complex set of UK anti-avoidance provisions which apply to impose a charge to income tax on a UK resident by reference to the income of a 'person abroad'.*" However, he disagrees with Mr Prosser's analysis of the operation of those provisions as they affect the Second Respondent (also pointing out the apparent error in the year from which this applies).

29. This arises from section 720A, as inserted into the 2007 Act. He confirms the view that, following the Supreme Court's decision in the ***Fisher*** case, there is no question of the Second Respondent being an Excluded Person before 6 April 2024. Mr Mullan focuses on the issue about whether the Second Respondent had "*any direct or indirect involvement in the decision-making of the company*", which in this instance relates to C Limited. It is Mr Mullan's view that the letter apparently provided in 1994 to the trustees of the Y Settlement and the directors of C Limited, which the Second Respondent does not remember, does not mean that the Second Respondent was involved in the decision-making of C Limited for the purposes of section 720A(4).

30. Mr Mullan agrees with Mr Prosser that "*Paragraph 3 is defectively drafted and does not achieve any tax saving*". He also agrees with the summary I have already quoted from para. 15 of Mr Prosser's Supplemental Opinion that the Re-Amended Application would not create a resettlement. If the Court were to grant para. 6 of the Re-Amended Application, though, this would assist.

31. Mr Rivett's initial Opinion is exhibited to the Third Respondent's First Affidavit. He comments, similarly to Mr Mullan, on the Supplemental Opinion of Mr Prosser, with which he had been provided. Mr Rivett helpfully sets out the text of the relevant provisions and explains a little more about some of the definitions that were also inserted into the 2007 Act in 2024. However, for similar reasons, he shares the view of Mr Mullan in relation to the Second Respondent when it comes to the Third Respondent and the involvement with C Limited and its decision-making. For example, at para. 18, Mr Rivett states:

> "*In my view even if it is the case that [the Third Respondent] was consulted by the trustees of the [Y] Settlement as to [the Third Respondent's] views regarding the 1994 Transaction and [the Third Respondent] wrote to the trustees indicating [the Third Respondent's] consent to the trustees' proposed course of action, that would not amount to 'direct or indirect involvement' on [the Third Respondent's] part in the 'decision making' of [C Limited] for the purposes of s. 720A ITA 2007, for a number of reasons.*"

He then explains the reasons for his conclusion in more detail. Interesting those these are, they are not relevant to the issue I have to determine for the purposes of para. 6 of the Re-Amended Application. Mr Rivett similarly agrees with Mr Prosser (and therefore also Mr Mullan) that the proposed changes to the Z Trust instrument do not amount to a resettlement. However, he considers that para. 6, if granted, would assist.

32. Mr Rivett's Supplementary Opinion is exhibited to the Third Respondent's Second Affidavit, to which I have already referred because it sets out the text of the letters that the Second and Third Respondents may have sent in 1994. Mr Rivett maintained his view that section 720A of the 2007 Act was not engaged in relation to the Third Respondent even if the Third Respondent's recollection about those events was wrong.

The parties' contentions

33. This was a rare instance within the family where peace appears to have broken out because the Second and Third Respondents both supported para. 6 of the Re-Amended Application being granted. In these circumstances, I will concentrate on the submissions of Advocate Edwards on behalf of the Applicant and only mention briefly what the other Advocates had to say. I had dispensed with the attendance of Advocate Davidson on behalf of the First Respondent, but he was present at the hearing, so I will also touch briefly on what he had to say.

34. Prior to the hearing I had the benefit of a Skeleton Argument from Advocate Edwards in support of para. 5(d) and 6 in accordance with the Act of Court from 1 November 2024 when the proceedings were first before the Court and a later one prepared for the hearing itself dated 18 July 2025. This Skeleton Argument followed my agreement to depart from the decision I had originally taken to deal with para. 5(d) of the Application, as well as para. 6, as set out in the Act of Court dated 3 June 2025. I also had a Skeleton Argument prepared by Advocate Robison on behalf of the Second Respondent. Advocate Havard confined himself to making brief oral submissions.

35. As Advocate Edwards notes, the Z Trust and the Y Settlement "*are closely related and their affairs are somewhat entwined.*" Both Trusts were being used for inheritance tax planning within the family. When the Y shares in C Limited were created, they had little value, but

would become more valuable as the years passed. This was the deferred share scheme. It was then decided to use the Z Trust as part of this process. Although the majority shareholder in C Limited was the Y Settlement, the Z Trust acquired a single share in C Limited through a company it owned, B Limited. Because the Y Settlement chose not to subscribe for any of these Y shares, B Limited was able to subscribe for all 1,000 of them. (This process is described in more detail in the Deloitte LLP memorandum.)

36. The Z Trust instrument (or Deed) creates a category of "Excluded Persons", to which the Fourth Schedule to the Deed relates. The Applicant was aware that the terms of para. 3 of the Fourth Schedule meant that the Beneficiaries named, the Second and Third Respondents, might be Excluded Persons. Section 739 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), with the relevant provisions commonly referred to as the "Transfer of Assets Abroad" (or "TOAA"), and which provisions are now found in the 2007 Act. This regime was explained in the ***Fisher*** case. The effect of the Supreme Court's judgment was to confirm that the TOAA provisions only took effect where an individual performed the transfer to the overseas person. This resulted in the changes made by the Finance (No. 2) Act 2024 which *inter alia* inserted section 720A into the 2007 Act. The Applicant is concerned that this provision may make both the Second and Third Respondents Excluded Persons once again. Because the events in 1994 might cover both the Second and Third Respondents, although the Applicant appreciates they might not, it seeks a determination of para. 6 of the Re-Amended Application to put the matter beyond question.

37. Advocate Edwards also explained that his primary contention was that section 57 of the 2007 Law could be used. In particular, he relies on para. (c) in section 57(1) but could invoke para. (e) if that were necessary. If he were wrong about that, then he relied on section 69 or on the Court's inherent jurisdiction. (I will address the applicable section later in these reasons, and also whether para. 6 enables the Court to do what the Applicant wishes, and which the Respondents support.) In relation to the terms of para. 3 in the Fourth Schedule to the Deed, a document had been produced showing the proposed deletions and the words to be added. The effect of these was that para. 3 would read: "*This schedule shall take effect so that 'Excluded Persons' means the only or any one of the Excluded Persons.*"

38. I was not particularly attracted to these words remaining and, on behalf of the First Respondent, Advocate Davidson agreed that they were rather pointless. The First Respondent was broadly supportive of para. 6.

39. On behalf of the Second Respondent, Advocate Robison was also supportive, whilst not believing that the Second Respondent is an Excluded Person, but recognising that HMRC might take a different view, so there was an element of uncertainty. He also agreed that there appeared to be little point in leaving any words in para. 3 of the Fourth Schedule. He supported reliance on section 57.

40. On behalf of the Third Respondent, Advocate Havard was also broadly supportive, whilst also confirming that the Third Respondent did not believe the Third Respondent is an Excluded Person (as explained in Mr Rivett's Opinions). As an adult beneficiary, the Third Respondent supports the proposed variation of the trust instrument. If needs be, section 57(1)(c) can be used. Advocate Havard considered that any variation could only be prospective.

41. In reply, Advocate Edwards confirmed that the aim of the Applicant was to restore certainty going forward. If the proposed wording for para. 3 in the Fourth Schedule was not favoured, para. 6 of the Re-Amended Application enabled the Court to remove the paragraph in its entirety.

Discussion

42. Before turning to the issues raised by the evidence, I will start by confirming why I am satisfied that this could properly be an application pursuant to section 57 of the 2007 Law.

43. Section 57 falls within Part II of the Law. Section 5 provides that Part II "*applies only to Guernsey trusts.*" A "*Guernsey trust"* is defined in section 80(1) as meaning "*a trust the proper law of which is the law of Guernsey*".

44. As I have already explained, when the proper law of the Z Trust was changed to Guernsey law in 2018, the First Respondent, in his capacity as Protector, joined in that instrument. If the First Respondent had been validly appointed as the Protector, that participation constitutes the required simultaneous written consent. However, if the First Respondent had not been validly appointed, it follows that there was no Protector of the Z Trust and so the requirement for any Protector consent did not exist. Either way, I was satisfied that the change of the proper law would be effective meaning that the Z Trust became and is a Guernsey law trust. (Although it is not of direct relevance to determining para. 6 of the Re-Amended Application, as a Guernsey law trust it will mean under section 16(2) that its maximum duration will be 100 years from the date of its creation.)

45. Section 57 provides:

> "*(1) The Royal Court, on the application of any person mentioned in section 69(2), on behalf of –*
>
> *(a) a minor or a person under legal disability having, directly or indirectly, an interest, vested or contingent, under a trust,*
>
> *(b) any person unborn,*
>
> *(c) any person, ascertained or not, who may become entitled, directly or indirectly, to an interest under a trust, as being (at a future date or on the happening of a future event) a person of any specified description or a member of any specified class,*
>
> *(d) any person, in respect of an interest that may accrue to him by virtue of the exercise of a discretionary power on the failure or determination of an existing interest, or*
>
> *(e) with leave of the Royal Court, any other person,*
>
> *may, subject to subsection (2), approve any arrangement which varies or revokes the terms of a trust or enlarges or modifies the powers of management or administration of any trustees, whether or not there is another person with a beneficial interest who is capable of assenting to the arrangement.*
>
> *(2) The Royal Court shall not approve an arrangement on behalf of a person mentioned in subsection (1)(a), (b) or (c) unless the arrangement appears to be for his benefit.*"

46. The advantage of the reliance placed on para. (c) in section 57(1) is that subsection (2) ensures that consideration is given to the benefit of those for whom the application is being made. Advocate Edwards confirmed that the Applicant was bringing para. 6 on behalf of the Second and Third Respondents. Both are, of course, already ascertained and would, if the variation

proposed by para. 6 were granted, become Beneficiaries and so entitled to an interest under the Z Trust. It did not, in my view, matter if the Applicant did not need to bring para. 6 on behalf of these two persons because, being both of full age, they could agree to the variation anyway. I was, therefore, persuaded that section 57(1)(c) could be relied on for these purposes and the Applicant as the holder of the assets which are not its own (see section 1 of the 2007 Law), clearly had standing to bring the application under section 69(2)(b).

47. As I have just noted, the advantage of relying on section 57(1)(c) is that it requires a consideration of benefit. However, if I was wrong to have been satisfied that consideration of benefit had to follow, and should instead have given leave under section 57(1)(e), which I would have done in the alternative, then I would still of my own motion have considered the benefit issue by reference to section 57(2).

48. Although Advocate Edwards refers to section 4 of the Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016 ("*The preamble to an enactment and the headings of the parts, fasciculi, chapters, sections, articles, schedules, appendices and other divisions and subdivisions into which an enactment is divided form part of the enactment, but only to assist in explaining its intent and meaning.*"), I do not consider this was strictly necessary because the heading to section 57 ends with "*etc.*", which necessarily implies that it covers more than just the "*minors*" as the word immediately preceding this. What matters are the words used in section 57(1)(c), which I am satisfied are of wider application than the words found, for example, in para. (a) and so can be advanced on behalf of adults.

49. Section 57(1) enables the Court to "*approve any arrangement which varies … the terms of a trust*". As explained by both Advocate Edwards and Advocate Robison, this concept has been construed broadly.

50. This was made clear in the Jersey Court of Appeal in <u>*Mubarik v Mubarak*</u> 2008 JLR 430. At para. 82 of the judgment delivered by McNeill JA, referring to art. 47, which is in similar terms to what is now section 57 of the 2007 Law, he highlighted that:

> "*In my opinion, therefore, art. 47 empowers approval of an arrangement even though the arrangement might be so extensive as to leave little of the existing trust provisions extant; but so long as those benefiting were within the ambit of the settlor's expressed bounty. Under the 1958 and the 1961 Acts and the 1984 Law, trusts have been substantially altered, brought to an end and distributed. So long as the arrangement is to some extent to the benefit of those entitled to the court's protection (or, in Scotland, not prejudicial to their interests), the court may grant approval.*"

Reference was also made in that paragraph to <u>*Re Osias Settlements*</u> 1987-88 JLR 389, which on page 408 also accepted that the article "*should be construed widely*".

51. Both of these decisions were adopted by this Court in <u>*Trustee 'T' v Five Respondents*</u> (unreported, 25 July 2011). I am similarly prepared to treat these decisions as indicative of the proper approach for this Court to follow and will construe the ambit of section 57 widely. This follows the approach I took in <u>*In re the X Trust, the Y Trust and the Z Trust*</u> (unreported, 21 November 2014).

52. In <u>*Re A Settlement*</u> (unreported, 28 June 2011), the then Deputy Bailiff described section 57 as being "*a simplified version of the English Variation of Trusts Act 1958*" (para. 19), reflecting in part the comment of McNeill JA in <u>*Mubarik*</u>, adding (in para. 21):

> "*The common law position is that an adult beneficiary with legal capacity may consent to a variation of trust. Section 57 enables the court to give consent on behalf of persons who are not able to do so for themselves. The role of the court was considered by the*

> *Court of Appeal in Goulding v James [1997] 2 All ER 239 at page 249. Mummery LJ (at page 249h) said that the court is almost in the position of a 'statutory attorney' on behalf of those for whom it consented.*"

Paragraph 23 further explained:

> "*There are two considerations for the Court under Section 57. First of all, whether the proposed arrangement "varies or revokes the terms of the trust or enlarges or modifies the powers of management or administration" of the Trustee. The second consideration is whether the proposed variations will be for the "benefit" of the persons for whom the Court is consenting.*"

53. These two principles were repeated at para. 18 in the *Trustee 'T'* case. I am satisfied that these are the two principles to which I needed to have regard. As I have already set out, even if the route to considering section 57 were to rely on para. (e) of subsection (1), I would still have considered whether the variation proposed by the Applicant is of benefit to the Second and Third Respondents. It is appropriate that it is a two-stage process and there is, in my view, sufficient domestic learning for there to be no need to refer to decisions from other jurisdictions.

54. It is convenient at this point to put what is found in the Fourth Schedule of the Z Trust instrument into context of developments in the United Kingdom. The judgment of the Supreme Court in the *Fisher* case was delivered by Lady Rose on 21 November 2023, with whom the other members of the Court agreed. Because it is a helpful summary of the mischief to which the relevant provisions related, I will quote what Lady Rose set out at para. 2:

> "*The basic idea behind the provisions is expressed in the tag given to them – the transfer of assets abroad code or TOAA. The paradigm case in which they impose a tax charge is where an individual resident in the United Kingdom transfers assets, for example, shares in a company or partnership, to a person overseas so that instead of that individual receiving and paying tax on income arising from the assets, such as dividends from those shares, the overseas company either retains the income or transfers it to the individual in the form of capital. The effect, broadly, of the provisions is that the income received by the overseas person is deemed to be the income of the individual who is then charged tax on it, whether or not he had actually received any of that income within the jurisdiction. An early case in which the provisions came before the House of Lords involved just such a paradigm sets of facts: Latilla v Inland Revenue Comrs [1943] AC 377, (1943) 25 TC 107. Their Lordships in that case were scathing in their dismissal of the arguments put forward by the taxpayers seeking to construe the provisions in a way which left their ingenious methods of avoiding tax intact. Viscount Simon LC in the first paragraph of his speech in Latilla said that:*
>
> > *"... one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."*"

55. As Lady Rose set out in para. 5 of her judgment, the central question arose on "*the sale of a business operated by a UK incorporated company, the shares of which were owned by the Fishers, to a company incorporated in Gibraltar which the Fishers also owned.*" (These two companies are referred to as "SJA" and "SJG".) It was common ground in that case that the reference to "*"individuals" means natural person and not bodies corporate. None of the Fishers held a majority interest in either the transferor or the transferee company.*" As a consequence, Lady Rose concluded that "*the Fishers are not caught by the taxing charge on which HMRC have relied in issuing their assessments to tax.*"

56. The judgment proceeds to analyse the provisions that were originally found for most of the tax years in that case in sections 739 to 746 of ICTA 1988. As set out in para. 7, it was agreed that what is now found in the 2007 Act, to which the final year of assessment applied, meant "*any differences do not affect the issues in this case*". The various Opinions to which I have already referred agree that the re-enactment of what is mentioned in the Fourth Schedule to the instrument by the 2007 Act applies.

57. The first issue addressed in detail in this judgment relates to whether the individual charged to tax under section 739 has to be the transferor of the assets. At para. 62, this issue was decided in favour of the Fishers, with the reasoning being found shortly before that:

> "*56. I respectfully agree with Lord Wilberforce that the most natural meaning of the words is the meaning he gave to the earlier provision in Vestey [ie, Vestey v Inland Revenue Comrs (Nos 1 and 2) [1980] AC 1148]. The reference in section 739(2) to "such an individual", being the individual who has power to enjoy the income of the overseas person, requires one to consider what characteristics of the individuals referred to in section 739(1) are thereby brought into subsection (2). There is no reason to pick out one of those characteristics (the fact that the individual is ordinarily resident in the UK) and ignore the others (that they are trying to avoid liability to income tax by means of transfers of assets).*
>
> *57. The presence of section 744 does not mitigate the features of the charge that led to it being described as penal and harsh. It is still the case, following Lord Howard de Walden [ie, Lord Howard de Walden v Inland Revenue Comrs [1942] 1 KB 389], that a single individual caught by section 739 can be charged tax on the whole of the income of the overseas transferee if they have power to enjoy that income, even if they have received little or no actual income from which to defray that tax. The Court of Appeal in Lord Howard de Walden posited a case where the assets were transferred to an existing overseas corporation with very large assets and income of its own. The income attributable to the assets transferred might be a very small proportion of the overseas company's total income. Lord Greene MR recognised that the effect of the provision was that it would be the total income that was deemed to be the income of the individual and subject to tax. This is why he described the provision as "the severest of penalties" imposed on those who were minded to throw the burden of taxation off their own shoulders on to those of their fellow citizens. That burden is certainly thrown by the transferor of the assets but that is not an apt description of someone who was not the transferor*."

58. The second issue addressed is whether the Fishers transferred the assets. However, as set out in para. 63 of the judgment:

> "*There is no doubt that the legal transferor of the assets was SJA and not the Fishers. HMRC argue that because the Fishers together owned the controlling interest in SJA, they should be treated as transferors of the assets and therefore within the charge imposed by section 739. This raises two questions – is it ever possible for someone other than the owner and legal transferor of the assets to be treated as a transferor for the purposes of section 739? If so, in what circumstances (if any) do the shareholders of a company which transfers its assets count as transferors?*"

Paragraph 73 then summarises why Lady Rose disagreed with this premise:

> "*Nonetheless, the speeches of their Lordships in Vestey left some flexibility as to who is a transferor. Is there any reason to construe section 739 as applying to the shareholders of a company on the basis that they are "associated with" or that they*

> *"procure" the transfer of assets by that company? In my judgment there are no reasons for construing the section in that way and plenty of reasons not to do so.*"

59. The reasoning leading to the conclusion in para. 88 that HMRC's appeal "*must be dismissed*" because the Fishers "*were not either singly or collectively the transferors of the business that was sold by SJA to SJG*" includes para. 78:

> "*Section 739 is expressly limited to "individuals". The absence of any definition of what it means for an individual to control a company in order to be the transferor of assets transferred by that company suggests strongly to me that section 739 was not intended to apply to transfers by companies. Any attempt to draw a bright line by saying, for example, that someone who owns 100% of the shares, or 51% of the shares is caught does not avoid the problem. If the owner of 100% of the shares is itself a body corporate, is the owner of that parent, or of the parent of that parent caught? Whether any particular shareholder, even one with more than 50% of the shares, is actually consulted on and involved in the decision to transfer assets depends on the division of responsibilities in the articles of association between the board of directors and the shareholders. A large company may transfer an income generating asset which, though substantial in absolute terms, is only a small fraction of its overall business. That decision may be delegated entirely to the directors, but HMRC accept that directors will rarely be caught by the charge because they do not have a "power to enjoy" the income of the overseas transferee. HMRC counter that the provision should apply at least where the shareholders and directors are the same people. Again, there are other places in the tax code where the concept of the "close company" is introduced and that concept was defined in section 414 and 415 ICTA 1988. It is a sophisticated definition which defines a close company as one which is under the control of five or fewer participants but goes on to exclude certain companies, to bring in other defined terms such as when shares are or are not deemed to be held by the public as well as what is meant by "control".*"

60. The consequence of this ruling was that neither the Second nor the Third Respondent could be regarded as being the transferor for the purposes of what was section 739 of ICTA 1988 (or by virtue of its re-enactment in the 2007 Act, section 720 and related provisions). From that moment, it followed that neither the Second nor the Third Respondent was an "Excluded Person". However, this may have changed as a result of the insertion into the 2007 Act of provisions by section 22 of the Finance (No. 2) Act 2024 (subsection (10) of which confirms that the amendments "*have effect in relation to income arising on or after 6 April 2024*"). As Lady Rose commented at the end of para. 87 of her judgment, "*if there is indeed a gap created by this ruling, then as Viscount Dilhorne said in Vestey, gaps in our tax law can be and usually are speedily filled. If the Government does not regard section 740 as adequately filling the gap, then it will need to think carefully about how to fill that gap in a fair, appropriate and workable manner.*"

61. As the Opinions set out, the key change made was by section 22(2) of the 2024 Act, which inserted section 720A immediately after section 720. The new provision reads:

> "*(1) The charge under section 720 also applies for the purposes of preventing the avoiding of a liability to taxation by means of a relevant transfer carried out by a closely-held company in which an individual has a qualifying interest.*
>
> *(2) But the charge only applies in those circumstances if–*
>
> *(a) the individual is involved in the company, and*
>
> *(b) the avoidance condition is met.*

(3) An individual has a qualifying interest in a closely-held company if the individual, or a nominee of the individual, is a participator in–

(a) the closely-held company, or

(b) the first closely-held company in a chain of two or more closely-held companies where each company in the chain is a participator in the next company in the chain, or which one such company is a closely-held company that carried out the relevant transfer.

(4) For the purposes of this section, an individual with a qualifying interest in a company is treated as being involved in the company unless the individual satisfies an officer of Revenue and Customs that neither the individual nor (in a case where the individual is not the relevant participator) the relevant participator has any direct or indirect involvement in the decision making of the company.

(5) The avoidance condition is met if–

(a) the relevant participator did not object to the making of the relevant transfer, and

(b) it is reasonable to draw the conclusion, from all the circumstances of the case, that the relevant participator was aware, or ought reasonably to have been aware–

(i) of the transfer, and

(ii) that one of the direct or indirect consequences of the transfer is the avoidance of a liability to taxation.

(6) For the purposes of subsections (4) and (5) the "relevant participator" means–

(a) in a case where the individual's qualifying interest arises as a result of a nominee of the individual being a participator in a company, the nominee, or

(b) otherwise, the individual.

(7) Any arrangements to secure that a person has no direct or indirect involvement in the decision making of a company are to be disregarded if the main purpose, or one of the main purposes, of the arrangements is to secure that the condition in subsection (2)(a) is not met.

(8) Any arrangements that would result in the avoidance condition not being met are to be disregarded if the main purpose, or one of the main purposes, of the arrangements is to secure that the avoidance condition is not met.

(9) In this section–

"arrangements" include any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);

"taxation" has the meaning it has in section 737."

62. I have set out this provision in full even though para. 6 of the Re-Amended Application does not require me to determine whether either of the Second and Third Respondents is an Excluded Person for the purposes of the Fourth Schedule as it currently stands. This is because para. 6 is expressed in terms "*whether or not the Second and/or the Third Respondent are Excluded Persons*". I have further noted that section 22(4) adds a reference to section 720A in section 721(1), which sets out the circumstances in which an individual is liable to income tax in any tax year, which includes (in section 721(3A)) that "*the individual is UK resident for the tax year*". Section 22(3) of the 2024 Act inserts section 727A into the 2007 Act and I have also noted that section 22(6) inserts section 719A, containing some further definitions applicable to the Chapter:

> "*In this Chapter–*
>
> *"closely-held company" means–*
>
> *(a) a close company for the purpose of the Corporation Tax Acts (see Part 10 of CTA 2010), or*
>
> *(b) a company that would be a close company if section 442(a) of CTA 2010 were ignored (non-UK resident company not to be treated as close);*
>
> *"nominee", in relation to an individual, means a person–*
>
> *(a) who possesses any rights or powers on behalf of the individual, or*
>
> *(b) who may be required to exercise any rights or powers on the individual's direction or behalf;*
>
> *"participator" is to be construed in accordance with section 454 of CTA 2010.*"

63. By reference to section 454 of the Corporation Taxes Act 2010, a "participator" in a company is anyone "*having a share or interest in the capital or income of the company*", with particular examples set out in subsection (2) of that section. Again, it is not necessary for me to consider whether the Second and Third Respondents fall within any of these definitions, but I have, of course, taken into account what Mr Mullan and Mr Rivett have set out in their Opinions as to their views in relation to each of those Respondents. Those arguments may need to be deployed on another occasion, but do not affect my decision on para. 6. Whether shares held by a trustee make the trustee a "nominee" for these purposes on behalf of a Beneficiary is potentially an interesting issue that will have to be resolved by another court.

64. As the Applicant has stressed, para. 6 of the Re-Amended Application is predicated on the fact that the Second and Third Respondents (or either of them) might be an Excluded Person under the terms of the Fourth Schedule because of the introduction of section 720A in the 2007 Act. It is the uncertainty brought about by legislation that is yet to be tested that para. 6 seeks to address. I was satisfied that section 57(1)(c) of the 2007 Law can be invoked by the Applicant on behalf of the Second and Third Respondents on the basis that there is an argument at present that both of them might be regarded as an Excluded Person by the strict application of the Fourth Schedule but that if para. 6 were to be granted, each would become entitled to an interest under the Z Trust as they would no longer fall within the category of being an Excluded Person. I was further satisfied that the breadth of what has been recognised here and elsewhere as being an arrangement was covered by the proposed modification to, or removal of, para. 3 in the Fourth Schedule.

65. At the hearing I expressly left open the issue of whether the words in para. 3 of the Fourth Schedule were engaged. This is because para. 3(i) refers to "*any statutory modification or re-enactment thereof for the time being in force*" and para. 3(iii) adopts a similar reference. On one view, the effect of the *Fisher* case was to provide certainty that the transferor had to be an individual and that it did not extend to a shareholder who has an interest in a company that is the transferor. This can be applied to section 720 of the 2007 Act, which is, I accept, a re-enactment of section 739 of ICTA 1988, possibly with some modification as well. By reference to the various cases that bind this Court as to how to construe a trust instrument (such as *In the matter of the R Trust* [2020] GCA 065 and *In the matter of the K Trust* 2020 GLR 312), I doubt that the insertion into the 2007 Act of section 720A (or the other provisions found in section 22 of the 2024 Act) can properly amount to a re-enactment of what had been set out in section 739 of ICTA 1988. It appears more to be an attempt to fill a gap created by the ruling in the *Fisher* case, as referred to by Lady Rose. It is possible that section 720A amounts to a "*statutory modification*" of what existed as the re-enactment of what had been found in ICTA 1988 but, in the absence of any detailed submissions on that question, I prefer to leave that particular element open for future determination. In the context of para. 6 of the Re-Amended Application, it does not really matter because the arrangement to which I have just referred involves changing the wording of it, or removing para. 3 completely.

66. If I were wrong to rely on section 57(1)(c) for this purpose, possibly for the reason that I actually needed to decide whether or not the Second and Third Respondents are Excluded Persons, despite the premise of para. 6, then I would still have been minded to consider para. 6 because it was open to both of the Second and Third Respondents, who are of full age, to agree to the changes proposed to be made to the Z Trust instrument. This power is clear from para. 53-003 in *Lewin on Trusts*, 20th ed.:

> "*A trustee can safely depart from the provisions of the trust instrument or take an administrative step not authorised by the instrument or the general law if all the beneficiaries affected are of full age and capacity and agree to this being done. Sometimes the agreement of all the beneficiaries is needed because the interests of all of them are affected. In other cases the consent of some only of the beneficiaries is needed; for instance, where the true construction of the trust instrument is doubtful, the trustee can safely act on one construction if all those interested in asserting that the other is the true construction are of full age and capacity and consent.*"

67. Because I am satisfied that section 57 can be used, there was no need for me to consider the alternative basis of the Applicant relying on section 69 of the 2007 law.

68. The next consideration, as required by section 57(2), is to consider the benefit to the Second and Third Respondents. In this case, this is comparatively straightforward.

69. As noted in *Re A Settlement* (at para. 26, referring to an earlier edition of *Lewin on Trusts*):

> "*The court will not confine itself to looking at the alleged benefit to those persons for whom it has jurisdiction to approve but will examine the arrangement as a whole, in the light of the purpose of the trust as disclosed by the trust instrument and any other available evidence. It will undertake a practical and businesslike consideration of the arrangement, including the total amounts of the advantage which the various parties obtained, and their bargaining strength … The arrangement may be acceptable although in certain events no benefit or even a loss may result. The court will take the same sort of risk as a reasonable adult would be prepared to take.*"

70. This general statement was adopted by me in *In re the X Trust, the Y Trust and the Z Trust*, where I also mentioned the way in which the principle had been described in *Re Holt's Settlement* [1969] 1 Ch 100, noting that benefit is "*not confined to financial benefit, but may*

extend to moral or social benefit". Another version of the breadth of the approach to the question of benefit can be found in para. 40 of that judgment, quoting what I had stated in *A Trust Company v F, M and Cs* (unreported, 5 February 2014). I accepted, therefore, that benefit is also to be construed widely.

71. In relation to the Z Trust, the definition of "*Beneficiaries*" in clause 1(a) refers first to those mentioned in the Third Schedule. The only two names in that Third Schedule are the Second and Third Respondents. It would strike me as odd to mention both of them expressly as "*Beneficiaries*" and then to make each of them Excluded Persons for the purpose of the Fourth Schedule, despite what Mr Magrin advised. To leave it to each of the Second and Third Respondents to decide when to become non-resident in the United Kingdom in order to avoid being an Excluded Person also strikes me as unnecessarily burdensome for that person. As I have just noted, it is this potential uncertainty following the introduction of the changes to the 2007 Act made by the 2024 Act that needs to be resolved. As the First Respondent appeared to wish to benefit the Second and Third Respondents, making both of them Beneficiaries, it would seem odd if they were then unable to benefit by virtue of being, or now becoming, Excluded Persons.

72. Indeed, in accordance with the principles for construing a trust instrument I have mentioned, it appears that there is an internal inconsistency in the inter-relationship between these different concepts. Why would the First Respondent, as the Settlor, have created a class of Beneficiaries comprising the Second and Third Respondents only to then set out a provision that would now, with effect from 6 April 2024, potentially make them Excluded Persons? It appears that this was not the Settlor's plan. As such, I was satisfied that there was a benefit in the Applicant seeking to vary the terms of the instrument to remove that uncertainty. I took the view that it should be regarded as beneficial to the Second and Third Respondents to approve an arrangement that confirms that they are Beneficiaries of the Z Trust.

73. Having regard to the Opinions to which I have already referred, I was also satisfied that Leading Counsel had opined that the variation in granting para. 6 of the Re-Amended Application would not amount to a re-settlement. I have relied on their views and adopt the reasons they set out in those Opinions, without repeating them.

74. In doing so, I realise that the variation I have approved should only be prospective. It is, therefore, possible that from 6 April 2024 to 29 July 2025 when the variation was granted the Second and Third Respondents may have to defend themselves if section 720A of the 2007 Act is relied upon against either or both of them.

75. I decided that it was preferable to delete the entirety of para. 3 in the Fourth Schedule to the Z Trust instrument rather than to leave any words as had been suggested in the draft Order exhibited to the director's Second Affidavit. It was unclear to me whether the final words in the original para. 3 of the Fourth Schedule were intended to apply only to that para. 3 or to be of general application. The positioning of the words "*and so that "Excluded Person" means the only or any one of the Excluded Persons*" appeared to indicate that it applied only to para. 3. If the intention of the Re-Amended Application was to remove para. 3, there would be no benefit in leaving any words, even by inserting "*This schedule shall take effect*" in place of "*and*". If the whole of para. 3 were deleted, it would leave just paragraphs 1 and 2 (although I am uncertain as to whether para. 1 can properly take effect, but that will be an issue for determination on another day). Moreover, even if the words at the end of the Fourth Schedule were intended to be of general application, there would be no need to supplement what remains once para. 3 is deleted. The Excluded Persons would then be those listed in paragraphs 1 and 2 and there would, in my view, be no benefit in having the generality of what would be left as para. 3. For these reasons, I was satisfied that the better option was to delete the whole of para. 3 in the Fourth Schedule. In that manner, the Second and Third Respondents would not be Excluded Persons.

76. Once I had announced my decision to the parties, they were all content for their costs relating to the Beneficiary Reinstatement Application to be raised and paid as an expense of the Z Trust at the full indemnity rate, and which had been proposed aa para. 2 of the draft Order, and was consistent with para. 7 of the Re-Amended Application.

Conclusion

77. This judgment aims to set out as briefly as possible the reasons for the decision I announced at the end of the hearing that took place on 29 July 2025. I noted that there was no opposition to what was proposed from any of the Respondents. Indeed, the Second and Third Respondents both supported the granting of para. 6 of the Re-Amended Application, which would offer both of them certainty. I was satisfied that the amendment proposed, which became to remove the whole of para. 3 of the Fourth Schedule to the Z Trust instrument, was an arrangement that was capable of being approved and that it would be of benefit to the Second and Third Respondents on whose behalf para. 6 was being made. If nothing else, it would remove any concerns about the impact of section 720A of the 2007 Act following approval of the variation achieved. There was also general agreement that all the parties should have their costs from the Z Trust under section 71 of the 2007 Law on the indemnity basis.