Equiom Trust (C.I.) Ltd v Jean-Pierre Mattas

Jurisdiction:	Jersey
Judge:	Sir Michael Birt
Judgment Date:	01 March 2024
Neutral Citation:	[2024] JRC 68
Court:	Royal Court

Text

In the Matter of Equiom Trust (C.I.) Limited

And in the Matter of the Estate of the Late Constantin Mattas

And in the Matter of Article 2 (1) of the Probate (Jersey) Law 1998 (As Amended)

And in the Matter of Articles 11, 47 (3) and 51 of the Trusts (Jersey) Law 1984 (As Amended)

Between
Equiom Trust (C.I.) Limited
Representor
and
(1) Jean-Pierre Mattas
(2) Philippe Mattas
(3) The Government of Greece
(4) HM Attorney General

and

(5) Advocate Richard Arthur Falle and John Bisson (in their capacity as the Joint Executors of the Will of the late Aréty Racadji)
Respondents

[2024]JRC068

Before:

Sir Michael Birt, Commissioner, sitting alone.

ROYAL COURT

(Samedi)

Estate.

Authorities

Probate (Jersey) Law 1998.

Trusts (Jersey) Law 1984.

In the matter of the Estate of Constantin Mattas [2022] JRC 237.

Equiom Trust (CI) Limited v Mattas and Ors [2022] JRC 288.

In Re Amy [2000] JLR 237.

In Re Amy at [2000] JLR 80.

Re Internine Trust [2005] JLR 236.

Re Malabry Investments Limited (1982) JJ 117.

In Re Cayford Limited [1975] 1 WLR 279.

Sifton v Sifton [1938] AC 656.

In Re Porter [1975] N.I. 157.

Re Williams [1897] 2 Ch 12.

Bird v Harris [1869–70] L.R. Eq 204.

Attorney General v Wax Chandlers' Co (1873) L.R. 6.H.L1.

Vucicevic v Aleksic [2017] EWHC 2335 (Ch).

Re The Don Benest [1989] JLR 330.

McPhail v Doulton [1971] AC 424.

Re Exeter Settlement [2010] JLR 169.

Theobald on Wills (19 th Ed).

Re Tuck's Settlement Trusts [1978] Ch 49.

Public Trustee v Butler [2012] EWHC 858 (Ch).

Lewin on Trusts, (20 th Ed).

Pengelly v Pengelly [2008] Ch 375.

Re Flavel's Will Trusts [1969] 1 WLR.

Meaker v Picot [1972] JJ 2161.

Snell's Equity (34 th Ed).

Trusts (Amendment No 4) (Jersey) Law 2006.

Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7.
(1732) 2 P Wms 686.

Rawlinson & Hunter Trustees SA v Chiddicks [2019] (1) JLR 87.

Halabi v Equity Trust (Jersey) Limited [2022] UKPC 36.

Stanley v Leigh (1732) 2 P Wms 686.

Jersey Law of Trusts (3 rd Ed).

St John's Law Review, Vol 35 (1960) No 1'

'Perpetuities in French Law', 'Journal of Comparative Legislation and International Law Vol 16.

Loi (1851) sur Les Testaments d'Immeubles.

Armitage v Nurse [1998] Ch 241.

Rahimtoola v Nizam of Hyderabad [1958] AC 379.

Re Koettgen's Will Trusts [1954] Ch 252.

Charities (Jersey) Law 2014.

Re Greville Bathe Fund [2013] (2) JLR 402.

Oppenheim v Tobacco Securities Trust Co Limited [1951] AC 297.

Caffoor v Commissioner of Income Tax, Colombo [1961] AC 584.

Inland Revenue Commissioners v Educational Grants Association Limited [1967] Ch 123.

Law and Practice Relating to Charities (4 th Ed).

Cayman Islands v Wahr-Hansen [2001] 1 AC 75.

Herbert v Cyr [1944] 2 D.L.R. 374.

N.S.W Limited v Presbyterian Church (N.S.W) Property Trust [1946] 64 W.N.N.S.W. 8.

Public Trustee v Young [1980] 24 S.A.S.R. 407.

Tudor (11 th Ed).

Re Wright's Will Trusts, 29 July 1982, (unreported) [1982] Lexis Citation 1509.

Chichester Diocesan Fund v Simpson [1944] AC 341.

Hoare v Osborne (1865–66) L.R. 1 Eq. 585.

Re Clarke [1923] 2 Ch 407.

Re Coxen [1948] 1 Ch 747.

Chapman v Brown (1801) 6 Ves Jun 404.

Mitford v Reynolds (1841) 1 Ph 185.

AG v Hinxman (1820) 2 Jac & W 270.

Fowler v Fowler (1864) 33 Beav 614.

Re Taylor (1888) 58 LT 538.

Re Porter [1925] 1 Ch 746.

Fisk v Attorney General (1867) LR 4 Eq 521.

Hunter v Bullock (1872) LR 14 Eq 45.

Dawson v Small (1874) LR 18 Eq 521.

Re Williams (1877) 5 LR Ch 735.

Re Birkett (1878) 9 Ch D 576.

Re Vaughan (1886) 33 Ch D 187.

Re Rogerson (1901) 1 Ch 715.

Kelly v Attorney General (1917) 1 IR 183.

South Eastern Sydney Area Health Service v Wallace [2003] NSWSC 1061.

Re Parnell [1943] 1 Ch 107.

Re Norton's Will Trusts [1948] 2 All E R 842.

Re Doering [1948] O.R. 923.

Jarman on Wills (8 th Ed).

Theobald on Wills (15 th Ed) 1993.

Re Kung (2014) 17 ITELR 662.

Plummer v Attorney General of New South Wales [2018] NSWSC 869.

Tudor (11 th Ed).

Re St Andrews (Cheam) Lawn Tennis Club Trust [2012] 1 WLR 3487.

Halsbury, Laws of England (Volume 8).

Re Golay's Will Trusts [1965] 1 WLR 969.

Advocate S. J. Williams **for the Representor**.

Advocate R. D. J. Holden **for the First Respondent**.

Advocate A. Kistler **for the Second Respondent**.

Advocate S. J. Alexander **for the Third Respondent**.

Advocate S. A. Meiklejohn **for the Fourth Respondent**.

The Fifth Respondents were excused attendance.

THE COMMISSIONER:

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COMMISSIONER

Introduction

1 This judgment is a further instalment in the proceedings which have given rise to two judgments already, namely at [2022] JRC 237 and [2022] JRC 288 (“the December 2022 judgment”). On this occasion, the Court is sitting to determine whether the ultimate disposal of his residuary personal estate by the will of the late Constantin Mattas (“the Testator”) is

valid, or whether there is a partial intestacy. As this involves an issue of law, I am sitting without Jurats.

2 The arguments raised have covered a number of areas including whether a trust (as opposed to a gift) was created, certainty of objects, whether prior to the enactment of the Trust (Jersey) Law 1984, trusts of indefinite duration were permissible in Jersey law, sovereign immunity, the requirements for a charitable trust and the circumstances in which a charitable trust may be held valid despite the inclusion in the will of an invalid non-charitable provision.

Background

3 The Testator died on 30 November 1979, domiciled and resident in Jersey. He was unmarried and had no children. Probate of the will with two codicils (together "the Will") was granted on 16 January 1980 to the Representor (it was then Lloyds Bank Trust Company (Channel Islands) Limited) as executor and trustee.

4 The key provision of the Will is set out in clause 11. It is lengthy and is not divided into any sub-clauses. For ease of reference, I have added some numbering in order to introduce sub-clauses. Amended only in that way – thus the punctuation is as in the original clause — clause 11 is as follows:

> ***"11. (i) I give and bequeath the rest or residue of my said Moveable Estate (hereinafter called 'the Trust Fund') unto the Company upon Trust to sell, call in and convert the same into money (except as hereinafter mentioned) with power in its absolute discretion to postpone such sale, calling in and conversion and to retain for any length of time any investments existing at the date of my death without being responsible for loss and after payment out of my debts and funeral and testamentary expenses to hold the Trust Fund upon Trust***
>
> ***(ii) first to pay net of income tax and quarterly in arrears:***
>
> > ***(a) to my said brother the annual sum of one thousand pounds (£1,000); and***
> >
> > ***(b) to the said Juliet Kathleen McClure the annual sum of Three thousand five hundred pounds (£3,500)***
>
> ***such annual sums to be adjusted on the 25th day of December of each year during the lives of my said brother and the said Juliet Kathleen McClure (hereinafter called 'the revision date') the increase to be proportionate to the increase in the figure of the Jersey Cost of Living Index…….***Provided always that the said annual payment shall never be decreased below the said sum of One thousand pounds (£1,000) and Three thousand five hundred pounds (£3,500) or such higher figure which may have been reached if at the following revision date the figure

of the Jersey Cost of Living Index shall have abated or the Arbitrators or Arbitrator decide that the annual payments should have decreased no adjustment shall then be made;

(iii) And secondly upon trust to pay and reimburse out of the income of the Trust Fund to the said Juliet Kathleen McClure during her life any occupiers rates for which she might be liable in respect of any interest in my Immovable Estate which I may devise or otherwise give her .

(iv) And subject to the Trust above set out the Company shall hold the said residue invested as hereby authorised until the expiration of twenty years next following the date of my death to accumulate the income thereof by investing the same and the resulting income thereof in any of the investments hereby authorised and to hold the investments representing such accumulations as an accretion to and augmentation of the Trust Fund to divide the same into two separate equal parcels at the twentieth anniversary of my death and thereafter to pay out of the annual income of one of the parcels to my nephew Jean-Pierre Mattas…during his lifetime and the annual income on the other of the two parcels to my nephew Philippe Mattas…during his life

(v) and upon the death of either one of my said nephews to hold the said parcel attributed to the nephew so dying upon further trust to accumulate the income thereof as aforesaid

(vi) and upon the death of the survivor of my two nephews Jean-Pierre Mattas and Philippe Mattas to hold the capital and income of both parcels augmented as aforesaid to pay the same to the Greek Government in Athens…and this for the purpose of creating a 'Prêt d'Honneur Trust' to be known as 'The Dr. Constantin Mattas Scholarship Fund' to employ the income arising from the same in such manner as the Greek Government shall see fit to provide further university education in England, France, Germany, Italy and the USSR (subject to the proviso hereinafter contained with regard to the children and grandchildren of the said Jean-Pierre Mattas and Philippe Mattas) for intelligent and promising young men of Orthodox Greek Church religious belief born in Greece of Greek Nationals also of Orthodox Church religious persuasion who shall first have undertaken to practise their profession in Greece for ten years first after qualifying and second after termination of their studies to repay without interest the said 'Prêt d'Honneur Trust' the monies expended on the said further education in ten annual payments subject to this period of repayment being extended at the option of the Greek Government to twelve years should it think fit

(vii) provided always that the children and grandchildren whether male or female of my two nephews the said Jean-Pierre Mattas and Philippe Mattas wherever born and whatever their religious belief and whatever the religious beliefs and nationality of their parents shall be entitled to and have priority to further education in the manner aforesaid from the 'Prêt d'Honneur Trust' to be created by the Greek Government from the Trust Fund without being bound

either to practice their profession in Greece at all or to refund to the 'Prêt d'Honneur Trust' the monies expended on their further education…." [Emphasis added]

5 The first codicil introduced a pecuniary legacy of £1,000 and the second codicil increased the sum referred to in clause 11(ii)(b) from £3,500 to £5,200 but these changes are not relevant for present purposes. The key provisions are those contained in clause 11(vi) and (vii), to which I shall refer as "the Bequest".

6 In the events which have happened, the residuary estate is presently held pursuant to the latter part of clause 11(iv). Thus, the income is paid in equal shares to the two nephews, Jean-Pierre Mattas and Philippe Mattas ("the Nephews"), for their lives. They are aged 88 and 86 respectively. Between them, they have four surviving children and seven surviving grandchildren. The children vary in age from 49 to 54 and the grandchildren from 8 to 32.

7 As discussed in the December 2022 judgment, an issue has arisen in relation to French taxation. In this connection, the Representor took advice from English chancery counsel, Mr Christopher Tidmarsh KC. He advised in June 2021 that the Bequest was invalid and that, on the death of each nephew, one half would fall to be dealt with on intestacy. In summary, his key conclusions were that:

(i) the terms of the Bequest displayed the requisite intention to create a trust;

(ii) unless it was a charitable trust, the trust was invalid because of a lack of certainty as to its objects (' *intelligent and promising young men*') and, if Jersey law was the same as English law, because of the indefinite duration of the trust; and

(iii) it was not a valid charitable trust because it was not exclusively charitable by reason of the priority given to the children and grandchildren of the two nephews.

8 It was following receipt of the opinion from Mr Tidmarsh that the Representor issued the current Representation which, amongst other things, seeks a ruling as to the validity of the Bequest.

9 If the Bequest is held to be invalid, there will be an intestacy in respect of the residuary estate after the death of the Nephews. In that event, as at present advised – although there are certain investigations still to be carried out which may alter the position – one half of the residuary estate will be paid to the estate of the Testator's deceased sister, Arety, and her will provides that her residuary estate is to be paid to the Government of Greece absolutely with an expressed wish that the monies be applied towards charitable objects, namely the supply of food to and the maintenance of the needy children of Greece. The other half will pass equally to the two Nephews as the only children of the Testator's deceased brother.

The issues

10 It seems to me that, in accordance with the way in which the parties have framed their submissions, the following key issues arise for consideration:

(i) Does clause 11(vi) and (vii) create a trust?

(ii) If so, is the trust (assuming for these purposes it is not a charitable trust) invalid because of (a) lack of certainty of beneficiaries, or (b) its indefinite duration?

(iii) If otherwise invalid, is it nevertheless a valid charitable trust?

(iv) If it is not a valid charitable trust, can the charitable aspects be saved or severed?

11 I shall consider each of these issues in turn, but should first mention two preliminary points.

Preliminary points

12 The first relates to the approach to interpretation of a will. The principles in this respect are well established and were conveniently summarised by the Court of Appeal in *In re Amy* [2000] JLR 237 at 243 per Southwell JA as follows:

> ***"The court's primary duty is to construe the will so as to give effect to the testator's intention.*** That primary duty is emphasized strongly in the Norman and French texts. That intention is, however, to be ascertained from the wording of the will together with any evidence of surrounding circumstances and other evidence properly admissible. In construing the will, the court is not to use an unduly narrow grammatical approach. It should adopt a generous and benevolent approach (see Pothier, op. cit., at para. 150). But where the will so construed is plain and unambiguous, the court must give effect to it. It is not entitled to re-write the will merely because it strongly suspects that the testator did not mean what he plainly said. Where there is ambiguity, the court should adopt that interpretation which best gives effect to the testator's intention as ascertained from the terms of the will and the surrounding circumstances (including any extrinsic evidence admissible)."

There is no extrinsic evidence in this case or evidence about the surrounding circumstances at the time of the Will.

13 As to when there is ambiguity, the Royal Court in *In re Amy* at [2000] JLR 80 at 99 said:

> ***"In my judgment, reference to ambiguity is not [restricted to where there is ambiguity on the face of the will].*** If a provision can reasonably bear two interpretations, it is ambiguous for these purposes so that the court may adopt

that which it concludes best fulfils the testator's intentions. However, the court must be careful not to find fanciful ambiguities. The fact that the parties have argued for different meanings does not necessarily mean that there is a genuine ambiguity or that the meaning of the provision is not plain and unambiguous. If, having heard the argument, the court is satisfied that there is a plain and unambiguous meaning, the court must give effect to that meaning."

14 The parties also agreed that the Court's approach was helpfully summarised in In *Re Internine Trust* [2005] JLR 236 at [62] and that applying that summary to the present case led to the following statement of principle:

(i) The aim is to establish the presumed intention of the testator from the words used.

(ii) Words must, however, be construed against the factual matrix existing at the time when the document was executed.

(iii) The circumstances relevant and admissible for this purpose are those that must be taken to have been known to the testator at the time and include *'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'*.

(iv) That said, evidence of subjective intention, drafts and other matters extrinsic to the document in question is inadmissible.

(v) The Bequest has to be read in the context of the document as a whole.

(vi) Words should as far as possible be given their ordinary meaning.

(vii) However, this last precept may have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion.

15 The second preliminary point relates to the relevance of the Trusts (Jersey) Law 1984 ("the 1984 Law"). Article 58 provides that, subject to Article 59, the 1984 Law shall apply to trusts constituted or created either before or after the commencement of the 1984 Law. However, Article 59(1)(c) provides:

"(1) Nothing in this Law shall:

(a) …

(b) …

(c) affect the legality or validity of any trust arising from a document or disposition executed or taking effect before the commencement of this Law."

16 As the Will was executed and came into effect before 1984, it is therefore common ground that the validity of the Bequest must be determined without reference to the 1984 Law.

17 With that introduction, I turn to consider each of the issues in turn.

(i) Is the Bequest a trust?

18 As mentioned above, the Tidmarsh opinion concluded that the Testator intended to create a trust. Paragraph 8 of the opinion is in the following terms:

> ***"English law requires that in order to create a trust, words must be used that show an intention that a trust should be created but that no particular words are necessary to create a trust.*** The question is whether an imperative obligation is imposed (*Re Williams* [1897] 2 Ch 12, 18). ***Thus, a gift 'for a purpose' or 'to the intent that' or 'upon condition', may create a trust (compare*** *Bird v Harris* (1870) 9 Eq. 204; *Attorney General v Wax Chandlers' Co*, 1873 L.R. 6 H.L.1). ***Whether a particular gift creates a trust turns on the wording of the gift and not on any rules (compare*** *Vucicevic v Aleksic* [2017] EWHC 23345 (Ch) ***paras 29–35)."***

19 It was common ground that Jersey law is to like effect. Thus, in *Re Malabry Investments Limited* (1982) JJ 117 at 120, Crill, DB, quoted with approval the following extract from *In Re Cayford Limited* [1975] 1 WLR 279 at 282:

> ***"…It is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like; the question is whether in substance a sufficient intention to create a trust has been manifested."***

20 The Attorney General and the Nephews submit that the Tidmarsh opinion is correct and that the Bequest was intended to create a trust. However, Advocate Alexander, on behalf of the Greek Government, submits that it was not so intended.

21 His primary submission, as set out in his skeleton argument, is that the Bequest is an outright gift to the Greek Government coupled with a wish that the Greek Government should thereafter settle (i.e. create) the Prêt d'Honneur Trust. He submits that clause 11(i)-(v) creates a primary trust in the hands of the Testator's executor and trustee and that the assets thereafter no longer belong to the residuary estate. Payment to the Greek Government absolutely terminates the primary trust and the Greek Government is then to be the settlor of the Prêt d'Honneur Trust. In creating the Prêt d'Honneur Trust, the Greek Government can cure the uncertainties (if any) as to the class of beneficiaries.

22 In supplemental submissions filed after the other parties had filed their reply submissions, the Greek Government submitted that an alternative analysis was that the Bequest

constituted an absolute gift to the Greek Government, but with a condition subsequent that the Government establish the Prêt d'Honneur Trust.

23 In connection with this supplemental submission, Advocate Alexander referred to two authorities. The first was *Sifton v Sifton* [1938] AC 656. The facts of that case were that a testator by his will bequeathed his estate to his executors upon trust to pay "to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually. The payments to my said daughter shall be made only so long as she shall continue to reside in Canada". The Privy Council held that this was a gift subject to a condition subsequent and that, as the reference to residing in Canada was too uncertain, the condition subsequent failed for uncertainty with the result that it had no effect and the daughter took the bequest free from the condition.

24 The second was *In Re Porter* [1975] N.I. 157, where the testator bequeathed his business to his brother subject to the brother paying £4,000 to his executors and trustees within six months of the testator's death. The will further provided that should the brother not pay the sum of £4,000 within six months or *'make satisfactory arrangements within that period for payment of such sum'*, then the bequest of the business was revoked and fell into residue. The £4,000 was never paid. The court held that the bequest to the brother was a gift subject to a condition subsequent, but that the condition was void for uncertainty as there was no indication as to what arrangements, made within six months of the testator's death for payment of the £4,000 at a later date, would be satisfactory and what would not. The brother therefore took the gift free from the condition imposing forfeiture but burdened with the obligation to pay £4,000 to the executors.

25 Turning to the cases mentioned in the Tidmarsh opinion, in *Re Williams* [1897] 2 Ch 12, the testator gave his residuary estate to his wife "…absolutely in the fullest confidence that she will carry out my wishes in the following particulars namely…..". The wishes which the testator then expressed related to how the wife should deal with certain insurance policies. Romer J noted that the testator had left the residuary estate to his wife *'absolutely'* and held that this showed that he intended her to have absolute dominion over the property – to do as she thought fit with it. The remaining words were an expression of his wishes which did not impose a trust or a condition. His decision was upheld by a majority of the Court of Appeal. In passing, Lindley LJ said at 18:

> ***"There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to shew an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed."***

26 In *Bird v Harris* (1869–70) L.R. Eq 204, the testator left his entire estate to two named individuals *'in and for the consideration of paying* over' the income to his wife during her life. He then appointed the two individuals as executors. There was no devise or bequest of

the reversion. An issue arose as to whether there had been a bequest of the reversionary interest to the two named executors. The court held that there was not and that there was a trust, with the reversionary interest undisposed of, so it passed as on intestacy. In passing, the judge said that the words 'in and for the consideration of' meant the same as *'for the purpose of'*. Accordingly, the clear implication from the judgment was that wording such as *'for the purpose of' is likely to impose a trust*.

27 In *Attorney General v Wax Chandlers' Co* (1873) L.R. 6.H.L1, the testator bequeathed certain houses to the Wax Chandlers of the City of London *'for this intent and purpose and upon this condition'*, namely that they should distribute annually £8 as described in the will and use the rest of the income for the reparation of the said houses. The will also provided that if the Wax Chandlers should leave any of these things undone, the property was to go over to the testator's next of kin. The question arose as to whether surplus income not required for reparation of the houses belonged beneficially to the Wax Chandlers. The House of Lords held that the wording was such that it imposed a trust and accordingly none of the income belonged to the Wax Chandlers beneficially.

28 In *Vucicevic v Aleksic* [2017] EWHC 2335 (Ch), the testator left a home made holographic will, the relevant part of which read:

> ***"All three property.*** House in Djenovice to Serbian Ortodox Church in Montenegro. And in Cardiff. 8, Wordworth Avenue CF24 3FQ. And in London 17 Fordwich Road NW2.3TN. All to Serbian Ortodox Church .
>
> ***Vladika Amfilohije to be in charge.*** Benefit from it to go to Kosovo, for the people in. Need. Especially the children .
>
> ***And all the money.*** Which is left (after Customs and Inland Revenue)
>
> ***I am having full confidence in Vladika Amfilohije Radovic that is going in right place in Kosovo only.*** With the consultation and discussion. With Serbian Patrijarch and church authority in Kosovo, with one condition. House in Djenovice not aloud to sell till 2040. Houses in the UK Britain Vladika is aloud to sell at any time, if he wish."

29 The question arose as to whether this was a gift outright to the Serbian Orthodox Church or whether it was a gift to be held on charitable trust by the Church for the benefit of people in need in Kosovo, especially children.

30 At [24], Judge Matthews said this:

> ***"As elsewhere in this case, therefore, the critical question is to determine the intention of the testator, by reference to the words used, in their context and in all circumstances; see Williams on Wills, 10th ed [49.1].*** There is of course no need for the word 'trust' to be used: see e.g. *Paul v Constance* [1977] 1 WLR 527, CA. ***In considering this question, in my***

> ***judgment there are four significant elements in the present case.*** The first is the statement that "benefit from it to go to Kosovo, for the people in need, especially children". The second is that "Vladika Amfilohije [Radovic] to be in charge". The third is the statement "I am having full confidence in Vladika Amfilohije Radovic that is going in right place in Kosovo only. With the consultation and discussion with the Serbian Patriarch and church authority in Kosovo". The fourth is the imposition of a condition that the house in Montenegro be not sold until 2040."

31 The judge went on to say that the testator was seeking to control what happened after his death and had expressed the gift to be for the benefit of people in need, especially children, rather than for the purposes of the Serbian church generally. Having considered the matter, the judge held that the wording of the will constituted a trust which, in the circumstances, was a charitable trust.

32 The sole Jersey case to which I was referred in this connection is *Re The Don Benest* [1989] JLR 330. In that case, the testatrix left land to the Connétable and Procureurs du Bien Public of the Parish of St Clement *"for and on behalf of the 'pauvres honteux'"* and expressed *'the desire'* that the bequest be known as the Don Benest in memory of her late father, that the income be applied to assist such *'pauvres honteux'* in the Parish of St Clement, who were not otherwise in receipt of parish relief, and that a statement of account of the income and expenditure of the Don Benest be prepared annually and approved by a committee of certain officers of the parish.

33 It was contended by the parish that this did not constitute a trust and that accordingly any surplus income after payment to *'pauvres honteux'* belonged to the parish generally. The court disagreed and held that, although precatory words (*"desire"*) had been used which would not *prima facie* create a trust, there were good reasons nevertheless for concluding that a trust had been created. Thus, the devise was made *'for and behalf of the pauvres honteux'*, which was a phrase pointing strongly in favour of a trust, and it did not matter that the word *'trust'* was not used; the reference to a separate name for the bequest indicated an intention that the fund should constitute a separate entity on trust to assist the *'pauvres honteux'* and not be part of the parish's general funds; and the desire for separate accounts was again evidence of the testatrix's intention that the funds were not to be merged into the parish's general funds.

Conclusion

34 In my judgment, the wording of the Bequest, when read in the context of the Will as a whole, was intended to create a trust. I would summarise my reasons as follows:

> (i) I cannot interpret the Bequest as containing any intention that the funds should belong beneficially to the Greek Government. On the contrary, the clear intention is

that the funds can be applied only for the provision of further education to the beneficiaries comprising *'intelligent and promising young men'* and the children and grandchildren of the Nephews.

(ii) The wording is very different from clauses 3, 4 and 5 of the Will, where, when an absolute gift is intended, the word *'absolutely'* is used. It is also different from clauses 8–10 where, although the word *'absolutely'* is not used, it is abundantly clear that the relevant gift is made to the recipient beneficially to deal with as he or she wishes.

(iii) The wording is also very different from that in *Re Williams* where the residuary estate was given to the wife *'absolutely'*. There is no mention of the Greek Government receiving the Bequest *'absolutely'*.

(iv) The fact that a trust is intended is supported by the fact that the Bequest is referred to as a Prêt d'Honneur Trust. Furthermore, the Prêt d'Honneur Trust is given a name, namely *'The Dr. Constantin Mattas Scholarship Fund'*, the income of which is to be used to provide the stipulated benefits. In *The Don Benest*, the use of a separate name for the fund suggested to the court that the assets were to be kept separate from those of the parish, and in my view the same is true here. The assets are not to form part of the Greek Government's general assets, but are to constitute a separate fund which can only be used to benefit the beneficiaries described in the Bequest in the manner described in the Bequest.

(v) The Bequest must be used *'for the purpose of'* creating a Prêt d'Honneur Trust. As stated in *Bird v Harris*, the expression *'for the purpose of'* is certainly indicative (although not conclusive) of the existence of a trust. If one considers clause 11 as a whole and omitting unnecessary wording, it provides at clause 11(v)-(vii) that after the death of a Nephew the Trust Fund is to be held *'…upon further trust to accumulate the income as aforesaid and upon the death of the survivor…to hold the capital and income of both parcels…to pay the same to the Greek Government in Athens…and this for the purpose of creating a Prêt d'Honneur Trust'*. In my judgment, this wording is very much the language of obligation and direction rather than the language of desire or wishes.

(vi) Similarly, the wording in relation to the Nephews' children and grandchildren is clearly indicative of an obligation or direction, with its reference to their being *'entitled'* and having *'priority'* to such further education. Furthermore, the entitlement of the children and grandchildren is expressed as a proviso (*"provided always…"*) to the provision concerning the other beneficiaries. That is wording suggesting a legally binding provision rather than a mere expression of wishes.

(vii) I acknowledge Advocate Alexander's argument that the Bequest refers to the payment to the Greek Government being *'for the purposes of creating a Prêt d'Honneur Trust'* and later on to *'the Prêt d'Honneur Trust to be created by the Greek Government'*. The argument runs that this suggests that the trust is to be created by the Greek Government as settlor. But, in my view, when read in context, that is not consistent with the overall meaning of the clause. In my judgment, the natural meaning of the words is that the Greek Government is to be the trustee of the Prêt

d'Honneur Trust which, as a factual matter, is established (or created) by transfer of the assets to the Greek Government pursuant to the Bequest.

(viii) I am also unable to interpret the Bequest as being a gift to the Greek Government with a condition subsequent, as Advocate Alexander submitted in his secondary argument. In both *Sifton* and *Porter*, it is abundantly clear that the gift was a beneficial gift to the recipient (of capital to the brother in Porter, and of income to the daughter in *Sifton*). The brother and the daughter were free to use the capital or income, as the case may be, as they thought fit, provided there was compliance with the condition subsequent. That is wholly different from the present case. The Bequest is not intended to belong to the Greek Government beneficially, even if it complies with the alleged condition subsequent; the funds may only be used by the Greek Government to apply the income for the stated purpose of further education for certain stipulated beneficiaries. That is the language of an intention to create a trust rather than a beneficial gift with a condition subsequent. Advocate Alexander argued that there was some indirect benefit to the Greek Government because it would save its own money to the extent that the Bequest paid for the further education of intelligent and promising young men rather than the Greek Government having to do so, as well as the general benefit for Greece in such young men being further educated. However, that is something completely different from saying that the Bequest belongs to the Greek Government beneficially.

(ix) Advocate Alexander further submits that, whereas the word *'trust'* is used regularly in clauses 11(i)-(v), the word is not used in clause 11(vi) and (vii) and that shows that there is a different intention as compared with the rest of clause 11. However, as stated earlier, no specific wording is required to create a trust and there is certainly no need to use the word *'trust'*. For the reasons already given, when read as a whole, I can only interpret the Bequest as showing an intention to impose a trust obligation on the Greek Government rather than a beneficial gift to the Greek Government combined either with a mere expression of wishes or a condition subsequent.

35 For these reasons, I reject the Greek Government's submission that the Bequest constitutes a gift with merely an expression of wishes or a gift subject to a condition subsequent. I find that the intention of the Testator as derived from the wording of the Bequest was to establish a trust for the benefit of those described in the Bequest. I shall accordingly, where appropriate, hereafter refer to the *Pret d'Honneur* Trust established by the Bequest as *"the Trust"*.

36 I should add that, on instructions, Advocate Alexander stated that, even if his argument was accepted (so that the Bequest was an absolute gift to the Greek Government), the Government would honour the wishes of the Testator (or the condition subsequent) and would establish the *Prêt d'Honneur* Trust as set out in the Bequest. I of course accept that assurance but it cannot alter or be in any way relevant to the true construction of the Bequest.

(ii) Validity of the Trust (assuming it not to be charitable)

37 The Nephews submit that, if the Bequest is a trust, and assuming for the moment that it is not a charitable trust, the Trust is invalid on four grounds; (a) that there is a lack of certainty as to the class of beneficiaries; (b) it is of indefinite duration; (c) it is administratively unworkable; and (d) it is invalid because the trustee is a sovereign state which has sovereign immunity.

(a) Certainty of beneficiaries

38 Ignoring for present purposes the subsequent statutory introduction of purpose trusts, it is well established – and not disputed in this case – that for a non-charitable trust to be valid under English law, there must be certainty of objects, i.e. certainty as to who can benefit from the trust. The test as to whether there is sufficient certainty in relation to beneficiaries was authoritatively established by the House of Lords in *McPhail v Doulton* [1971] AC 424, where it was held that a trust is valid if it can be said with certainty that any given individual is or is not a member of the class of beneficiaries. This is equally the position in Jersey law; see *Re Exeter Settlement* [2010] JLR 169 at [17] where the Court said:

> ***"It was therefore impossible for the trustee or the court to ascertain whether or not any particular person was a beneficiary of the trust, which is the accepted test for establishing the necessary certainty of objects (see** McPhail v Doulton*)."***

39 The class of beneficiaries in the Bequest is expressed to be *'intelligent and promising young men of Orthodox Greek Church religious belief born in Greece of Greek nationals also of Orthodox Church religious persuasion'*. It follows that, in order for the Trust to be valid, it must be capable of being said with certainty whether any given individual is or is not:

(i) 'intelligent'

(ii) *'promising'*

(iii) *'young'*

(iv) *'a man'*

(v) *'of Orthodox Greek Church religious belief'; and*

(vi) *'born in Greece of Greek nationals also of Orthodox Church religious persuasion'*.

40 There is clearly no conceptual difficulty in deciding whether an individual is a man or was born in Greece of Greek nationals. I also consider that the category of being of Orthodox

Greek religious belief (or persuasion) is sufficiently certain. As Theobald on Wills (19th Ed) states at 33-018, *'there is a modern judicial tendency not to invalidate religious conditions on the basis of uncertainty'*. See for example *Re Tuck's Settlement Trusts* [1978] Ch 49. I consider that there is no conceptual difficulty in ascertaining whether any given individual is or is not of Orthodox Greek religious belief (or persuasion). It follows that there is no conceptual uncertainty in relation to categories (iv)-(vi) of the preceding paragraph.

41 Advocate Meiklejohn, on behalf of the Attorney General, submitted that categories (i)-(iii) of paragraph 39 above are to be distinguished from those at (iv)-(vi), because whereas those latter three categories are qualifications for membership of the class of beneficiaries, the expressions *'intelligent', 'promising'* and *'young'* are merely criteria for being selected from within the class to benefit from the Trust rather than qualifications for membership of the class.

42 I cannot accept this argument. There is nothing in the terms of the Will which suggests any distinction in this respect between the various criteria mentioned in the Bequest. The Bequest creates a class which is described as *'intelligent and promising young men of Orthodox Greek Church religious belief born in Greece of Greek Nationals also of Orthodox Church religious persuasion'*. In my judgment, it is clear that all of the above criteria carry the same weight and are used to describe and limit the class of persons who may benefit from the Trust.

43 Turning to the criteria listed at (i)-(iii) of paragraph 39 above, I propose to consider first the expression *'young'* as this is the category which causes the most difficulty.

44 The Nephews submit that it is too uncertain. At what point does a person cease to be *'young'* for the purposes of the Trust? There is no objective criteria by which the Greek Government (or indeed the Court) can determine whether a person is or is not *'young'*. Whilst one can accept that, given that the Trust is for the purposes of further university education (i.e. post-graduate study), a person can no doubt be considered young if under the age of 25, at what point beyond that age does he cease to be young?

45 Advocate Alexander, on the other hand, submits that, when read in context, the word *'young'* is sufficiently clear. The fact that any grant will be for further university education and that there is a requirement that the beneficiary undertake to practice his profession for at least ten years after qualifying, effectively imposes an upper age limit. At paragraph 51 of his skeleton argument, Advocate Alexander submitted that the upper age limit was simply that the individual had to be below the Greek retirement age.

46 Notwithstanding the fact that a court will strive to give effect to a testator's intention and not to invalidate a trust on the grounds of uncertainty of object, I find myself in agreement with Mr Tidmarsh's opinion where he concludes at paragraph 26 that the word *'young'* remains vague and imprecise and it is not possible to say at what age an individual stops being

'young'. Opinions may differ on whether, for example, a 35 year old is *'young'*.

47 During the hearing, I raised with Advocate Alexander the question of what the upper limit of *'young'* would be in the context of the Trust. He submitted that, on the assumption of a normal retirement age of 65 and given the requirement for an undertaking to practise a recipient's profession for 10 years after qualification, anything up to the age of 55 should be considered as *'young'* for the purposes of the Trust. It is to be noted that this response was rather different from paragraph 51 of his skeleton argument (see paragraph 45 above), which shows that even the Greek Government was having difficulty in formulating what was meant by *'young'*.

48 In my judgment, to describe a 55 year old as *'young'* merely because he wishes to undertake further university education and is willing to undertake to practise his profession for 10 years is not a proper use of the word *'young'*. I do not think that such a person can properly be described as *'young'*, particularly when read in conjunction with the requirement for the individual to be *'promising'*, which looks to the future.

49 It is important to recall the purpose of the requirement for certainty. It is that not only must a trustee know whether it can properly bestow a benefit on an individual as falling within the class of beneficiaries but, equally importantly, the Court must be able to decide whether or not payment to a particular individual falls within the terms of the trust and therefore is, or is not, a breach of trust. That is why the test for validity is expressed as being that it can be said with certainty that any given individual is or is not a member of the class. If the Greek Government were to decide to benefit a 30 year old, a 35 year old, a 45 year old or a 55 year old, I do not see how the Court could determine with certainty which, if any, of these was a member of the class as defined, i.e. a *'young'* man. Indeed, the discussion with Advocate Alexander referred to above shows that it is not really possible to ascertain with any certainty what the Testator meant by *'young'* and supports my view that it is uncertain when a person would be *'young'* so as to fall within the defined class of beneficiaries of the Trust.

50 In the circumstances, it is not strictly necessary for me to decide whether the terms *'intelligent'* and *'promising'* are sufficiently certain for trust purposes. The Nephews submit that both expressions suffer from the same defect as *'young'*, in that they are too imprecise. Views may differ about whether a particular individual is 'intelligent' or *'promising'* and there are no objective criteria specified in the Trust to assist in resolving any uncertainty.

51 Advocate Alexander placed reliance on certain dicta in the case of *Public Trustee v Butler* [2012] EWHC 858 (Ch), which case was also referred to in the Tidmarsh opinion.

52 In *Butler*, the testator provided at clause 6 of his will:

> ***"After the death of my wife the bank will act as the sole trustee of the estate as left by my wife and it is empowered to grant, out of the net***

income, scholarships for education in India, British Isles or elsewhere to my promising relatives (descendants of my brothers and sisters, the individual names of whom will be shown in a list, to be supplied later on) and/or to help (out of one-quarter of the income as a maximum) the deserving materially hardship cases amongst my relatives."

53 It transpired that there was no list and accordingly the court held at [14] that the provision failed for uncertainty because it could not be said of any individual, albeit a relative or descendant of the testator's brothers and sisters, that he/she was or was not a member of the relevant class because the essential ingredient of his or her name being on the list could not be satisfied.

54 In the circumstances, it was not necessary for the Chancellor to reach a conclusion on whether *'promising'* was also uncertain as a defining characteristic. However, he expressed an obiter view as follows at [15]:

"15. In those circumstances it is not necessary to reach any concluded view as to whether the word 'promising' when applied to the 'relative' introduced an uncertainty which was not previously inherent in the description. In this respect I would accept the submission of counsel for the second defendant. The word 'promising' is not added in a vacuum but in the context of scholarships for education. In that context, although opinions may differ as to whether A or B is promising, I do not think the concept is uncertain. A person liable to benefit from the education for which the scholarship is offered would be 'promising'. As counsel for the second defendant pointed out schools and universities, even Inns of Court, apply this test regularly."

55 I have to say that, with all respect to the Chancellor, I do not find his reasoning convincing. The expression *'promising'* is fine for an exercise of selection from within a defined class. That is the equivalent of the exercise undertaken by schools and universities (referred to by the Chancellor) who select *'promising'* candidates from a class consisting of all those who have applied. However, the expression in the Will is a criteria which defines the class of beneficiaries. As the Chancellor said, opinions may differ on whether A or B is promising and, to my mind, it is difficult to see how in these circumstances it can be a satisfactory defining characteristic of a class. How is the Court to decide whether a trustee has acted in breach of trust by making a distribution to a particular individual? I accept that the word *'promising'* is used in the context of further education, but I do not see that this assists. Because the only benefit available under the Trust is the provision of further university education, it is not disputed by any of the parties that the class is by definition restricted to individuals who have already been to university. The word *'promising'* must be taken to add something to the characteristic of having already attended a university. It cannot therefore be consistent with the wording used by the Testator to say that all those who have already been to university can be taken as being *'promising'*. All in all, I do not consider that, even when read in the context of the Bequest, the concept of whether an individual is 'promising'

is sufficiently certain. I do not think that it can be said with certainty that any given individual is or is not promising.

56 I would reach a similar conclusion for similar reasons in relation to the expression *'intelligent'*. Whilst there will no doubt be unanimity that Einstein was intelligent and would fall within the class, it is impossible to know where the limit would be drawn when descending from such elevated heights. It is again an expression which is inherently vague upon which different people will have perfectly valid different views. It is not sufficiently certain to define a class of beneficiaries.

57 Finally, Advocate Alexander submitted that, even if there was uncertainty as to the class of beneficiaries, the Greek Government could cure any such uncertainty because of the wording in the Bequest which states that it may employ the income of the Trust *"in such manner as the Greek Government shall see fit"*. I cannot accept this submission. The discretion conferred by the above wording is limited to exactly how the income is to be applied within the constraints fixed by the Bequest. The discretion cannot be used to alter, expand or *'cure'* the definition of the beneficiaries. The Greek Government may only apply income in its discretion for the beneficiaries as defined in the Bequest and that definition, for the reasons I have given, is too uncertain.

58 In its supplemental submissions, the Greek Government submitted that, if its primary case that the Bequest did not constitute a trust was rejected, the Bequest constituted an executory trust rather than an executed trust. A convenient summary of the position in relation to executory trusts is to be found in Lewin on Trusts, 20 th edition, as follows:

> ***"7-003 A trust is called executory if it directs another, formal document to be executed, or where, instead of expressing exactly what the testator or settlor means, that is, filling up the terms of the trust, he tells the trustees to do their best to carry out his intention.*** This is executory in that he has not put the precise nature of the limitations into words, but has said in effect, 'Now these are my intentions; do your best to carry them out', or he has used such words as 'You shall hold the property on such trusts as will best correspond with' some other dispositions which cannot be exactly mirrored. A trust is executory only where it contemplates, expressly or by implication, the execution of some further instrument to effect the intentions which it evinces. Those intentions must, however, not be too ambiguous as stated. Once a valid executory trust is established, the court will compel the execution of the further instrument and will determine the precise limitations which it is to contain. Executory trusts were typically found in marriage articles and wills, but many comparatively recent examples occur in the interim trust deeds of pension funds, and further examples may well occur in future." [Emphasis added]

59 Further passages of assistance in Lewin are as follows:

> ***"7–084 Where the trust is executory, the rule that technical legal terms are***

> ***to be taken in their legal and technical sense is considerably relaxed.*** The court will not allow the intentions of testators or settlors to be frustrated and the trust to fail for want of the necessary ingenuity to frame trusts in accordance with their instructions. These instructions will be departed from so far as necessary where execution in strict accordance with them is impossible, or would make the trusts illegal, and not merely to adapt them to change circumstances."

And at 7–091 the following appears:

> ***"7–091 Executory trusts have historically been enforced by the court notwithstanding a lack of certainty in the instrument creating them as to the content of the intended trust provision.*** For instance, it was held that a trust in marriage article to 'provide suitably' for the settlor's younger children was not too vague to be executed; the court directed an enquiry what the provision should be. However, the court will not always be prepared to look past any uncertainty, such as a failure to properly identify the class of beneficiary. The court has also refused to dispense with any consent or approval that the executory trust instrument requires." [Emphasis added]

60 The authority given in Lewin in support of the emphasised passages in 7-003 and 7–091 is *Pengelly v Pengelly* [2008] Ch 375. In that case, the testator left one-third of his residuary estate to his trustees upon discretionary trusts for *'a class of beneficiaries as they shall decide, such class to include…my children, my grandchildren and their…spouses and widows and widowers.* Such settlement shall be established by a deed executed by my trustees'.

61 The claimant executors accepted that the provision had not created an immediate discretionary trust but asserted that it created a valid executory trust. If that was not so, they sought rectification by inserting the word *'only'* after the word *'include'* so as to restrict the class of beneficiaries to children, grandchildren, their spouses, widows and widowers. The judge's decision is conveniently summarised in the headnote which reads:

> ***"…in order for a provision in a will to create a valid executory trust, the directions as to the trusts to be defined could not be too ambiguous and a testator could not leave it to someone to make his will for him; that the provision in question did not, without rectification, satisfy the requirements of a valid executory trust since it failed, contrary to the testator's intention, sufficiently to define the class of beneficiaries."***

The judge went on to allow rectification and held that, as rectified, the provision in the will was effective to create an executory discretionary trust.

62 Advocate Alexander submitted that the thrust of the various extracts from Lewin is that the threshold for certainty of objects in the case of an executory trust is lower than in the case of an executed trust. I cannot accept that argument. No specific authority was drawn to my attention which supported that proposition and *Pengelly* is against him. While certain

aspects of an executory trust can be clarified or fleshed out when the further trust deed is executed, that does not apply to the identification of the class of beneficiaries; otherwise it is leaving the trustees to determine the selection of who may benefit from the trust created by the will and, as set out in the extract from the headnote quoted above and in *Re Flavel's Will Trusts* [1969] 1 WLR, 444 at 446, a testator cannot leave his trustees to make his will for him. This is also the position under Jersey law; see *Meaker v Picot* [1972] JJ 2161 at 2164. Snell's Equity (34 th ed) also suggests that the further instrument is confined to defining the beneficiaries' interests in the trust property rather than defining the class of beneficiaries when it states at 21–031:

> ***"Executed and Executory Trusts***
>
> ***This distinction refers to the degree of precision with which the trust instrument defines the beneficiaries' interests in the trust property.*** So an instrument which declares the full extent of the beneficiaries' entitlements under the trust is said to be executed. An instrument which defines a trust in a general way but which contemplates some further instrument to specify their interests in detail is said to be executory."

63 Accordingly, even if the Trust were to be considered as an executory trust rather than an executed trust, my decision in relation to the lack of certainty of the class of beneficiaries in this case would be the same and the Trust would still be invalid. It is not therefore necessary to determine whether the Trust is an executed trust or an executory trust, but on balance I consider that it is an executed trust. As Lewin states in the emphasised passage in 7-003 above, a trust is executory only where it contemplates, expressly or by implication, the execution of some further instrument to effect the intentions which it evinces. There is certainly no express mention of any further trust document in the Bequest and I do not consider that there is any necessary implication that the Testator contemplated the execution of such further deed by the Greek Government. The Bequest is very specific about the nature and purpose of benefits which may be conferred and no further detail is required. The lack of specific administrative provisions is not uncommon in older trusts and does not mean that the trust is executory rather than executed.

64 In summary, I do not think it assists the Greek Government even if the Trust is considered as an executory trust rather than an executed trust.

(b) Indefinite duration

65 The Trust contains no provision for the vesting of the capital in any of the eligible beneficiaries. The income from the capital is to be used for an indefinite period to provide the stipulated benefits. The Tidmarsh opinion stated that under English law, the Trust would be void unless charitable because its indefinite duration breached the rule against inalienability. It is common ground between the parties that the Tidmarsh opinion is correct in this respect and that, if not a charitable trust, the Trust would be void if governed by English law because of its indefinite duration.

66 However, it is of course governed by Jersey law, having been created in the will of a person who died domiciled in Jersey. The question therefore arises as to whether the indefinite duration of the Trust means that it is also void under Jersey law.

67 Apart from the Attorney General, the parties did not address this point to any extent in their submissions either before or during the hearing. I therefore asked the parties to provide written submissions on this issue following the hearing. They have done so and I am most grateful for the very helpful supplementary submissions which have been filed.

68 Strictly speaking, it is not necessary for me to address the issue as I have already held that, if the Trust is not a valid charitable trust, it is void for lack of certainty of objects. However, in case I am wrong on that point and in deference to the work which the parties have put into their supplementary submissions, I propose to express my conclusion despite the fact that the position is now governed by statute and the question is therefore unlikely in practice to occur again. As originally enacted, the 1984 Law provided that trusts could last for one hundred years but, as a result of an amendment introduced by the Trusts (Amendment No 4) (Jersey) Law 2006, Article 15 now provides that a trust may continue in existence for an unlimited period. However, for the reasons set out earlier, the provisions of the 1984 Law cannot affect the validity of the Trust and the question of whether it is void or not must be considered by reference to the law of Jersey as it was prior to 1984.

69 The starting point is the decision of the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 and in particular the observation of Lord Hodge at [57] in the following terms:

> ***"..In their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English law trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English trust law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes…***
>
> ***58. The TJL is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed."*** [Emphasis

added]

70 The effect of the decision in Investec was summarised by Logan Martin JA in the Court of Appeal in *Rawlinson & Hunter Trustees SA v Chiddicks*, 2019(1) JLR 87 (being the name under which the *Halabi* case referred to in the next paragraph was reported in the Court of Appeal) at [131] as follows:

> ***"….From these passages, it is apparent that in seeking to identify and to apply the trust law of Jersey, one should look to what is the trust law of England and to the English case law on trusts save where these may need to give way to customary law and Jersey legislation."***

71 This approach in *Investec* was endorsed by the Privy Council in the subsequent case of *Halabi v Equity Trust (Jersey) Limited* [2022] UKPC 36 where at [55] Lord Richards and Sir Nicholas Patten said this:

> ***"It follows from the Board's approach in*** *Investec 1* ***that the issues as to the nature and priority of a trustee's right of indemnity and lien should first be approached as matters of English law.*** If the appellants' submissions on English law, as summarised above, are correct, the appellants will succeed in these appeals. It is not suggested by the respondents that there are any rules of Jersey law which would provide ETJL or I & B with greater rights than those which they would enjoy under English law. If, however, the appellants' case on those issues is rejected as a matter of English law, it is necessary then to consider whether the English law principles require modification in the light of Jersey customary law or provisions of the TJL. We will therefore first consider the position as a matter of English law."

72 There was some discussion in the submissions as to whether the rule against trusts of indefinite duration is properly to be regarded as a rule of English trust law (and therefore fall in within the principle described in *Investec* and *Halabi*) or whether it is a more general rule of English property law.

73 I accept that the origins of the rule are to be found in the general principle of English law which sought to regulate dispositions purporting to fetter the future alienation of property and that this was not applied solely in the trust context. I agree with the submission made on behalf of Philippe that the rationale for such restrictions lies in considerations of public policy. These considerations were conveniently summarised in *Stanley v Leigh* (1732) 2 P Wms 686 as:

> ***"The mischief that would arise to the public from estates remaining forever or for a long time inalienable or untransferable from one hand to another, being a damp to industry and prejudice to trade, to which may be added the inconvenience and stress that would be brought on families whose estates are so fettered."***

74 For present purposes (I ignore the rule in respect of excessive accumulations as I do not consider it relevant to this case), there are two relevant rules of English law which are directed towards restricting the fettering of any future alienability. The first is the rule against perpetuities (strictly so called) which provides that an interest in property is void if it may vest outside the perpetuity period, which is lives in being plus 21 years (see the Report of the English Law Commission 'The Rules Against Perpetuities and Excessive Accumulations' (1998) at paragraph 1.7).

75 The second is the rule against perpetual (or indefinite) trusts. This is conveniently described in paragraph 1.14 of the above Report under the heading 'The rule against inalienability' in the following terms:

> ***"In addition to the rules against perpetuities and against excessive accumulations there is another rule that has evolved which has a related but distinct objective.*** This is the rule against inalienability, often called the rule against perpetual trusts. This rule does not restrict the future vesting of estates or interest, but the duration of trusts established for non-charitable purposes. Non-charitable purpose trusts are usually void because there is no beneficiary who can enforce them, but they are also objectionable because they may be perpetual. Even in those exceptional circumstances where such purpose trusts are recognised notwithstanding the absence of any person who can enforce them (such as trusts for the upkeep of tombs), they are restricted to the perpetuity period. However we note that the courts view non-charitable purpose trusts with some suspicion, given the very real difficulties that exist in enforcing and policing them. The rule against inalienability is, in reality, just one of the devices that is employed to keep the development of such trusts in check. In the light of this, any consideration of the rule against inalienability belongs more properly in a review of the law governing non-charitable purpose trusts and unincorporated associations. It was therefore expressly excluded from the Consultation Paper." [Emphasis added]

76 The separate nature of the rule against inalienability (or perpetual trusts) and the rule against perpetuities is helpfully described in Theobald On Wills (19 th ed) at 35–072 in the following terms:

> ***"It is now clear that there is a rule, independent of the rule against perpetuities, which renders void trusts for non-charitable purposes that are limited to last for longer than a life or lives in being and 21 years after.*** It is this rule which is infringed when property or its income is given indefinitely for non-charitable purposes, and it is this rule, and not the rule against perpetuities, to which gifts for charitable purposes are an exception. Statements that gifts of income indefinitely for non-charitable purposes are void because they 'tend to a perpetuity' are frequent, and have done much to obscure the true nature of this rule and its distinction from the rule against perpetuities. The two rules had a common purpose, in that both are designed to prevent property being withdrawn

> from commerce; but property can be withdrawn from commerce either by making present interests therein continue indefinitely, or by postponing the vesting of future interests therein until a remote date. The rule against inalienability is directed to the former, the rule against perpetuities to the latter." [Emphasis added]

77 In my judgment, whilst the underlying public policy reasons for the rule against perpetual trusts and the rule against perpetuities were of application to property interests generally, the rule against perpetual trusts is firmly established as a principle of English trust law and that is supported by the concluding observation of the Law Commission in the emphasised passage in paragraph 75 above, and by the fact that the rule in terms prohibits perpetual (or indefinite) trusts.

78 I therefore consider that the rule against perpetual or indefinite trusts (i.e. trusts lasting longer than lives in being plus 21 years), as part of English trust law, falls within the principle expounded by the Privy Council in *Investec* and *Halabi*. It follows that the rule is part of Jersey law unless it conflicts with Jersey customary law. Accordingly I turn to consider whether that is the case.

79 It is common ground that this issue (i.e. whether Jersey law requires the duration of non-charitable trusts to be limited to lives in being plus 21 years) has not arisen for decision previously. Advocate Alexander and the Attorney General place some reliance on a comment in Matthews and Sowden, the Jersey Law of Trusts (3 rd ed) where at paragraph 15.4 they state: "Before 1984 Jersey had no rules at all relating to future interests and duration of trusts". However, when read in context, I do not consider that the authors were stating that the rules against perpetuity and perpetual trusts did not apply; they were simply recording (accurately) that there was nothing in Jersey law on the topic one way or the other.

80 In order to ascertain what Jersey law would have been had the issue ever arisen, one must start by looking at the civil law, albeit that the civil law did not have the concept of trusts. In this connection I have been much assisted by paragraphs 2.6 – 2.29 of Matthews and Sowden together with an article by M Pock, 'The Rule Against Perpetuities – A Comparison of Some Common Law and Civil Law Jurisdictions, St John's Law Review, Vol 35 (1960) No 1' and a further article by Sir Morris Amos KC, 'Perpetuities in French Law', 'Journal of Comparative Legislation and International Law Vol 16, No 1 (1934) PP18–24' which were referred to by Advocate Kistler in his supplementary submissions.

81 Civil law jurisdictions have also set their face against property becoming inalienable and have taken steps to counter mechanisms whereby testators have sought to achieve this. As Matthews and Sowden point out at paragraph 15.2, in Roman law the wealthy used *fideicommissa* or *substitutions* to render property inalienable and so preserve it in the family. Justinian therefore forbade them beyond the fourth generation and Charles IX of France in 1560 forbade them beyond the second degree. Under the Code Civil

substitutions created in wills are prohibited (see article 896).

82 A substitution is, of course, not a trust. It is the successor to the Roman law *fideicommissum* and is described by Matthews and Sowden in the following terms at paragraph 2.16:

> ***"In other words a 'substitution' is an attempt to give the full legal ownership for a lifetime, fettered by an obligation not to dispose of the property in that time, coupled with a second gift of the absolute ownership, but only in the future.*** The second owner obtains nothing until the ownership of the first has come to an end. The normal way to create life interests is by means of a usufruct ("usufruit"), but that arrangement differs from a 'substitution' by giving the 'bare ownership' of the property to the person English lawyers would call the remainderman, leaving the usufructuary with merely the right to use and enjoy the property during his lifetime."

83 Consistently with the objection to property becoming inalienable, civil law jurisdictions have tended to place restrictions on the ability to create substitutions by will. Thus, having surveyed a number of such jurisdictions, Pock states at page 82:

> ***"Restrictions upon substitutions – the civil law rule against perpetuities – are generally more severe than their common-law counterparts: they restrict the number of such interests that can be created, they narrow the class of persons to whom they may be limited, and they may impose a period of time beyond which 'vesting' may not be suspended."***

84 Although the ability to make wills of immovable property was only introduced in Jersey by the *Loi (1851) sur Les Testaments d'Immeubles*, Article 6 of that Law provided that substitutions were prohibited in the following terms:

> ***"Les substitutions sont prohibées.*** Toute disposition par laquelle le légataire sera chargé de conserver et de rendre à un tiers sera nulle, même à l'égard du légataire. Toutefois la nue propriété peût être donné à l'un, et l'usufruit à l'autre."

In translation –

> ***""Substitutions" are forbidden.*** Every disposition by virtue of which the legatee shall be required to preserve [the property] and transfer it to a third party shall be void, even so far as the original legatee is concerned. However, the "reversion" may be given to one person and life enjoyment to another."

85 Thus, Jersey public policy at that time was clearly consistent with the Code Civil in France and with other civil law jurisdictions in restricting the ability by will to render property inalienable by way of substitutions in respect of immovable property.

86 The position in relation to wills of movable estate is conveniently summarised in Matthews and Sowden at paragraphs 2.26 to 2.28 and I can do no better than set them out in full:

> ***"2.26 So far as will trusts of movables are concerned, the Loi of 1851 has never had any application, and therefore before 1984 it was necessary to consider the common law rules.*** Although, as we shall see (para 2.30 below), Norman law countenanced the creation of substitutions inter vivos, gifts on death (necessarily of movables before 1851) were different. The Norman law's policy was expressed by writers such as Basnage, who railed at the vanity of rich men attempting to control their wealth after their death by means of:
>
> ***"institutions d'héritiers, & des substitutions perpetuelles, des fidéi-commis, & de tous ces autre moyens que les hommes ont inventés pour règner encore dans leur famille après leur mort…" (4th Ed, vol 1 at 337)*** .
>
> ***(Instituting heirs and perpetual substitutions, fideicommissa, and all the other means which men have invented to be able to go on controlling their family after their death)*** .
>
> ***Consequently, Norman customary law forbade all such attempts by the dead to control the living, and established strict rules of succession to property.*** [original emphasis]
>
> ***2.27 By the time of Le Geyt (who after all wrote of Jersey, not Norman law), gifts by will to pious or public uses, or to persons outside the family, were permitted to a certain extent: Code Le Geyt BK 3, Tit vii, Arts 3,4.*** But testamentary substitutions of movables were still struck down by the courts. Thus, in *Re Testament Fradin* (1753) 2 CR 103, ***a testamentary substitution by which a share in certain funds given to the testator's granddaughter would be given, on her death without issue, to her aunt was cancelled by the Court, "comme étant contraire à la Loi & pratique de cette isle en fait des Testaments…."***.
>
> ***2.28 The restrictions on testamentary freedom in relation to movables (sometimes known as "forced heirship") will still largely apply (para 6.7 below), but freedom of testation for immovables was conferred by the Loi (1851) sur les testament d'immeubles, and the Loi (1926) sur les héritages propres.*** Thus in 1968 the Royal Court could state that the "fundamental" principle of "conservation du bien dans la famille" was no longer of any significance, so far as immovables were concerned… But in *Lee v Lee* (1965) JJ 505 ***the Court said that the remaining restrictions (i.e. in relation to movables) meant that "the law may be said to have remained suspicious of the power of the dead hand".*** But it is important to emphasise that, as with Basnage, this is an objection to testamentary, rather than to inter vivos dispositions."

Thus, as set out in the above passage, Jersey customary law did not permit substitutions to be created in a will of movable estate.

87 In summary, it is clear that the customary law of Jersey, in common with other civil law jurisdictions (including France) and the common law itself, set its face against structures which would render property inalienable other than for a limited period and would strike down wills which infringed this principle.

88 In those circumstances, although trusts were previously unknown and only gradually introduced in more recent times, I regard it as highly unlikely that the customary law of Jersey would have allowed an indefinite trust of movables created by will. I consider that Jersey law would have regarded such a trust as invalid. To allow such a trust would be wholly inconsistent with the approach which the customary law of Normandy and Jersey (as well as other civil law jurisdictions) had taken in connection with the inalienability of property (both movable and immovable). Putting it at its lowest and reverting to the statement of the Privy Council in *Investec*, there is nothing in the customary law of Jersey which conflicts with the rule of English trust law which prohibits trusts of indefinite duration (other than charitable trusts).

89 Advocate Alexander placed some reliance on the Guernsey case of *Re Tardif*, which was decided by the Royal Court of Guernsey on 9 May 1953. The judgment itself was not before me, but I was provided with a case note prepared by the firm of Ozannes (although the date of the note is not clear) and also with a case note in issue 13 (1992) of the Guernsey Law Journal. Fortunately, the two accounts appear to be broadly consistent. As described on page 30 of the Guernsey Law Review, the facts of the case were that the deceased's will of real property contained a devise *"en fin et perpétuité d'héritage"*, but subject to the condition that the real property subject to the devise be not alienated *"avant la troisième generation"*. The devisee petitioned the Royal Court to declare the condition void on one or more of the following grounds:

(i) the condition was repugnant to the estate to which it was annexed;

(ii) the condition was contrary to public policy;

(iii) the condition was void for uncertainty.

90 The Royal Court held that the condition was void on grounds (i) and (iii). In relation to the ground (i), a restriction on alienation was repugnant to the estate created by the words *'en fin et perpétuité d'héritage'* being the greatest estate in real property known to Guernsey law, in that it purported to restrict that right of alienation which was an essential element of such an estate. As to ground (iii), the condition was void for uncertainty as it was impossible to determine whom the deceased intended should become entitled to the property freed from the restraint on alienation.

91 In relation to ground (ii), the Guernsey Law Review summarised the Court's decision as:

"The English rule against perpetuities had no local application and it was

not within the competence of the Court to lay down a general rule as to the extent to which a restraint on alienation is, or is not, against public policy."

92 The Ozannes' case note summarised the Court's decision on ground (ii) in the following terms:

> ***"As regards the second prayer contained in the petition i.e. that the condition is void as being contrary to public policy, no rule of law or case to that effect of local application was brought to the notice of the Court*** .
>
> ***The English rule against perpetuities has no local application and apparently has no local counterpart.*** While conscious of the mischief which would or might arise from estates remaining for a long time inalienable, the Court, by a majority, felt that it is not within its competence to lay down a general rule as to the extent to which a restraint on alienation is, or is not, against public policy."

93 I am unable to derive any assistance from this case. One simply does not know what authorities and arguments were put before the Royal Court. Furthermore, the case did not involve a trust and it is quite clear that the Royal Court was not specifically considering whether the English rule against perpetual trusts was or was not part of Guernsey law. When set against the matters I have described earlier in relation to the approach of civil law jurisdictions, I do not consider that any weight can be placed on *Re Tardif* in connection with the issue at present before me.

94 For the reasons given above, I hold that Jersey customary law is not inconsistent with the English rule against trusts of indefinite duration (i.e. trusts lasting longer than lives in being plus 21 years). Accordingly, applying *Investec* and *Halabi*, the English rule forms part of the Jersey law of trusts as it existed before 1984. It follows that, unless the Trust is a valid charitable trust, not only is it void for uncertainty of objects but it is also void as being in breach of the rule prohibiting trusts of indefinite duration. This finding applies not only to the Trust as a whole, but also to the trust for children and grandchildren if considered separately. That is because, although that trust will terminate upon the death of the last surviving grandchild of the Nephews, that will not necessarily occur before the expiry of lives in being as at the date of the Testator's death plus 21 years. In theory, either Nephew could still have another child who could in turn have children well into the future. Thus, the trust for the children and grandchildren is invalid when considered on its own.

(c) Administrative unworkability

95 Even where the definition of a class is conceptually certain, a trust will fail if it would be administratively unworkable. The trust would be void where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form anything like a class; see Lewin 5–051 relying on *McPhail* (*supra*) per Lord Wilberforce at 457.

96 Advocate Kistler submitted that the Trust would be administratively unworkable. A convenient summary of his submissions is at paragraph 52 of his skeleton argument where he raised the following points:

> (i) Given that the Trust only authorised the payment of income to beneficiaries, steps would have to be taken to ensure that the capital was appropriately invested so as to generate a meaningful income.
>
> (ii) As there was no express power to accumulate income, the Greek Government would need to take steps to ensure that the Trust was suitably advertised to potential beneficiaries.
>
> (iii) The Greek Government would need to devise a procedure for inviting applications, verifying the eligibility of the beneficiaries, gauging the level of financial support required, obtaining the requisite undertakings with regard to both living and practising their profession in Greece and agreeing to repay the sums loaned, and ensuring that any funds paid to duly-selected beneficiaries were indeed used for the purposes intended. This would pose logistical difficulties given the need for the Greek Government to have oversight over the activities of potentially a large number of beneficiaries in England, France, Germany, Italy and the former members of the USSR (in which countries it would of course not have jurisdiction).
>
> (iv) The Greek Government would additionally need to keep in close contact with all of the children and grandchildren of the Nephews in order to ensure that sufficient income was always retained in the event that any of them wished to pursue further education.
>
> (v) Upon completion of the beneficiaries' education, the Greek Government would need to ensure that such beneficiaries remained resident in Greece and practising their profession for a period of ten years and ensure that the sums provided to them were repaid. In appropriate cases, the Greek Government would also need to consider if it should exercise its discretion to extend the repayment term to twelve years. It would also need to take enforcement steps against beneficiaries who failed to repay the funds loaned to them within the ten or twelve year period.

97 Advocate Meiklejohn, on behalf of the Attorney General, submitted that none of these difficulties were insurmountable and the Trust was administratively workable.

98 On the hypothesis that the Trust is otherwise valid, I do not consider that it would be administratively unworkable. On that hypothesis, it would set out the criteria for who was to benefit from the Trust and would therefore differ from the sort of case where there is an enormously wide class with no indication of who should benefit. As to the practical issues raised by Advocate Kistler, I see no reason why the Greek Government would not be able to address them satisfactorily. They could no doubt arrange for advertising, outreach to universities and other measures to draw the attention of potential candidates for benefit to

the existence of the Trust and could set up an administrative team to deal with issues of selection, conferring benefit, ensuring that the funds are used for a specified purpose and obtaining repayment in due course. As Hayton, Matthews and Mitchell, Law of Trusts and Trustees state at 8.76, *'in practice it seems from McPhail v Doulton*, *Re Demley and Re Gestetner that the court will be loath to inhibit the flexibility of widely drafted discretionary trusts by holding them void for administrative unworkability'*. I would endorse this sentiment and would only wish to hold a trust void for administrative unworkability if driven to that conclusion. In this case, I have no difficulty in concluding that it should be perfectly possible for the Greek Government to administer the Trust in accordance with the terms set out in the Will if it is a valid trust.

(d) State immunity

99 While some of the parties addressed this issue under the heading *'administrative unworkability'*, I think it preferable to deal with it separately.

100 In essence, the argument put forward on behalf of the Nephews is that, although the Greek Government has submitted to the present proceedings, it has not submitted to any future proceedings in relation to the Trust. It would therefore be able to claim state immunity in respect of, for example, any future claim against it for breach of trust. In those circumstances, the Trust would be unenforceable against its trustee. They relied on the dictum of Millett LJ in *Armitage v Nurse* [1998] Ch 241 at 253 where he said:

> ***"I accept the submission made on behalf of Paula that there is a irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust.*** If the beneficiaries have no rights enforceable against the trustees there are no trusts."

101 Advocate Holden accepted that he could find no specific authority which dealt with the issue of where a state is a trustee and whether this means that the trust is void, but he relied upon this dictum of Millett LJ in support of the proposition that, if the rights cannot be enforced against the trustee, the trust is invalid.

102 I would reject this argument on three grounds.

103 The first relates to the question of submission. I agree that the Greek Government has so far only submitted to the present proceedings. However, during the course of oral submissions, Advocate Alexander confirmed that the Greek Government would be willing to undertake not to claim state immunity in respect of any future proceedings relating to the Trust. In those circumstances, the issue would not arise and the beneficiaries would be able to enforce their rights against the Trustee. It would therefore be highly unsatisfactory to declare the Trust void on the ground of lack of enforceability in circumstances where the

Greek Government is willing to give such an undertaking so that the Trust will be enforceable.

104 The second ground relates to whether state immunity could in fact apply to proceedings in relation to the Trust. Advocate Holden relied on certain observations in the case of *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, a decision of the House of Lords. For example, Lord Reid said at 401:

> ***"We were referred to cases which show that the court will not halt the administration of an English trust because a foreign sovereign makes a claim in respect of the trust property, but will not submit his claim to the jurisdiction of our courts.*** It may well be that the claim to sovereign immunity does not extend to such a case. But in these cases there was an independent trustee who was subject to our jurisdiction, and they appear to me to have no application to a case where the trustee is the sovereign himself. It would be quite inconsistent for the whole conception of sovereign immunity that we should require the sovereign to submit himself to our jurisdiction and seek to control him in his conduct of the trust which he has undertaken. If the State of Pakistan is a trustee then it must be left to that State to determine what its duty is."

105 However, that case preceded the development of the restrictive theory of state immunity and also the enactment of the State Immunity Act 1978 ("the Act"), which has effect in Jersey pursuant to the State Immunity (Jersey) Order 1985.

106 The relevant provisions of the Act, as it applies in Jersey, are as follows:

> ***"1(1) A State is immune from the jurisdiction of the courts of [Jersey] except as provided in the following provisions of this Part of this Act*** .
>
> ***(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question*** .
>
> ***Exceptions from immunity***
>
> ***2(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of [Jersey]*** .
>
> ***(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement…*** ..
>
> ***3(1) A State is not immune as respects proceedings relating to:***
>
> ***(a) a commercial transaction entered into by the State…*** .
>
> ***(2) …*** .

(3) In this section 'commercial transaction' means ..

> ***(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority…"*** [Emphasis added]

107 Although I have not heard detailed argument, I consider that the Greek Government would not be entering into its trusteeship and carrying out its activities as trustee *'in the exercise of sovereign authority'*. It has been appointed as a result of the Will, not by the exercise of sovereign authority, and it would be carrying out its activities as trustee in the same way as any other trustee. The activities which it undertakes as trustee could be undertaken by any corporate trustee and would not involve the exercise of sovereign authority. I would therefore be of the opinion, as at present advised, that because of the terms of section 3(1)(a) of the Act, the Greek Government could not claim sovereign immunity in respect of any action against it for breach of trust in relation to the Trust. It follows that the Trust could be enforced against its trustee.

108 Thirdly, even if I am wrong in relation to my second ground, I am not persuaded that the mere fact that the trustee is a sovereign state is sufficient to invalidate the Trust from the outset. Quite apart from the undertaking to submit referred to earlier, it cannot be known at this stage whether, in any given case, the Greek Government would claim immunity. If it did not claim immunity, the Trust could be enforced in the usual way and there would be no difficulty. I do not consider that the mere possibility that the Greek Government might claim sovereign immunity in future is sufficient grounds to declare the Trust invalid. Indeed, as Advocate Alexander said in the course of oral argument, the Greek Government might well wish to see a professional corporate trustee appointed as trustee, in which event any supposed difficulty would disappear. I do not consider it right to declare the whole Trust invalid simply because there may be circumstances in future where, if it remains as trustee, the Greek Government may claim state immunity. Even if such a situation were to arise, the beneficiaries would still have the rights conferred by the law of trusts and the Greek Government would be subject to the duties imposed by such law even if they could not be enforced. I do not think that Millett LJ had such a situation in mind when he expressed himself as he did in the passage referred to above from *Armitage*.

109 In summary therefore, I uphold the submissions of the Nephews in relation to certainty of objects and indefinite duration, but reject their remaining arguments. Accordingly, if I am wrong on the certainty point and the indefinite duration point, the Trust would be a valid non-charitable trust.

(iii) Is the Trust a valid charitable trust?

110 There is no requirement for certainty of objects in relation to a charitable trust and such trusts can also last indefinitely. Accordingly, if the Trust is a valid charitable trust, the

concerns over certainty of objects and indefinite duration discussed above disappear. The Greek Government submitted that the Trust is indeed a valid charitable trust but this was disputed by the Nephews, and the Attorney General accepted that the Trust as a whole was unlikely to be upheld as a valid charitable trust (paragraphs 36 and 37 of his skeleton).

111 Before turning to consider the various arguments raised, I should deal with a preliminary point, namely whether the provisions of the Charities (Jersey) Law 2014 ("the Charities Law") are applicable. In his skeleton argument, Jean-Pierre placed some reliance upon Article 5(2) of the Charities Law, which provides that an otherwise charitable trust does not meet the charity test described in Article 5(1) of that Law if its trustee is or is controlled by a Minister or any equivalent in another jurisdiction. It was submitted that the Greek Government is clearly the equivalent of a Minister and that accordingly, pursuant to Article 5(2), the Trust cannot be charitable as it cannot meet the charity test described in Article 5(1).

112 The Attorney General submitted that the Charities Law is of no application and, during the course of the hearing, this was ultimately conceded by counsel for both Nephews. That is because the charity test described in Article 5(1) is relevant only for the purpose of deciding whether a trust (or other entity) can be registered as a charity under the Charities Law. Registration confers certain advantages, but a charity (including a charitable trust) does not have to register. It is the customary law which determines whether a trust is a charitable trust and it remains a charitable trust even if for any reason (such as having a trustee which is the foreign equivalent of a Minister) it decides not to register or it cannot be registered as a charity under the Charities Law. It was therefore ultimately not disputed that the Charities Law is not relevant to the issues which fall for decision in this case.

113 In order to be a valid charitable trust under customary law, a trust must be:

(i) for exclusively charitable purposes; and

(ii) for the public benefit, which means that it must benefit the community or a section of the community. See *Re Greville Bathe Fund* [2013] (2) JLR 402 at [20].

114 It is common ground between the parties that the Trust is for the advancement of education and that this is a charitable purpose. It is further common ground that, to the extent that the Trust is for the beneficiaries described in clause 11(vi) of the Will (to which class I shall refer for convenience as *'young Greek men'*), it is for a section of the community and accordingly fulfils the requirement for public benefit so as to amount to a charitable purpose. Accordingly, viewed on its own, the trust for the further education of young Greek men in clause 11(vii) is a valid charitable trust.

115 The difficulty arises because the trust in clause 11(vi) is made subject to the proviso in clause 11(vii), which provides that, in the provision of further education, the children and grandchildren of the Nephews will be entitled to priority. It is well-established that, to be a

section of the community for these purposes, the class of beneficiaries must not be dependent upon their relationship to a particular individual. In *Oppenheim v Tobacco Securities Trust Co Limited* [1951] AC 297, Lord Simonds summarised the position as follows. At 305 he said:

> ***"It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit.*** This is sometimes stated in the proposition that it must benefit the community or a section of the community."

And at 306:

> ***"These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasise the word 'possible') beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.*** It is for this reason that a trust for the education of members of a family or….of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

116 In *Oppenheim*, the class of beneficiaries eligible for the provision of benefits for education was confined to children of employees or former employees of a particular company or its subsidiaries. Although the number of potential beneficiaries was very substantial because of the size of the company, the House of Lords held that, because the nexus between them was employment by particular employers, the trust did not satisfy the test of public benefit requisite to establish it as a charitable trust. The principle established in *Oppenheim* was held to be equally applicable as a matter of Jersey law in *Re Greville Bathe Fund*.

117 It follows that, if it stood on its own, the trust to provide further education for the children and grandchildren of the Nephews would not be a charitable trust as it would not be for the benefit of a section of the community. The question which arises in this case is whether the existence in the Bequest of the provision for the Nephews' children and grandchildren means that the Trust as a whole cannot be regarded as a charitable trust notwithstanding that the remaining portion of the Trust (i.e. that for young Greek men) satisfies the requirements for a charitable trust.

118 I was referred to a number of decisions which touch upon this problem.

119 In *Re Koettgen's Will Trusts* [1954] Ch 252, the testatrix bequeathed her residuary estate on trust for the commercial education of British born subjects whose means were insufficient to obtain such education at their own expense. There was also a direction in the

will that the trustee should give preference to employees of a particular company and to their families although this preference was limited to a maximum of 75% of the income of the trust in any year.

120 It was argued on behalf of the beneficiary who would take into default that, as to 75%, the trust was primarily for the benefit of the employees and their families and it was only if there were insufficient members of that preferred class in any one year that the public could come in as beneficiaries under the trust.

121 Upjohn J accepted that there was *'much force'* in this argument, but construed the relevant clause rather differently. He held that the primary class consisted of British born subjects who could not pay for commercial education themselves. This was a wide class which satisfied the requirement for public benefit. It was only when making a selection from within that primary class that preference was to be given to particular members of the class, namely employees of the company and their families. He held that the question of the public nature of the trust fell to be considered at the stage when the primary class of eligible persons was ascertained and that that primary class was of a sufficiently public nature. The direction that, when selecting from within that primary class, the trustees were to give preference to the employees of the company and their families did not affect the validity of the primary trust, it being quite uncertain whether such preferred persons would in any year exhaust 75% of the income.

122 As can be seen, it was critical to his decision that the preferred class was simply a sub-set of the primary class of beneficiaries such that the preference only came into play when the trustees were deciding who to select for benefit from within the primary class.

123 According to the Tidmarsh opinion, *Koettgen* has not been followed in any other English case and has been the subject of some doubt and/or criticism as follows.

124 In *Caffoor v Commissioner of Income Tax, Colombo* [1961] AC 584, the trust deed provided that, after the death of the grantor, the income was to be applied by the board of trustees in their discretion for all or any of a number of purposes which included the education, instruction or training in England or elsewhere abroad of deserving youths of the Islamic Faith. The trust deed went on to provide at clause (2)(b) "the recipients of the benefits…shall be selected by the board from the following classes of persons and in the following order:- (i) male descendants along either the male or female line of the grantor or of any of his brothers or sisters failing whom" youths of the Islamic faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Colombo or elsewhere in Ceylon. The question arose as to whether the income of the trust was exempt from income tax as being a charitable trust. At 603, Lord Radcliffe, giving the judgment of the Privy Council, said as follows:

> ***"It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of***

deserving young people of the Islamic Faith, and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the grantor's own family. Their Lordships go with the arguments so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust income which is conferred on the grantor's own family by clause (i) of sub-head (b), the only fair way to describe this trust is as a family trust under which the income is made available to provide for the education or training of relatives of the propositus, in this case the grantor himself, provided only that they are young, deserving and of the required Faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes."

125 Lord Radcliffe went on to comment on Koettgen in the following terms at 603–604:

"In the Supreme Court judgment much consideration was given to the English decision *In re Koettgen's Will Trusts*, ***the facts of which have much in common with those of the present case.*** The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British-born subjects without sufficient means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees or members of the families of employees of a named company. It is evident that the court's decision, which upheld the trust as a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued that the trust was one 'primarily for the benefit of the employees.. and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust'. The judge says in his judgment that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense, and that the preference given merely amounted to a duty in the trustees to select employees or members of their families, if available, out of this primary class.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the judge did, or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with

> *Oppenheim's* ***case, but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place upon the trust which is now before them.*** Here the effect of the wording of clause 2(b)(i) is to create a primary disposition of the trust income in favour of the family of the grantor."

126 As can be seen, whilst expressing some doubt about the decision in *Koettgen*, the Privy Council did not ultimately disapprove it, but distinguished it on the basis that in *Koettgen* the direction was to give preference to the preferred class out of a wide primary class whereas in *Caffoor*, the Privy Council held that the wording created a primary trust in favour of the family.

127 In *Inland Revenue Commissioners v Educational Grants Association Limited* [1967] Ch 123, the taxpayer company (the Association) was established for the advancement of education in general terms. It was promoted by a director of MB Limited, the council of management were all connected with MB Limited and the income of the Association consisted primarily of monies received from MB Limited. Between 76% and 85% of the income in the relevant years was applied for children of persons connected with MB Limited. The question arose as to whether the Association could properly claim exemption from income tax on the grounds that the income was applied for charitable purposes only. The court was therefore concerned with how the income had in fact been applied, not how it might be applied in future.

128 Pennycuick J held that, to the extent that income had been applied for the benefit of persons connected with MB Limited, it was not for the public benefit and accordingly the claim for exemption failed. In this respect, he followed *Oppenheim*.

129 In the circumstances it was not necessary for him to consider whether *Koettgen* had been correctly decided but, having referred to it and to Lord Radcliffe's judgment in *Caffoor*, he said the following at [143]:

> ***"I think it right, however, to add that for myself I find considerable difficulty in the*** *Koettgen* ***decision.*** I should have thought that a trust for the public with preference for a private class comprised in the public might be regarded as a trust for the application of income at the discretion of the trustees between charitable and non-charitable objects. However, I am not concerned here to dispute the validity of the *Koettgen* ***decision.*** I only mention the difficulty I feel as affording some additional reason for not applying the *Koettgen* ***decision by analogy…"***

130 Tudor on Charities (10 th ed) summarises the position as follows at 2–072:

> ***"It is certainly possible to argue that*** *Re Koettgen's Will Trust* ***is wrongly decided on the basis that by reason of the preference being mandatory***

> ***the trust was not for the benefit of the public, but was for the benefit of a private class and the public.*** Its correctness was indeed doubted by Lord Radcliffe in *Cafoor v Commissioner of Income Tax, Colombo*.
>
> ***...*** .
>
> ***The correctness of*** *Koettgen* ***was also doubted by Pennycuick J in*** *IRC v Educational Grants Association*. ***Pennycuick J said that the advancement of education for private benefit, or in part for public benefit and in part for private benefit, is not an exclusively charitable purpose.*** The Court of Appeal in *IRC v Educational Grants Association* ***took a similar view.*** It is suggested Pennycuick J accurately stated the law, and that Koettgen, if not wrongly decided, is at best a case which was decided on its own particular facts, and should not be followed generally."

131 To like effect is the commentary in Picarda, Law and Practice Relating to Charities (4th Ed) at 79 where, having described *Koettgen* as a *'somewhat puzzling case'*, the author goes on to say:

> ***"Not surprisingly the case of*** *Re Koettgen's Will Trusts* ***has been much criticised.*** Indeed as Walton J once pithily and appropriately commented in *Re Martin Deceased* ***'it has found very few friends indeed'."***

132 I share the concerns expressed by Pennycuick J, Tudor and Picarda as to whether *Koettgen* was correctly decided. I would additionally refer to the observation of Lord Browne-Wilkinson speaking for the Privy Council in Attorney General of the *Cayman Islands v Wahr-Hansen* [2001] 1 AC 75 at 81E:

> ***"In order to demonstrate the trusts are, in law, charitable it must be shown that those trusts are exclusively charitable.*** If it is shown that, consistently with the provisions of the trust deed, property can be applied for purposes other than charitable purposes the trust will fail." [Original emphasis]

133 Where a trust provides that preference or priority is to be given to members of the settlor's family over general members of a section of the public, it is quite hard to see how such benefits can be regarded as charitable given the decision in *Oppenheim*. If that is right, property could be applied for purposes other than charitable purposes and, in accordance with the observation of Lord Browne-Wilkinson, the trust should fail. Certainly if *Koettgen* is followed, there is scope for settlors to seek to benefit their families by means of a trust masquerading as a charitable trust, with all the tax and other advantages which that can bring.

134 However, I do not need to go that far. In my judgment, *Koettgen* is to be distinguished from the present case. As mentioned above, it was critical to Upjohn J's decision in that case that there was one class of beneficiaries, namely British born subjects who could not afford

the relevant education. That class formed a section of the public. The preferred beneficiaries also had to be British born subjects who could not afford the relevant education. Thus the judge was able to hold that the class of beneficiaries as a whole formed a section of the public and the fact that, when selecting from within that class, preference was directed to be given to employees of a particular company and their families did not alter the fact that the class of beneficiaries constituted a section of the public.

135 The situation here is very different. The preferred beneficiaries (namely the children and grandchildren of the Nephews) do not have to fall within the primary class. The primary class consists of “intelligent and promising young men of Orthodox Greek church religious belief born in Greece of Greek nationals also of Orthodox Church religious persuasion”. The children and grandchildren of the Nephews do not have to meet any of these requirements in order to obtain benefits. Thus they do not have to be born in Greece of Greek Nationals, or be of Orthodox Greek Church religious belief, or be male, or be intelligent, promising or young. Their right to benefit is conferred solely by their relationship to the Testator (through the Nephews), not by membership of the primary class. They do not form a sub-set of the primary class. As they do not have to form part of the primary class, they cannot be considered as a section of the community and their inclusion therefore falls foul of the principle established in *Oppenheim*.

136 Advocate Alexander submits that, given that there are only seven grandchildren and four children (with the latter probably being past the age when they would wish to seek further university education) of the Nephews, their inclusion is not a practical issue. Furthermore, he relies on Lord Radcliffe's comment in *Caffoor* quoted above to the effect that the Privy Council contemplated the possibility that some kind of preference in selection would not cause a trust to lose its charitable status or public character. However, that observation was made in the context of the preferred class being a sub-set of the wider class.

137 That is not the situation here and accordingly I find that the Trust as a whole cannot be considered as a valid charitable trust because, insofar as monies may be applied for the education of the children and grandchildren of the Nephews (and they are entitled to priority over any young Greek men) such monies would not be applied for charitable purposes because the children and grandchildren do not form a section of the community. As Lord Browne-Wilkinson said in the passage from *Wahr-Hansen* quoted above and as this Court said in *Greville Bathe*, a trust must be exclusively charitable if it is to be classed as a charitable trust. The fact that the non-charitable objects may be comparatively few in number cannot affect this principle.

138 I should add that in his skeleton argument, Advocate Meiklejohn on behalf of the Attorney General, referred to three Commonwealth cases which he submitted were similar to *Koettgen*. These were *Herbert v Cyr* [1944] 2 D.L.R. 374, a case in the New Brunswick Supreme Court, and two Australian cases, namely Permanent Trustee Co of *N.S.W Limited v Presbyterian Church (N.S.W) Property Trust* [1946] 64 W.N.N.S.W. 8 and *Public Trustee v Young* [1980] 24 S.A.S.R. 407.

139 In *Herbert v Cyr*, the testatrix left the residue of her estate for “the education of poor boys and girls of merit – my relatives to have preference”. The Court held that this was a valid charitable trust.

140 In Permanent Trustee Co of N.S.W., the testator left the residue of his estate upon trust to provide scholarships to students and intending students of any primary or secondary school in New South Wales, with preference to be given to descendants of the testator's father and others. This was also held to constitute a valid charitable trust.

141 Finally, in *Public Trustee v Young*, the testator bequeathed the residue of his estate to the Public Trustee for the income to be used to provide one or more scholarships to a named School of Mining with preference being given to employees of a named company. The Court held that, on its true construction, the clause in the will was a general trust for educational purposes in favour of the School and that the preference was simply an administrative direction to the trustee that, all other things being equal, eligible and willing employees from the company should get preference, but not otherwise. It was held to be a valid charitable trust.

142 It seems to me that all three of these cases could be subject to similar criticisms as have been levelled at the decision in *Koettgen*. However, they are also to be distinguished. On my reading, in all three cases, as in *Koettgen*, the members of the preferred class were simply a sub-set of the primary class which was eligible for educational benefit and the primary class was a section of the community. As in *Koettgen*, the cases therefore differed from the present case where the children and grandchildren of the Nephews are not a sub-set of the primary class and have no connection with the primary class in that they do not have to fulfil any of the criteria which define the primary class. Accordingly, even if the above three cases are accepted as being correctly decided, I do not consider that they assist the argument of the Greek Government in this case.

(iv) Can the charitable aspects be saved or severed?

143 The starting position must be that, as the Trust is not for exclusively charitable purposes, it must fail as a whole. As Lord Browne-Wilkinson said in the passage quoted above from *Wahr-Hansen* at 81E:

> ***“If it is shown that, consistently with the provisions of the trust deed, property can be applied for purposes other than charitable purposes the trust will fail.”***

144 Thus in *Meaker v Picot*, having held that the trust was not a valid charitable trust because monies could be applied for non-charitable purposes, the court held that the whole gift failed for uncertainty.

145 Similarly, Lord Radcliffe in *Caffoor* said this at 602:

> ***"To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied."***

146 However, the Attorney General and the Greek Government submit that this is not an inevitable result where invalid non-charitable purposes are mixed up with charitable purposes. I accept that one is faced with that situation here. The trust in relation to the children and grandchildren of the Nephews is a trust of indefinite duration as it is not limited to lives in being plus 21 years. Not being charitable, it is therefore void. On the other hand, the trust for young Greek men is, when viewed on its own, a valid charitable trust. The Attorney General and the Greek Government submit that in this situation the Court may in some circumstances uphold a trust to the extent that it is for charitable purposes.

147 The 11 th edition of Tudor summarises the position in the following terms at 6–012:

> ***"The question as to whether a trust is void for uncertainty of subject-matter has arisen most frequently in cases where gifts have been made partly for illegal or impossible objects and partly for charitable objects.*** It is clear that whether there is an enforceable trust for the charitable objects will depend upon whether the amount of the subject-matter to be devoted to them can be ascertained. This is a question of construction but also a question of fact as to the possibility of ascertaining the amount needed or intended for each purpose .
>
> ***The authorities as to gifts partly upon invalid and partly upon charitable trusts in undefined proportions fall into three groups.*** First, those in which the void and the charitable objects rank pari passu such that the gift may be capable of being apportioned between them. Secondly, those in which the gift to charity is of the balance (if any) which would be left over after the void purpose had been satisfied. Third, those in which the whole fund is given to charity subject to payments for the void purpose. All of these situations should be distinguished from one in which the whole of the fund may be capable of being applied for non-charitable objects (in the alternative to charitable objects) with the result that the whole trust is invalidated."

148 Taking first the situation described in the last sentence of the quotation in the preceding paragraph, an example is to be found in *Re Wright's Will Trusts*, 29 July 1982, (unreported) [1982] Lexis Citation 1509. In that case, the testatrix left the residue of her estate for her trustees to apply the same at their absolute discretion for people and institutions who had *'helped'* her and her husband including, amongst others, seven named charities. The Court held that the trust for those who had helped her and her husband was void for uncertainty. It was then submitted to the Court of Appeal that there were in fact two classes, namely those

who had helped the testatrix or her husband on the one hand and the named charities on the other and accordingly the trust could be divided into a valid part and an invalid part. The Court of Appeal rejected that submission. In doing so, Fox LJ observed as follows:

> ***"We were referred by Mr Picarda in his concise argument to*** *Re Clarke* [1923] 2 Ch 407 ***in the hope that something could be saved from the wreckage by apportioning some part of the gift to charity.*** But the principle of *Re Clarke* ***and of the cases upon which it depends proceeds, as I understand it, upon the court being able to come to the conclusion that some part of the testatrix's bounty was absolutely dedicated to charity and it is left then for the court, in the circumstances, to decide how much.*** That is, in my view, certainly not the case here, because, assuming the gift had been wholly valid, there is I think no doubt that the trustees could, if they had so chosen, have devoted the whole of the gift to non-charitable purposes. The result is, in my view, that the gift fails and therefore devolves as upon an intestacy."

149 To like effect is the decision of the House of Lords in *Chichester Diocesan Fund v Simpson* [1944] AC 341, where the testator, by his will, directed his executors to apply the residue of his estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England" as they should in their absolute discretion select. The House of Lords held that a benevolent object was not necessarily a charitable object and that accordingly the entire bequest failed; see also the decision in *Meaker v Picot* (*supra*).

150 I do not consider that the present falls within this category. There is no general discretion to apply the whole fund or its income to the non-charitable purposes. The discretion of the trustee is limited to providing educational benefits for the children and grandchildren of the Nephews, with everything else being for charitable purposes in the form of the education of young Greek men.

151 I turn therefore to consider next the first situation described in the passage from Tudor cited at paragraph 147 above, namely where the void and charitable objects rank *pari passu* so that the gift may be capable of being apportioned between them.

152 Tudor at 6–012 describes the approach in this first situation in the following terms:

> ***"In the first situation, where a fund is given to be divided between charitable and illegal or impossible objects in such a way that neither part of the gift is residuary upon the other so that it can be ascertained what are the proportions to be attributed to each object, the court will uphold the charitable part by apportioning the fund between the two groups of objects.*** This apportionment may be effected by means of an inquiry, or, in a simple case, by an affidavit, as to the amounts which would be required for the respective objectives. If, however, it is impossible to ascertain what proportion

> shall be applied for each object, or the apportionment was intended to be a matter of discretion, the court will order an equal distribution among the named objects or classes of objects, applying the maxim 'equality is equity'."

153 I was referred to two cases in support of this proposition, namely *Hoare v Osborne* (1865–66) L.R. 1 Eq. 585 and *Re Clarke* [1923] 2 Ch 407.

154 In *Hoare v Osborne*, the testatrix bequeathed £600 upon trust to apply the income in keeping in good repair (i) a monument in a named church; (ii) a vault in which her mother was interred; and (iii) an ornamental window in the church, with any surplus being applied for specific charitable purposes. The Court held that (i) and (iii) were charitable purposes, but that (ii) was not. Having reached this decision, the judge, Sir R T Kindersley, VC, said at 588:

> ***"The question remains, what ought to be done with the fund?*** The cases shew that where a single fund is given for several objects of this nature, and one of them is bad, the principle on which the Court acts is, that if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an enquiry on the subject; but if, from the nature of the gift, it appears impracticable to fix the proportions, the Court divides the fund equally between the different objects; and I think the latter is the course I must adopt in this case, as I feel assured that no correct conclusion could be arrived at on an enquiry."

Thus one-third fell into residue, with the remaining two-thirds being upheld.

155 In *Re Clarke*, the testator gave his residuary estate to (a) indefinite charitable objects, (b) and (c) two named charities, and (d) such indefinite charitable and non-charitable objects as his executor should think fit; and directed that the residue should be divided amongst (a), (b), (c) and (d) in such shares and proportions as his executor should determine. Romer J held that (d) was invalid and the question then arose as to whether the entire gift was void or only (d). The judge held that this was not a case where the executors in exercise of their discretion could apply the whole fund to non-charitable objects and that accordingly that part which was to be devoted to charity should be upheld. He held that the power of appointment was invalid and that accordingly the property was vested in all four objects or sets of objects. Applying the principle that equality is equity and following *Hoare v Osborne*, he held that the estate was held equally for the four objects. The estate therefore passed as to one-quarter to each of the three valid objects and on intestacy in respect of (d) which was invalid.

156 I do not consider that the present case falls within Tudor's first situation. Under the terms of the Trust, the income is not to be applied in such a way that neither part of the income is residuary upon the other. On the contrary, preference is to be given to children or grandchildren of the Nephews and only thereafter is the income to be applied for young Greek men. It therefore falls within either the second or third situations as described in

Tudor.

157 Turning to the second and third situations (as described in the extract quoted at paragraph 147 above), Tudor states as follows at 6–014:

> ***"In the second situation where the gift to charity is residuary upon a void gift, the general rule is that it fails if the court, as it did in*** *Chapman v Brown*, ***finds that the precedent gift is of an unascertainable amount.*** But the charitable gift is valid if the subject-matter needed for the precedent gift can be reduced to certainty by means of an inquiry. The court will not direct an inquiry, and the gift to charity will fail, if it is manifestly impossible to determine the amount needed for the primary gift, or if it is clear that there will be nothing left over after satisfying it. Cases relating to gifts of the income of a fund for the upkeep of tombs followed by a gift of the particular residue to charity have received exceptional treatment and, although worded as though the charitable gift were residuary, are dealt with as examples of the class of gift next considered. [Tudor then quotes from the judgment of Jenkins J in *Re Coxen* [1948] 1 Ch 747 at 751–742 as set out in the following paragraph of this judgment.]
>
> ***In the third situation… where the gift is construed as devoting the whole fund to charitable objects subject to a payment for a void object, the failure of the latter will result in the whole fund becoming available for the charity.*** Therefore, where a capital sum was given to effect an impossible purpose and 'the rest' (being what was not needed for the first object) was to be devoted to charity, the whole fund was directed to be paid to charitable objects: the court read the gift as a direction to pay all the fund to charity except for what was needed for the impossible purpose. Similarly, if a gift of a sum the income of which is to be applied primarily for an illegal purpose while the particular residue is given to charity can be read as a gift to charity subject to a charge for the illegal object, the charity will take the whole upon the failure of the charge .
>
> ***A number of cases, in which there have been gifts upon trust to keep up tombs (or graves) not forming part of the fabric of a church with a gift of the particular residue to charity, may be regarded as establishing a special rule of law.*** 'Where a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, it has been held that the result of the failure of the trust for the repair of the tomb is that the whole of the income becomes applicable for the charitable purpose' . [**Quoting** *Re Rogerson* [1901] 1 Ch 715 **at 718].** *These cases are distinguished from Chapman v Brown* ***upon rather slender grounds and in*** *Re Birkett* ***Sir George Jessel MR followed them reluctantly.*** In *Re Dalziel* ***Cohen J, after approving the above statement of the special doctrine in cases relating to tombs, expressed the opinion that the real foundation of the tomb cases was that the court felt itself able to construe the provision in the various wills as to the upkeep of tombs as imposing only a moral obligation; but the obligation to give all that is not***

> ***applied for the upkeep of the tombs in favour of the valid charitable purpose is not honorary, but an enforceable trust which must be executed.*** It seems that they will not be regarded as precedents for cases not involving trusts for the maintenance of tombs (or burial places)."

158 The passage from the judgment of Jenkins J in *Re Coxen* referred to by Tudor is as follows:

> ***"The case is, therefore, said to be one of the type in which a fund or the income thereof is directed to be applied primarily to purposes which are not charitable and as to the balance or residue to purposes which are charitable.*** I was referred to a number of cases in which the effect of dispositions of this type has been considered, and the result of the authorities appears to be: (a) that where the amount applicable to the non-charitable purpose can be quantified the trusts fail quoad that amount but take effect in favour of the charitable purpose as regards the remainder; (b) that where the amount applicable to the non-charitable purpose cannot be quantified the trusts both charitable and non-charitable wholly fail because it cannot in such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity; (c) that there is an exception to the general rule in what are commonly known as the 'Tomb cases', that is to say, cases in which there is a primary trust to apply the income of a fund in perpetuity in the repair of a tomb not in a church, followed by a charitable trust in terms extending only to the balance or residue of such income, the established rule in cases of this particular class being to ignore the invalid trust for the repair of the tomb and treat the whole income as devoted to the charitable purpose; and (d) that there is an exception of a more general character where as a matter of construction the gift to charity is a gift of the entire fund or income subject to the payments thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift. See (for example) *Chapman v Brown*, *In re Birkett*, *In re Taylor*, *In re Porter*, *In re Dalziel* ***and*** *In re Parnell*. ***See also Tudor on Charities, 5th ed.*** pp. 61 and 62 and cases there cited."

As can be seen, Jenkins J is dealing with the second and third situations described in Tudor, albeit that he summarises the position in four propositions.

159 It seems to me that the present case is of the type summarised by Jenkins J in that the income is to be applied preferentially for the children and grandchildren of the Nephews and subject thereto, for the young Greek men. The Court therefore needs to consider whether the void gift to the non-charitable purpose (i.e. the further education of the children and grandchildren) can be quantified and/or whether the Trust falls within (d) of Jenkins J's categorisation. For ease of reference I shall hereafter sometimes refer to the non-charitable provision for the children and grandchildren as "the family trust". Furthermore, when I refer simply to, for example, *"category (a)"*, it is a reference to the relevant category from the categorisation of Jenkins J in *Coxen* quoted at paragraph 158 above.

160 The evidence and submissions before the Court at the original hearing did not really address these issues. Accordingly, on 15 June 2023, I circulated a draft judgment substantially in the terms of paragraphs 1 to 159 above together with a direction that the Representor should file an affidavit addressing the issue of quantification of the amount needed for the non-charitable family trust and that the parties subsequently file supplementary submissions dealing with the remaining issues.

161 Mr Stephen Le Seelleur of the Representor has filed a detailed affidavit on the topic of quantification and the parties have filed supplementary submissions on the remaining issues. These submissions are very detailed and I have found them extremely helpful. I am most grateful for the assistance given by the parties.

162 I think it is convenient to consider the remaining issues in the following order given the nature of the parties' supplementary submissions:

(a) Does the general exception referred to in category (d) of *Coxen* in fact exist?

(b) If so, does the Trust fall within category (d)?

(c) If the answer to either of the above questions is no, is the amount needed for the void non-charitable family trust capable of quantification so that the Trust can take effect for young Greek men with regard to the amount not needed for the family trust?

(a) Does the general exception referred to in category (d) of Coxen in fact exist?

(i) The cases

163 In their supplementary submissions, the Nephews contend that category (d) does not exist and that the only exception to the principles set out in categories (a) and (b) of Coxen is that of the tomb cases described in category (c). As a secondary submission, they say that, even if category (d) does exist, the terms of the Trust do not fall within it. Conversely, the Greek Government and the Attorney General submit that category (d) is correct and that, properly construed, the Trust falls within it. It is of course the case that all the textbooks and cases referred to are dealing with English law and accordingly, having resolved the argument between the Nephews on the one hand and the Attorney General and the Greek Government on the other, I must decide whether Jersey law is to like effect.

164 Advocate Meiklejohn, on behalf of the Attorney General, takes a preliminary point. He notes that *Coxen* was referred to by him in his original submissions and that, prior to the supplementary submissions, no party had queried the existence of category (d). Furthermore, the direction which I issued on 15 June (see paragraph 160 above) had assumed the existence of category (d). It was therefore now too late, he submitted, for the Nephews to seek to challenge the correctness of *Coxen* in relation to category (d).

165 The argument raised by the Nephews has indeed come late in the day but I have concluded that they should be permitted to take the point. It is a question of pure law and so does not affect the production of evidence in any way. Furthermore, following the direction which I issued, the Nephews filed their supplementary submissions first. Accordingly, it was known by the other parties that the Nephews were taking the point and the other parties have all had full opportunity to respond, and have indeed done so in some detail. Accordingly, I see no prejudice to the other parties in allowing the point to be argued.

166 The parties have referred me to what appear to be all the relevant cases in this area and I have carefully read them all. However, I do not think it is necessary to refer to them all in this judgment or to descend into the facts of most of the cases, although this was helpfully done in the parties' submissions.

167 I think that the simplest way of addressing this first issue is to start with a brief summary of how the cases had developed prior to the decision in *Coxen*.

168 For our purposes, the story begins with *Chapman v Brown* (1801) 6 Ves Jun 404 where the testatrix left the residue of her estate to her executors for the purpose of building or purchasing a chapel, with any surplus to be used to pay £20 per annum to a minister with any surplus thereafter being applied for general charitable purposes. The first two purposes were held to be void but of course the trust for general charitable purposes was, when viewed on its own, valid. The Master of the Rolls held that, if it could be ascertained how much would have been employed by the executors for the first two purposes, the charitable bequest would have been valid as to the remainder. However, he found it impossible to ascertain how much would have been required for the first two purposes and therefore how much was to be held on the residuary charitable trust. In the absence of any certainty as to subject matter, that bequest had to fail as well as the first two and accordingly the whole residuary estate passed on intestacy.

169 In *Mitford v Reynolds* (1841) 1 Ph 185, the testator directed his executors to build a monument for him and three relatives, with the remainder being held for purposes which the Court held to be charitable. On the assumption that the bequest for the monument was void, the Lord Chancellor applied the principle of *Chapman v Brown* but concluded that, on the facts of this case, the amount necessary for the monument was capable of being quantified on inquiry by the Master and accordingly did not hold that the charitable bequest failed.

170 As can be seen, categories (a) and (b) of *Coxen* reflect the principle established by *Chapman v Brown* and applied in subsequent cases, including *AG v Hinxman* (1820) 2 Jac & W 270; *Fowler v Fowler* (1864) 33 Beav 614; *Re Taylor* (1888) 58 LT 538 and *Re Porter* [1925] 1 Ch 746.

171 The first case of a series which have led to the establishment of the exception in category (c) of *Coxen* concerning tomb cases was *Fisk v Attorney General* (1867) LR 4 Eq 521. In

that case, the testatrix gave £1,000 to the rector and church wardens of a parish and their successors upon trust to apply such of the income therefrom as should from time to time be necessary to keep her family grave in repair and to pay or divide the residue of such income once a year to or amongst the aged poor of the parish. The latter was a valid charitable trust but provision for the family grave was void.

172 Wood V-C considered *Chapman v Brown* but held at 524 that, on the proper construction of the will, there was a gift to the rector and church wardens of the whole of the fund subject only to a gift of a portion for a purpose which had failed. They were therefore entitled to the whole fund free of the void charge. He went on to say at 527 that, if the proper construction had been that the gift of the residue of the fund had been exclusive of the amount required for the repair of the grave, this would have been a case where the amount required for the void purpose could have been ascertained, so that the rest of the £1,000 would be held on the charitable trust for the poor, but that the better construction was that the whole gift was taken by the rector and church wardens.

173 Following the decision in Fisk, there was a line of cases which have given rise to the tomb exception described in category (c) of *Coxen*. Those I have been referred to (in chronological order) are *Hunter v Bullock* (1872) LR 14 Eq 45; *Dawson v Small* (1874) LR 18 Eq 521; *Re Williams* (1877) 5 LR Ch 735; *Re Birkett* (1878) 9 Ch D 576; *Re Vaughan* (1886) 33 Ch D 187; and *Re Rogerson* [1901] 1 Ch 715.

174 It is clear that the tomb cases have come to be regarded as a special exception based upon the trust for repair of a grave being regarded only as an honorary trust – see for example *Dawson v Small* at 118; *Re Rogerson* at 719 and Tudor at 6–015 (quoted above at para 157). Nevertheless, that is not the basis upon which *Fisk* itself was decided. As I read the judgment in that case (summarised at paragraph 172 above), this was an example of category (d). In other words the gift was construed by the Vice-Chancellor as providing that the whole fund was given to the charitable purpose subject only to payments for the void purpose, namely maintaining the grave. In view of the invalidity of the grave maintenance provision, the whole gift was held for the charitable purpose. There is no suggestion in the judgment of a special exception for cases concerning graves; the fact that the invalid prior gift was for the maintenance of a grave rather than for some other purpose was not relevant to the Vice-Chancellor's decision.

175 A case which did not involve prior provision for the maintenance of a grave is the Irish case of *Kelly v Attorney General* (1917) 1 IR 183. The facts of that case were that the testator bequeathed certain lands to his trustees on trust to apply the income of the lands for the erection of a parish chapel and parish house on a specified part of the lands. Once the chapel and house had been built, the rest of the land was to be held upon trust to pay half the income to the parish priest for the saying of masses and the other half to be divided annually amongst the poor of the parish. These last two purposes were both held to be charitable purposes.

176 Following the death of the testator it was established that there was no need to erect a parish chapel or parochial house as there was already a parish chapel and parochial house in the immediate neighbourhood. Most significantly, as a result of this, the bishop refused to give permission for the erection of a chapel or parochial house on the specified part of the land. It followed that the trust in respect of the chapel and the parochial house could not be fulfilled.

177 It was contended on behalf of the heirs of law that it was impossible to say how much would have been needed for that purpose and accordingly it was impossible to say what was left for the charitable purposes. Accordingly, following *Chapman v Brown*, the whole gift failed and the value of the lands (which had been sold by then) all passed on intestacy. The Attorney General submitted that the whole fund should be devoted to the charitable trust, i.e. half to the parish priest for the celebration of masses and half for the poor of the parish.

178 O'Connor MR introduced his consideration of *Chapman v Brown* in the following terms at 189:

> ***"Apart from authority I would have no difficulty in deciding that when a fund is dedicated in the first place towards a definite charitable purpose, and the residue of the fund, which is not required for that purpose, is dedicated to another charitable purpose, the whole fund is available for the latter in the event of the primary purpose failing.*** The intentions of testators should be carried out as far as possible, and it would seem to be an act of violence against the testator to say that because one of his purposes failed, both should fail. But it is not contended that in every such case the final purpose should fail, but only in those cases in which the amount required for the first purpose is not defined or ascertainable, because then the amount required for the final purpose is also unascertainable. This seems to me to be one of those refinements in reasoning which is more calculated to defeat than to carry out the intentions of ordinary testators. I think that when a man says that he wishes to devote a fund in the first place to a particular charitable purpose, and that when that purpose is satisfied the residue of the fund is to be devoted to another charitable purpose, he means that whatever is not required for the first, for any reason whatever, including complete failure, should go to the second. This is my own view, and it seems more conformable to common sense than completely to disappoint a testator's intention. I am, however, referred to *Chapman v Brown*, ***an authority which it is said binds me to decide in another way."***

179 Having discussed the argument based on *Chapman v Brown*, O'Connor MR went on to say at 190:

> ***"But if the meaning of the gift is that the entire should be devoted to the final purpose subject to whatever may be required for the firstly named purpose, the decision in*** *Chapman v Brown* ***is not applicable.*** This is my

interpretation of the gift. The whole estate is given to the trustees for the several charitable purposes specified, without any indication how much is spent on one purpose, and how much on another, and the testator says: “When the chapel and house (the first charitable object) are built, to hold the rest etc”. I think that the fair construction of this is – subject to that trust the whole is to be given to the other charitable purpose.”

Accordingly, he held that the whole fund was held upon the final charitable trusts.

180 This was the state of the authorities when the 5 th edition of Tudor was published in 1929, which was the edition referred to by Jenkins J in *Coxen*. The relevant text was as follows at 61–62:

> ***“If the gift to charity is residuary upon a void gift, the general rule is that it fails if the Court finds that the precedent gift is of unascertainable amount.*** But the charitable gift is valid if the subject-matter needed for the precedent gift can be reduced to certainty by means of an inquiry…. Cases relating to gifts of the income of a fund for the upkeep of tombs followed by a gift of the particular residue to charity, have received exceptional treatment, and although worded as though the charitable gift were residuary, are dealt with as examples of the class of gift next considered .
>
> ***Where the gift is construed as devoting the whole fund to charitable objects subject to a payment for a void object, the failure of the latter will result in the whole becoming available for the charity.*** Therefore, where a capital sum was given to effect an impossible purpose and ‘the rest’ (being what was not needed for the first object) was to be devoted to charity, the whole fund was directed to be paid to charitable objects, the Court reading the gift as a direction to pay all the fund to charity except what was needed for the impossible purpose (n). Similarly, if a gift of a sum the income of which is to be applied primarily for an illegal purpose while the particular residue is given to charity can be read as a gift to charity subject to a charge for the illegal object, the charity will take the whole upon the failure of the charge (o) .
>
> ***A number of cases (p) in which there have been gifts upon trust to keep up tombs not forming part of the fabric of a church with a gift of the particular residue to charity, may be regarded as establishing this special rule of law, ‘Where a fund has been given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for valid charitable purposes, it has been held that the result of the failure of the trust for the repair of the tomb is that the whole of the income becomes applicable for the charitable purposes’ (q)*** .
>
> ***These cases are distinguished from*** *Chapman v Brown* ***(r) upon rather slender grounds and Sir G Jessel followed them reluctantly (s).*** It seems that they will not be regarded as precedents for cases not involving trusts for the maintenance of tombs (t).”

Footnote (n) refers to *Kelly*, footnote (o) refers to the cases listed at footnote (p) and footnote (p) lists a number of cases, all of which were tomb cases.

181 I turn now to *Coxen*. In that case, the testator left the residue of his estate to the Court of Aldermen upon trust (i) to apply £100 per annum for a dinner for the Court of Aldermen, (ii) to pay one guinea to each Alderman who attended a committee meeting in connection with the trust, and (iii) to apply the balance for specified charitable purposes. The issue before the court was whether the trusts at (i) and (ii) were charitable trusts and, if not, what the consequences were.

182 Having stated the facts and key submissions, Jenkins J began his judgment with the passage quoted at paragraph 158 above. He then considered the possible consequences if the trusts at (i) and (ii) were invalid and said as follows at 754:

> ***"It therefore seems to me that even if the two disputed trusts must be held invalid as being for purposes neither charitable in themselves nor incidental to the attainment of the charitable purpose, the result must simply be that the entire income of the fund is applicable to the charitable purpose on the ground that the testator has devoted the whole income to the charitable purpose but has subjected a part of it to trust designed to promote that purpose by particular means to which effect cannot legally be given."***

Thus the judge was saying that, if the trusts at (i) and (ii) were invalid, this was a case falling within category (d). However, he went on to hold that the trusts at (i) and (ii) were valid. It follows that his observations in the passage quoted at paragraph 158 above were obiter.

183 Despite that, the passage from *Coxen* (including category (d)) has been treated in subsequent editions of Tudor (see paragraph 157 above in respect of the 11 th edition) as accurately stating the position under English law. Similarly, Jarman on Wills (8 th edition, 1951), having quoted the passage from *Coxen* says at 487 in respect of category (d):

> ***"(d) In certain cases it may be possible, as a matter of construction, to treat the legacy as a bequest of the whole to charity, subject to the gift previously made out of it so far as that gift is valid and effectual.*** This is merely one application of the general rule which has been expressed as follows: 'If a part of a particular fund be given to one person and the residue to another, it is a question of intention, not subject to any particular rule, whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it…; or a gift of the entire fund subject to the gift previously made out of it… In the latter case, if the gift or part fails, the gift of the residue may carry the whole fund: in the former case, not so'."

(ii) The Nephews' submissions

184 Advocate Holden and Advocate Kistler have each filed submissions. I shall for convenience refer simply to the submissions of the Nephews to encompass both sets of submissions.

185 The Nephews submit that Jenkins J was wrong to say that category (d) existed because there was no proper basis for him to do so. The true position is as set out in categories (a) and (b), based upon *Chapman v Brown* and the cases which followed it. The sole exception is that of the tomb cases as set out in category (c). I would summarise the grounds which they put forward in support of this submission as follows:

(i) None of the cases listed by Jenkins J at the conclusion of his summary of the four categories in fact supports the existence of category (d). They are all cases involving categories (a) or (b) or a tomb provision.

(ii) Apart from the listed cases, Jenkins J also referred to Tudor, 5 th edition, in support of his four categories. However, the only non-tomb authority mentioned in Tudor in support of the principle which Jenkins J summarised as category (d) was *Kelly* at footnote (n). *Kelly* was not a satisfactory authority. There was no proper analysis or explanation of why the judge felt able to depart from the principles established in *Chapman v Brown* and succeeding cases. In any event it was an Irish case. It had not been adopted and followed in any English decision.

(iii) Thus there was no proper basis for the existence of category (d) either in the cases listed by Jenkins J or in the cases used by the 5 th edition of Tudor to support the text which suggested the existence of category (d).

(iv) The tomb cases were described as a special rule and as something of an anomaly; see the observation of Burchett AJ in the Supreme Court of New South Wales in South Eastern *Sydney Area Health Service v Wallace* [2003] NSWSC 1061 at paragraph 1. Furthermore, in *Re Porter* (cited above), Eve J said at 750 that he did not think he should extend the application of tomb cases to something which was not a tomb (in that case a masonic temple). The suggestion that tomb cases should be narrowly confined as being something of an anomaly pointed against a general exception on the lines of category (d).

(v) If category (d) existed, there was no need for category (c) as all the category (c) cases would fall within the wider terms of category (d).

(vi) Although, as submitted by the Greek Government and the Attorney General, it was true that Jenkin J's summary had been referred to in a number of subsequent cases, this was merely in passing. There was no case where category (d) had specifically been followed and applied.

(vii) A general exception on the lines of category (d) would turn on fine, artificial and

therefore undesirable distinctions as to the manner in which particular bequests are expressed and therefore whether the wording falls within category (d) or categories (a) and (b).

(iii) Conclusion on the existence of category (d)

186 In my judgment, category (d) of *Coxen* should be regarded as an accurate statement of the position under English law. I would summarise my reasons for so concluding as follows.

187 First, although I accept that the sources relied upon by Jenkins J in formulating category (d) could be said to be somewhat slender, I do not think they are quite as slender as the Nephews suggest. It is true that the two key pillars of support were the text in the 5 th edition of Tudor (quoted at paragraph 180 above) and the decision in *Kelly*. However, there were two matters which gave additional support to category (d).

188 In the first place, Jenkins J referred to *Re Parnell* [1943] 1 Ch 107 as one of the cases which supported his statement about the four categories. That was not a case which concerned charitable trusts. In that case the testatrix left the residue of her estate – defined as the *'residuary trust fund'* — on income trusts as to various sums to certain of her relations for life and after their deaths as to the capital of each such trust for such relation's children. Her will then went on to provide that " *As to all the remainder of the trust fund I direct that my said trustee shall stand possessed thereof for Harry Duncan Nourse*". After the testatrix's death, one of the relations died without children. The issue was therefore whether the fund of £2,000 which had been left on trust for the relation and his children fell within *"all the remainder of the residuary trust fund"* so as to pass to Mr Nourse or did not do so and therefore fell into intestacy.

189 In this context, Uthwatt J said at 109 (omitting references):

> ***"The question is whether the sum of £2,000 falls into, and is comprised in the gift of, 'the remainder', or whether it is undisposed of.*** This class of question is very common. I accept the statement with regard to it in Hawkins on Wills, 3rd ed., p.53, which is as follows: 'If a part of a particular fund be given to one person and the residue to another, it is a question of intention, not subject to any particular rule, whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it, as in the cases of ….: or a gift of the entire fund subject to the gift previously made out of it, as in… In the latter case, if the gift or part fails, the gift of the residue may carry the whole fund: in the former case, not so'. This statement accords with common sense. The matter is to be treated purely as a question of the proper construction of the will under consideration and not as one calling for the application of a rule of law. The question here, therefore, is: does the 'remainder' mean the residuary trust fund less the various sums, or what remains of the residuary trust funds after giving effect to the gift of those

various sums?

> ***There is a further general observation to be made.*** If the words of the will are rationally capable of two constructions, and one of them results in an intestacy and the other does not, one should prefer the latter construction."

The judge went on to hold that the correct construction of the will meant that the remainder included everything which it did not pass under the specific trust for the relation and accordingly formed part of the residue payable to the estate of Mr Nourse (who had died after the death of the testatrix). In my view, the principle described by Uthwatt J has some relevance to the circumstances which Jenkins J was considering in *Coxen* and gives some support by analogy to the existence of category (d). It is of note that Jarman is also of this view; see the extract quoted at paragraph 183 above.

190 Category (d) also derived some support from the decision in *Fisk*. As I have described earlier, although the exception for tomb cases has come to be regarded as based on specific matters such as the honorary nature of a trust to maintain a tomb, an analysis of the decision in *Fisk*, which was the foundation of the tomb cases, suggests that the judge was simply construing the will in that case in the manner summarised by Jenkins J in category (d) (see paragraph 174 above).

191 Secondly, whilst I accept that there is no subsequent English case in which category (d) has been specifically referred to and applied, it was applied by necessary implication in *Re Norton's Will Trusts* [1948] 2 All E R 842, a decision of Jenkins J himself only a matter of months after his judgment in *Coxen*. In that case the testator left £500 for purposes which the judge held to be charitable subject to a provision for the maintenance of a grave. Having held that the grave provision was invalid, the question arose as to whether this invalidated the gift to charity. The judge held that it did not in the following terms at 844:

> ***"Does that result in any part of the £500 not being validly disposed of so that it falls into residue?*** In my judgment, the answer to that question must be 'No' because this is a case in which the testator has devoted the whole of the legacy to charitable purposes, and then has empowered the trustee of the legacy to apply a part of it to the particular non-charitable purpose of keeping in repair two specified graves. That being the position, the result of the invalidity of the power conferred on the counsel quoad this particular object is that the power should to that extent simply be ignored. Any amount which they might have spent on this object, had it been a valid charitable object, will be available for the general charitable purposes to which the legacy as a whole is subjected. That conclusion can also be justified on the principle of the 'tomb cases' reference to which is made in the judgment of Cohen J in *Re Dalziel*, ***that a provision for the repair of a tomb is to be regarded as imposing only a moral obligation.*** On this principle the moral obligation, being one which cannot be validly carried out, should simply be ignored and the testator's disposition in favour of the valid charitable object should be treated as extending to the whole of the subject-matter of the gift." [emphasis added]

192 Although no reference is made by Jenkins J to his decision in *Coxen*, the first reason which he gives for upholding the charitable object is expressed in the same terms as category (d). The fact that he then states that his conclusion can also be justified under the tomb cases makes it clear that he was in fact applying category (d) as one of his two alternative grounds for upholding the charitable bequest.

193 Thirdly, category (d) has been referred to in a number of cases with apparent acceptance that it correctly reflects the law. I have been referred to the following:

(i) In the Canadian case of *Re Doering* [1948] O.R. 923, the testator left his estate upon certain family trusts for a period and subject thereto on charitable trusts. An issue arose as to the validity of the family trust and the judge held that it was valid. It follows that the court was not concerned with the issue before this Court, namely an invalid non-charitable gift and a charitable trust. Accordingly, as Advocate Holden correctly submits, what the judge said about *Coxen* was obiter. Nevertheless, the judge expressed views which were entirely consistent with category (d). Thus on page 12 of the report which is before this Court, he said:

> ***"In any event, this is not a case, of which there are many instances to be found in the authorities, where a testator made incidental provision for some charitable object in the event that it should happen that there might be some small surpuls*** [sic] ***unused in respect of the figt*** *[sic] [?* gift] **to the first and principal object of his bounty.** The underlying purpose of this whole will was to advance the religion which the testator embraced, whether by means of educating the young or by other means are to be inferred from a reading of the will as a whole. The educational advantages provided for were, in a sense, ancillary to his main purpose. It was clearly his intention to provide a most substantial benefit for the two religious bodies named in the residuary clause, and for purposes or objects which I regard as essentially charitable. The preceding gifts, to be provided out of income, are quite subordinate to the main gift to the residuary beneficiaries, although that gift can be said to be made subject to them.
>
> ***The Courts have always gone to great lengths to give effect to a charitable gift and this is amply illustrated in the recent case of in*** *Re Coxen…* ***At the bottom of p 497 Jenkins J summarises the result of a number of authorities and refers to an exception of a general character, where, as a matter of construction, the gift to a charity is a fit*** *[sic] [?* gift] **of the entire fund of income, subject to the payments thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift…."**

The clear inference from the judge's observations is that, if it had been necessary, he

would have construed the will in that case in accordance with category (d).

(ii) As Advocate Holden emphasised, *Wallace* (referred to at paragraph 185(iv) above) was a tomb case, i.e. a provision for a tomb followed by a residual gift to charity. The judge held that the tomb provision was invalid and accordingly the question arose as to whether this affected the validity of the gift to charity. Having quoted the passage from *Coxen* at the outset of his judgment and noted that it was treated as representing the law in Jarman on Wills 8 th edition and as being authoritative in Theobald on Wills (15 th edition, 1993), the judge considered at [15] whether there was a problem by reason of categories (a) or (b) of *Coxen*. He went on to say:

> ***"There will be no such problem if either the third principle, the exception established by the 'tomb cases', or the fourth principle, the general exception where the gift should be construed as including the income subject to the payments thereout required to give effect to the non-charitable purpose, has application in this case.*** In my opinion, both these latter principles apply." [Emphasis added]

He then went on at [16] to explain why the case fell within category (d) and expressly relied on Kelly and on the passage from *Re Norton* which I have quoted earlier. He then held at [17] that category (c), the tomb cases, was an alternative way of reaching the same conclusion. In short therefore, this was a case where category (d) was specifically applied as one of two alternative grounds for concluding that the whole amount, including what would have been required for maintenance of the tomb, passed to the charity.

(iii) *Re Kung* came before the Courts of Hong Kong at three levels, namely at first instance, the Court of Appeal and the Court of Final Appeal. The case involved the proper construction of a home made will made by the testatrix. The main issue was whether a charitable foundation took the residue absolutely or whether it took as trustee of a charitable trust subject to certain provisions set out in clauses 2, 3 and 4 of the will. The judge held that the foundation took as trustee and his decision was upheld by the Court of Appeal and the Court of Final Appeal. There was no suggestion that any of clauses 2, 3 and 4 was invalid and accordingly, as Advocate Holden correctly pointed out, the case was very different from the present one. However, I was referred to certain observations from the judgment of the Court of Appeal, reported at *Re Kung* (2014) 17 ITELR 662, where that Court was considering the issue of certainty of subject matter in the context of clause 4 not being a charitable provision. Having at [99] quoted the statement of Jenkins J in Coxen, the Court of Appeal went on to say this at [100] and [101]:

> ***"[100] In this connection, Mr Hinks confirmed in his oral submission that he is not arguing that the Foundation must discharge its obligation under cl 4 before applying the residue of the estate for the charitable objective set out in cl 2(2).*** There is thus no question of uncertainty of subject matter stemming from the need to ascertain what would be the balance left over for charitable purposes after satisfying all

the objects in cl 4 .

> ***[101] Further, in our judgment, [the testatrix] clearly intended the charitable objects under cl 2 to be the primary purposes to which the future income from the Chinachem Group should be used.*** Thus, on the proper construction of the Will, it falls within the general exception alluded to by Jenkins J. In other words, if the non-charitable gifts under cl 4 fail, the whole corpus would go to the charitable gift under cl 2. See a similar analysis at Tudor on Charities (9th edn, 2003), paragraph 3–011 in respect of what the learned editor referred to as the third situation:
>
> ***"In the third situation where the gift is construed as devoting the whole fund to charitable objects subject to a payment for a void object, the failure of the latter will result in the whole fund becoming available for the charity."***
>
> ***…*** .
>
> ***[103] ….If any one of those objectives is uncertain in that regard, the legal consequence, as we have said above, is that that part of the gift would fail and the corpus intended by [the testatrix] to be used for that purpose would then be utilised for the charitable objectives under cl 2 in accordance with the principle discussed in*** *Re Coxen*…"

I accept that the observation of the Court of Appeal was obiter and not necessary for its decision. Indeed the Court of Final Appeal did not find it necessary to comment on what the Court of Appeal had said or to refer to Coxen. However, it is the case that if clause 4 had been invalid, the Court of Appeal would have applied category (d) and would have construed the will as providing that the whole fund would be held on the charitable trust. It does therefore provide some further indication that Coxen is regarded as accurately stating the law in this respect.

(iv) The final case where *Coxen* has been referred to is *Plummer v Attorney General of New South Wales* [2018] NSWSC 869, a decision of the Supreme Court of New South Wales. It was a factually complex case and it is not necessary to summarise the facts. The Court decided the case by reference to the various documents which constituted the various trusts which were the subject of dispute. However, the Court alluded to *Coxen* in the following terms:

> ***"115. A number of alternative hypothetical analyses lead to the same result. The first part of the 1978 Trust Deed, clause 3 could, for example, be characterised as a gift for a non-charitable purpose which failed. In such circumstances, no possibility of apportionment of the property between the two purposes would arise and the trust property as a whole would be treated as being held for the charitable purpose: Dal Pont and Gino Evan, Law of Charity (2nd ed, 2017,… at [13.13] citing*** *Re Coxen* [1948] Ch 747 ***at 752 per Jenkins J*** .

> ***116. This is an exception to the ordinary principle that would require some apportionment between charitable purposes and quantifiable gifts to non-charitable purposes (which thereby fail). The exception is appropriate in circumstances where 'as a matter of construction the gift to charity is a gift of the entire fund or income subject to the payments thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift'*** : *Re Coxen*… ***at 752 per Jenkins J***.
>
> ***117. This analysis is consistent with the Charitable Trusts Act, s23 which provides that the inclusion of a non-charitable purpose, as well as some charitable purpose, does not invalidate a trust."***

Again, this observation was clearly obiter. Furthermore, as Advocate Holden pointed out, it was an observation made in the context of a statute which dealt with the position. Nevertheless, it can be said to be a further example of a court apparently having no difficulty in accepting the validity of category (d).

194 In short, category (d) has been referred to with apparent approval by courts in Canada, Australia and Hong Kong, including in recent times. Although, except for *Wallace* (where category (d) was one of two alternative grounds for the decision), the observations were obiter and not necessary for the decision at hand, the fact remains that in not one of these cases is there any suggestion of any question mark over the existence of category (d) or the accuracy of Jenkin J's formulation of the four categories.

195 Fourthly, leading textbooks refer to category (d) with apparent approval. I have already quoted the relevant part of Tudor (11 th edition) (see paragraph 157 above) which clearly treats *Coxen* as being accurate. Jarman on Wills, 8 th edition (1951) quotes the passage from *Coxen* at 485 and then goes on to consider each of the four categories in turn. Category (d) is described at 487 in the terms quoted at paragraph 183 above.

196 Halsbury, Laws of England Volume 8 deals with the matter as follows at page 92:

> ***"Where there is a gift of a fund to be applied in the first place to a particular purpose with a gift over of the surplus, then if the first purpose cannot be carried out because it is unlawful, but the amount which would have been required can be reasonably ascertained, the gift to charity of the surplus over that amount is valid.*** But where the first purpose is so indefinite that the amount required for it cannot be reasonably ascertained, so that there is no ascertainable surplus, the gift fails entirely… .
>
> ***However, where a fund is given primarily for a charitable purpose, but is subject to an invalid charge, as, for example, for the perpetual repair of a tomb not forming part of a church, there is no apportionment, for the whole fund goes to charity."***

The observation in the final paragraph cites Kelly and a number of the grave cases in support.

197 Finally, according to paragraph 1 of the judgment in *Wallace*, Theobald on Wills (15 th ed, 1993 at 471–472) also accepts the statement by Jenkins J as authoritative, although I have not been specifically referred to the relevant extract from Theobald.

198 Fourthly, I do not accept the Nephews' submission that the existence of category (d) would render category (c) superfluous as all grave cases would fall within category (d). As Advocate Meiklejohn pointed out on behalf of the Attorney General, category (c) does not depend on the form of the gift and whether it applies to the whole fund. The rationale for category (c) is said to be that a trust for the maintenance of a grave is purely honorary. Accordingly, category (c) does not require any particular language. Conversely, category (d) will only apply if the charitable gift can be properly construed as applying to the whole fund subject only to the payments required for the non-charitable purpose. As nothing is required for this purpose (as it is invalid), the whole passes to the charitable purposes. Whilst in many cases the facts will fall within both category (c) and (d) (as in *Re Norton*), this is not necessarily so. A provision for the maintenance of a grave falling within category (c) will not necessarily meet the constructional requirement described in category (d). That is why category (c) is described as a special rule.

199 Fifthly, I do not accept the submission that category (d) should be rejected as it will lead to decisions which turn on fine and artificial distinctions depending on the exact manner in which the will is expressed. The existence of category (d) will of course require a court to consider the exact terms of the will and some cases will be found to satisfy category (d) whereas others will not. However, it is part of a court's regular diet to construe statutes, contracts and documents such as wills and trust deeds. Different decisions can be reached depending on the exact terms in which the relevant provision is expressed. I see no reason why category (d) should prove particularly difficult so as to lead this Court to reject its existence despite its apparent acceptance in textbooks and in other jurisdictions since 1948.

200 In summary, whilst I accept that the pre-existing authority for category (d) could be described as somewhat slender, there was nevertheless some authority to justify it and it appears to have been accepted as accurate since then both in case law and in textbooks. It is of note that I have not been referred to a single case or textbook which questions the existence of category (d).

201 Accordingly, for the reasons which I have given, I accept that the statement by Jenkins J in *Coxen* is an accurate statement of the position under English law. None of the parties has suggested to me that Jersey law should differ from English law in this respect and I see no good reason to hold that it does. On the contrary, it seems to me that there is much to be said for category (d). Although he is discussing two charitable gifts rather than one

charitable and one non-charitable provision, I find the sentiments expressed by O'Connor MR in Kelly (quoted at paragraph 178 above) persuasive. If on a proper construction, the testator is found to have intended that the whole fund should go for charitable purposes subject only to a prior non-charitable provision and such non-charitable provision is found to be invalid, why should the whole charitable gift fail and the estate pass to the testator's heirs at law on intestacy? This would not be consistent with the testator's intention.

202 Accordingly, even if I had found that category (d) did not exist under the law of England, I would nevertheless have held that Jersey law should apply it as being a proper and sensible approach which honours, so far as possible, the expressed intention of the testator.

(b) Does the Trust fall within category (d)?

203 The Nephews submit that, even if category (d) exists, the terms of the Bequest do not fall within it. On the contrary, they submit that this is a standard provision whereby the Will directs that assets are applied first and in priority to the trust for children and grandchildren and only thereafter for the further education of young Greek men. That is because the Bequest specifically provides that the children and grandchildren are entitled to priority. The Nephews submit that the Bequest therefore falls within category (a) or (b) depending on whether the amount required for the further education of the children and grandchildren is capable of quantification.

204 Despite this submission, I am of the clear view that, properly construed, the Bequest falls within category (d) (and the third situation as classified in Tudor). My reasons for reaching this conclusion are as follows:

(i) The relevant provision at clause 11(vi) and (vii) of the Will is set out in full at paragraph 4 above. It begins by saying that, upon the death of the last surviving Nephew, the whole fund is to be paid to the Greek Government for the purpose of creating a *Pret d'Honneur* trust known as the Dr Constantine Mattas Scholarship Fund and that the income of this fund is to be applied for the further education of young Greek men; in other words for a charitable purpose. This is the principal gift.

(ii) This provision is then made ‘subject to the proviso’ concerning the children and grandchildren. The proviso is set out at clause 11(vii) and begins by stating *‘provided always’* that the children and grandchildren should be *‘*..entitled to priority to further education in the manner aforesaid…’. It seems to me that the natural construction of these two sub-paragraphs is that the fund is intended for the young Greek men (i.e. a charitable purpose) subject only to any amount that is required for the children and grandchildren.

(iii) It is not therefore a case, as in many of the authorities, where there is a trust to pay the income or capital for the invalid purpose with the *‘remainder’ or ‘surplus’* being

held for the relevant charitable purpose. The Bequest starts by establishing the charitable trust for young Greek men but simply makes it subject to any priority payments for the children and grandchildren.

(iv) The Nephews place reliance on the fact that the children and grandchildren have priority. But, as can be seen from the opening words of the passage from *Coxen* (quoted at paragraph 158 above), all four categories in Jenkins J's formulation (including category (d)) are cases where "..a fund or the income thereof is directed to be applied primarily to purposes which are not charitable and as to the balance or residue to purposes which are charitable". The fact that the children and grandchildren have priority does not of itself assist in determining whether the provision of the Will falls within category (d) or category (a) or (b).

(v) The payments to the children and grandchildren will be finite in that there will come a time when they have all died or no longer wish to receive support for further education, yet the Trust for young Greek men will continue indefinitely. Indeed, it must have been within the reasonable contemplation of the Testator that there might be no children or grandchildren who wished to pursue post-graduate education, in which event there would be no call upon the income of the Trust for that purpose and the whole income would be devoted entirely to a charitable purpose, namely the further education of young Greek men.

(vi) Standing back, if I ask myself whether the intention of the Testator, as derived from the words he has used in the Will, is that the gift to the trust for young Greek men is a gift of the entire income subject to the payments thereout required to give effect to the provision for the children and grandchildren, I am in no doubt that it is. Given the invalidity of the provision for the children and grandchildren, this means that the entire fund and income is held on the trust for young Greek men.

(vii) I bear in mind the approach stated by Uthwatt J in *Re Parnell* at 110 that "If the words of the will are rationally capable of two constructions, and one of them results in an intestacy and the other does not, one should prefer the latter construction". I have not found it necessary to rely on that observation but, if I had been less clear as to the correct construction, it would be an additional reason to prefer the construction which I have adopted.

205 It follows that, the provision for the children and grandchildren being invalid for the reasons I have given, the whole fund (including any amount which might otherwise have been applied for the children and grandchildren), will on the death of the last surviving Nephew pass to the Greek Government for the income to be applied solely for the further education of young Greek men in accordance with the terms of clause 11(vi) but without being subject to the proviso in clause 11(vii).

(c) Is the amount required for the children and grandchildren capable of quantification?

206 In view of the conclusion which I have reached as to the applicability of category (d), it is not strictly necessary to consider this aspect. However, in case I am wrong in holding that category (d) exists and/or that it applies to the terms of the Will, I propose to consider this aspect briefly.

207 It is to be recalled that categories (a) and (b) provide that, where the amount applicable for the invalid non-charitable purpose can be quantified, the gift fails in respect of that amount but takes effect in favour of the charitable purpose as regards the balance. Conversely, where the amount applicable to the invalid non-charitable purpose cannot be quantified, then both the charitable and non-charitable trust fail because it cannot be said what part of the fund is held upon the charitable trust and accordingly there is no certainty of subject matter in relation to that trust.

The factual position

208 As stated at paragraph 160 above, in order that the Court could consider this argument, the Representor was directed to provide evidence about the capital value and income of the trust fund, both for the date of death and at the present time and to obtain, so far as practicable, evidence of the costs of post-graduate university education, both at the present time and in 1979. The Representor has made commendable efforts to obtain this information and the parties have very properly acknowledged the lengths to which it has gone.

209 As to the capital value and income, the affidavit of Mr Le Seelleur states that the Executor prepared a statement as at 8 September 1981. It shows a capital value of the estate at that date of £2,321,516 together with a net income since the date of death which amounted to an annual income of £131,945. As at 30 November 2022 (the latest available accounts), the capital value was £26,865,868 and the net annual income was £487,833.

210 As to the cost of post-graduate education, the Representor has investigated such costs for courses starting in September 2023 at five universities in England (albeit that Cardiff is in Wales), namely Cambridge, Cardiff, Durham, Exeter and University College London. At each university, the Representor has investigated the cost of four post-graduate courses, namely an MSc in Civil Engineering, MSc in Economics, MA in Archaeology and LLM in Law (the terminology used at Cambridge differs other than for law). It has not obtained any information about the costs of post-graduate courses at universities in France, Germany, Italy or any of the countries previously forming part of the USSR.

211 There is considerable variation in the purely educational costs between the various courses at the same university. For example, the costs at Durham vary from £28,500 for civil engineering to £24,500 for economics, a difference of some £4,000 per annum.

212 There is also considerable variation in the educational costs as between the different

universities. For example, in relation to civil engineering, the cost for international students at the five universities varied from £25,450 to £35,673, a difference of some £10,000. I should add that the Representor has produced figures both for home students and for international students but, given the Testator's background and lack of connection with the UK, it seems to me that the Court should proceed on the basis of the costs for international students.

213 It seems to me that the terms of the Trust are wide enough to enable the Greek Government to pay for maintenance costs of pursuing such further education as well as the purely educational fees. The Representor has helpfully produced information about maintenance costs for 2023. These also vary between universities, from the lowest annual figure of £9,300 to the highest figure of £16,522, a difference of some £7,000 per annum.

214 The Representor has prepared average costs across the different courses for each university and has then prepared an aggregate average figure for each university for the combined educational and maintenance costs. These vary from £31,562 to £50,216, a difference of some £18,654.

215 I acknowledge that the lowest figure is that of Cardiff, which is not in England if the Will is construed as limited to that country. However, I would be surprised if there were not other universities in England with a similar cost level. Even if one takes the figure for the least expensive of the English universities considered by the Representor (£35,647), there is still a variation of some £14,500 per annum below that of the highest figure.

216 It has not proved possible for the Representor to obtain information about the costs of post-graduate education at the above universities in 1979. Accordingly, the Representor has used the Bank of England's inflation figures in order to calculate the equivalent of each of the 2023 figures as at 1979. These calculations show that the average educational and maintenance costs for each university as at 1979 (i.e. the equivalent of the figures in the preceding two paragraphs) vary from £6,735 at the cheapest university (Cardiff) to £10,715 at the most expensive, i.e. a difference of some £3,940. If one takes the cheapest of the four English universities at £7,606, the difference is £3,109.

(ii) The submissions of the parties

217 The Greek Government submits that the Court should take a broad view when deciding whether sufficient quantification is possible for the case to fall within category (a). Advocate Alexander sought to draw an analogy with the decision in *Re Golay's Will Trusts* [1965] 1 WLR 969 where the court held that a direction to pay a *'reasonable income'* to a beneficiary was sufficiently certain to be enforceable as, if there were a dispute, the court would be able to determine what was a reasonable income. Thus, submitted Advocate Alexander, the Court in this case should take a broad view as to what might be required for the family trust, so there would be sufficient certainty of what was left for the trust for young

Greek men.

218 Advocate Alexander accepted that, if the Court's task was to put a specific value in pounds sterling on the amount necessary to satisfy the non-charitable family trust in 1979, such an exercise would be difficult given the variables involved in such a calculation. However, he submitted that it was not necessary to consider matters as at the date of death when the Will came into effect. There was always going to be a long delay before the Trust itself came into effect because of the accumulation period of twenty years and then the life interest to the Nephews; indeed it has still not come into effect some forty-three years after the Testator's death. The trustee of the Trust did not need to consider certainty of subject-matter as at 1979; this would only become relevant when the Trust comes into effect following the death of the last surviving Nephew. At that stage, it would be simple to ascertain on inquiry whether any of the limited number of children or grandchildren would wish to pursue further education and in what circumstances.

219 Even assessing the position at the present time, it was reasonable to assume that no further grandchildren are likely to be born given the ages of the children (between 49 and 54), that none of the children will wish to pursue post-graduate education and that there is every chance that none of the seven grandchildren (aged between 8 and 32) will wish to pursue post-graduate education (as opposed to under-graduate education). Following inquiry of the class of beneficiaries as to their intentions, an amount can be set aside to reflect the maximum amount reasonably required. The balance would then be available for the charitable trust.

220 Alternatively, the Court should proceed on the basis of the sort of projections discussed by the Attorney General, which would provide sufficient certainty of subject-matter for the charitable trust to be valid.

221 On behalf of the Attorney General, Advocate Meiklejohn agreed with the submission of both Nephews that the time for judging the validity of the Trust is the date of the Testator's death in 1979, not the present time or as at the death of the last surviving Nephew. But he submitted that it is possible to quantify the maximum amount which could realistically be attributed to the non-charitable family trust by reference to sensible estimates or assumptions as at 1979 as follows:

(i) Each Nephew would have four children.

(ii) Each child of a Nephew would in turn have four children.

(iii) This gives a total of forty persons who would be eligible for benefit from the invalid family trust.

(iv) Given that the family trust (if valid) would not have come into effect until after the twenty year accumulation period and the death of the last surviving Nephew, the Nephews' children would be likely to be middle aged by the time the Trust came into

effect and unlikely to seek further education. Furthermore, most graduates, even if of a suitable age, do not go on to post-graduate work and did not do so in 1979. Even if it is assumed that every one of the hypothetical forty potential beneficiaries would have gone to university, it is extremely unlikely that as many as 25% would have gone on to post-graduate work. On a generous assessment, if one assumed that 25% of the forty potential relatives would go on to post-graduate work, that would result in ten of the children and/or grandchildren possibly wishing to benefit from the invalid family trust.

(v) Taking the highest average cost (education fees and maintenance) for an international student in 1979 gives a figure of £10,715.65.

(vi) The cost for a one year post-graduate course for ten students at 1979 rates would therefore come to a total of £107,156.50.

(vii) Assuming an average of a two year post-graduate course, this would give the total cost for ten students of £214,313 at 1979 rates. This would therefore be the estimated maximum cost of fulfilling the invalid family trust.

(viii) The residuary estate as at date of death was £2,018,462.18 (the difference from the figure quoted at paragraph 203 above is because the Attorney General has taken the value of the net residuary estate as at the date of death, i.e. excluding income and capital gains between the date of death and the date of the accounts on 8 September 1981). From that had to be deducted tax, fees and administration expenses of £46,942.96 and legacies, bequests, annuity funds etc of £182,770.16, leaving a net residuary estate at death (excluding post-death income and profit on sales of shares since death) of £1,788,767.06.

(ix) The estimate of £214,313 for the total costs of fulfilling the invalid family trust represents just under 12% of the net residuary estate at date of death.

(x) On the assumption that the increase in the educational costs and maintenance would broadly correspond to the increase in the value of the residuary estate, the Court should apply the same percentage to the current value of the Trust as being the amount reasonably attributable to the invalid family trust, with the result that the remainder would be held upon the charitable trust for young Greek men.

222 Advocate Meiklejohn accepts that these figures can be varied by changing the assumptions. He also accepts that there is no data for universities in France, Germany, Italy or the former countries of the USSR, that the use of an inflation calculator necessarily results in approximate figures, and that there were many other universities in England in 1979 which no doubt offered other post-graduate courses than the four investigated by the Representor. Nevertheless, he submits that the estimate is generous to those interested in the family trust given that the figure of ten relatives who might be expected to benefit under that trust is a generous one, the estimate takes the highest figure for the annual cost of tuition and maintenance and there is an assumption that the whole of the educational maintenance costs of a beneficiary would be paid for rather than merely a contribution

towards them. The Court could therefore properly find that no more than this sum would be required for the invalid family trust.

223 The Nephews submit that there are too many uncertainties. Thus the amount to be awarded to any child or grandchild is at the discretion of the trustee; in 1979 it would not be known (i) how long the Nephews would live (the Trust only taking effect after the death of the survivor), (ii) the number of children and grandchildren the Nephews would have, (iii) the number of them who would engage in further education, (iv) the number of them who would ask the trustee for payment towards their further education and the amount of income which would be available in the Trust.

224 There was similar uncertainty in relation to the costs. There was no evidence in relation to the costs of further university education in France, Germany, Italy or the former countries of the USSR; there were many other universities in England and many other courses where the costs would be different from the amounts before the Court; apart from fees and maintenance, there could well be further expenses in the provision of further education such as the purchase of equipment; and a child or grandchild might fail and then choose to re-take the course thereby requiring further funds.

225 All these uncertainties, submitted the Nephews, were to be contrasted with the few cases where the court had held that the invalid prior gift could be quantified. Thus in *Mitford v Reynolds*, the invalid bequest was to build a monument for a grave. The Lord Chancellor held that he could direct an inquiry as to the amount required because the exact location, size and nature of the monument were known, unlike in *Chapman v Brown*. Similarly, in *Coxen*, where the judge indicated that he would have ordered an inquiry if he had found the prior bequest to be invalid, it would clearly have been a simple matter to ascertain the amount required for members to be paid one guinea to attend a realistic number of meetings. There was no comparison, submitted the Nephews, with the extent of the uncertainties and assumptions in the present case.

226 The Representor acknowledges that there are undoubtedly many difficult points which would need to be resolved on any inquiry and expressed some sympathy with the submissions made on behalf of the Nephews in this respect. However, the Representor suggested that the Court could proceed on the basis of certain reasonable assumptions as at 1979, namely that there would be five children of the Nephews, that each of them would have two children, or alternatively three; that, based on public data, the peak number of children in education at any one time would likely be three and the peak number of grandchildren in post-graduate education at any one time would be six if there were two grandchildren per child and eight if there were three grandchildren per child; and finally that each child or grandchild would most likely be in post-graduate education between (and including) the ages of 21 and 25.

227 On these assumptions, the Representor prepared a table calculating what the maximum demand might be on the fund in any one year and expressing this as a percentage of the

annual income of £130,061 in the period immediately following the Testator's death. The table assumes a figure for fees and maintenance of an international student of £8,646 (being the average of the five universities) as compared with the figure of £10,715 taken by the Attorney General. The resulting percentage of the fund's income is said to be 40% in the case of six grandchildren and 53% in the case of eight grandchildren.

228 As an alternative methodology, the Respondent prepared a second table aimed at showing the capital amount necessary to set aside in order to meet the funding demands for the children and grandchildren based upon the same assumptions, namely five children with either ten or fifteen grandchildren. In both cases it is assumed that those eligible would require five years of post-graduate funding. The resulting capital sum is expressed as a percentage of the value of the fund in 1981 of £2,321,516 (which is not the same as the figure taken by the Attorney General as at 1979). The resulting percentages are 28% for ten grandchildren and 37% for fifteen grandchildren.

229 The Representor does not suggest that these figures are definitive, but submits that there is sufficient likelihood of being able to quantify the amount required for the invalid family trust to justify the Court ordering an inquiry in order to determine the exact amount.

(iii) Conclusion

230 I accept the submission of the Attorney General, the Nephews and the Representor that the validity of the charitable part of the Trust must be considered as at 1979, when the Will took effect upon the death of the Testator. If support is needed for this proposition, I would quote from the judgment of Arnold J in *Re St Andrews (Cheam) Lawn Tennis Club Trust* [2012] 1 WLR 3487 at [51] where he said:

> ***"The validity of the trusts falls to be tested at the date of the trust deed.*** The fact that nobody realised that there might be a problem until nearly 70 years later does not affect the issue."

231 It follows that I reject the submission on behalf of the Greek Government that the validity is to be determined either by reference to the circumstances today or upon the death of the last surviving Nephew. It so happens that the query over validity was identified following the obtaining of the Tidmarsh opinion in June 2021 in connection with the French taxation issue. However, the issue could have arisen at any time since the date of death. On Mr Alexander's submission, the decision as to validity might vary depending on when the issue arose and therefore how much certainty (or uncertainty) there was in connection with the beneficiaries of the invalid family trust at that time. If the issue of validity had been raised at an early stage, it would not be open to a Court simply to defer a decision until, for example, the death of the last surviving Nephew.

232 Any court is disposed to uphold a charitable trust to the extent that it properly can.

However, I have reluctantly come to the conclusion that, judged as at 1979, it cannot be ascertained with any certainty what sum would be required for the invalid family trust and therefore what sum would be subject to the trust for young Greek men.

233 There are just too many uncertainties. For example:

(i) How long would the Nephews live?

(ii) How many children and grandchildren would there be?

(iii) How many of these would wish to pursue post-graduate education?

(iv) Of those who did, which of the eligible countries would they choose?

(v) Having chosen a country, which university would they choose?

(vi) Having chosen a university, which course would they undertake?

234 Depending on the answer to each of these questions, the amount required would vary considerably. Furthermore, apart from the above variations, there would be variation from year to year in the amount of income required. In some years there would almost certainly be no call on the income because there would be no children or grandchildren pursuing post-graduate education. Conversely, in other years there might be several post-graduate students.

235 Although they have each attempted to be extremely helpful, the difficulties are illustrated by the submissions of the Attorney General and the Representor. Apart from any differences as to the value of the residuary estate as at 1979 (which could easily be resolved), they have each made different assumptions and have reached widely varying possibilities as to the amount (expressed as a percentage of the net residuary estate) required for the family trust because of these different assumptions. I do not consider any of their approaches to be unreasonable and there is much to be said for all of them. But it highlights that it is really not possible to determine with any certainty what amount would be required. I accept the Nephews' submission at paragraph 225 above that, in cases where the court has found that the amount required for the invalid prior gift could be quantified, there has been no comparison with the extent of the uncertainties and necessary assumptions in the present case.

236 Altogether there is just too much uncertainty to be able to reach a satisfactory conclusion. Nor do I think that an inquiry could achieve a result. The difficulty in this case does not lie in the mathematical calculations; it lies in the assumptions which have to be made in order to decide what calculations are necessary. In my judgment, it is not for an inquiry to determine such assumptions, this is a matter for the Court. In any event an inquiry would be in no better position than the Court to determine what assumptions should be made.

237 In summary, with reluctance, I have concluded that the amount required for the invalid family trust cannot be sufficiently quantified. Accordingly, if I am wrong in my conclusion as to the existence and applicability of category (d), I would hold that the Trust as a whole is invalid and the entire fund passes upon intestacy.

Summary of conclusions

238 I would summarise my key conclusions as follows:

(i) The Bequest constitutes a trust.

(ii) If not charitable, the Trust is invalid (a) for want of certainty of objects and (b) because it is of indefinite duration. If the family trust is considered on its own, it has sufficiently certain objects but is void as being a trust of indefinite duration because it is not limited to lives in being plus 21 years.

(iii) The Trust as a whole is not a valid charitable trust because of the inclusion of the family trust.

(iv) Category (d) of Coxen applies with the result that, in view of the invalidity of the family trust, on the death of the last surviving Nephew, all the assets of the residuary estate will be held on the charitable trust for young Greek men in accordance with clause 11(vi) of the Will, but without being subject to the proviso contained at clause 11(vii).

(v) If the conclusion at (iv) is wrong, it is not possible to quantify how much is required for the family trust and accordingly the Trust as a whole is invalid and the whole fund passes on intestacy.