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Representation of the C Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Kerley, Nicolle
Judgment Date:	25 April 2012
Neutral Citation:	[2012] JRC 86B
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Text

[2012] JRC 86B

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner, and**Jurats Kerley**and**Nicolle.

IN THE MATTER OF THE REPRESENTATION OF A (A MINOR) AND B (A MINOR) BY MARK HOWARD TEMPLE (GUARDIAN AD LITEM)

AND IN THE MATTER OF THE C TRUST AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Between
A and B represented by their guardian ad litem Mark Howard Temple
Representors
and

Verite Trust Company Limited
First Respondent
George Machan
Second Respondent
D
Third Respondent

and

E
Fourth Respondent

Advocate M. J. Temple **for himself**.

Advocate R. J. MacRae **for the First and Second Respondents**.

Authorities

Lewin on Trusts 18 th edition.

In the matter of the H Trust [2007] JLR 569 .

The Law of Trusts by Thomas and Hudson, 2 nd edition.

S, L and E -v- Bedell Cristin Trustees [2005] JRC 109 .

Payne -v- Pirunico Trustees Limited [2001] JLR 1 .

Trusts (Guernsey) Law 1989.

Trusts (Jersey) Law 1984.

In re Esteem Settlement [2001] JLR 7 .

Trust — representors seek to set aside an instrument of appointment dated 5 th November, 2010.

THE COMMISSIONER:

1 The representors, through their guardian, Mr Temple, seek to set aside an instrument of appointment dated 5 th November, 2010, ("the instrument of appointment") under which they were effectively excluded from the beneficial class of the C Trust ("the Trust") during the lifetime of their grandmother, the fourth respondent, E.

2 The Trust was established by the first respondent Verite Trust Company Limited ("the

trustee") by declaration dated 30 th September, 1993, at the instigation of the representors' grandfather, G, who settled the majority of the assets ("the settlor"). The settlor was married to E (who we will refer to as "the widow") and they had one surviving son by their marriage, namely D (who we will refer to as "the father"). He married H, who was born in Peru of an English mother and Peruvian father (we will refer to her as "the mother"), on 16 th May, 2001. The representors are their two children, born in July 2004 and July 2006 and who are seven and five years of age respectively (who we will refer to as "the grandchildren"). The first grandchild was born shortly after the settlor executed his last letter of wishes on 20 th June, 2004, when his health was failing. He died later that year.

3 Subsequently, in January 2007, the marriage between the father and the mother irretrievably broke down and she went to live in Peru with her mother, taking the grandchildren with her. Contact between the father (who lives in England) and the widow (who lives in Greece) on the one hand and the grandchildren on the other hand, has been sporadic.

4 On 15 th December, 2008, the father commenced divorce proceedings in the Family Division of the High Court of Justice of England and Wales and a decree nisi was pronounced on 24 th March, 2009. A decree absolute was made on 16 th October, 2010. On 27 th March, 2009, the mother commenced ancillary proceedings against the father which led to a final judgment and order of Moylan J on 27 th July, 2010. The decision to exclude the grandchildren was taken in the context of those proceedings.

The Trust

5 The Trust is a discretionary trust in familiar form. The beneficiaries are listed in Part II of the second schedule of the Trust Instrument as follows:-

(i) The settlor;

(ii) The widow;

(iii) The father;

(iv) The grandchildren and remoter issue of the settlor and the widow (now living or hereinafter born during the Trust Period);

(v) Any body organisation or association the objects of which are by the law of the Island of Jersey charitable;

(vi) Any person who is the subject of a nomination under Clause 3(2) of the Trust Instrument.

6 Originally, a protector committee was established under the Trust Instrument comprising the

settlor, the second respondent George Machan and Advocate David Le Quesne, but at the material time, George Machan was the sole protector. He is also a director and the beneficial owner of the trustee. We will refer to him as “the protector”. Certain powers of the trustee can only be exercised with the written consent (defined in the trust instrument as the “prescribed consent”) of the protector, in particular, the power to exclude beneficiaries, the distribution of income or capital and the exercise of the trustee's overriding power of appointment (pursuant to which the instrument of appointment was executed). For the purposes of this judgment, we set out the clauses dealing with the power to exclude and the overriding power of appointment:-

Instrument of appointment

" *4. The Trustees may by instrument revocable during the Trust Period or irrevocable having first obtained the prescribed consent wholly or partially exclude any Beneficiary (whether ascertained or not) from future benefit under this Trust and thereupon such Beneficiary shall be excluded accordingly****PROVIDED THAT****this power shall not be capable of being exercised so as to derogate from any interest to which such beneficiary has previously become indefeasibly entitled whether in possession or in reversion or otherwise.*

……

8 (1) The Trustees shall hold the Trust Fund and the income thereof upon such trusts for the benefit of all or any one or more exclusively of the others of the Beneficiaries at such ages or times with such powers of appointment maintenance advancement and otherwise in favour of all or any one or more of them and which such administrative powers and subject to such provisions (whether or not such powers and provisions are similar to those contained in this Trust) and generally in such manner in all respects as the Trustees may at any times subject to first having obtained the prescribed consent revocably or irrevocably appoint but so that any revocable appointment if not revoked before the date of expiration of the Trust Period shall become irrevocable on that date.

……

9.(1) Subject as aforesaid the Trustees shall hold the Trust Fund and the income thereof upon trust to pay or apply the whole or any parts of the income or capital of the Trust Fund to or for the maintenance education advancement or benefit of all or such one or more exclusively of the others of the Beneficiaries for the time being in existence if more than one in such shares and in such manner generally as the Trustees shall in their discretion from time to time think fit subject to first having obtained the prescribed consent.”

7 The material terms of the instrument of appointment are as follows:-

" *1. In exercise of the power conferred by Clause 8(1) of the Trust Instrument and all*

other powers of the Trustee, the Trustee hereby irrevocably appoints that from the date of this instrument [the widow] shall be the sole Beneficiary of the Trust during her lifetime and that thereafter it shall hold the Trust Fund of the Trust upon trust for the benefit of the Beneficiaries described at paragraphs 3 to 6 of Part 11 of the Second Schedule to the Trust Instrument.

….

3. The trusts, powers and provisions contained in the Trust instrument shall continue to be applicable to the Trust Fund so far as is consistent with the provisions of this instrument."

8 As can be noted, the appointment is irrevocable. In the two days reserved for this hearing, time did not permit a discussion with counsel as to the precise effect of the instrument of appointment. Clause 8(1) of the Trust empowers the trustee to appoint the trust fund upon new trusts for the benefit of any one or more of the beneficiaries. It would seem that under the instrument of appointment no new trusts were appointed but the widow was declared the sole beneficiary of the existing trusts. In effect, the father and any grandchildren and remoter issue were removed as beneficiaries during her lifetime, in which event it might be argued that the trustee might more appropriately have exercised its power under Clause 4 to partially exclude the father and the grandchildren, as the only other living beneficiaries, from benefiting under the Trust during the widow's lifetime. In any event, it seems to us that the effect of the instrument of appointment is to exclude the father and the grandchildren as beneficiaries of the Trust during the lifetime of the widow so that she became the sole beneficiary.

Letter of wishes

9 The settlor executed a number of letters of wishes before signing the last letter dated 20 th June, 2004, but as the trustee and the protector relied very substantially upon his wishes for justifying the exclusion of the grandchildren, it is necessary to set out the last letter in full:-

" *To:*

The Trustees from time to time of the settlement dated 30 th September, 1993, created by an instrument of Trust made by Verite Trust Company and known as THE [C] TRUST.

The Trust Deed gives the Trustees discretionary powers over capital and income, including power to distribute either capital or income within a very long period amongst a class of beneficiaries from time to time.

I appreciate that I cannot fetter your discretion or determine the way in which you exercise your powers but I believe the Trustees may find it helpful if I express in this letter my considered views as to how I would wish such distributions and powers to be exercised. I appreciate that I only recently set out my wishes to you however as you are aware I have been unwell for some time

resulting in your communicating by necessity with my wife to whom I have been married for over 40 years and in whom I have great faith and trust. I would therefore ask that all future communications are directed through my wife as her long term financial requirements are of paramount importance and as you will understand it is my wish that her needs are provided for to the best of my ability.

Firstly, I would ask that the Trustees communicate directly with my wife on all matters concerning the Trust and that they liaise with her as to any financial requirements that she may have as the Trust Fund is principally for her benefit and therefore I would ask that the Trustees give favourable consideration to any requests that they may receive from my wife be it of an income or capital nature. Such requests that my wife may make will be in writing and signed by my wife and therefore I would ask in light of my health that you accept her signature as if mine for the purposes of my consent as protector. The security of the Trust Assets is also of paramount importance and needs to be carefully considered with regard to investment as I see no need for any undue risk and therefore would suggest assets are chosen of a conservative nature.

[The Father's] Fund

In the event of the death of my wife and on the understanding that I am no longer alive I would ask that the Trustees divide the Trust Fund equally so as to create two funds with each fund receiving 50% of any undistributed income. The first fund “the [father's] Fund” should be held for the absolute benefit of [the father]. I would however ask that the Trustees take appropriate taxation advice in the event that my son requests either a capital or income distribution and that a copy of such advice is provided to my son. The Trustees I ask consider favourably requests received from my son in the event that he chooses to ignore tax advice so received. Should the Trustees become aware at the time of receiving a request from my son to distribute either capital or income that by acceding to such a request would have adverse financial implications for my son (in matters such as divorce etc.) to refuse such a request until such time as matrimonial matters or other matters had been successfully resolved. In the event that [the father] predeceases either myself or my wife then I would ask that, that share for his benefit be added to the “Grandchildren's Fund as set out later in this letter.

The Grandchildren's Fund

As I have stated above in the event of the death of my wife and on the understanding that I am no longer alive I ask that the Trustees consider dividing the Trust Fund so as to create two funds of equal financial proportion. The second fund I would like the trustees to hold for the benefit of our grandchildren and if more than one in equal shares. Generally I would not like to see such grandchildren receiving a benefit until such time as each child attains the age of 35 years. I would however hope that the Trustees would provide assistance to such of my grandchildren that are in financial need, this being in circumstances where their parents have not provided for their general welfare and

maintenance to include education up to University standard.

I emphasise that I am fully aware that this letter is not binding on you and that you are free to administer the Trust Fund in accordance with the Trust Deed in your unfettered discretion. I merely wish to be of assistance to you in your exercise of such discretion by indicating my wishes in this regard. From time to time my wife may ask that you consider other matters or may feel the time has come to revise our wishes and I would ask that you give favourable consideration to her wishes as if they were my own.

Yours faithfully

Sgd. [G]

Date 20/6/04"

10 A number of observations can be made about this letter of wishes at this stage.

Evidence at the hearing

(i) The letter is concerned principally with the trustee's discretionary powers over capital and income. The settlor expressly makes reference to the exercise of such powers in the context of a discretionary class. There is no reference to the possibility of members of that class being excluded. In an earlier letter of wishes, there was one reference to the power to add beneficiaries.

(ii) The grandchildren's fund, comprising 50% of the trust fund, would only come into existence on the death of the widow, but even so, the settlor was concerned with the welfare, maintenance and education up to university standard of his grandchildren, expressing the hope that the trustee would provide assistance if they were in financial need. That concern is expressed in his earlier letters of wishes.

(iii) There is no reference to the mother benefiting. She is not a beneficiary and in his first letter of wishes, executed after the father and the mother were married, the settlor declared that he did not want her to be added as a beneficiary.

11 The Court received affidavits from the mother, Paul Baudet (a director of the trustee) and the protector. Their affidavits were accepted as their evidence in chief and they were cross-examined. The widow and the father provided affidavits in compliance with their obligation to make discovery but did not otherwise assist the Court or take part in the proceedings.

12 Before turning to that evidence, it is helpful to track the events leading up to the signing of the instrument of appointment from the documents held on the files of the trustee. The email exchanges are extensive and our reference to them necessarily selective but our intention is to illustrate the thinking of the trustee and the protector and their legal advisors as it evolved. We will then summarise the evidence of the witnesses before coming to our

decision. We can confirm that in coming to our decision, we have taken into account all of the evidence laid before us, even if we do not make express reference to every part of it.

Background to the instrument of appointment

13 The mother was represented in the English proceedings by A.W.G. Solicitors and the father by Harrops of Oxted, Solicitors. The trustee retained Carey Olsen and Withers, the latter in particular to assess the financial disclosure made by the mother and father in the English proceedings and the orders likely to be made by the High Court in so far as they might impact upon the Trust.

14 The financial means of both mother and father were limited. The mother worked full time in Lima as a teacher, earning £17,000 per annum gross (she informed us £11,000 to £12,000 net of tax) plus child benefit of £1,400 per annum. She was, and still is, lodging with her mother and stepfather. The father ran and still runs a lamp recycling business in England, from which he then derived an annual income of only £5,500. His other asset was the former matrimonial home in Surrey, which was worth £535,000, but which was charged to the Trust in an amount just short of £800,000.

15 The widow (now aged 67) had means independent of the Trust (upon which we will comment later) from which she had received limited distributions. The Trust had assets of some £4.8M. Throughout its history up to the English proceedings, the Trust had made income distributions significantly less than its net income receipts. The High Court found that the grandchildren's reasonable income needs were £2,500 per month or £30,000 per annum. The mother was looking for a lump sum to enable her to purchase a flat for herself and the children in Lima, a car and membership of a country club (the need for which we will comment on later) together with maintenance to enable her to look after and educate the children. Such needs were beyond the means of the father and mother and therefore it came down to whether and to what extent the trustee would assist the father in discharging his obligations to the mother and/or assist the grandchildren directly. It was clear, therefore, that from the outset of the English proceedings the Trust would be a central feature of the case. This was recognised by Mr Peter Alexander (“Mr Alexander”) of A.W.G. who wrote to the trustee on 19 th October, 2009, suggesting that it be joined in as a party to the English proceedings and saying this:-

> “ *I cannot emphasise enough that the steps that I am taking are not being taken in any hostile way and indeed I believe that I am acting both in the best interests of [the father] as well as the children who are the potential beneficiaries of the Trust*.
>
> *You may be aware that [the mother] is now living in Peru with the children of the family and she is living in her mother's house*.
>
> *What I am hoping is that the Trustees will be prepared to consider benefiting the children both by way of capital in order to buy them a suitable property in which to live and equally provide the children with income to cover both their support*

and education.

That is to say [the father] is currently paying maintenance for the children at the rate of US$1,100 per month and you will appreciate that this is hardly adequate to support the children in Lima which is on a par with London for the cost of living.

In order to assist the Trustees in deciding whether to benefit the children under the terms of the Trust I wonder what information the Trustees will require to assist them in making a decision and for example would they wish [the mother] to come to Jersey to meet them. I would hope that the Trustees would then be prepared to look on this request in a sympathetic way.

Also if it would be helpful I am prepared to come over to the Island to discuss matters with you.

Obviously any help that they can give will assist in bringing the expensive financial proceedings between the parties to an end.

I wish to end this letter by emphasising again that it is not written in any hostile way and it is hoped that it will be viewed on a friendly way so that the Trustees can consider carefully the best interests of the children."

16 At this stage of the disclosure in the English proceedings it would seem that the mother and her advisors were not aware that the grandchildren were beneficiaries of the trust; hence the reference to them being potential beneficiaries. The trust had no assets within the jurisdiction of the High Court and Carey Olsen therefore advised the trustee against submitting to the jurisdiction of the High Court.

17 The widow was resistant to any assistance being given either to the father or to the grandchildren. In his email advice of 20 th November, 2009, (sent before he had seen the letter of wishes) Advocate Buckley of Carey Olsen stressed to the trustee and to the protector that the grandchildren's position must be considered independently of their parents' position and the widow's opposition to them getting anything needed to be considered very carefully " *because her rationale may be flawed and may be morally objectionable to the Court"*. Unless there were good reasons, he had advised at that stage that it would be extremely difficult to avoid assisting the grandchildren.

18 On 15 th January, 2010, A.W.G wrote a long letter to Carey Olsen setting out the background to the request for the trustee to consider exercising its discretion either in favour of the husband to enable him to meet any order which the High Court might make or in the alternative to exercise its discretion directly in favour of the grandchildren. In its reply of 5thFebruary, 2010, Carey Olsen sought further information in relation to the grandchildren, and Advocate Buckley made this comment:-

" *I should say that our client has some scepticism about your client's request on*

behalf of the children in the light of the fact that between your client and [the father], the children's needs appear to have been catered for during times of marital harmony and further since their separation without the need for reference to the Trustees."

19 In his judgment of 27 th July, 2010, to which we will come in a moment, Moylan J found that a rather surprising assertion and questioned whether the trustee was fully aware of the position of the grandchildren which was that they were lodging in their maternal grandmother's house and having regard to their clear income needs.

20 A final hearing of the English proceedings was fixed for the 26th, 27 th and 28 th July, 2010. Pressure was placed upon the trustee by a joint letter from A.W.G and Harrops dated 9 th February, 2010, on behalf of the mother and father asking for assistance in providing a capital sum to meet the mother's housing needs and a monthly sum to meet the expenses for the grandchildren and in particular their educational needs.

21 By letter dated 10 th March 2010 the protector sent Advocate Buckley the letters of wishes saying that the trustee and protector were not then minded to consider a distribution to the father which would only end up in the hands of the mother (bearing in mind that they had both been given a loan towards their housing needs in the past) but they were minded to consider assistance for the grandchildren, the quantum being dependent upon the contribution the parents were able to make and the financial information Carey Olsen had requested from A.W.G for that purpose.

22 The letters of wishes were considered by Advocate Buckley and he advised by email on the 17 th March, 2010, having summarised the same, that "… *subject to there being sufficient capital and income in the trust to meet [the widow's] financial requirements, the trustees have two options…"* which "…will boil down to ensuring the children (as beneficiaries) are properly cared for".

23 On 18 th May, 2010, the widow sent an email to the protector in relation to her own needs which would appear to be the only document held on the trustee's file in that respect:-

" *The first thing that comes to mind is to see whether there will be enough money in the trust to see me through to my old age.* I need medical insurance, which up to now I don't have and which is something that worries me tremendously, dentist, I need a car which I have not due to the cost, travelling with my friends, a maid once a week, hair dresser, a zillion things which I am doing without worrying about the expenses and the insecurity that old age bring along. I also think if it is possible to re-write [G's] Will to read that upon my demise the rest of the tribe inherit. You know my views as to how much I want to settle for. I refuse to give anything to grandchildren which I don't hear nor see."

She went on to express concern that having settled with the mother, the trustee would face demands from the father, who would be likely to pursue the Trust for what he considered to be his inheritance.

24 On 3 rd June, 2010, Advocate Buckley wrote to the protector with further advice, acknowledging the difficulty created by the widow's views. Having reviewed the letters of wishes, he gave this advice:-

> " *[The mother] is not a beneficiary and [the settlor] is quite clear that she should not inherit*.
>
> *As for [the widow's] position, it seems that she has not made much use of the trust fund to support her existence.* Perhaps you would let me know to what extent she has sought distributions of income since [the settlor's] death? She expresses a need for financial assistance and that assistance is likely to increase as she increases in years. Do you know what her needs presently are? What income is the trust producing and is it sufficient to cover her needs now and going forward? I am uncertain as to [the widow's] age, but clearly you need to take into account [the widows] needs going forward.
>
> *[The father] has sought financial assistance from the trustee.* The children have, through [the mother], also sought financial assistance from the trustee in respect of their general welfare, education and accommodation.
>
> *The starting point is that both [the father] and the children are beneficiaries and have a right to be considered for the purpose of benefiting from the trust.* As trustee, you have a discretion, notwithstanding the letters of wishes, to distribute income and/or capital. [The settlor] expressly wishes that in the event the children are not being cared for, then the trustee should step in and financially assist in their care when necessary notwithstanding his general wish that the children should not benefit until they are 35. However, this notwithstanding, you are also to consider [the widow's] needs given the wish that she benefit solely from the income of the trust until her death. Any decision you make therefore ought to have regard to this important issue because capital payments are likely to reduce the trusts income to her detriment."

25 Noting the trustee's preliminary view that it was not minded to consider the father's request but was minded to consider assisting the grandchildren, he went on to discuss the ways in which this could be done, saying this in relation to the relationship between the widow and the grandchildren:-

> " *You have expressed concern that [the widow] does not see the grand children and there is no relationship between them nor seemingly will there be, in addition to the fact that the grand children will have no understanding or appreciation of the wider [settlor's] family and the wealth generated by [the settlor].* These are important factors on one level, but they are and should not be persuasive in your decision making process."

26 He concludes as follows:-

> " *Going forward, and subject to confirmation of [the widow's] needs, I believe that the in principle decision to assist the grand children by purchasing a home owned by the trust in which they can live with [the mother]) is probably the correct decision.* I would be grateful for your instructions on seeking appropriate legal advice in Peru as to how this might be achieved. In relation to payments for the children's welfare and education, you might reasonably agree to this subject to periodic reviews as to both [the mother's] and [the father's] ability to provide financially for their children without the support of the trust. If you provide such assistance, then you might regard that assistance as being correctly applied to [the father's] "pot" so as not to damage the children's "pot".

He did not think that such assistance required the sanction or blessing of the Court, although this might be something the trustee would have to consider if the widow objected strongly.

27 The protector responded on 8 th June, expressing the view that £30,000 per annum for the grandchildren was not acceptable and saying this:-

> " *Both of the parents have a duty to contribute to the proper bringing up of their two children – the proposal to contribute £30,000 per annum would seem to be on the basis that both parents are walking away from their financial responsibility and throwing that at the Trustees"*.

28 There was no question, in his view, of a capital distribution to the mother as she was not a beneficiary. As for a payment of £300,000 to buy a house in Peru for the grandchildren to live in, he pointed out that the trustee had already provided substantial help to both parents in the UK but suggested that if the house in Surrey were to be sold, the best part of £600,000 would come back into the Trust, in which event a property in Peru could be considered with the remaining £300,000 put in a specially designated fund for the grandchildren, with a need to ensure that both parents were contributing to the upbringing of their children rather than adopting a "not my problem or responsibility policy".

29 In an email of the same date, Paul Baudet, for the trustee, expressed his full agreement with the comments of the protector, and said that he felt that a payment of £30,000 per annum to pay for the grandchildren seemed as if the mother was attempting to profit from this and that the father should give up his recycling business and get a job that paid something that he can use to support the grandchildren. He added the following;-

> " *Anything we do must be done on the understanding that this is in full and final settlement of any claim during the life of [the widow]*. I feel for her as she lives a life where she makes few demands of the Trustees, she wants a car but has been too concerned to ask for it so what I would want to do is set aside the

balance of funds for [the widow] during her life, [the father] and the children (through their guardian) will have to sign up to this so that we can take care of [the widow] during her lifetime as that was the true intention of the settlor. From my perspective the parents are just passing the buck and do not want to take financial responsibility and I agree, why should the Trustees. In relation to the visits to the UK, in my opinion not something I can dictate but it would be nice to think that [the father] as part of his divorce settlement can arrange something but he has to fight for it!"

30 Advocate Buckley responded to both the protector and Paul Baudet later that day, stressing the need to ascertain the present and future income needs of the widow and asking whether this information had been requested from her. He seemed to accept the general thrust of their objections that both the mother and the father appeared to be washing their hands of their financial responsibility for the grandchildren and instead seeking to leave that responsibility to the trustee – something he said needed addressing.

31 The protector was clearly very unhappy with the suggestion that the trustee should ascertain the widow's present and future income needs, saying in email response later that same day:-

" *I am not sure I am happy with this email and certainly if I was the Settlor I would be back from the dead and it would be Whitehaven all over again!*

Just because [the widow] has been careful in her requests doesn't mean surely that there is more for the grandchildren that leaves a very sour taste in my mouth. I must make sure my trust actually excludes grandchildren given the way this is developing. May be as Protector I force the resignation of the Trustee leaving [the widow] to appoint new Trustees resident elsewhere than Jersey – contempt? Prove it!!"

32 We assume that the reference to "my trust" is to a separate trust established by the protector for his own family. This is the first reference to exclusion we can see.

33 In a final email in what must have been a busy day, Paul Baudet said that the settlor would turn in his grave as the Trust was supposed to benefit the widow during her life and only on her death would anybody else benefit. He agreed to support the grandchildren, but only to a point, because they had their life ahead of them and could make their own way.

34 On 14 th June, 2010, A.W.G filed statements in the English proceedings by the mother, her mother and stepfather, which were copied to the trustee and to its legal advisers. The maternal grandmother's statement describes the impact of the mother and the grandchildren living with her and the financial pressures she and the stepfather were under. She expressed a particular concern as to the mother's ability to pay for the grandchildren's education in Lima expressing this view:-

> " *It is more important for the boys to be given a good start in life than it is to give money to them later in life"*.

35 On 14 th June, 2010, Carey Olsen forwarded advice from Withers on the English proceedings and the possibility of enforcement against the Trust. In summary, Withers considered that the English court was unlikely to view the Trust as a nuptial settlement capable of variation but that it might view the Trust as a resource available to the husband and the grandchildren. On that basis, any order for ancillary relief may be made against the father on the basis that he is in a position to make a request to the trustee for a distribution and if that happened, the trustee might wish to seek directions from the Jersey Court about the exercise of its discretion in that regard. In order to avoid this, the trustee could consider making an alternative offer of assistance:-

> " *To decline any assistance at this stage appears like an unreasonable response by the Trustee, irrespective of the powers of the Family Division and we consider that the Trustee needs to give serious consideration to the Husband and Wife's joint request.* If the Trustee considers it unreasonable that the Husband and Wife are looking to the Trustee to meet their obligations for the children's education and maintenance, the Trustee could offer something less or on terms. It could offer to purchase a home in Peru at a specified price for the children to live in and could offer a lesser sum than the £30,000 requested on the basis that both parents should contribute the balance. Alternatively the Trustee could agree to pay £30,000 for a limited number of years with a view to reviewing this according to the children's needs and their parents' ability to contribute to their support."

36 Advocate Buckley clearly concurred with that view. Having seen the letter of wishes, Withers further advised on 14 th June, 2010, as follows:-

> " *We note there is provision in the penultimate paragraph of the 2004 letter of wishes to provide for the grandchildren if they are in "financial need" where their parents have not provided for their "general welfare and maintenance".* On that basis, any potential distribution by the Trustee for the children's education and maintenance could be earmarked out of the Grandchildren's Fund. This would address any potential concerns that the Trustee may have about making any distribution directly to the Husband which would be contrary to the settlor's wish that no distributions are made from the [father's] Fund "which would have adverse financial implications for my son (in matters such as divorce etc)".
>
> *Though [the widow] objects to any distributions to the Husband and the Grandchildren, it seems to us that it is difficult for the Trustee to refuse to make any distribution at all if the value of the trust fund is still worth anywhere near £4 million."*

37 On 18 th June, 2010, Advocate Buckley gave the following advice to the protector by email,

advice which we consider to be significant in terms of the ultimate decision made by the trustee:-

> " *There are two separate issues at play here:-*
>
> > *1. The ancillary relief which the family court will order [the father] to pay, and that will be determined based on [the father's] financial resources, potentially including the trust; and*
> >
> > *2. The children's request, in their capacity as beneficiaries, for financial assistance*.
>
> *There is the potential for these issues to be confused.* At the moment we are focussing on (1), but clearly strong references are being made to the children's interests as beneficiaries as per (2), but this cannot form part of the ancillary relief claim. You will have to consider separately however, how the trustee might exercise its discretion and assist the children. That might be influenced by the nature and scope of any order made in the ancillary relief proceedings and the extent to which, if at all, you would assist [the father] satisfying such an order.
>
> *We need to discuss this matter generally and perhaps we can do so either before, after or during our meeting with [the widow]."*

38 We think this advice is significant because it correctly identifies the two issues at play firstly the English proceedings and the father's potential obligations to the mother under any orders that might be made and secondly the grandchildren's request as beneficiaries for assistance. As will be seen the trustee assisted the father discharge his obligations to the mother under the orders of the High Court but far from considering how to assist the grandchildren, the trustee proceeded to exclude them from any possibility of benefit during the lifetime of the widow.

39 Advocate Buckley and the protector met with the widow on 22 nd June, 2010, and we have Advocate Buckley's typed note of that meeting. The views and comments attributed to her are extreme. In order not to exacerbate already damaged relations we will not set out those views and comments in full but she was vehemently opposed to any benefit being given to the grandchildren during her lifetime. She is noted as saying that the settlor would not have made the grandchildren beneficiaries if the mother and father were not together and that he would have had no problem disinheriting them. Her overriding concern was that the mother would use the grandchildren to drain the trust fund. It was a difficult meeting, but it is clear from the note that the widow did eventually accept that in view of the risks involved in the English proceedings and the relatively small amounts the mother was seeking for the grandchildren, the cheapest and simplest solution commercially to the issue was to agree to help the father by settlement of the lump sum claim and that only. The trustee could then consider what steps it might take to protect the Trust for the widow's sole benefit for the rest of her life. It was pointed out that save for any steps the trustee might take to ring fence the assets, there was nothing to stop the grandchildren from seeking financial assistance from

the trustee, as they were beneficiaries and " *the trustee would look bad in the Court's eyes simply refusing to help them"*.

40 On 25 th June, 2010, Mourant Ozannes wrote to Carey Olsen saying that it had been instructed by A.W.G to act on behalf of the mother and the grandchildren in Jersey, making it clear that they were seeking from the trustee a distribution of £325,000 to the father so that he could make a lump sum payment to the mother to enable her to purchase a house and meet other expenses, and this by way of a clean break, and maintenance on behalf of the grandchildren of £30,000 per annum until they had completed their education, including university.

41 On the 28 th June, 2010, Withers, having reviewed the income figures of the mother and father as disclosed in their respective forms E, advised that based on their own incomes they were short by some £8500 of the sums needed to maintain and educate the grandchildren and this taking no account of their own maintenance requirements.

42 On 29 th June, 2010, the protector emailed Advocate Buckley reiterating his earlier view against a capital payment to the father but saying that in the alternative he would consider the sale of the house owned by the father in Surrey and the use of the proceeds to settle his financial matters with the mother. Noting that the widow was against any payment either to the father or the grandchildren and whilst having strong regard to her views in this respect, he said this:-

" *I feel the Trustees need to have concern for the welfare and maintenance of the grandchildren and whilst this is a duty of both the parents which they should not neglect or abandon clearly there is a strain on the finances of both [the mother] and [the father] and as a result of which and whilst we will not take on parental role I do feel a sum of £10,000 per annum could be set aside by the Trustees for the next three years to assist with the general welfare and maintenance of the grandchildren.* In arriving at the above figure I would be more than happy to reconsider but would want independent advice from a party in Peru but again I stress it is not for the Trustees to take on the responsibilities of the parents who must contribute to their own creation. In three years from now the trustees would wish to review the finances of the parents in particular [the father] as his contribution to the maintenance of his children does seem extremely low which tends to suggest his own quality of lifestyle cannot be that great."

43 Thus notwithstanding the strong views of the widow, the protector, at least, remained concerned at this stage for the welfare and maintenance of the grandchildren. This is the last recorded reference that we can see by either the protector or the trustee to the welfare of the grandchildren. In a matter of weeks following a number of telephone calls between the protector and the widow (of which there do not appear to be any notes) and exchanges of email a plan had been formulated for the trustee to exclude the father and the grandchildren.

44 On the 2 nd July, 2010, the father forwarded to the protector the advice he had received from Harrops on the likely orders the High Court would make against him at the final hearing later that month. The trustee had in the meantime taken advice on the possibility of the Trust acquiring a property in Lima for the mother and grandchildren to occupy, which it discounted for practical reasons, and after deliberation the protector was in a position on 5 th July, 2010, to indicate to the father that the trustee might be prepared to consider a distribution of £300,000 to him, funded by the sale of the house in Surrey which was fully mortgaged in favour of the Trust. In an email to the protector of the same date, the widow stressed the need for any payment to be final as she did not want either the father or the mother coming back for further funding.

45 The possibility of a distribution to the father was formally minuted at a meeting of the trustee chaired by the protector held on 6 th July, 2010, which read as follows:-

> " *The Chairman stated that he did however wish to draw the attention of the Meeting to the fact that [the widow], the principal beneficiary of the Trust, had agreed by email and by telephone to a "subject to privilege" letter being sent by the Company's advocates here in Jersey to the solicitors acting for [the father] and whereby the Trustees may consider a distribution to [the father] in a sum of £300,000, such distribution to be effected as a result of the sale of a property presently occupied by [the father] the remaining £300,000 from that sale to be returned to the Trust Fund."*
>
> The matter was taken up with Harrops so that tax advice could be obtained.

46 This indication of assistance enabled the parties in the English proceedings to agree terms principally that the father would pay the mother a lump sum of £295,000 using the loan from the Trust and maintenance for the children of £30,000 per annum; an agreement that in so far as it related to maintenance could only have been reached on the basis that the Trust would give favourable consideration to assisting the father bearing in mind his lack of resources. A.W.G expressed grave doubts as to the willingness of the trustee to make both the loan and to provide the support for the grandchildren. It talked in terms of "enforcement" against the Trust and suggested to Harrops in a letter of 16 th July, 2010, that the parties should jointly make an application to the Court for directions appointing the mother as a beneficiary and for the trustee to make the payment and provide the support for the grandchildren.

47 The trustee then progressed with the consent of the widow to the making of a formal offer of a loan as opposed to a distribution, in that Advocate Buckley wrote to Harrops on the 16 th July, 2010 in the following terms:-

> " *We confirm that the Trustee has resolved to make available to [the father] the sum of £295,000 by way of loan, the purpose of which is to enable [D] to compromise on a full and final settlement basis certain proceedings between him and [the mother] presently before the Family Court."*

48 A.W.G drew back from its suggestion that a joint application be made to the Court, but continued to press for confirmation that in addition to the loan, the trustee would meet the maintenance costs of the children, or some part of it. In a letter of 21 st July, 2010, Mr Alexander expressed his firm's position in this way:-

> " *Would it be possible for you to write to me a letter confirming that the Trustee will be prepared to pay annual maintenance for the children at the rate of £30,000 in advance on the 1 st August each year or whatever payments they are prepared to make so that I can produce this to the Court on Monday*.
>
> ….
>
> *Obviously the provision of support for the children is more important during their childhood so that they can obtain the best start in life possible and more particularly the best education*.
>
> *On reflection our use of the word "enforcement" is regretted*.
>
> *We are no longer considering making such an application to the Jersey Court but we would still ask the Protector/Trustee to consider this request carefully*.
>
> *What we would like to see as the final outcome to all these proceedings is for a relationship to develop between the Trustee and our client so that jointly they can make financial decisions in the best interests of the children*.
>
> *We would ask the Trustee whether he is prepared to meet our client or to write to our client but generally to set up a dialogue between them without the intervention of lawyers*.
>
> *We would hope that this is still something that can be arranged at this late stage" (* his emphasis)

49 By email of 21 st July, 2010, Advocate Buckley made this comment to the protector in relation to this request:-

> " *As to this, and as a general comment, I do not recall that [the father] has made a specific request of you as trustee to pay for the children's maintenance.* Either way, I think I can characterise your position as being that the trustee has considered the request carefully (whether coming from [the father] or the children) and that you have reached a decision that you are not prepared to assist in the way requested – you are of course not obliged to. A repeat of the request might cause you to reconsider your decision but unless there is a change in circumstances which might cause you to change your mind, then simple repetition of the request is unlikely to cause you to do so. In any event, while there may be doubt that [the father] may not be able to afford the maintenance payments (a fact of which you are aware), he is not yet obliged by

court order to do so and consequently he has not yet defaulted in his payment obligations. Primary in your decision making process has been for whom this trust was intended to be established and in that regard you are in no doubt that it was for [the widow]. I have advised separately on this issue and I await your instructions."

We will come to the separate advice in a moment, but it related to the plan to exclude the father and the grandchildren.

50 Advocate Buckley responded to Mr Alexander's request on 21 st July, 2010, as follows:-

" *The Trustee has considered this matter and I have apprised you of the extent to which the Trustee is prepared to assist [the father] in resolving, on a full and final settlement basis, the ancillary relief claims against him by your client.* As the Trustee understands matters, the proposals made by [the father] are agreed between him and your client save as to the amount of costs which might be payable by him.

The Trustee has not submitted to the English jurisdiction and it is not able to provide you with the confirmation you seek or any confirmation which might be regarded as its consent to be bound by any order of the English court. Neither this letter nor our letter to you dated 20 July, 2010, should be regarded as any such consent.

The Trustee sincerely hopes that your client and [the father] are able to resolve the proceedings by consent on a full and final settlement basis in accordance with the agreement we understand has been reached between them without the need or expense of a final hearing."

51 Mr Alexander responded as follows:-

" *I know your position and understand it and you may rest assured that I will take nothing in your correspondence to me to be a submission to the jurisdiction of the English Court*.

I also know that we are both lawyers but can we not both step out of that box and start acting in the interests of these two very young boys?

They deserve protection from the Trust and standing by strict legal positions is doing them no favours.

Unfortunately there will have to be a Hearing on Monday so that the Court can enter the Order and deal with the question of costs. I hope that on reflection the Trustee will be prepared to help [the father] pay those costs so that my client does not have to eat into her lump sum to meet them.

You will appreciate that the lump sum has specifically been allocated to

housing etc.

I send my kind regards and nothing that I say in my letters should be taken by you or the Trustee personally in any way."

52 The father was now acting in person and Mr Alexander made this comment to Advocate Buckley in his letter of 21 st July, 2010, in the context of the mother's costs:-

" *I feel that it is only reasonable that [the father] should pay those costs and I would hope that the Trustee will see fit to increase the loan to [the father] to enable him to meet those costs*.

It would be entirely unfair if my client's lump sum were to be reduced by the amount of my costs and already my client's mother has had to sell a property to fund the litigation.

It is such a pity that the Trustee did not take an interest in the two boys, the beneficiaries of the Trust, from the outset and I hope that he will for the future.

It is not fair that he should have ignored the interests of what might be regarded as his wards.

I repeat again that my client will still face a shortfall in the amount required to support the children and again I hope that the Trustee might be prepared to take on responsibility for the children's school fees.

The cost to my client's mother and stepfather in supporting the children since they have been in Lima has been over $100,000."

53 On 25 th July, 2010, the widow emailed the protector as follows:-

" *At last the dreaded date has arrived.* I spoke to [the father] a little while ago and reminded him that the Trust has no intention of contributing £30,000 a year for the maintenance (education) of the children and to be very careful as to what he is committing himself, especially if he cannot afford to pay this exorbitant amount on his own. He is convinced (according to his lawyers) that [the mother] will be coming after the Trust. I hope that the Trust has taken the necessary steps should they pursue us and to act immediately to our plan of modification.

If you have a moment, please drop me a line to calm my nerves which are taking the better off me."

54 The plan of modification she refers to is the plan to exclude the father and the grandchildren from the Trust during her lifetime. It is clear from the evidence of Paul Baudet that the father was made aware of this plan before the High Court hearing, as this email from the widow suggests, but before we return to that, it is helpful to quote from the

judgment of Moylan J of 27 th July, 2010. In that judgment, he noted that the mother's claims had been agreed, namely that she would receive a lump sum of £295,000 and that she would receive periodical payments for the benefit of the grandchildren at the combined rate of £30,000 per annum. The only matters which were not agreed were whether there should be a nominal order for periodical payments in her favour and what contribution the father should make to her costs. Quoting selectively from the judgment:-

" ***4. The husband's position in respect of periodical payments for the children has changed because, he says, he is no longer confident that the trustees of a discretionary Jersey trust (which I will return to later in this judgment) will exercise their discretion so as to enable the proposed payments to be met by him***.

…

11. As I will explain later in this judgment, a central feature of this case has been the Jersey discretionary trust, of which the husband's mother, the husband and the children are beneficiaries .

…

25. It is manifest from the parties' evidence that they themselves own no substantial capital resources and also that their own incomes are inadequate to meet their respective needs, as stated by them, and their obligations. I include within their respective needs and obligations the needs of the children and their respective obligations to seek to meet the children's financial needs .

26. The most significant financial resources in the case are the assets held in a Jersey discretionary trust. It is called the C Trust and was set up on 30 th September, 1993, by a Jersey trust company. Essentially, as I understand it, the assets which were used to establish the fund were the husband's father's (or alternatively his parents') assets. The named discretionary beneficiaries are the husband's father, his mother, the husband and the husband's father's grandchildren; in other words the children of this family. The trustees have very broad conventional discretionary powers under the trust deed .

…

67. As I have indicated, the husband has been paying, first $1,100 per month and, more recently, $1,540 per month. This is clearly not a sum sufficient to meet the shortfall in the children's income needs as set out in the wife's Form E and as corroborated in the statements from the wife's mother and step-father. Further, the husband's agreement in correspondence to the payment of £30,000 per annum (£2,500 per month) clearly reflects the reality that this sum is required to meet the children's reasonable income needs. It clearly demonstrates the parties' collective view that that sum is required to meet the children's reasonable financial needs .

68. Having regard to the evidence which I have read and to the course of this case, I am entirely satisfied that a sum of £2,500 per month is required to enable the children's reasonable income needs to be met. The question is how is it to be paid?

70. The husband himself, apart from, if accurately described, the "benefit" of a loan, has not received a benefit from the trust. Until very recently, he believed that the trustee would enable him to meet the proposed payments for the children of £2,500 per month. The trustee had seen the correspondence and had indicated to him that, when he required the funds, his request would be considered at that time. Whether in fact this would be a tax-efficient way of meeting the children's needs rather than by making direct payments to them or to their mother on their behalf is not for me to decide, but it is a matter, I would suggest, the husband raises with the trustee. However, as I have said, the husband clearly believed, until very recently, that he would be able to meet the proposals set out in the correspondence from his solicitors .

71. As I have already indicated, on Sunday night the husband spoke to his mother who told him that the trustee was in fact unlikely to support the payment of maintenance for the children. No explanation was given for this apparent change of position .

72. I find it difficult to understand how the trustee could pre-empt the exercise of its discretion in this way. Further, no reason has been advanced to explain why the trustee might choose not to exercise its discretion so as to enable, to put it directly, the children's income needs to be met. It is clear to me, as I have already indicated, on the evidence in this case that the children have a substantial income need equal to the proposed amount of £30,000 per annum. It has not been said that, if the trustee was to exercise its discretion by providing the annual sum of £30,000, this would in any way prejudice the interests of the trust, or of the other beneficiaries. Indeed it would be to the manifest advantage of three of the named beneficiaries, namely it would enable the children's financial needs to be met and it would enable the husband to meet, if that is the route chosen, his obligations to ensure that the financial needs of the children are met .

73. On the information available to me, including in particular the needs of the children, the resources available in the trust and the accumulated balance on the income account, I am satisfied that the interests of the trust and of the other named beneficiary, namely the husband's mother, would not be appreciably damaged if the trustee was to exercise its discretion so as to enable the children's income needs to be met in the way proposed in the correspondence. I am accordingly satisfied that, to comply with my view of the justice of this case, it would be appropriate for me to make an order that the husband do pay periodical payments to the wife for the benefit of the children in the amount of £30,000 per annum .

74. Before leaving this aspect of the case, having regard to my comment that,

on reflection, the trustee might decide that it would be more appropriate to exercise its discretion to benefit the children directly by payments to their mother in Peru, I make it clear that if, after the trustee has considered the position and after an application, if appropriate, has been made to the Royal Court of Jersey, I would be prepared to consider the structure of my order to accommodate the possibility that payments are in fact going to be made direct to the children if it is considered that this is a more beneficial way of the children's income needs being met."

55 In the context of the father's late disclosure in the English proceedings of his status and that of the grandchildren as beneficiaries of the Trust, Moylan J said this at paragraph 34:-

> " ***It is not to the benefit of a party to proceedings, nor is it, in my view, to the benefit of beneficiaries of a trust, for an inaccurate position to be provided to this court.*** I consider there is an obligation, consequent on the obligation imposed on the husband in these proceedings, on trustees to ensure that full information is provided to a beneficiary who is involved in proceedings for ancillary relief in the English courts to ensure that the beneficiary has sufficient information to enable them to discharge their obligation to give full and frank disclosure."

56 It is a matter of concern to us that the High Court was not informed of the plan to exclude both the father and the grandchildren from the Trust, a plan formulated before the hearing took place and implemented shortly thereafter. This is particularly so in the light of the formal undertaking given by the father to the High Court to use his best endeavours at all times to obtain the consent of the trustee to the making of the payments under the current and any future orders; an undertaking given at a time when he had been consulted on and apparently raised no objection (if not consented) to the plan to make it impossible for the trustee to do so. The High Court proceeded on the inaccurate assumption that the father and the grandchildren would continue to be beneficiaries of the Trust.

57 Moylan J made orders for the payment of the lump sum and maintenance for the children and that the father should pay the mother £1 per annum by way of nominal maintenance during their joint lives. The lump sum payment was not therefore in full and final settlement. He also ordered that a transcript of the judgment should be prepared and the parties given leave to disclose a copy to the trustee or its representatives.

58 Returning to the plan of modification, Advocate Buckley emailed the protector on 20 th July, 2010, as follows:-

> " *I have now spoken with one of my non contentious trust colleagues in relation to how this trust fund might be protected and ring fenced from further claims either by [the father] or the children.* It seems that you have two options which we think would not be open to challenge by [the mother], the children or [the father]. Pursuant to clause 8(2) of the trust you have power to create any

interests whatsoever in either the capital or income or both whether absolute or limited, whether in possession or reversion and whether revocable or irrevocable. Accordingly, we see two options for you:-

> *1. Granting [the widow] an interest in possession. No other beneficiary could then benefit during her life time; or*
>
> *2. Settle new trusts so that [the widow] is the only possible discretionary beneficiary during her life time*.

…

How and when this occurs is important. This must occur after the loan has been made to [the father] – to do it before would be a breach of trust, although subject to [the widow's] consent, there would be no one to complain about that breach during her life time.

…

The appointment can be made revocable or irrevocable. You will need please to consider this. Unless there are good reasons to the contrary, we would usually advise that it should be revocable, but you may have other views in this case."

59 In his response, the protector asks for the safer of the two options from the Trust's point of view to be chosen but does not expressly comment on whether the appointment should be revocable or irrevocable. When the first draft was produced on 29 th July, 2010, it was expressed as being irrevocable.

60 The widow then changed her tune in relation to the proposed loan to the father to enable him to meet the lump sum order. On 8 th August, 2010, she emailed the protector saying that she regarded the proposed loan to the father as being excessive and unjustifiable and requested the trustee not to make it until she had had the opportunity of taking her own legal advice in relation to the Trust and to the divorce settlement. She then instructed Baker Platt to advise her. The protector in response pointed out that she had originally agreed to the loan being made to the father, but this would be held back pending her obtaining independent legal advice to which the trustee had no objection.

61 Advocate Buckley met with Advocate David Wilson of Baker Platt who expressed a concern on behalf of the widow that the lump sum order made by the High Court was not in full and final settlement as the terms of the trustee's offer of a loan required, and the door was still open, therefore, for the mother to bring further claims against the father. He also questioned whether the protector had a conflict of interest in his role as protector and as a director of the trustee.

62 Advocate Buckley raised the conflict point with the protector who in turn informed Paul Baudet of the need for him to consider the matter independently as trustee. Paul Baudetacknowledged that he had taken " *largely a back seat"* on the Trust, but did not see any conflict in the protector's role arising as he knew he would discharge his responsibilities appropriately. It is fair to comment that until this point the documents show the protector as having the primary conduct of the matter for the trustee.

63 Paul Baudet did then take advice from Advocate Buckley, who advised in his email of 3 rd September, 2010, that notwithstanding the absence of a full and final settlement between the mother and the father in the circumstances the trustee should proceed with the loan to the father:-

> " *Should the trustee now change its mind?* It is entirely possible for it to do so, although on reflection, I take the view that it would be risky to do so. That risk lies in the fact that [the father] will be left with no choice but to either appeal the Family Court order (difficult when it was made by agreement, partly based on the offer of assistance from the trustee) or to force you to make good on your offer by bringing proceedings in Jersey. There are also the risks that I referred to in my earlier e-mail today.
>
> *I think the better view of the letters of wishes would be to use them and the payment to [the father] and the risk to which the trust is potentially exposed, to justify your proposal to convert the trust to a life interest trust for [the widow].* It is well within the bounds of reasonableness in all of the circumstances for you to have agreed to help [the father] in any event and for you to take the proposed step to protect the trust fund for [the widow] going forward.
>
> *The fact that the claim against [the father] is not full and final is also a supporting reason to protect the trust fund.* From your perspective, the step will close off future claims against the assets by him (or the children). It would not prevent [the widow] seeking to benefit [the father] or the children if she were so minded to do so. To now resile from the offer to help [the father] in those circumstances may expose you to criticism in the event proceedings were brought in Jersey. I have expressed the view that we think the protection of the trust fund for [the widow] should be safe from successful challenge (I cannot say that it is safe from any challenge).
>
> *My view is that in all of the circumstances and looking at the matter in the round, you should make the payment and then declare that the trust is held as a life interest settlement for [the widow] thereafter.* I have said that I do not think directions are necessary at this time and I remain of that view. If the board is not able to agree, for genuine reasons, then a direction may be necessary, but you would have to surrender your discretion to the Royal Court. That should not be necessary in this case and the board should be able to agree how to proceed. If there is a conflict as to [the protector's] position as protector and his position on the board, then he should resign as protector as soon as possible."

64 Paul Baudet was concerned about proceeding with the loan in the light of the last letter of wishes of the settlor. He felt that the loan could only be made if the letter of wishes was ignored. He was given this advice by Advocate Buckley on the role of letters of wishes in any court proceedings:-

> " *Paul, if the matter came before the Royal Court, it would not ignore the last LOW [letter of wishes].* Let me add some commentary to this statement however.
>
> > *1. The LOWs are not binding on you; they are however important documents to which the trustee should have regard. The duty of the trustee is to act in the best interest of the beneficiaries but have regard to the wishes and intent of the settlor as per the LOWs. It is not appropriate to disregard one LOW in favour of another to fit the circumstances of any particular issue; you must have regard to the entirety of the settlor's wishes. On the other hand, LOWs should not be slavishly followed. For example, the wishes of a deceased settlor may no longer fit with the practical reality of the family's circumstances or how the fortunes of individual beneficiaries have developed over time. In other words, a LOW may simply become outdated*.
> >
> > *2. If the matter were presented to the Royal Court, the court would have primary regard to your duties and powers as trustee as per the instrument of trust. The court would then look at the settlor's wishes and the views of the beneficiaries as expressed to you. You, however, retain full discretion and the Royal Court will only interfere with the exercise of your discretion if the decision you have reached was so unreasonable in all of the circumstances that no reasonable trustee could have reached that decision when presented with the same facts and circumstances. The court will also look at questions of conflict of interest or whether there was any other matter which would vitiate your decision. The Royal Court does not have to agree with your decision but so long as your decision falls within the bounds of reasonableness, it will not be set aside*.
>
> *Applying these principles to this case, I would advise as follows:-*
>
> *In relation to the proposed step of making a loan to [the father], this clearly falls within your powers and discretions as trustee.* Equally, the creation of a life interest in favour of [the widow] also falls within your powers and discretions.
>
> *Should you/is it within the bounds of reasonableness to exercise such powers in the way proposed bearing in mind the settlor's wishes as a whole?* I have rehearsed the various arguments in this regard in earlier emails and my advice falls in favour of continuing with assisting [the father] and then taking a step, whether creating a life interest or some other step, to benefit [the widow] (as to this, our preference is to create a life interest – it fits with the LOWs; distribution/appointment to a new trust cuts out [the father] and the children completely. With a life interest, they remain beneficiaries but who can only benefit following [the widow's] death. That achieves precisely what the settlor

wanted."

65 The widow sought the imposition of conditions to the making of the loan, namely that it should be a once only payment, that the property in Peru should be in the grandchildren's name and that the lump sum payment should be in full and final settlement. Paul Baudet was now dealing directly with the widow and on 17 th September, 2010, he expressed these views to her by email:-

> " *From my perspective you and the Trustees have one aim and that is to protect as much money for the future whilst protecting your sons/family name, in my opinion we are strongly of the opinion that to do this the loan to your son must be made (on the understanding that he has no assets himself to use) this will ensure he settled his divorce which is a legally binding agreement*.
>
> *You and I know that his ex wife will take this all the way so we are risking him being made bankrupt!*
>
> *In addition to the above we have taken careful note of what your late husband wanted and that was for you to benefit during your life so we are planning to grant you a life interest, Carey Olsen have advised that the Trustees can do this as it is consistent with what was intended and will protect against the ex wife making claims against the Trust assets*.
>
> *I accept that she can always try to attack your son but if you have a life interest what damage can she do to the Trust assets, if we do not grant the loan and we have this matter outstanding it is hard to restructure and you open the door to allow her to come to the Jersey Court and I do not think this is wise*.
>
> *It is also my belief that by sacrificing the £300K we are protecting the greater value per advice from Carey Olsen and give the children time to grow up and move away from their mother and closer to your son"*.

66 The involvement of Baker Platt and the widow's resistance to the payment of £295,000 by way of loan to the father raised the prospect of legal proceedings on her part. In his email of 3 rd September, 2010, Advocate Buckley gave the protector the following advice:-

No note of advice on the prospects of a successful challenge was provided as far as we are aware.

> " *2. If the trustee carried through the proposal to convert the trust into a life interest trust (I can provide a note of advice as to why we say this works and should not be capable of successful challenge), the whole issue goes away. By this I mean that irrespective of the meaning or effect of the English order, because the trust fund is to be held as a life interest trust for [the widow], you can decline any request from any of the other beneficiaries until her death because of [the widow's] life interest*.

3. We think the prospect of a successful challenge by either the children or [the father] to the converting of the trust to a life interest trust are small. [The mother] would have even less prospects of bringing a successful challenge.

4. If you refused to now assist [the father] because of the change in circumstances (i.e. the settlement is not full and final) the prospects of [the father] are potentially bleak. [The mother] could seek a committal order against him, she could even possibly open up the whole application again and obtain an even greater order against him and/or possibly attack the trust. These are all matters we sought to avoid by concluding to assist [the father] in the first place.

5. Refusal to now assist in the circumstances might result in some embarrassment/criticism for you if the matter came before the Royal Court.

On balance, and subject to your comments, our view is that you should proceed with the making of the loan and finalising the loan documentation and then proceed with the conversion of the trust into a life interest trust in favour of [the widow].”

67 The father also took the line that he would only accept the loan of £295,000 if its payment by him to the mother would be in full and final settlement, leaving the trustee at an impasse as reflected in the file note of the telephone conference held between Paul Baudet and the father on 1 st October, 2010. In any event, both the father and the widow subsequently withdrew their objections and the loan proceeded, allowing the lump sum payment to be made (late) to the mother.

68 On 25 th October, 2010, Miss Connolly of Carey Olsen expedited a further copy of the draft instrument of appointment “ *by which [the widow] would become the sole beneficiary of the Trust during her lifetime with the other beneficiaries becoming capable of benefit thereafter”*. In an email of 4 th November addressed to Paul Baudet and Lewis Buckley, Miss Connolly mentioned that as this was a slightly unusual case, the trustee might wish her to minute the decision and the reasons for it, which might assist should the decision ever be challenged by one of the beneficiaries, which was possible even though Cary Olsen regarded the trustee's decision as being reasonable and had advised to that effect. She gave this further advice:-

“ *I believe that the Trustee's understanding (based on the letters of wishes produced by the late settlor, and conversations with him) is that it was at all times intended that the Trust would be for the primary benefit of [the widow] during her lifetime, and that the other beneficiaries would (all things being equal) only be considered for benefit after her death.* This position has been thrown into question by the recent divorce of [the father] and [the widow] was very concerned that her future well-being could be jeopardised by any claim that may be made in respect of the Trust either by [the father] or [the mother] (on her own behalf or more likely on behalf of the children of the marriage, who are beneficiaries (she is not)). [The widow] was agreeable to a loan being made by the Trustee to [the father] to enable him to pay a divorce settlement agreed with

his wife, and the Trustee, considering all relevant matters, agreed to take this step and that has been done. However, [the widow] is concerned that this should not lead to further claims being made.

It is therefore my understanding that the Trustee considered inter alia the following matters – there may be other factors which the Trustee had in mind when making its decision:-

1. The wishes and intentions of the settlor at the time when the Trust was established and at all times up to his death.

2. The competing needs and interests of all the beneficiaries of the Trust.

3. The understandable concerns of [the widow]; and

4. Its powers under the terms of the Trust, and the purposes for which those powers can and should be exercised."

69 Paul Baudet emailed Advocate Buckley on 2 nd November:-

" *I am back from vacation and have seen the draft instrument of appointment granting [the widow] a life interest, this was the route that you proposed as being legal, defensible and within the original intent of the settlor so as to give [the widow] a lifetime indulgence as such I have reviewed the draft instrument and can confirm that it basically looks in order and I am prepared to present the instrument for approval by the Trustee.*

In relation to the Protector consent, as you are aware he has kept well away from the Trustee decision making and he has not given any feedback on the deed. I propose that you engross the deed. Trustees will approve and deliver to the Protector for final consideration and signature."

70 Paul Baudet did not take up Miss Connolly's suggestion that she draft the trustee minutes and the meeting at which it was resolved to execute the instrument of appointment was held on 4 th November, 2010. Paul Baudet and Trevor Robinson (another officer of the trustee) were present and Paul Baudet acted as chairman. It is necessary to set out the minute because it represents a clear indication of the thinking of the trustee:-

" *INSTRUMENT OF APPOINTMENT SUPPLEMENTAL TO THE [C] TRUST DATED 3 SEPTEMBER 1993*

The Chairman reported that for some period of time the Trustees had been in regular dialogue with the adult beneficiaries of the Trust, primarily, [the widow] and [the father]. The Chairman and the Protector of the Trust, George Robinson Machan, had known the person who provided the corpus for the Trust, [the settlor], for some period of time and his wishes had always been expressed that on his demise the Trust funds should primarily be held for the exclusive benefit

of his wife and after her demise, for the remainder of the beneficiaries in accordance with his guidance which had been expressed in writing. Over recent months the understanding amongst all the adult beneficiaries appeared to have been under question given that [the father] had divorced his wife with his ex-wife suggesting that claims may be made against the Trustees if he failed to meet his financial obligations in relation to their divorce. The Trustees and the Protector had entered into separate discussions concerning this matter and employed the services of Carey Olsen Fiduciary Services. The Chairman and Protector had taken counsel amongst the adult beneficiaries of the Trust who continued to maintain their position that they both believed that the Trust fund was exclusively for the benefit of [the widow] during her lifetime. [The father] had confirmed to the Chairman in October that this was still his understanding and he had never intended to receive a distribution from the Trust Fund, however, had benefited from a commercial arm's length loan advancement secured against personal assets. Carey Olsen had in the circumstances advised that to take account of the original wishes of [the settlor] that it was appropriate for the Trustees to record this understanding to make an appointment to [the widow] whereby she would be recorded as the sole discretionary beneficiary during her lifetime. [The widow] was somewhat concerned that in the absence of such an appointment the Trust Fund could be attacked during her lifetime which would be contrary to her late husband's express wishes establishing the Trust and both herself and her son were content for the Trustees to enter into an instrument of Appointment supplemental to the Trust, such instrument drafted by Carey Olsen was now tabled.

After due consideration of the instrument of Appointment IT WAS RESOLVED that the appointment in favour of [the widow] making her the sole discretionary beneficiary during her lifetime as to capital and income was appropriate and consistent with the original intentions of [the settlor], provider of the totality of the Trust Fund and therefore the Trustees would sign the instrument of Appointment leaving it undated until such time as the Protector of the Trust considers and approves the instrument."

71 A number of observations can be made in relation to the minute:-

(i) The trustee's concern related to attacks or claims that might be made against the Trust by the mother if the father failed to meet his financial obligations in relation to the divorce; in other words, the first of the two separate issues mentioned in Advocate Buckley's email of 18 th June, 2010.

(ii) There is not one reference to the grandchildren and their request for assistance, the second issue identified by Advocate Buckley in his email of 18 th June, 2010, or to the fact known to the trustee that neither parent could meet their maintenance and educational needs or that the father had been ordered to pay maintenance for them in an amount he could not discharge out of his own resources. We know that the widow did not want them to benefit, but Paul Baudet confirmed to us in evidence that he had

not raised the interests of the grandchildren with the father (in his capacity as their father) when he was consulted before the High Court hearing in relation to the proposed appointment.

(iii) The appointment was apparently made in order to record the understanding of the widow and the father that the trust fund was “exclusively” for the widow. In the absence of that the widow was “somewhat” concerned that the trust fund might be attacked by the mother, which would have been contrary to the wishes of the settlor. Both she and the father were content for the appointment to be made.

(iv) There is no reference to or consideration of the judgment of the High Court in proceedings in which the Trust was, as the trustee must have known, a central feature. It would appear from the evidence of Paul Baudet and the protector that they had neither read nor requested sight of it.

(v) There is no reference to any discussion as to whether the appointment should be revocable or irrevocable, following the advice of Carey Olsen of 20 th July, 2010, that they would usually advise that it should be revocable.

72 The widow was sent a copy of the instrument of appointment on 11 th November, 2010, but it would appear that the father was not given a copy.

73 From 1 st December, 2010, the father unilaterally reduced the maintenance for the grandchildren from £2,500 per month to $1,000 per month (£638) and in March 2011 applied to the High Court to seek a downward variation of the maintenance payable for the grandchildren. Both parties have filed their Forms E in relation to this application which we understand has yet to be heard.

74 On 3 rd December, 2010, the former matrimonial home was sold by the father, with the entire proceeds being paid to the Trust. On 17 th March, 2011, Carey Olsen informed Mourant Ozannes, in response to a letter from the latter, that whilst there was no intention to remove the grandchildren as beneficiaries, they could not benefit during the lifetime of the widow.

75 Since 16 th November, 2010, the widow has had far greater access to the trust fund than she had enjoyed previously. Capital distributions totalling £420,353.54 have been made to her in varying sums. A distribution of £200,000 on 7 th October, 2011, was for the purpose of refurbishing her London flat. Some of the monies distributed to her have apparently been paid over to the father, to assist him with his legal fees.

Evidence of the Witnesses

76 Moving to the affidavit evidence and evidence given in cross-examination, Paul Baudet took us through the documentation, much of which we have referred to above. He

explained some of the family history and the assistance given by the settlor to the father to enable him to establish and run a business in the United States, which he had guaranteed. Their relationship had, however, been strained, particularly over a withdrawal of funds made by the father and the mother, which risked the settlor's exposure under the guarantee.

77 After the settlor's death, the father had apparently put great pressure on his mother to allow him access to the trust fund, in a manner which would have been contrary to the settlor's wishes and which caused the protector and the trustee concern. After the settlor's death, it is clear, however, that the widow assisted the father and his family financially. Distributions were frequently made to her, which she then used to assist them in various matters, including providing support for nursery fees. She also supported the trustee in purchasing a warehouse, which it was intended would be leased to the father for his business. However he said that at all times it was made clear that the Trust was principally held for the benefit of the widow during her lifetime and that the father and the grandchildren were only to benefit upon her death.

78 The reasons for executing the instrument of appointment are of course set out in the minutes of the meeting he chaired but in essence, he said in his affidavit that the trustee had taken into account the needs of the grandchildren by making the loan of £295,000 to the father, the principal purpose of which was to provide a roof over their heads. Having provided that assistance it was then up to the father and the mother to assume financial responsibility for the grandchildren. The father, he said, should have left his business to his manager and gone and got a job.

79 In deciding not to assist the grandchildren the trustee had regard to its concerns that the mother would seek to benefit from any monthly payments. It could be seen, he said, that her purchase of an expensive car and membership of a country club using the lump sum paid to her made it highly possible that she would use distributions from the Trust on unnecessary expenditure to fund her own extravagant lifestyle. The trustee sought, he said, to ensure that the trust fund would be available for the grandchildren when they reached an age where they could be in a position to make their own decisions in relation to their finances rather than the mother making claims on their behalf which would reduce the trust fund to their disadvantage. His criticisms of her extended to questioning why she had taken the grandchildren to Peru as opposed to staying in England where many of the services she was now paying for were freely available and where the father could have contact with them. Importantly, he said, the widow remained a discretionary beneficiary allowing the trustee to accumulate and retain income within the trust fund from which the grandchildren could eventually benefit.

80 We will comment more generally on the position of the trustee in a moment but at this stage we would make the following initial observations on this evidence:-

(i) The suggestion that the mother was leading an extravagant lifestyle in Peru (whatever her lifestyle when living with the father may have been) was wholly

unsupported by the evidence before the trustee at the time of the decision. She was working full time as a teacher and lodging with her mother. The trustee appears to have taken little note of the information filed in the English proceedings and the statements filed by the mother, her mother and stepfather which described very clearly the circumstances in Lima and, for example, the need when living there for membership of a club—we will come back to that.

(ii) There appears to be an antagonism towards the mother (whom Paul Baudet told us he had never met until these proceedings) such that no distribution to the grandchildren would be contemplated in case she, as their mother and primary carer, sought to benefit from it. It is difficult to envisage circumstances in which money can be paid to a mother for the maintenance of her children without her benefiting indirectly in some way.

(iii) It ignores the clear advice from Withers that the mother and father were simply unable to maintain and educate the grandchildren to a standard found reasonable by the High Court from their own resources. It would seem that the grandchildren's needs in this respect were to be sacrificed so that funds could be accumulated and paid to them later in life when they were free of their mother's influence, unless their father got a job, something the grandchildren had no influence over.

81 In cross-examination, he stressed the decision of the trustee to uphold the true intention of the settlor, who wanted " *a strict arrangement"*. He talked in terms of the widow as having an " *absolute right"* to the trust fund during her life and to the trustee giving the settlor " *an undertaking"* to give effect to his wishes. She had apparently been told by the settlor that she would have " *exclusive"* access to the trust fund. He agreed that in executing his letter of wishes the settlor had not expected the circumstances that had now arisen, but he was " *a firm, rigid man"* who would have put retaining funds within the Trust above the maintenance and educational needs of his grandchildren. Paul Baudet told us that if the settlor had been alive and enjoying contact with the grandchildren, then he might have assisted them personally but he would not have assisted them if there was no contact.

82 The Court was concerned with the issue of unforeseen eventualities and whether it can have been the settlor's intention for example that his grandchildren might be excluded from even being considered for benefit during the lifetime of his widow, who, being 67, could well live another 20 years, if not more. What, we asked, would be the position if the grandchildren lost their mother and were destitute in Peru with, hypothetically, the father and the widow being unable or unwilling to help? Could the settlor ever have contemplated the trustee putting itself in a position where his own grandchildren were beyond direct reach? In Paul Baudet's view, the settlor would have had no difficulty in cutting the grandchildren out if they were living far away and estranged from him and there is a strong possibility that he would have left them destitute in Peru.

83 As previously mentioned, he confirmed that in consulting the father over the proposed instrument of appointment, he did not raise with him the interests of the grandchildren in his capacity as their father, although he said by necessary inference, the father would have

been aware that the grandchildren were being excluded.

84 Paul Baudet also confirmed that he had not seen or requested sight of the judgment of the High Court when the decision was taken on 5 th November, 2010, but having read it subsequently it would not have altered the decision made.

85 Although it is not referred to in the minute, he deposed that the trustee preferred the instrument of appointment to be irrevocable, on the basis that this would provide greater certainty, and make it more difficult for the instrument to be set aside.

86 He had never enquired into the widow's financial position in any formal sense but was aware from his many discussions with her what her general financial position was. He described her as asset rich and cash poor. She had inherited a luxury property developed by the settlor in the United States worth some $3 —$4 million, and had been living off the sale proceeds which had apparently been drip fed through to her in Greece. She owned a flat in Greece and a flat in London (now recently refurbished). She was now dependent upon the Trust for her every-day needs. He accepted that there was nothing on file as to her financial position apart from her email of 18 th May, 2010.

87 Notwithstanding the statement in the minute of 5 th November, 2010, that the settlor had settled all of the assets in the Trust, he confirmed that the widow had settled assets of her own which in re-examination he thought might extend to some 37% of the trust fund. She had never however executed a letter of wishes.

88 The protector in his affidavit told us that he had known the settlor for 25 years prior to his death. He had first encountered him whilst working at Grindlay's Bank (Jersey) Limited where he was an account manager. They established a good relationship. He met the settlor in Florida, where he was shown round the father's US business, and in Montpelier (in a property previously owned by the Trust) where he resided to his death. He described the settlor as financially astute and careful with his money. He was successful in his career and for a number of years was the general manager of a car dealership in the Middle East.

89 In establishing the Trust, the settlor made it clear to him that following his death, it was his strong intention that the Trust was to be administered for the “exclusive benefit” of the widow during her lifetime, with the other beneficiaries only benefiting upon her death. He too was aware of the relationship between the settlor and his son and the financial difficulties that had arisen. He explained in more detail the pressure placed by the father on the widow in 2004.

90 In giving consent to the instrument of appointment in his capacity as protector, he said it was clear to him that it was the settlor's wish that the trust fund be administered “ *principally (* indeed solely *) for the benefit of “the widow during her lifetime”*. In the light of the concerns

expressed by her, it was apparent to him that steps had to be taken to safeguard the assets of the Trust.

91 As our review of the documents above demonstrate it was the protector who was principally concerned with Carey Olsen in formulating the plan to exclude the father and the grandchildren and it was not surprising therefore that he consented to the same as protector. In giving his consent, he said he was required to weigh up the interests of the widow who consistent with the settlor's wishes had been treated as principal beneficiary and who clearly had increasing needs as she became older and the father and the grandchildren, who although they were within the beneficial class had never in fact benefited from the trust fund (the loan made to the father in the past having been on commercial terms). In consenting to the loan, which was to be used for the purpose of buying a property for the grandchildren to reside in, he was having regard to the grandchildren's interests notwithstanding that the widow had opposed the making of the loan. Helping the father resolve the ancillary proceedings, he had regard to the possibility that he might otherwise be declared bankrupt, which would adversely affect his future earning potential. He went on to say this at paragraph 65:-

> " *65. However, it was my view that [the father] and [the mother] should assume some financial responsibility for their own children and that they should be required to maintain the Representors. In the event that [the father] was not obtaining sufficient profits from his company, [M] Ltd, to maintain the Representors, then in my view he ought to be looking for other employment."*
>
> Again we find the suggestion that the mother was not assuming financial responsibility for the grandchildren surprising in the light of the evidence. The mother was after all working full time as a teacher, lodging with her mother and bearing the full responsibility for the day to day care of the grandchildren.

92 He then said this at paragraphs 66 and 67:-

> " *66. Having made the loan, in my view it was important that steps were taken to secure the assets of the Trust for the benefit of [the widow] during her lifetime as this was consistent with the settlor's wishes and how the Trust had been administered until that date. I also gave consideration to (i) the Order, which left open the possibility that [the mother] could seek increased maintenance payments from [the father] who could in turn request distributions from the Trust fund and (ii) the possibility that [the mother] might seek further payments on behalf of the Representors*.
>
> *67. It was clear from the correspondence that [the widow] had previously been subjected to undue pressure from [the father], who had wanted access to the Trust funds, and it was important that all beneficiaries were aware that [the widow] was intended to be the sole beneficiary during her lifetime. In this regard, it was important that the instrument was irrevocable as this provided additional certainty."*

93 He too expressed the view that the money paid over to the mother had been wasted, leaving the grandchildren no better off as a result of the loan, and that the assets she had acquired appeared to reflect a desire to continue with the lifestyle she previously led in Florida.

94 In cross-examination, he painted the settlor in more reasonable terms than Paul Baudet. He agreed that the settlor would have wanted the grandchildren to be maintained and educated, subject to the needs of his widow being met, and that in the hypothetical example put by the Court of the grandchildren being found destitute in Lima, he said that if alive, the settlor would have placed influence upon the trustee to assist them. In re-examination, he rolled back somewhat on that, in that he did not think he would have asked for payments to be made out of the Trust, as he had never done so before.

95 As far as he was concerned, a final decision was taken in July 2010, before the final hearing in the English proceedings, to exclude the father and the grandchildren, but its implementation was interrupted by the widow instructing Baker Platt and resisting the making of the loan. In the end, he said, he had " *coerced her"* into agreeing.

96 He maintained that in agreeing to the loan to the father, the grandchildren's interests had been taken into account in that accommodation was being provided for them but as for their maintenance and education, that was for the parents, not the Trust. The exclusion prevented the grandchildren coming back to the trustee " *with their hands open"*. The whole purpose of the exclusion was to give the widow certainty that this would not happen.

97 The protector had not himself made any inquiry into the financial position of the widow or asked her what assets she had. He was aware of the luxury property in the USA worth $3—$4 million which she had inherited and her properties in Greece and London. He too had not read or requested sight of the judgment of Moylan J prior to the decision on 5thNovember, 2010, but said that if he had done so, it would not have made any difference. He had made no inquiry either of the father or the mother or anyone else as to the needs of the grandchildren and the effect of the proposed plan to exclude them would have upon them.

98 The mother responded to the criticisms made of her as to the use she had made of the lump sum by Paul Baudet and the protector in her second affidavit. She said that as a result of the father's unilateral decision to reduce the maintenance for the children her modest income as a teacher was insufficient both to maintain and educate the children and pay the expenditure on a new property and she therefore abandoned the search for a property as there was little sense in purchasing a property which she could not afford to live in.

99 She explained there were profound differences between life in Peru and England. Lima was a city of extremes, into which she said many millions of poor people had immigrated from the rural community bringing with them crime and homelessness. There is a large gap

between the educated Peruvians based in Lima and the poor uneducated migrants and there exists no suitable public infrastructure to meet the needs of the people. Those Peruvians who have been lucky enough to have had a formal education have created for themselves city enclaves, shops, restaurants, private clubs, private schools and private health systems, following European and American models. Many of these services would be freely available in cities such as London on a public or commercial basis.

100 The membership of a club had attracted particular criticism and she responded to that as follows:-

The cost of joining such a club was disclosed in the English proceedings (in particular, in the statement of her step-father) and should have been known to the trustee. No objection to it was taken by the father or his advisers as far as we are aware.

" *36. I understand from Mourant that the Trustee and Protector have raised yet further criticism of me in respect of the purchase, in December 2010, of a family membership to Club Regatas in Lima. It appears that the Trustee and Protector may be implying that I have purchased membership to an expensive country club for myself. This could not be further from the truth*.

37. Club Regatas is a family orientated sports club on the beach in Lima. It offers families sports and recreational lessons such as football, swimming, badminton, basketball, volleyball, tae kwon do, karate, fencing, body board surfing, water polo and other activities. Club Regatas has two further branches, one in the mountains and another 70km south of Lima where families can spend the day or stay for a longer period in family bungalows, for example over a weekend.

38. To join Club Regatas there is a one off, lifetime, membership fee in the sum of US$ 53,835.89 (approximately £34,600), which covered the children and me. Thereafter, there is a cost of approximately US$ 100 (approximately $64) per month, (for all three of us) which covers the use of all of the facilities at the club without tutored lessons. There is a minimal cost where tutored lessons are provided to children. So for example, the cost of football lessons, which the children both attend, costs less than US$ 50 (approximately £32) per month.

39. I should add that membership of a 'club' in Lima is not the luxury that it may be in the United Kingdom or Jersey; rather, it is a necessity. It provides a safe environment for the children and enables them to develop their social skills, participate in supervised recreation, spend time with their friends away from the dangers of the streets of Lima and it enables them to integrate themselves into the society in which they will ultimately live and work if they choose to remain in Peru in later life. It is the only real and time-efficient solution for a single working mother, such as myself; it enables me to attend to and focus on various family matters, secure in the knowledge that the children are in a safe environment.

. My reasons for choosing Club Regatas are simple; it is the nearest one to my mother's house, it is well-run, it had openings available, it provides the children with

the opportunity to partake in wide range of sports lessons at one place and in a safe environment and also allows us, as a family (i.e. myself and the children), to spend quality time together away and independently from my mother and step father."

101 As to the suggestion that she had purchased an expensive car, she explained that when she moved to Lima she had the use of her mother's car but that had been stolen. She purchased a new Kia Sorrento for approximately £17,345 which is a family car. Buying second hand was not a realistic option in Peru. It was essential, she said, to buy a car:-

" *Lima is unsafe. The streets are unsafe. The public transport system is poor, unreliable and potentially dangerous. It is inappropriate for the children to travel alone (not least because of their ages) and it is dangerous for me, as a single woman, to travel alone."*

102 A further criticism made of the mother was her use of part of the lump sum payment to fund the legal costs of the proceedings. In her second affidavit, she says that she has no alternative resource from which to fund the proceedings. She had hoped that the father would share the burden of seeking to protect the children's interests under the Trust but he had taken no active stance in the proceedings whatsoever, not even to say that he supports the children's application, so she had no choice but to protect the children's interests; not for personal gain, but to ensure that their financial maintenance and educational needs are properly met.

103 In terms of the grandchildren's education she explained that Peruvian national schools are amongst the worst in Latin America. If the children were to attend there was a high probability that that they would be incapable of competing for further education and unable to speak fluent English. A British-type education would enable them to reach their full educational potential and there were private international, American and British institutions which offered an excellent education the cost of which had been considered and taken into account by the High Court.

104 Finally, the mother says this at paragraph 53:-

" *53. Finally, both my mother and my step-father are 75 years of age. They have been extremely patient and kind in ensuring that the children and I are safely accommodated at the present time and in the present circumstances. However, it has been extremely difficult for them, both financially and emotionally. They have little to no independence from the children and me. The children are very young and energetic which can often be very tiring on my mother and step-father. They, like me, did not intend for us all to be living under the same roof. They continue to do all that they can for myself and the children but the difficulties that face me as a consequence of [the father's] failure to meet his financial obligations to the children and as a consequence of the Trustee's and Protector's decision to exclude the children from benefit under the Trust during the lifetime of [the widow], has had the effect of causing my mother and step-*

father difficulty also."

Legal principles

105 There was no contention between counsel as to the law to be applied in this case. This is hostile litigation in which the grandchildren through their guardian *ad litem* seek to set aside the decision of the trustee to enter into the instrument of appointment, the effect of which was to exclude them as beneficiaries during the lifetime of the widow. The onus is upon the grandchildren to show that the discretion of the trustee has been improperly exercised. As stated in Lewin on Trusts 18 th edition at paragraph 29–304, the Court does not sit to entertain appeals from trustees' decisions. The mere fact that the Court would not have acted as the trustee has done is no ground for interference. The settlor has chosen to entrust the power to the trustee, not to the Court.

106 The Court will interfere where the trustee has acted perversely. Quoting from *In the matter of the H Trust* [2007] JLR 569 paragraph 43:-

> " ***43 There was no issue between counsel as to the circumstances in which this court should seek to control the exercise of powers vested in trustees.*** In*S -v- L (3)*, ***the court held that its role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful.*** The court in that case referred to Lewin on Trusts, 17 ed., para. 29–100, at 765, which provided a helpful guide to the sort of circumstances in which the court is likely to intervene in relation to a trustee's decision where the trustee had not surrendered its discretion. Whilst not analysing or hearing argument on every sub-paragraph in detail, the court drew particular attention to para. (4), which is in the following terms:-
>
> " ***(4) Trustees must not act perversely, i.e. they must not take a decision to exercise their powers which no reasonable body of trustees could arrive at.*** But the discretion to exercise a power is that of the trustees, not that of the court, unless they have surrendered their discretion to the court: thus a decision not perverse in that sense cannot be challenged merely because the court would have reached a different decision"."

107 The principle that an exercise of discretion by a trustee will not be set aside unless it can be shown that it was such that no reasonable trustee would have acted or decided in the same way is described in The Law of Trusts by Thomas and Hudson, 2 nd edition, paragraph 20.02 as the " ***no rational trustee test"*** on which they give the following commentary at paragraph 20.05:-

> " ***20.05 On the other hand, it is a fundamental principle that the court will not interfere with the exercise of a power or discretion simply on the ground that it might have reached a different or better conclusion.*** Different people will be influenced by a variety of circumstances and they will have different ideas of what is reasonable in the exercise of their discretions.

> However, the donor has conferred a discretion on the trustee and not on any other person; and it would therefore not be appropriate if the discretion of another (or of the court) were to be substituted for that of the trustee. Indeed, for the same reason, there is a reluctance on the part of the courts to review or permit any challenge to the exercise of a power or discretion on the ground of 'unreasonableness' (which is a different exercise from seeking to 'improve' on what might otherwise be a reasonable, if not the best, decision). Hence the general adherence to the 'no rational trustee' test. It is not sufficient to convince the court that another decision would have been more reasonable, or more likely to be adopted by most reasonable trustees, or indeed that the court itself would have acted differently. The discretion was given to the trustee who actually exercised it; and 'irrationality' of some degree on his part must be established if the court is to interfere with his decision."

108 At paragraph 29–143 of *Lewin* is the following commentary:-

> " ***Nonetheless, the settlor has entrusted the power to the trustees and not to the court.*** Their decision, it has been held, does not have to be reasonable in the sense that the court thinks it reasonable; in particular, it is not open to challenge merely because the court disagrees with it or the court would have exercised the power differently. It may be that the decision is vitiated if it was impossible for reasonable trustees to have reached it, a stringent test derived from public law and there called "Wednesbury unreasonableness", but even that is uncertain."

The footnote to this passage reads:-

> " *In Edge -v- Pensions Ombudsman* [2000] Ch. 602***at 628–630, CA the court cited that passage from Wednesbury but went on to say (at 630) that it was not necessary to decide how far principles of public law should be applied in a pension trust.*** The suggestion that Wednesbury unreasonableness is a ground of challenge of a decision of trustees is controversial in New Zealand: it was adopted in*Craddock -v- Crowhen* (1995) 1 NZSC 40,331 and *Blair -v- Vallely* [2000] W.T.L.R. 615***at 632–633, NZ HC (by concession) but rejected in****Re Fletcher Challenge Energy Employee Educational Fund* [2004] W.T.L.R. 199***at [88] – [89], NZ HC."***

109 These cases were not cited to us nor was this a matter of discussion but it would appear to us that if the Court's supervisory role is to have any meaning at all, there must be circumstances in which it can intervene in the exercise of a trustee's discretion. It clearly cannot substitute itself as trustee, because as Birt, Bailiff said in *S, L and E -v- Bedell Cristin Trustees* [2005] JRC 109 at paragraph 21 that would lead to every beneficiary disappointed by a trustee's decision coming to Court in the hope of an alternative decision. In our view the "no rational trustee" test is now well established in this jurisdiction, namely that an exercise of a discretion by a trustee will not be set aside unless it can be shown that it was such that no reasonable trustee would have acted or decided in the same way, and

that, in our view, provides an appropriate boundary which respects the choice of the settlor to confer the discretion upon the trustee not the Court and at which the Court can intervene. It is a stringent test.

110 Both counsel also referred to the well established duties of a trustee:-

(i) To take into account relevant matters and ignore irrelevant matters (*Lewin*, 29–146).

(ii) To have regard to the settlor's wishes (*Lewin* 29–150).

(iii) To take into account the wishes of the beneficiaries and their needs (*Lewin* 29–153).

111 In terms of the beneficiaries' needs, we note that clause 5 of the trust instrument provides that in exercising any of the powers vested in them in favour of any particular person the trustees are expressly authorised to ignore entirely the interests of any other person interested. No appointment shall be invalid on the ground that any objects of such power are thereby altogether excluded. In this case the power was being exercised in favour of the widow but the grandchildren were directly and adversely affected by it. It was not contended that the trustee was entitled to ignore their interests in reliance on this provision. The trustee's case is that by virtue of the loan to the father, their interests were taken into account.

Submissions

112 Mr Temple submitted that the grandchildren had been severely prejudiced and let down by the decision to execute the instrument of appointment. Quoting from his skeleton argument:-

" *(a) They have been prejudiced and let down by the Trustee and [the protector] who together had complete disregard for their present and future welfare and financial needs as discretionary beneficiaries of the Trust, favouring, as they did, the views and wishes of [the widow] (and part of the wishes of the settlor) and determining to exclude them from benefit under the Trust during the lifetime of [the widow];*

(b) They have been let down by [the father] (who benefits from this application if it is successful), who has not only failed financially to support them (which in large part is due to the fact that he also was excluded as a beneficiary of the Trust during the lifetime of [the widow]) but has also indicated that he wishes to take no part in these proceedings (whether on his own behalf or on behalf of his issue and remoter issue other than the grandchildren).

(c) They have also been severely let down by their paternal grandmother, [the widow], whose “morally objectionable” and irrational views are that she has no desire or wish

for them to benefit from the Trust during her lifetime and was instrumental in ensuring their exclusion as beneficiaries of the Trust while she is alive. Of course, her views and wishes were ultimately implemented by the Trustee and [the protector]."

113 In Mr Temple's view it was without question that in the context of the ancillary relief proceedings, the trustee and the protector received requests for financial assistance from the father and from the mother (on behalf of the grandchildren). Those requests related to two distinct issues:-

(i) Assistance to the father in respect of the payment to the mother of a lump sum; and

(ii) Assistance to the grandchildren as discretionary beneficiaries of the Trust in relation to their education, financial and maintenance needs.

114 The decision that the trustee and the protector ultimately arrived at was, he said, as follows:-

(i) To make a loan in the sum of £295,000 available to the father in order to allow him to comply with an order of the High Court in respect of the lump sum order made in favour of the mother. The main purpose of the lump sum was to allow the mother to purchase a property in Peru for herself and the grandchildren; and

(ii) Not to provide any assistance to the grandchildren in respect of their financial, education and maintenance needs; and

(iii) To exclude the grandchildren and the father from benefit under the terms of the Trust during the lifetime of the widow immediately following payment of the loan in the amount of £295,000; and

(iv) Deliberately to keep confidential (as between the trustee, the protector and the widow) from the High Court, the grandchildren and the father the fact that the grandchildren and the father would be excluded following payment of the loan.

115 In reaching the decision to enter into the instrument of appointment, Mr Temple submitted that the trustee and the protector:-

(i) Failed to consider the terms of the Trust adequately or at all;

(ii) Failed to consider the entirety of the wishes of the settlor;

(iii) Gave too much weight to those parts of the wishes of the settlor that suited the widow;

(iv) Took into account the irrational and "morally objectionable" views of the widow and gave too much weight to such views;

(v) Failed to take into account the views of the father;

(vi) Failed to take into account the views of the grandchildren (as expressed by the mother and the father);

(vii) Failed to take into account adequately or at all the terms of the ancillary relief proceedings and associated correspondence;

(viii) Failed to take into account adequately or at all the Order of the High Court dated 27 th July, 2010, (including the undertaking given by the father to the High Court);

(ix) Failed to obtain, and therefore take into account, the judgment of Moylan J dated 27 th July, 2010;

(x) Failed to properly consider the legal advice from Carey Olsen and Withers in relation to the factors and considerations that the Trustee and the protector should take into account when reaching its decision(s) and those that it should not so take into account;

(xi) Failed to take any account of the competing needs of the beneficiaries by:-

(a) Failing to take into account the resources available to the widow, which information was never requested, despite legal advice to obtain the same;

(b) Failing to take into account the present and future needs of the widow, which information was never requested, despite legal advice to obtain the same;

(c) Failing to take into account the resources available the father in meeting the grandchildren's financial needs, which information had been fully provided;

(d) Failing to take into account the present and future needs of the father, which information was not requested;

(e) Failing to take into account the resources available to the mother in meeting the grandchildren's financial needs, which information had been fully provided;

(f) Failing to take into account the present and future financial needs of the grandchildren, which information had been fully provided;

(g) Failing to take into account the particular circumstances (health, education, location) of the grandchildren, which information had been fully provided; and

(h) Failing to take into account that the execution of the instrument of appointment was not at all in the interests of the grandchildren or the father.

(xii) Failed to take into account the value of the trust fund and the income produced (the Trust being worth £4,808,340 at year end 2007 and £4,820,074 at year end 2010);

(xiii) Failed to take into account the relatively insignificant effect upon the trust fund and the income produced in the event that financial assistance was provided to the grandchildren;

(xiv) Failed to undertake a proper and considered process of decision making;

(xv) Failed to take into account change of circumstances of certain beneficiaries and re-evaluate the decision (for example but not limited to the fact that the father was selling the former matrimonial home with the proceeds of sale in their entirety having to be returned to the Trust under known pre-existing loan arrangements);

(xvi) Failed to consult with the father as regards the execution of the instrument of appointment;

(xvii) Failed to consult with the grandchildren (whether via the mother or the father) as regards the execution of the instrument of appointment despite being in correspondence with the grandchildren's lawyers;

(xviii) Failed to take into account the obviously and hugely prejudicial effect the execution of the instrument of appointment would have on the grandchildren and the father;

(xix) Failed to take into account the effect the execution of the instrument of appointment would have on the other potential members of the class of beneficiaries (such as the issue and remoter issue of the father other than the grandchildren, if born);

(xx) Failed to consider adequately or at all whether the instrument of appointment should be revocable rather than irrevocable;

(xxi) Failed to consider alternative proposals other than the disproportionate and draconian step of executing the instrument of appointment; and

(xxii) Failed to take into account the fact that the protector had an obvious conflict of interest given his dual roles as Protector and director of the trustee and that such conflict has not been managed at all.

116 He described the facts of the case as dreadful, sad and depressing and concluded that the decision to enter into the instrument of appointment was perverse; no trustee acting rationally or reasonably could have reached it.

117 Mr MacRae, in response, pointed out that the trustee carefully considered and took legal advice in respect of the request for assistance from the mother and the father which arose from the English proceedings. The trustee decided to help the father meet his obligations, making a loan to him of £295,000, which it was intended he would use to pay the mother for her to buy a property in which she and the grandchildren would reside. Thereafter, and again on the advice of its legal adviser, the trustee executed the instrument of appointment, which irrevocably appointed the widow as the sole beneficiary of the Trust during her

lifetime. In making the loan, and executing the instrument of appointment, the trustee validly exercised its discretionary powers (to appoint assets for the benefit of one beneficiary, exclusively of the others) and took into account all relevant considerations, which included the terms of the Trust, the settlor's wishes, the widow's views, the English proceedings (although he would have to concede that the trustee had not considered the judgment of the High Court), legal advice from Carey Olsen and Withers and the competing needs of the beneficiaries. Therefore it was the trustee's view that its decision to execute the instrument of appointment was reasonable and should not be set aside.

118 The trustee properly considered the requests made of it to assist the grandchildren and decided to help them by making a loan to their father, which was to be used to purchase a house in which they would reside. In making the loan, the trustee was aware that the father would require the assistance of the trustee in meeting his financial obligations to the grandchildren. However, having taken into account all relevant considerations, especially the settlor's wishes, the trustee was of the view that the father and the mother should be responsible for the ongoing maintenance of the children in the usual way.

119 Furthermore, the trustee was not obliged to consult the mother or the father in relation to its decision to execute the instrument of appointment, although it is clear from the evidence of Paul Baudet that it did consult the father. Mr MacRae submitted that in any event, in the circumstances of this case (where the instrument of appointment did not alter the parties' understanding of how the Trust was to be administered, i.e. for the widow's sole benefit during her lifetime) it was not necessary for the trustee to consult with either the father or the mother. Even if the trustee consulted with the mother and the father in relation to the grandchildren, it would have proceeded to execute the instrument. By “parties” Mr MacRae can only have been referring to the widow and the father—there was no evidence that the grandchildren through their guardian shared this understanding as to how the Trust would be administered.

120 Mr MacRae, as with the trustee, placed much reliance upon the letter of wishes, from which he said it was clear that it was the settlor's wish that the widow should be the principal beneficiary during her lifetime, with the father and the grandchildren only benefiting on her death. This was, of course, a trust fund to which the widow had contributed. To wish to leave his wealth principally for his wife's benefit was not unusual, as it is fairly standard for spouses to bequeath their wealth to the surviving spouse upon their death and entirely reasonable, Mr MacRae said, in the light of the often difficult relationships the settlor had with his son and the mother. Further, that the money settled in the trust fund was considered to be matrimonial assets. Why, he asked, shouldn't the trustee be concerned to protect the widow? Why should she not be able to go to bed every night knowing that she was financially secure and with peace of mind?

121 The settlor had utilised a discretionary trust, supported by a detailed letter of wishes, in order to obtain legitimate tax benefits and protect his and his wife's assets for their future, in the knowledge that the trustee and the protector would exercise their discretion in a manner

consistent with the trust instrument and his wishes. The trustee had done no more and no less, he said, than comply with those wishes.

122 The widow had led a relatively prudent lifestyle, concerned to ensure that there were sufficient assets in the Trust to meet her needs as she got older. She had not worked in Greece nor paid Social Security and would therefore have to fund private health care. It had always been the understanding of the widow, the father, the trustee and the Protector that the fund would be administered solely for her benefit.

123 Mr MacRae then went on to say that the widow was concerned to ensure that there would be sufficient assets in the Trust to meet her needs. The mother had enjoyed an affluent lifestyle whilst married to the father. She was concerned that she would use the grandchildren to drain the trust fund in order to continue that lifestyle. The nominal maintenance order left open the possibility of the mother seeking further distributions from the Trust via the father in the future. Despite all these concerns, the widow had eventually agreed to the trustee making a loan to the father provided that the remainder of the assets would be ring-fenced for her benefit during her lifetime. It is relevant to note, however, that the widow has not filed any evidence in the proceedings to support any submissions made on her behalf.

124 The trustee had sought legal advice, which included considering the competing interests of the beneficiaries. The trustee had done this and contrary to the wishes of the settlor and the widow agreed to make a loan to the father on the basis that his settlement with the mother would be full and final. If it had not made the loan, there was a risk that the father would have been declared bankrupt. The trustee did not offer to assist with the maintenance of the grandchildren, in view of the fact that having assisted with the lump sum, it was the mother's and the father's responsibility to feed, clothe and educate them. If the father's business was not generating sufficient income, then he was able and should obtain employment. It was always the position of the trustee that any payment to the father would be on a full and final settlement basis and that thereafter the remainder of the Trust would be protected for the widow. Although the English order could not be enforced against the Trust, the fact that it was not in full and final settlement meant that the mother might seek increased maintenance payments for herself, which the father might have to ask the trustee to pay. It was clear, therefore, he said, that the trustee had to take steps to safeguard the trust assets.

125 The effect of the instrument of appointment was to make the widow the sole beneficiary during her lifetime, with the trustee having discretion to accumulate income as well as capital. It was the trustee's view, Mr MacRae submitted, that the instrument was consistent with the settlor's detailed letter of wishes and the manner in which the Trust had been administered to date.

126 Mr MacRae in his written submissions and in his cross-examination of the mother, was critical of the mother's use of the lump sum. He said it was difficult to understand how

membership of the club could be regarded as a necessity when it appeared to be an exclusive club for the very rich. He was critical of her purchase of a new car and said that it appeared that the mother had used the money received from the lump sum payment to sustain a reasonably affluent lifestyle, rather than to purchase a property or invest money for the grandchildren's future benefit.

127 Mr MacRae pointed to the mother's criticism in her second affidavit of the education system in Peru. Bearing in mind the mother's description of Peru as an unsafe place to reside, with poor education and infrastructure, it clearly could not have been in their best interests to move from England, where they could have had regular contact with the father and the widow and access to good states schools and the public health service. Furthermore, Mr MacRae said it was unfair to expect the Trust to fund an expensive lifestyle in Peru when the grandchildren had access to a good standard of living in the UK at a much lower cost.

128 The trustee and the protector taking into account all relevant considerations had reached the decision to execute the instrument of appointment responsibly and in good faith. The decision was objectively reasonable in all of the circumstances and is one at which a reasonable trustee could have arrived.

129 In his oral submissions, Mr MacRae said that we should regard the loan to the father and the instrument of appointment as one transaction, which is consistent with the evidence and his suggestion that the widow had agreed to the making of a loan provided that the remainder of the assets were ring-fenced for her benefit during her lifetime. Mr MacRae reminded the Court that it was the trustee and the protector who the settlor had appointed to exercise these powers, not the Court, and the very limited circumstances in which the Court could interfere. The trustee and Protector had taken legal advice and were told that the exclusion of the grandchildren was a reasonable step to take in order to protect the widow. It would, he said, be a bold decision for the Court to hold that the actions of the trustee, acting as it was on legal advice, were absurd or perverse.

130 Mr MacRae characterised the Court's questions as to unforeseen eventualities as “nightmare scenarios” which he said were unlikely to happen and inherently less likely than the litigation that would ensue if the trustee's decision was overturned. He pointed to the remaining prayers in the grandchildren's representation which have been left over, in which further relief against the trustee is sought, and said that overturning the decision would open the door to years of hostile litigation. This was the real “nightmare scenario”. Everything the trustee did would be challenged. He saw the trust fund being depleted on legal fees within ten years.

Decision

131 As we said earlier, the effect of the instrument of appointment is to exclude the father and the grandchildren from the Trust during the lifetime of the widow. We are not dealing with a

decision to make or refuse to make a distribution to the grandchildren but with a decision to prevent them from even being considered for benefit during the widow's lifetime. Powers of exclusion are commonly found in discretionary settlements and *Lewin* at paragraph 30–45 says they may be viewed as a power of amendment of a special kind. Such powers are not, in our view, to be equated with ordinary discretionary powers to pay income or capital to a beneficiary. In *S, L and E -v- Bedell Cristin Trustees*, Birt, Deputy Bailiff, drew a distinction between a power to terminate the initial period of the trust, which in that case would have the effect of terminating the settlor's life interest, and ordinary discretionary powers to pay income or capital, saying that the former power had to be used sparingly and in exceptional circumstances. We think the same distinction can be drawn here, namely that a power to exclude beneficiaries (effectively a decision to amend the Trust) is a power to be used sparingly and in exceptional circumstances. That must surely be the case where it is young children who are being excluded.

132 The central justification put forward by the trustee for the use of such a power in this case is that it gives effect to the wishes of the settlor. Evidence was given about wishes expressed verbally by the settlor but he committed his wishes into writing through a number of letters of wishes and finally in his letter of the 20 th June, 2004, and it is right therefore to regard this letter as reflecting his last and carefully considered wishes.

133 The settlor's wish that the widow should be regarded as the principal beneficiary is not unusual in our experience, but he was careful not to fetter or seek to fetter the trustee's discretion and expressly contemplated the existence of a discretionary class comprising his wife, son and grandchildren amongst which the trustee would exercise its discretion from time to time. He purposely left the trustee with flexibility to meet circumstances that might arise and which he may not have anticipated. The letter does not create “a strict arrangement” as contended by Paul Baudet nor is there any reference to the widow having “exclusive” or “sole” use of or access to the trust fund or indeed an “absolute right” to the trust fund as contended by both Paul Baudet and the protector. Nowhere in the letter of wishes does he say that no assistance is to be given to the grandchildren during the lifetime of his widow; on the contrary he expresses concern about their having assistance if their parents cannot provide for their maintenance and education.

134 The only reference the settlor makes to divorce is in relation to the Father's Fund where the trustee is asked to refuse requests which might have adverse financial implications for him but, as one would expect, there is no reference to the grandchildren's interests being affected by divorce. Children are always innocent parties in such situations and it would have been iniquitous for the settlor to have suggested that their status as beneficiaries should be prejudiced because their parents had divorced. There is no such suggestion in the letter of wishes.

135 The guidance given by the settlor in his letter of wishes can only have been of a general nature. He could not, in 2004, have foreseen the future and have anticipated all of the circumstances that might arise from time to time. When he wrote the letter, the father and

the mother were happily married and about to have their first child. He would have assumed that they would, in the ordinary course, be responsible for their children's welfare and education, no doubt with the support, from time to time, of the widow; they had, after all, supported the father and the mother from time to time up until that point as any parents would do. Whilst the settlor was clear that the mother should not be a beneficiary and he could no doubt contemplate the possibility of divorce in general terms, he could not, as Paul Baudet conceded, have foreseen the particular circumstances faced by the trustee in 2010, namely the grandchildren living in Peru and the parents being unable to meet their maintenance and educational needs. Nor in our view could he have foreseen the widow's hostility towards the mother being such as to blind her, so it seems to us, to the interests and needs of the grandchildren.

136 What is clear from his successive letters of wishes is that he regarded the welfare and education of his grandchildren as important, as recognised in the advice of both Carey Olsen and Withers. Would he have wished his grandchildren to be cut off from any possibility of assistance in that respect? Paul Baudet painted the picture of the settlor as a hard, if not cruel man, who would have been quite prepared to cut the grandchildren off in this way if they were estranged from him. The protector, who had the longest association with the settlor, painted him in more reasonable terms and conceded that he would have regarded the grandchildren's maintenance and education as important. We prefer the evidence of the protector in this respect.

137 Yes the letter of wishes made it clear that the widow's financial needs were the settlor's principal concern but there is nothing in the letter of wishes to suggest that, subject to her reasonable needs being met, no assistance can be given to the other beneficiaries during her lifetime. One of the main benefits of the arrangements set up by the settlor is that it gives the trustee the flexibility to deal with circumstances as they arise from time to time and which the settlor may not have foreseen. It would be a question to be considered by the trustee in the light of the circumstances then prevailing but we can find no support in the letter of wishes for a decision to exclude the grandchildren from any possibility of benefit during the widow's lifetime.

138 The suggestion was made by Paul Baudet in evidence that the settlor would have preferred a more rigid trust structure which would have formally protected the interests of the widow but he was advised for tax reasons to utilise a discretionary settlement. It seems to us that there would have been a number of ways in which the settlor could have formally protected the widow within the terms of a discretionary settlement if he had so wished by, for example, not including the father and/or the grandchildren as beneficiaries at the outset or by requiring the consent of the widow for any distribution to anyone other than herself during her lifetime. Even so, the settlor has created a discretionary settlement and the trustee and the Court must work within that structure. The Trust created and the letter of wishes is premised upon the existence of a discretionary class of which the widow is one of four living beneficiaries. The instrument of appointment has the effect of removing that discretionary class which in our view is contrary to the expectations of the settlor as set out in the letter of wishes.

139 As identified by Advocate Buckley in early course, the trustee had before it an application by the father for assistance in discharging his obligations to the mother under the English proceedings and an application by the grandchildren for assistance in their maintenance and education. The widow opposed both, but eventually, agreed to assistance being given to the father, but on the basis that the trust fund was ring-fenced for her exclusive benefit. The decision to loan £295,000 to the father was a positive decision to assist him in discharging his financial obligations to the mother as ordered by the High Court. The decision to exclude the father and the grandchildren was entirely defensive in nature. It was not a decision taken after a careful analysis of the widow's needs (there was no such analysis) on the basis that she actually needed the entirety of the trust fund. Under the terms of the instrument of appointment she had neither income nor capital appointed to her. She remained a discretionary beneficiary. Indeed Paul Baudet contemplated income being accumulated during her lifetime from which the grandchildren could eventually benefit. It was a defensive step taken to prevent the other beneficiaries from exercising their right to be considered for benefit or as the protector put it coming to the trustee with “their hands open”.

140 One might think that dealing with applications for financial assistance from beneficiaries of a discretionary trust from time to time would be grist to the mill for the trustee and that the trustee would have been perfectly capable of exercising its dispositive powers in such a way as to protect the reasonable financial needs of the widow. There was no need to exclude the other beneficiaries in order to do so.

141 Before making its decision the trustee consulted the father and he raised no objection. It seems to have made little difference to him in practice as it would appear that he continues to benefit indirectly through his mother. Nowhere does the minute of 4 th November, 2010, record the trustee as considering the interests of the grandchildren or having consulted anyone on their behalf. Paul Baudet did not raise their interests with the father. Was their exclusion a decision a reasonable trustee could have arrived at? It is helpful to look at the position from their point of view:-

(i) They were aged five and seven.

(ii) They were living in Peru with their recently divorced mother and lodging with their maternal grandmother and her husband.

(iii) Their mother was working full-time as a teacher, but was not earning sufficient to meet their maintenance and educational needs.

(iv) They were estranged from their father, who had very limited earning capacity and who was also unable to meet their maintenance and educational needs.

(v) They were estranged from their maternal grandmother, a woman of independent means, who was hostile to their mother.

(vi) Their late paternal grandfather had established a trust of some £4.8M, of which their paternal grandmother, their father and they were the only living beneficiaries.

(vii) If they were going to receive a good education in Lima, then they had to receive it soon. In a relatively short period of time, the opportunity for them to receive a good education would be lost forever.

142 Thus, the grandchildren were at a crucial stage in their development and in need. It was in these circumstances that they asked for assistance. The trustee decided that far from assisting them, it would do the precise opposite and actually exclude them from the Trust; to cut them off from a reliable source of potential funding for their maintenance and education; to prevent them from even being considered by the trustee for financial assistance during the lifetime of the widow. It is true that they could still benefit from the trust indirectly through the widow if she so wished but she was estranged from them and hostile to their mother. Would the settlor ever have contemplated such a drastic step being taken at such a time in their lives? What, one might ask, had they done to deserve such treatment? It would seem that they had simply asked for assistance; a bare right of any discretionary beneficiary.

143 Under our customary law, a person in the position of a trustee for a minor (a *tuteur*) is required to act as a " ***bon père de famille"*** (see *Payne -v- Pirunico Trustees Limited* [2001] JLR 1). We note that this obligation, which exists equally under Guernsey customary law, has been expressly incorporated into the duties of trustees under section 18(1) of the Trusts (Guernsey) Law 1989. It has not been expressly incorporated into the duties of trustees under Article 21 of the Trusts (Jersey) Law 1984. That law is not a codification of laws regarding trusts. It might, therefore, be argued that under Jersey law and in the context of a family trust involving minor children such an obligation applies to a trustee. It may not add anything to the existing duties of a trustee under Article 21 but it has a powerfully paternalistic element. It is that paternalistic element which lies behind Mr Alexander's complaint that the trustee had shown no interest in the grandchildren who might be considered its wards. It seemed to us inconceivable that any good father would cut these young children out in this way. This was not, however, argued before us but we can say that Jersey law has recognised the paternalistic nature of trustees' powers (see *In re Esteem Settlement* [2001] JLR 7 paragraph 38).

144 In our view, notwithstanding the advice given to it and the extensive information available to it, the trustee never independently and dispassionately considered the circumstances of the grandchildren as beneficiaries of the Trust in their own right. It had become unduly influenced by the invective of the widow and as the minute shows, was fixated upon the mother, who was seen as a hostile party threatening to attack the Trust. It failed to heed the clear advice of Advocate Buckley not to confuse the two issues before it; advice that seems to have been lost sight of as the matter progressed. It was focused on the first issue namely the English proceedings in the High Court in which the mother could properly be regarded as a threat to the trust estate to the extent that the High Court regarded the Trust as a resource available to the father. However in the context of the second issue she was acting

as the guardian of the grandchildren and making a request for assistance on their behalf as beneficiaries in their own right. That request cannot properly be characterised as a claim or attack upon the Trust. That request was never considered by the trustee.

145 We reject the suggestion that the grandchildren's request for assistance was met by the loan to the father. That loan enabled the father to discharge his obligations to the mother and she received the resulting lump sum in her own right. Although the grandchildren may have indirectly benefited from it, they were beneficiaries of the Trust and were entitled to have their request considered by the trustee, particularly when the trustee knew as a fact that neither the father nor the mother could meet their maintenance and educational needs, even with the loan. Not only did the trustee fail to consider their request but, perversely, actually excluded them from the Trust in order, it seems, to prevent threats from the mother arising out of the English proceedings. As Advocate Buckley had warned on the 18 th June, 2010, the two issues before the trustee had become confused.

146 The undue influence of the widow is evidenced by the quite unjustifiable attacks made upon the character of the mother which we feel can only have come from the widow. The trustee (in this context Paul Baudet) had never met or communicated with the mother (other than through lawyers). We do not understand how it was possible to suggest that she was not discharging her obligations as a parent to the grandchildren or that she was leading an extravagant lifestyle when she was working full-time as a teacher and had the sole burden of their care, albeit with the assistance of her mother and stepfather. The attacks upon her use of the lump sum payment, in particular the membership of the country club, in our view demonstrate an unwillingness to take into account the very different conditions in Lima, as very clearly explained in the evidence of the mother and the statements of her mother and stepfather. We had no difficulty in accepting her responses to the criticisms made as to her use of the lump sum.

147 On what possible basis could the mother be criticised for her decision to go and live with her family in Peru, following the breakup of her marriage? We note from her first affidavit that it was the father who suggested that she should go to Peru to live with her family and that is supported by the statement of her mother who stated at paragraph 3 that it was the father who asked if she and the grandchildren could come and stay with them until his finances improved. In any event that's where her family live.

148 The invective of the widow appears to have so poisoned the thinking of the trustee that it could not contemplate any distributions to the grandchildren in case the mother were to benefit indirectly in any way. To the trustee the mother was so toxic that the grandchildren had to wait until they were older to be free of her influence even if this was to be at the expense of their one opportunity to receive a good education.

149 We have fully taken into account the limited circumstances in which this Court can intervene in the decision of a trustee. We acknowledge that the settlor chose the trustee and the protector who knew him personally to exercise these powers and we appreciate the

very considerable hurdle created by the engagement of experienced lawyers to advise on the matter, in particular where those lawyers have expressed the view that the decision was reasonable. In doing so they necessarily reflected the instructions they had received, instructions which in our view would have been tainted by the invective to which we have referred. However our task is to consider and objectively assess the decision and much as we respect the views of the trustee's lawyers, ultimately those views are not determinative.

150 It is a bold move for the Court but we find ourselves constrained into setting aside the instrument of appointment, because in our view no reasonable trustee would have excluded the grandchildren as beneficiaries in these circumstances. The trustee, unduly influenced by the invective of the widow, confused the issues before it and as a consequence did not independently and dispassionately consider the request for assistance of the grandchildren as beneficiaries. If it had done so, it could not, in our view, have taken such a drastic step. We agree with Mr Temple that it was on any analysis a perverse decision which the Court is duty bound to set aside.

151 Whilst we accept the central case put forward by Mr Temple that does not mean that we find in his favour in relation to all of the many failures on the part of the trustee that he has somewhat exhaustively asserted as set out above. In particular:-

(i) We make no finding that the trustee and the protector deliberately kept the plan to exclude the father and the grandchildren from the High Court.

(ii) It is clear that Paul Baudet did consult with the father before executing the instrument of appointment.

(iii) We do not set the instrument of appointment aside on the grounds of an alleged conflict given the protector's dual role. It was clearly a matter that concerned Advocate Buckley and the point remains open to argument. The whole purpose of having a protector is that he is able to act as an independent check upon the actions of the trustee in relation to the powers specified. That must be difficult to achieve where the protector is a director of the trustee and has the conduct of the trust, as he had in this case for much of the material time; indeed he was instrumental in formulating the plan which was put to him by the trustee for his consent. Our finding is that the decision was perverse irrespective of the protector's alleged conflict.

152 We therefore set aside the instrument of appointment.

The future

153 In our view, the nightmare scenario painted by Mr MacRae on the likely outcome if the instrument of appointment was set aside is not a relevant matter for us to take into account in considering whether the decision to exclude the grandchildren and the father was one which no reasonable trustee could arrive at. However, we do think that his warnings are

very relevant to the future of the Trust, which will not be able to sustain relentless litigation. We were shown an open offer made by the widow to Mr Temple as guardian *ad litem* shortly before the hearing to establish a fund of £300,000 for the grandchildren to be accepted before the proceedings commenced. The offer was not accepted and the offer has therefore expired. The matter was not explored at the hearing, but we believe that it was rejected because it did not extend to university education for the grandchildren and because financial assistance was made conditional upon contact with the widow. It was not immediately clear to us whether the offer was in settlement of the grandchildren's interest in the settlement as a whole. On reflection, we think it was not intended to affect their on-going status as beneficiaries.

154 We express the hope that discussions upon a similar arrangement can be entered into in early course. Separating out a capital sum to be used for the grandchildren's maintenance and education seems eminently sensible. The mother is already making a full contribution to the grandchildren's welfare but we would agree that any such fund must not relieve the father of his obligation to provide properly and fully to the best of his ability. To the extent that he is not doing so this could be set against his presumptive and notional share in the trust fund as suggested by Advocate Buckley in his email of 3 rd June, 2010, referred to above.

155 We understand the depth of emotion surrounding the issue of contact which surfaced repeatedly at the hearing. From the grandchildren's point of view, it is very sad that they do not appear to have contact with either their father or paternal grandmother. The mother says there is no obstacle to such contact, but the father and the widow say that in practice it is discouraged. We suspect that as is often the case in matters such as this, there is fault on both sides. There may be an element of the mother not actively encouraging contact, because of the way the grandchildren have been treated financially (and in particular, their exclusion) and there may be an element of the widow discouraging financial assistance, unless she has contact with her grandchildren. Wherever the truth lies, the grandchildren are innocent in all of this and it seems inappropriate, in our view, for any financial assistance provided to be conditional upon contact, something which the grandchildren are powerless to influence or control.