The RR Settlement

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff:
Judgment Date:	20 July 2011
Neutral Citation:	[2011] JRC 141A
Reported In:	[2011] JRC 141A
Court:	Royal Court
Date:	20 July 2011

Text

[2011] JRC 141A

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, Esq., Deputy Bailiff, **and** Jurats Clapham **and** Morgan.

In the Matter of the Representation of a Trustees Limited
And In The Matter Of The Rr Settlement
And In The Matter Of Article 51 Of The Trusts (Jersey) Law 1984

Advocate L. J. Buckley **for the Trustee**.

Advocate T. V. R. Hanson **for the D Foundation**.

Authorities

Trusts (Jersey) Law 1984.

Bombay Public Trust Act 1950.

S Settlement 2001/154.

Public Trustee v Cooper (Unreported) 20th December 1999.

S v L, E and Bedell Cristin Trustees Limited as Trustee of the L Settlement [2005] JRC 109.

Lewin on Trusts (17 th Edition).

Lewin on Trusts (18 th Edition).

Re Meaker JJ (1972 – 1973) at page 2161.

The Deputy Bailiff:
Introduction

1 This is an application by A Trustees Limited ("the Trustees") pursuant to Article 51 of the Trusts (Jersey) Law 1984 (the "1984 Law") seeking the sanction and blessing of the Royal Court to the exercise by the Trustees of their power pursuant to Clause 6(A)(i) of the RR Settlement to appoint the entirety of the trust fund to an Indian charitable trust known as the O Trust, registered under the Bombay Public Trust Act 1950 (the "O Trust"). The application was heard in private and this judgment has been anonymised before publication in the usual way. Without objection from any party, the Court directed shortly prior to the hearing that the exhibits to the Trustee's affidavits be provided to counsel for the Foundation.

2 The Trustees have not surrendered the exercise of its discretion to the Court. This is therefore an application to the Court seeking Court sanction on the principles set out by the Royal Court in the matter of the S Settlement 2001/154, where the Court followed the approach which has been adopted in cases in the Chancery Division such as the *Public Trustee v Cooper*, an unreported decision of Hart J dated 20 th December 1999.

3 To the extent that this is a case where the Trustees wish to obtain the blessing of the Court for the action on which they have resolved, it is clear that the three issues which the Court now has to consider are these:-

(i) Are we satisfied that the Trustees have in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to make the appointment which it is minded in principle to make?

(ii) Are we satisfied that the opinion which the Trustees have formed is one at which a

reasonable Trustee properly instructed could have arrived?

(iii) Are we satisfied that the opinion at which the Trustees have arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?

4 As will become apparent from the description of the facts set out below, there is one issue which more nearly falls within the first category than the second category as described in the judgement of Robert Walker J (as he then was) in the unnamed case referred to by Hart J in *Public Trustee v Cooper*, namely whether the proposed action is within the Trustees' powers. The issue which arises here is whether O has been validly added as a beneficiary of the RR Settlement, an issue to which we return below. If it has not been validly added to the class of beneficiaries, the proposed appointment is one we clearly could not sanction.

5 Detailed consideration of the Court's approach to matters of this kind was set out in *S v L, E and Bedell Cristin Trustees Limited as Trustee of the L Settlement* [2005] JRC 109. The Court there set out in some detail paragraphs 29 – 100 of Lewin on Trusts (17 th Edition) which the Court indicated, without approving every part of it, was a helpful guide to the circumstances in which the Court might intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. Advocate Buckley, for the Trustees, referred to the 18 th Edition of Lewin on Trusts at paragraph 29 – 299 where the authors say this:-

> ***"The court's function where there is no surrender of discretion is a limited one.*** It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of the beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the Court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The Court, however, acts with caution because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the Court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the Court all relevant considerations supported by evidence. In our view that would include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the Court's assessment of the proposed exercise."

6 The Court finds this summary of the functions which we are to perform on this application to be helpful.

The Settlement and Letters of Wishes

7 The RR Settlement was established on 22 nd November 1978 and is governed by Jersey Law. The Settlor was C, who died in April 1993. The initial settled property of the settlement was the sum of £100 but the present value is reasonably substantial. The dispositive terms of the settlement conferred on the Trustees discretion during the trust period to make appointments as to both capital and income. Although we were not shown any specific provisions conferring upon the Trustees a power to ignore other interests, the terms of the discretionary trusts are broad:-

> *"5. The Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following that is to say:-*
>
> *(A) Upon Trust during the Trust Period to pay, appropriate or apply the whole or such part of the income of the Trust Fund as the Trustees may in their discretion think fit to or for the maintenance or otherwise for the benefit of all or such one or more exclusive of the others or other of the Beneficiaries from time to time in existence in such shares and proportions if more than one and generally in such manner as the Trustees shall in their absolute discretion think fit…"*

8 Similar provisions apply in relation to the trusts of capital.

9 The Trust Deed contains no provision for the appointment of a Protector. From the documents which have been put before us, the question as to whether the Trust Deed should contain Protector powers was considered by the Settlor and the Trustees, but the Settlor accepted the Trustees' view that it would be far simpler if the Protector was merely named in a letter of wishes, and that the trust arrangements could only be successful if there was mutual trust between the client and the Trustees. Subsequently the various letters of wishes which the Settlor gave to the Trustees did from time to time give directions about the identity of one or more protectors. We will return to this point at paragraphs 23–24 below.

10 The Schedule to the Settlement provides for 12 named beneficiaries, their spouses, children, and at paragraph (14) of the Schedule "such charitable object or objects or purpose or purposes as the Trustees shall by deed or deeds executed during the Trust Period declare to be amongst the Beneficiaries".

11 Paragraph 2(3) of the Trust Deed provides an additional power for the Settlor, by deed executed at any time during the trust period to declare that any person or class of persons or any charitable object or purpose named or described in such deed shall be added to the

class of beneficiaries. The power to add beneficiaries was exercised by the Settlor on 15 th October 1984 when he added the D Foundation, a charity registered in India, (the "Foundation") to the class of beneficiaries under the settlement. The power to add beneficiaries was also exercised by the Trustees on 12 th August 2010 when it added the O Trust to the beneficiaries' settlement, a matter to which we return at paragraphs 32–42 below.

12 The Settlor executed his first letter of wishes on 23 rd November 1978. In this document, which he made plain was not intended to bind the Trustees in any way or constitute any trust, he nominated himself as the "Protector" of the settlement and indicated a wish that the Trustees should make distributions to beneficiaries both as to capital and income as he might request from time to time. He reserved the right to amend this, and indeed, during his lifetime, he amended the letter of wishes given to the Trustees on many occasions. The letters evidenced two intentions on the part of the Settlor – subject to any payments which might be made to him personally during his lifetime, the first was to benefit various members of his family, and indeed different members of the extended family were joined as beneficiaries from time to time, and the second was to benefit charitable purposes and in particular the Foundation which in the early days was to benefit to the tune of at least 40% of the income of the fund.

13 On 28 th October 1987, the Trustees received from the Settlor a letter of wishes which indicated his desire to split the overall fund into two funds – an A fund which would comprise 60% of the overall value and would ultimately be for the benefit of family members not resident in India, and a B fund which would comprise 40% of the value which was for charitable purposes. In this letter he named two classes of protector – E, F and G were in one class and H and J were in the other class. The Settlor indicated that he expected the trust to continue for at least 15 years, and to be liquidated on the written request of any three protectors, at least one of whom should come from each class of protector.

14 By letter dated 18 th July 1990, which is written on Foundation headed notepaper, the Settlor gave a final list of beneficiaries of the trust, in relation to both the A and B funds. Some of those listed have died, and for present purposes it is sufficient to say that in effect the list of beneficiaries indicated in that letter is limited to F and E, their respective wives, and the Foundation.

15 The Settlor's last letter of wishes to the Trustees was dated 23 rd August 1990. He reiterated his wish that during his lifetime the Trustees should make all or any part of the capital available to him in the exercise of the Trustees' discretion, and to accumulate the income. He asked that after his death, the Trustees should have regard to the wishes of three Protectors, of which at least one should come from each class of Protector as mentioned above.

16 From time to time, distributions were made from the trust to the Settlor at his request during

his lifetime, until his death on 27 th April 1993.

Protector Problems

17 Difficulty for the Trustees lay around the corner. On 5 th June 1993, the Trustees received from the Foundation a request for three million rupees "for completing the charity works and running of the Medical Complex" by the Foundation. The communication was endorsed by three Protectors, of whom one came from each of the two classes of Protector confirming the recommendation to release these funds. However, within a couple of months, that endorsement of a charitable distribution was cancelled and the Protectors indicated that they did not at that time anticipate making any further requests for at least 12 months.

18 The papers put before us by the Trustees are not, we surmise, a complete record of the Trustees' files because very little is disclosed for the period between 1993 and 1998 and nothing between March 2003 and December 2005. We note that the only two documents in the first of those periods are resolutions of the Foundation on 13 th October 1995 and 19 th April 1996 indicating a need for funds from the Trustees in London, which we think must be a reference to the Trustee of the RR Settlement. It is not clear whether any funds were actually paid although the Trustees later asserted no payments were made. Although the copy resolutions are on the file, the affidavit of B of P, a director of the Trustees, indicates that there is no record in the correspondence of any approach actually being made to the Trustees.

19 The dispute between the Protectors became apparent to the Trustees by November 1998. The Trustees' position was that although the Settlement did not contain any express protector provisions, the Settlor had expressed his wish that the Trustees should have regard to the Protectors within the formula he had set out, and in the spirit of the Settlement, the Trustees would do so prior to providing any benefit to any of the beneficiaries.

20 Unfortunately it appears clear that F and E had a developing dispute with the Foundation, to which we shortly turn, and the dispute between the Protectors no doubt was affected by the fact that one class of protector supported the Foundation. Thus on 19 th April 2000, the Trustee received a letter purportedly signed on behalf of the three UK Protectors indicating that:-

> *"1. It is the clear understanding of the protectors, including other family members that it was the wish of my uncle, C, that main beneficiary of the trust should be the foundation. The foundation was the life and soul of my uncle for many years prior to his death.*
>
> *2. The question that we have to address is whether the trustees of the foundation are running the foundation efficiently and if the request for funds is justified. The main focus of the foundation is the running of the hospital in Bhavnagar. Here, we have*

been fortunate to have the benefit of feedback by C following a trip to India during the last month whereby he was able to visit the hospital and meet with the trustees of the foundation. In addition we also have the benefit of the views of K who was my uncle's trusted business partner and life long friend. You also have a copy of his letter.

F was very impressed with the way in which the trustees of the foundation are running the hospital and found their request genuine and deserving. Taking all factors into account, we feel the request is justified but we however do not feel it appropriate that such a large sum of money should made available in one go…".

21 An internal email of the Trustees on 20 th April 2000 indicates that one of the persons on whose behalf that letter had purportedly been signed had telephoned that afternoon to suggest the letter be disregarded because he had received further information from E and F which the UK Protectors would like to consider. He added that although the two protector groups were not of the same opinion, it was their intention to liaise with the sole aim of giving one definite viewpoint which would help the Trustees when making their decision. There is no indication that such a definite viewpoint was ever given to the Trustees.

22 In fact from that moment it appears that the three UK based Protectors became progressively less involved in the administration of the Settlement. F reported to the Trustees that communication from the other protectors had been very limited, and B indicated that by January 2007 the other protectors were not involved at all. This is perhaps evidenced by the fact that the Trustee attended a meeting with E and F in London in December 2005 regarding the Settlement, at which the UK based Protectors were not present. Indeed there is nothing in the papers before us which indicates any really sustained effort by the Trustee to contact the UK Protectors at all. At all events, the result of the lack of agreement between the two classes of protector seems to have been that the administration of the trust during the period from 1995 to 2005 did not involve the payment of income or capital to the intended beneficiaries.

Protector Powers

23 Jersey Law enables powers conferred upon the trustees of a Jersey settlement to be limited by reference to a requirement that the exercise of those powers is subject to approval by one or more protectors. When a settlement so provides, the Court is obliged to identify whether the protectors have in fact consented to the exercise of the proposed power or discretion, and if that exercise is criticised, the Court has to review the fiduciary nature of the protector power and the extent to which it would be proper to interfere with its exercise. What marks this Trust out is that it does not contain protector provisions but because the Settlor's letter of wishes has these references, and because the discussions which took place prior to the constitution of the settlement evinced an intention that there should be some equivalent to a protector power, the Trustees have in fact acted in some ways as though the settlement were subject to protector provisions. The Trustees clearly thought that the absence of protector powers in the Trust Deed gave them more flexibility in the administration of the Trust. In some cases, that may well be so; but the one disadvantage in

making the assumption that there is such flexibility as a matter of law lies in subsequently making arrangements which are inconsistent with that flexibility. Had the Protector provisions been in the Trust Deed, we are confident that some consideration would have been given to what would happen if the two classes of Protector disagreed. As it was, no such consideration appears to have been given to the problem in advance and the result was that when the disagreement became apparent, although there was no reason in law to consult the “protectors”, the Trustees in effect appear for the most part to have considered it impossible to contemplate any payment of income or capital to any of the Beneficiaries.

24 Nonetheless the Trustees could arguably be criticised for not being consistent in their application of those provisions. If one had regard to the letter of wishes of the Settlor, his intention was clearly that there were two classes of protector, and the different classes each needed to approve before the Trustees’ powers exercised. Although it is true that the UK class of Protectors do not seem to have participated in this trust for some years, it also appears to be the case that since 2003 the Trustees have not contacted these Protectors to ask for their views either. They have instead placed reliance on the views of E and F. Their reason for doing so is that in his last letter of wishes, the Settlor also showed an intention that the beneficiaries to benefit from the Settlement should be E and L, F and M and the Foundation. The Trustees therefore appear to have considered the views of the two protectors who are beneficiaries as being of more substance than the views of the protectors who were not beneficiaries. In his first affidavit B explained it in this way:-

> *“91. I am also aware from having studied the Trustee's file in some detail, and in particular the voluminous correspondence from the Settlor, that he had strong reliance upon family in general and his nephews E and F in particular. They were named as beneficiaries and were specifically referred to in the Settlor's last letter of wishes. Their views would be relevant for that reason alone. However they were also named as part of the informal protector council, with whom the Settlor wanted the Trustee to consult following his death, in relation to any distributions from the Settlement”*.

We add that it is also very important to recognise that E and L and F and M themselves have shown no wish for personal benefit, but do subscribe to the admirable culture of giving, which is regarded as so important in some parts of Indian society, as indeed it was important to the Settlor.

The Foundation

25 It is also clear from what we have seen that there developed considerable dispute between the Foundation and E and F. The Court is not able to say with any degree of conviction where the merits of that dispute lie and does not attempt to do so. We note that there has been dispute as to whether E and/or F should be appointed to the Board of the Foundation, and that within that dispute there is argument as to whether as a matter of Indian Law it is possible to make such appointments. The Trustees have been given conflicting legal opinions on that point. Those opinions are within the papers passed to the Court and it is

perhaps not unfair to indicate that each of those opinions prompts as many questions as they seek to answer.

26 It appears that E and F have also criticised the Foundation as following expansion plans which are over ambitious and which take the Foundation away from the core function of providing help to the poor and the needy, which was one of the objectives of the Settlor. At one stage there were undoubtedly complaints of inefficiency, but as Advocate Hanson rightly pointed out, such complaints relate to an incident over 10 years ago.

27 What one can say from a review of the papers is that as a result of the dispute between the Foundation on the one part and E and F on the other, the Trustees took the view that no payment should be made to the Foundation. They have from time to time asked for information which the Foundation has, sometimes after some delay, produced but in our view it is not unfair, notwithstanding the submission of Advocate Buckley that the Trustees have not been led by the nose by those Protectors, to conclude that the Trustees were much influenced by what they have had to say. Indeed in his submissions, Mr Buckley said that the deadlock between the Foundation and the family is beyond repair. That that is of concern to the Trustees illustrates the importance attached to the views which E and F have expressed. We have referred above to paragraph 91 of B's first affidavit where he deposes that the Settlor placed strong reliance on his family in general and on E and F in particular. The Court finds that this approach of the Trustees was reasonable.

28 The Trustees' reliance on the views of E and F is also demonstrated by these parts of the evidence put before us:

(i) the file note of the meeting with all five protectors on 22 nd July 1993 where E is described as "an immensely impressive individual who to a great extent channelled the enquiries" and where F is described with G as having made a valuable contribution.

(ii) the fact that whenever E or F objected to a payment being made, the payment was not made; whereas if they supported the making of a payment from the Trust (as with the Indian earthquake appeal in 2001 or the first payment to O in 2006) not only was the payment made but also the other Protectors were not even asked for their views.

(iii) the fact that the Trustees' responses to enquires made by or on behalf of the Foundation were routinely late and perhaps even unhelpful, in nearly every case amounting to either an acknowledgment or a series of requests for further information which would later be considered. The papers before us show that the Foundation consistently and regularly sought distributions and/or information from the Trustees. Requests were made directly on 5 th June 1993, 31 st December 1999 and 5 th August 2002; through Messrs Setlzer, Caplan, Wilkins & McMahon, a US firm of lawyers in San Diego, California, on 6 th August 1999 and 11 th October 1999; through Messrs Vyman, English solicitors in Harrow, on six occasions between 29 th

August 2006 and 18 th January 2008, and through Messrs Hanson Renouf here in Jersey on six occasions between 30 th September 2008 and 17 th March 2010. Furthermore, it appears that a number of requests were also made in the early years by the Foundation to one or more of the "protectors".

29 In determining the present application we have had to consider the extent to which this reliance of the Trustees was reasonable.

30 Advocate Buckley summarised the matter for us by suggesting that if the Court considered that the Foundation was the main beneficiary, then in all probability the Court would not consider it right to bless the provisional decision of the Trustees. On the other hand, if the Court considered that the family members were the main beneficiaries, then it would be right to bless the decision because the Court is aware that those family members agree with it.

31 On the application of Mr Hanson on behalf of the Foundation, we gave leave for B to be cross examined on his affidavit. The Court was impressed with B's candour and with his ready acceptance of points which might not have gone in the Trustees' favour. He accepted that the Foundation was hugely important to the Settlor, and was very prominent in the Settlor's mind. He was not aware that the Settlor lived on the Foundation complex. But he said, and the Court accepts this, that the Trustee has always acted in good faith and has sought to exercise its powers and discretions on the basis of what it believed the Settlor would have wanted. B's reliance on the views of E and F is consistent with the provisions of clause 9 of the Foundation's Trust Deed where he stipulates that either E, failing him F should be appointed after his death as a Trustee of the Foundation.

O

32 As a result of the falling out between the Foundation on the one hand and E and F on the other, the latter recommended to the Trustees that consideration be given to providing benefit through the Trust for O. This emerged for the first time at the end of 2005 when the Trustees agreed to make an appointment to F of £144,332 to enable him to finance a pilot project of the O Trust. The relationship between F and the O Trust clearly was consolidated over the next years, and on 12 th August 2010, the Trustees executed a deed of addition by which the O Trust was included among the beneficiaries of the Settlement. As this trust is the intended recipient of the balance of the trust fund by the exercise of the Trustees' discretion which they now ask us to sanction, and as objection has been taken to the lawfulness of such appointment, it is now necessary to review the matter in more detail.

33 We note that the O Trust has been registered under the Bombay Public Trust Act of 1950 with registration number E/ 10699/Ahmedebad, of 13/12/95. The name of the trust, as earlier indicated is O. We have not been provided with a copy of the constitutive documents of O and it is accordingly difficult to say whether the O Trust exists for exclusively charitable

purposes. We have been provided with the business plans for the years 2009 to 2011, and audited reports for the years 2006 to 2009. These documents certainly seem to show that the majority of the activities of O relate to improving the quality of primary education and providing health care support in Gujarat, that part of India where the Trust was active. The programme of the O Trust is said to be one of helping the urban poor of the area. We have also been provided with an opinion from senior Advocate Saurabh N Soparkar which describes the purposes of the O Trust as helping the urban poor anywhere in India, and it recites that the Trust has worked on various programmes of providing infrastructure facilities, health care services as well as upgrading the skills of the poor to enable them to get well paying jobs in industry.

34 In this connection, we now turn briefly to the Trust Deed and to the law.

35 The Beneficiaries are defined by clause 2(1)(c) of the Settlement as meaning "the persons, objects and purposes named, specified or described in the Schedule hereto". The schedule names a number of persons, and at sub clause (14) provides:-

> *"Such charitable object or objects, or purpose or purposes as the Trustees shall by deed or deeds executed during the Trust Period declare to be amongst the Beneficiaries"*.

36 Clause 2(3) of the Settlement contains what is described as a proviso which permitted the Settlor by deed to add any person or charitable body to the class of beneficiaries. We take it that that is a proviso to the definition of "Beneficiaries" in clause 2(1). As it was a power vested in the Settlor, it seems clear that it cannot be exercised after his death.

37 Clause 2(4) of the Settlement provides this:-

> *"A body shall be conclusively deemed to be charitable if registered as a charity by the Charity Commissioners for England and Wales or any person pursuant to the Charities Act 1960 or any English statutory re-enactment or modification thereof and no object or purpose wheresoever situate shall be deemed to be charitable unless it would be recognised to be charitable according to the law of England or the law of Jersey if one of such laws were the law of the jurisdiction in which such objects or purpose shall be situate."*

38 The power of the Trustees to add a charitable object or purpose to the list of beneficiaries falls therefore to be construed in accordance with the provisions of Clause 2(4). In that connection it is clear that O has not been registered as a charity by the Charity Commissioners for England and Wales and therefore the provisions of that part of the clause which would conclusively deem O to be charitable if so registered do not apply. One is left, therefore, with the concluding five lines which provide that an object or purpose is only deemed to be charitable if it would be recognised as charitable under the laws of England or Jersey if it were operating in either of those jurisdictions. These rather

complicated deeming provisions require one to have regard to what the laws of England and Jersey might be in this connection, as well as what the organisation actually does.

39 We add that a provision of the kind set out in clause 2(4) of the Settlement is capable in theory of causing all manner of difficult questions today. The enactment of the Charities Act in 2006 may possibly result in a number of organisations having now a charitable status they would not once have had and therefore being entitled to be registered by the Charity Commissioners for England and Wales. Furthermore, the deeming provisions of the closing five lines of the clause do not take into account that public policy may be an important element in recognising an organisation as charitable – thus a society whose objects are the promotion of military efficiency in the Territorial Army may well be recognised as charitable in England or Jersey, but public policy might deflect such a conclusion where one was looking at a society promoting the efficiency of reserve forces in a foreign state. It does seem to us to be clear that a provision such as that in clause 2(4) cannot override the terms of our domestic law, and it is not therefore one whose use should be encouraged.

40 The Court has received no detailed submissions on either the law of England or the law of Jersey. As far as the law of Jersey is concerned in relation to these matters, the leading case is *Re Meaker* JJ (1972 – 1973) at page 2161. In that case the Royal Court substantially followed English law by holding that in Jersey the expression “charitable purposes” had the same wider meaning as it then did in England. Essentially, the Court followed the test as to whether the trust was exclusively for the relief of poverty, the advancement of education, for religious institutions or for the wider benefit of the community.

41 Article 11(2) of the Trust (Jersey) Law 1984 confirms that, subject to the special provisions of permitted non charitable purpose trusts, a trust in Jersey is invalid if it is created for a purpose which is not charitable. It would clearly be an unlawful exercise of discretion by the Trustees to determine to make an appointment in favour of an organisation which is not in fact charitable and therefore not eligible to be a beneficiary of the Settlement, both because of Article 11(2) and because of the provisions of the Schedule to which we have referred.

42 We are satisfied that the O Trust does contain some provision for charitable purposes, and while the Court has not received any detailed submissions that it is not exclusively charitable, prima facie it appears that it might be exclusively charitable. Without deciding the validity of the addition of O to the list of beneficiaries, we find that there is insufficient evidence before us to cast doubt on the conclusion of the Trustees that the O Trust is a validly constituted charitable organisation and, in the circumstances, we do not regard this lurking question as a sufficient reason to withhold consent to the proposed course of action by the Trustees. Any major dispute as to its charitable status would no doubt result in the O Trust taking an active part in the litigation. When the trustees of that trust decided not to participate in these proceedings, they could not reasonably have anticipated that their status as a charity might be in question and as it is a matter which was raised only obliquely before us, we do not propose to consider it further on this application. However, to protect themselves from future action, the Trustees should at least satisfy themselves from

the constitution of the O Trust that it is a bona fide charitable organisation. The sanction which we give below to the proposed action of the Trustee assumes that O is a valid charitable trust and the Trustees are not released from their obligation to satisfy themselves that it is. It may be that they have other evidence which was not before us which allows them to reach their conclusion.

Conclusion

43 It is clear that a strong case can be made for the assertion that the Foundation was expected by the Settlor to receive substantial benefit from this Trust. The evidence for that proposition comes not just from the fact that there were numbers of letters of wishes in which the Foundation was to receive varying degrees of benefit, but also from the fact that the Trustees themselves accepted that the Foundation was very close to the Settlor's heart; and indeed the material from all sides suggests that to be the case. In essence, the reason that the Trustees are not considering conferring any benefit upon the Foundation is not that the Foundation was not an intended recipient of benefit by the Settlor but rather that the primary intention of the Settlor was that the Trustees should have regard to the views of the so called Protectors, of which E and F are the only ones to have shown a continuing interest and it appears to have been their strong belief that the Foundation was not being run as the Settlor would have wanted. As was indicated at paragraphs 25–31 above, it seems to us that the reasonableness of the decision which the Trustees ask us to sanction really turns upon the extent to which we think it is proper for the Trustees to have given the weight which they so clearly have to the views which E and F have expressed.

44 It will be clear from the way in which this judgment has been expressed so far that we do find some of the actions taken by the Trustees to have been surprising. We are not impressed, for example, by an approach which emphasises the desirability of the absence of protectors in the Trust Deed, thereby conferring discretions for use by the Trustees alone, coupled with an apparent acceptance in practice by the Trustees of a prohibition against them exercising a discretion which is legally only theirs to exercise upon the basis that some informal protector provisions had been requested by the Settlor in his lifetime. The vice of that approach is that if those who are treated as informal protectors, who would have the obligation to exercise the protector powers in a fiduciary manner if they were indeed protectors as a matter of law, exercise their informal powers improperly or contrary to the fiduciary obligations imposed upon them, there is no obvious basis for legal recourse against them – the only legal recourse would be against the Trustees who, notwithstanding the full legal discretion which they have to exercise, chose not to exercise it. Indeed that is perhaps one of the criticisms which could be levied against the Trustees here.

45 Considerations of this nature lead us to the conclusion that the decision which we now have to take is a finely balanced one. Nonetheless, we have reached the conclusion that the decision to wind up the Settlement and distribute the entire fund to O, as one of the charitable beneficiaries – assuming it to be so – is one which a reasonable trustee could have reached. In those circumstances, applying the tests set out in *Re the S Settlement*

(supra) we do sanction the proposed course of action, essentially for these reasons:

(i) It is clear that the Settlor saw some need for the Foundation to be supervised if it were to receive benefit. He himself supervised the Foundation to a large degree during his lifetime, living on the hospital premises and, as is clear from the affidavit of N and indeed from the other material presented to us, played an active part in the decisions which the hospital trustees took. If he had intended the Foundation to receive an absolute benefit without any supervision at all, he could simply have left a capital sum to the Foundation, or alternatively put a capital sum in trust with mandatory income distributions to the Foundation annually. Instead, he created a discretionary settlement of which the Foundation was but one potential beneficiary, and furthermore added provisions by his letter of wishes to the effect that the Trustees should have regard to the views of the informal protectors in determining whether or not to make any payments. Accordingly we have approached the request of the Foundation for benefit with the same careful eyes with which we think the Settlor would also have approached the matter.

(ii) Although we do not necessarily regard them as being very strong points, we have noted that the local trustees of the Foundation appear not to have investigated closely the mechanisms by which monies might be received tax free in India from the Trustees, in similar fashion to the way in which they did not apparently investigate sufficiently closely the customs duty on the CT scanner which they obtained in or about 1999, which duty was paid and ultimately recovered for the benefit of the Foundation by F. It does not seem to be entirely clear as to whether the CT scanner was actually fit for purpose, once fitted. Although made aware of these criticisms through their lawyers, the Foundation does not appear to have answered them at all directly, and indeed did not really do so in the hearing before us, other than make similar criticisms of the Trustees and O.

(iii) Furthermore it is clear that the Board of the Foundation have been prepared to litigate over the proper constitution of the Board, and in particular whether E and/or F should have been appointed to the Board. Of course we cannot reach any firm conclusions on that point, because it is not for us to decide matters of Indian law which are clearly sufficiently complex that different views have been taken by various Indian lawyers who have been asked to advise. It is also not for us to reach any judgment on who is at fault, if indeed anyone is at fault, for the breakdown in the relationships between the Foundation and F and E, because we have not heard direct evidence from those most intimately involved – but nonetheless, we can register a concern about the apparent failure on the part of the Foundation to find a way of involving the family in the business of the hospital, as it does seem clear from the Foundation's constitutive documents that that was always the intention of the Settlor.

(iv) The Trustees have proceeded upon the basis that supervision of the Foundation had to come from the class of informal protectors. As we have indicated earlier, there were undoubtedly problems caused by the structure of two classes of informal protector, where agreement from both classes appears to have been impossible to

obtain. The papers put before us do show that initially the Trustees pressed the London based protectors for a view on proposals to make a payment out of the Trust on a number of occasions but the track record of replies was, to put it kindly, hit and miss in the early years and subsequently any communication from the London based protectors seem to have been non-existent. In these circumstances it is unsurprising that the Trustees came to rely more heavily on those protectors who did show an interest in the Trust Fund by responding to the request for information, namely E and F. Furthermore, it is clear that the Settlor regarded E and F as persons of importance to him because they, with their wives, accounted for four of the principal beneficiaries in the final letter of wishes. We note also that at the very first meeting which all five protectors attended, the protectors present themselves appear to have regarded E as the unofficial leader of the protectors in the sense that the questions and communications were channelled through him, with valuable contributions from G and F.

(v) While the Trustees may be criticised for over reliance on E and F, we nonetheless think that they were entitled to regard their views as very important indeed in the administration of the Trust and they are bound to have been influenced too by the fact that F was prepared to travel from Kenya to the Foundation's hospital in India on a number of occasions to ascertain what was actually going on at those premises. Accordingly, we think a reasonable trustee, properly instructed, would have noted that the informal protectors did not have any blanket authority to prevent trustees exercising their discretions under the Trust Deed, but will also have noted that they were entitled to place a strong degree of reliance on the guidance which the informal protectors interested in providing that guidance were prepared to give.

(vi) The Trustees have resolved that the settlement should be brought to an end and we think it is absolutely right that that resolution should have been made. This settlement has clearly run its course. To the credit of E and F and their respective wives, they have stepped back from personal gain, and they have identified a charity with projects designed to help the poorest of the poor in Gujarat, which they believe now adheres more closely to their uncle's wishes. By contrast, during the past 18 years since the Settlor's death, the only substantial beneficiary of this Trust, apart from one large and one minor distribution to charities through the family, has been the Trustees, in their receipt of annual professional fees. The impasse caused by the failure of the informal protectors to reach agreement as to what should be done has now been overcome by the Trustees, perhaps belatedly, in seeking the Court's blessing for their proposed appointment of trust assets. It certainly appears to us to be quite unacceptable to contemplate the use of these trust monies for ongoing litigation which would benefit only the lawyers and the Trustees as opposed to a charity in India, which although not one originally identified by the Settlor, has nonetheless been identified by those close to the Settlor as an appropriate object of his bounty.

46 For all these reasons we sanction the proposed action of the Trustees.