Trilogy Management Ltd (as Trustee of three charitable sub-trusts) v White Willow (Trustees) Ltd

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Thomas, Hughes
Judgment Date:	13 May 2021
Neutral Citation:	[2021] JRC 136
Court:	Royal Court

Text

[2021] JRC 136

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner and Jurats Thomas and Hughes.

Between
Trilogy Management Limited (as Trustee of three charitable sub-trusts)
Representor
and
White Willow (Trustees) Limited (1)
HM Attorney General (2)
RBC Trustees (C.I.) Limited as Trustee of five charitable sub-trusts (3) to (7)
Respondents

Advocate S. M. Baker **for the Representor**.

Advocate N. A. K. Williams **for the First Respondent**.

The Second and Third to Seventh Respondents did not appear and were not represented..

Authorities

Trilogy Management v YT and Others [2014] JRC 214.

Trilogy Management v YT and Others [2012] JRC 093.

Trilogy Management v YT and Others [2012] JCA 204.

Lewin on Trusts (20th Edition).

Trusts (Jersey) Law.

Minister of Infrastructure v Parish of St Helier [2016] JRC 153.

Parish of St Helier v Minister for Infrastructure [2017] JCA 027.

Landau v Anburn Trustees Ltd [2007] JLR 250.

Trusts.

THE COMMISSIONER:

1 By this Representation, the Representor seeks the decision of the Court on two issues which have arisen in relation to the administration of a charitable trust. The first concerns how certain HSBC shares distributed in specie should be valued; and the second concerns the fees which the First Respondent is entitled to charge as trustee.

General background

2 This is a further instalment in long running litigation involving the above parties. The background is set out fully in the judgment of the Court published at *Trilogy Management v YT and Others* [2014] JRC 214 ("the 2014 judgment"), to which reference can be made as necessary. For present purposes, we can summarise the general background as follows.

3 JY is a Jersey company which in the past held very substantial assets. It is owned by the trustee of a charitable trust ("the Foundation") established in 1987 by a settlor known as OM. The Foundation is governed by the law of Jersey. Until March 2016, the trustee of the Foundation was another Jersey company called Yee Tak Charitable Foundation (International) Limited ("YT").

4 OM died in 2001 leaving eight children. Disagreements arose and certain proceedings came before this Court in 2004, as a result of which a compromise ("the 2004 compromise") was reached. This involved, amongst other things, varying the terms of the Foundation. Whereas previously the Foundation had been expressed to be generally for charitable purposes, it was now amended so as to provide that all income and capital distributions received by the Foundation were to be paid to eight charitable sub-trusts in equal shares. The sub-trusts were established at that time. Each child of OM is the guardian of one of the sub-trusts. Trilogy Management Limited ("Trilogy") is the trustee of three of the sub-trusts ("the Trilogy sub-trusts") and RBC Trustees (C.I.) Limited ("RBC") is the trustee of the remaining five sub-trusts (the "RBC sub-trusts"). Under the 2004 compromise, the Articles of Association of JY were amended so as to provide for an annual minimum dividend of 75% of the profits of JY of that year. All such dividends would be paid to YT as trustee of the Foundation and thence equally to the eight sub-trusts.

5 Under their respective Articles of Association, decisions of the board of YT had to be unanimous and those of JY had to be unanimous save for any decision to pay a dividend in excess of the required minimum 75% of the profits for a year. Following the 2004 compromise, the board of directors of both YT and JY consisted of four of OM's children together with Advocate Binnington. Differences arose between members of the family as to the level of dividends to be paid by JY. Three sisters, who were guardians of the Trilogy sub-trusts, believed there should be very substantial distributions from JY so that the sub-trusts could apply those monies for charitable purposes. Other members of the family, most notably MC (a daughter of OM) and OM's widow, Mrs C, were of the view that OM wished his charity to continue for generations, so that the main body of assets should be preserved in JY with only modest distributions being made to the sub-trusts. The constitution of the boards of JY and YT meant that it was impossible to resolve these differences.

6 As a result, Trilogy on behalf of the three Trilogy sub-trusts, issued a Representation in November 2010 seeking relief. The Representation raised two broad issues. The first was an allegation that JY had not declared dividends as required by the Articles of Association. Secondly, it was alleged that the administration of the structure had become dysfunctional because of the different views of the family and the need for unanimity at board level. Trilogy therefore applied for an order that the structure be unwound, with the assets being distributed equally to the eight sub-trusts, or alternatively that YT be removed from the trusteeship and replaced by a new trustee.

7 The question of the level of dividend was dealt with as a preliminary issue and was subject to the Court's decision at *Trilogy Management v YT and Others* [2012] JRC 093 with a subsequent appeal to the Court of Appeal at *Trilogy Management v YT and Others* [2012] JCA 204.

8 The second part came before the Royal Court presided over by Commissioner Herbert and was the subject of the 2014 judgment, which was issued on 10 th November 2014. It was a

detailed judgment covering many aspects of the matter, but, for our purposes, the relevant aspect is that the Court agreed that the structure was dysfunctional and ordered as follows:

The Court made it clear that the sole purpose of the Foundation was to provide funding to the sub-trusts and that it envisaged the whole structure being liquidated fairly promptly, with all the assets then being passed to the sub-trusts.

(i) YT to be removed as trustee of the Foundation and replaced by a new trustee;

(ii) the Articles of Association of JY to be amended so that decisions of the directors could be taken by a majority; and

(iii) the wording of Article 96 (which dealt with the 75% minimum dividend) of JY's Articles of Association to be amended to remove the words 'of that year'.

9 The Articles of Association of JY were amended as directed in February 2015. However, in circumstances we shall describe in more detail when dealing with the question of trustee fees, there was considerable delay in appointing a new trustee. It was not until 9 th March 2016, that the First Respondent ("White Willow") was appointed as trustee in place of YT. White Willow is a private trust company wholly owned as part of the Stonehage Fleming Group in Jersey. That group comprises a number of companies authorised to carry on trust company business in the Island. We shall refer simply to "Stonehage", without being specific as to any particular company within the group unless that is necessary. At about the same time as White Willow was appointed as trustee, companies within the Stonehage Group were appointed as corporate directors of JY and the other three underlying companies of the Foundation. It follows that until March 2016, the affairs of the Foundation and its companies were under the control of YT, of whom the directors were four family members and Advocate Binnington, with the administration being carried on by RBC. Since March 2016, the affairs of the Foundation and its companies have been under the control of White Willow with administration being carried on by Stonehage.

(A) The HSBC Issue

(i) Factual background

10 Against that background, we turned to outline the relevant facts in relation to this first issue.

11 Following the 2004 compromise, the relevant provision of the Foundation dealing with income and capital distributions is to be found at Clause 2 of an Instrument of Appointment dated 25 th June 2004 ("the 2004 Instrument of Appointment"), which is in the following terms:

"2. The Present Trustee in exercise of the power in Clause 7(a) of the first trust instrument and every other power (if any) enabling it in this regard hereby irrevocably appoints and declares that henceforth the trustee of

the Foundation shall hold the appointed fund in trust to pay the income thereof (and in the event that JY is wound up or otherwise makes distributions to the trustee of the Foundation that are capital distributions in trust to pay such capital distributions) to the trustees of the eight sub-trusts in equal shares TO THE INTENT and so that each trustee of one of the eight sub-trusts shall be entitled to an equal one-eighth undivided share of the income of the appointed fund (and such capital distributions) and shall hold the same on the terms of the sub-trust of which it is trustee"

12 On 8 th May 2015, JY declared an interim dividend for 2013 in the sum of US$223,004,340.

13 JY did not have sufficient cash to pay this dividend but it did hold a portfolio of shares in HSBC. In August 2015, the directors of YT, as trustee of the Foundation, passed a written resolution. This noted that, in recent times, YT had, for ease, adopted the practice of directing JY to transfer the amounts payable by JY by way of dividend to YT as trustee directly to the sub-trusts. YT resolved to instruct JY on this occasion also to transfer cash/assets in specie directly to the sub-trusts with the consequence that each sub-trust should receive US$27,875, 542 (we shall omit references to cents for convenience save where we think such reference is necessary). The resolution further noted that, in the event that any sub-trust wished to receive any of the HSBC shares in specie in part satisfaction of its 1/8th entitlement to the interim 2013 distribution, JY could not transfer more than 281,707 HSBC shares to any sub-trust (being 1/8th of the total HSBC shares held by JY).

14 JY+ held a board meeting on 25 th August 2015. The minutes note that Trilogy had asked to receive 3/8ths of the HSBC shares (1/8th for each of the Trilogy sub-trusts) in specie by way of part payment of the 2013 distribution due to the Trilogy sub-trusts. It was further noted that RBC had not yet indicated whether it wished to receive HSBC shares in specie for any of the RBC sub-trusts. Accordingly, JY resolved as follows:

"IT WAS RESOLVED that:

1. the Company shall as expeditiously as possible (and subject to sufficient funds becoming available) by way of payment in respect of the 2013 Distribution transfer to Trilogy (in its capacity as trustee of each of the Trilogy sub-trusts):

a. 1/8th of the HSBC shares in specie; and

b. The sum of US$27,875,542.50, less the value of 1/8th of the HSBC shares at their date of transfer.

2. Upon receipt of an indication from RBC in its capacity as trustee of an RBC sub-trusts (sic) that such RBC sub-trust wishes to receive a distribution in respect of the 2013 Distribution (and subject to sufficient funds becoming available), the following arrangements shall apply:

a. Where RBC has declared in respect of an RBC sub-trust that it wishes to receive HSBC shares, the Company shall by way of a payment in respect of the 2013 Distribution:

(i) transfer to RBC (in its capacity as trustee of that RBC sub-trust) 1/8th of the HSBC shares in specie; and

(ii) as expeditiously as possible pay to RBC (in its capacity as trustee of that RBC sub-trust) the sum of US$27,875,542.50 less the value of 1/8th of the HSBC shares at their date of transfer.

Where RBC has declared in respect of an RBC sub-trust that it does not wish to receive 1/8th of the HSBC shares in specie, the Company shall by way of a payment in respect of the 2013 Distribution and as expeditiously as possible pay the sum of US$27,875,542.50 to RBC in its capacity as trustee of that RBC sub-trust." [Emphasis added]

15 We have emphasised the underlined passages because, as set out below, White Willow places some reliance upon these words.

16 On 27th August 2015, RBC confirmed that all the RBC sub-trusts wished to receive HSBC shares in specie as part of the distribution. Accordingly, by that date, it was known that all the sub-trusts wished to be dealt with in the same way, i.e. a transfer of 281,707 HSBC shares and the balance in cash.

17 Given that there had been no distributions in respect of dividends for 2013, and that it was now 2015, Trilogy had lost patience and instituted proceedings in May 2015, seeking an order for payment of dividends for 2013 and 2014. It subsequently filed a summons seeking summary judgment, which came before the Court (Commissioner Birt presiding) on 1st September 2015.

18 As set out in an unpublished judgment dated 23rd September relating to that hearing, the Court was informed that part of the distribution would be by way of distribution of HSBC shares in specie and went on to grant Trilogy's application for summary judgment in the following terms (as reflected in the Act dated 1st September):

"[YT] shall as soon as is reasonably practicable and in any event by 4 p.m. on 18th September 2015, procure the payment of assets to the value of the sum of US$27,875,542.50 to each of the Eight Charitable Sub-trusts in satisfaction of the sums due to the Eight Charitable Sub-trusts pursuant to the interim dividend declared by [JY] in the amount of US$223,004,340 on the 8th May 2015, in respect of the year of account ending the 31st December, 2013."

19 The Court went on to order JY also to declare an interim dividend for the year ended 31 st December 2014, and for YT to distribute US$7.5m to each sub-trust in respect of that interim dividend by the same date i.e. 18 th September.

20 On 18 th September 2015, YT brought an urgent application before the Court under the liberty to apply provision. It had transpired that, following receipt of advice from the auditors, the profits of JY for 2013 had been increased by inclusion of certain unrealised profits, but the profit available for distribution in 2014 was likely to be less than had originally been thought, which meant that the proposed interim dividend for 2014 was now too large. The Court therefore agreed to vary its order of 1 st September by increasing the distribution in respect of 2013 (by way of a declaration of a final dividend) and reducing the distribution in respect of 2014. However, the overall amount remained the same. The relevant provisions of the Act of 18 th September are as follows:

> ***"1). [YT] shall as soon as it is reasonably practicable and in any event by 4.00 p.m. on the 18th September 2015, procure the payment of assets to the value of US$33,468,111.25 to each of the Eight Charitable Sub-trusts in satisfaction of the sums due to the Eight Charitable Sub-trusts pursuant to the interim dividend declared by [JY] in the amount of US$223,004,340, on 8th May, 2015, and pursuant to the final dividend declared on 14th November*** *[that must be an error for September]* ***2015 in the sum of US$44,740,550, both being in respect of the year of account ending 31st December 2013;***
>
> ***2). [YT] shall as soon as is reasonably practicable and in any event by 4.00 p.m. on the 18th September 2015, procure that [JY] declare an interim dividend in the sum of US$15,259,450 in respect of the year of account ending 31st December 2014, in partial satisfaction of the minimum dividend declarable pursuant to Article 96 of the Articles of Association of [JY] in respect of the said year of account ending 31st December 2014;***
>
> ***3). [YT] shall as soon as reasonably practicable and in any event by 4.00 p.m. on 18th September 2015, procure the payment of the sum of US$1,907,431.20 to each of the Eight Charitable Sub-trusts in satisfaction of the sums due to the Eight Charitable Sub-trusts pursuant to the interim dividend declared by [JY] in accordance with paragraph 2). above……"***

21 The interim dividend in respect of 2014, was always intended to be paid solely in cash and has been so paid. The issue with which we are concerned does not therefore arise in connection with that distribution. Accordingly, for convenience, we shall hereafter simply concentrate on the distribution in respect of the 2013 dividend which, following the hearing on 18 th September, required the payment of assets to the value of US$33,468,111 to each sub-trust as set out in paragraph 1 of the Act.

22 The amounts due to the Trilogy sub-trusts were duly paid in accordance with this order.

Thus, so far as the distribution for 2013 was concerned, 281,707 HSBC shares were transferred to each Trilogy sub-trust. The shares were valued as at 18 th September with a share price of £5.025 per share converted to US dollars at the rate of US$ 1.5523 to the £. This gave an aggregate value for the HSBC shares transferred to each Trilogy sub-trust of US$2,197,401 (rounded). This meant that the cash element paid to each Trilogy sub-trust was US$31,270,710, thus making the required total of US$33,468,111.

23 It transpired that in fact, YT had made an error in connection with the currency, with the result that each of the Trilogy sub-trusts was overpaid in cash terms (in that each sub-trust received more than US$31,270,710 in cash). However, this is acknowledged by Trilogy and it was agreed before us that this can be sorted out between the parties and need not trouble the Court. Accordingly we say no more about it and will proceed, for ease of explanation, on the basis that each Trilogy sub-trust received US$31,270,710 in cash in fulfilment of the 2013 distribution.

24 Unfortunately, for reasons not known to Trilogy or White Willow, YT did not make the required distributions to the RBC sub-trusts at the same time as it did to the Trilogy sub-trusts and RBC did not apparently press for them either. The upshot was that when White Willow assumed office on 9 th March 2016, it discovered that the 2013 distribution (and the 2014 distribution although that is irrelevant for the reasons stated earlier) had not been paid to the RBC sub-trusts. It accordingly set about rectifying the position. Unfortunately, by then the HSBC share price had fallen and the dollar/sterling exchange rate had also changed. The upshot was that the overall value of 281,707 HSBC shares was less than had been the case for the Trilogy sub-trusts, with the consequence that, if an aggregate amount of US$33,468,111 was to be paid to each RBC sub-trust, a greater cash amount had to be paid to each RBC sub-trust than had been paid to each Trilogy sub-trust. Despite correspondence with Advocate Baker on behalf of Trilogy, who argued that this was not the appropriate way of addressing the matter, White Willow maintained this position.

25 The distributions in respect of two of the RBC sub-trusts (“the SG Charitable Trust” and “the E Charitable Trust”) were made on 29 th June 2016. The SG Charitable Trust received 281,706 HSBC shares whereas the E Charitable Trust received 281,707 shares. This was because the HSBC shares held by JY were not exactly divisible by eight. Accordingly the extra cash (over and above that paid to each Trilogy sub-trust) paid to these two sub-trusts in order to make the total amount received up to US$33,468,111 was US$422,277 in respect of the SG Charitable Trust and US$422,271 in respect of the E Charitable Trust. The same exercise was undertaken on 12 th July 2016, in respect of the remaining three RBC sub-trusts with each sub-trust receiving 281,707 HSBC shares. However, by then the share value and exchange rate had altered again, with the consequence that these three RBC sub-trusts each received US$448,864 more in cash than the Trilogy sub-trusts had received in order to make the total amount up to US$33,488,111. Accordingly, the five RBC sub-trusts between them received an aggregate cash sum of US$2,191,142 more than they would have received if the distributions had all been made on 18 thSeptember. All eight sub-trusts received the same number of HSBC shares (ignoring for these purposes the fact

that the SG Charitable Trust received one share fewer).

26 Trilogy argues that the RBC sub-trusts must repay the excess sum of US$2,191,142 to JY whereas White Willow argues that it acted correctly and that the RBC sub-trusts do not have to repay anything.

27 The delay by YT in effecting the payment of the 2013 distribution has caused loss to one side or the other, whichever way the Court decides. If Trilogy is right, each RBC sub-trust has been overpaid by over US$400,000 and accordingly the aggregate cash sum of US$2,191,142 must be repaid to JY. Although that sum would then be available for a new distribution, with 1/8th going to each sub-trust, each RBC sub-trust would still have actually received over US$400,000 less in respect of the 2013 distribution than the stipulated sum of US$33,468,111 because of the decline in the value of the HSBC shares by the time of their distribution to the RBC sub-trusts.

28 On the other hand, if White Willow is right, the consequence is that the sum of US$2,191,142 has been distributed to the RBC sub-trusts when, if the distributions had all been made on 18 th September 2015 as they should have been, that sum would have remained in JY. It would therefore have been available for future distributions and each Trilogy sub-trust would have received 1/8th of that sum as and when the next distribution was made. Accordingly, each Trilogy sub-trust has lost out to that extent.

29 Unfortunately it is questionable whether whichever set of sub-trusts is unsuccessful will have an effective remedy against YT for its failure to pay the distributions to the RBC sub-trusts when it should have. YT was a single purpose vehicle and the directors, apart from Advocate Binnington, were members of the family. We were informed that it has no insurance policy and it has no assets. Whether the unsuccessful party would have any claim against RBC as administrator of YT is not something we are in a position to comment on.

(ii) Discussion

30 The RBC sub-trusts were convened to the Representation but wrote to the Court indicating that they did not wish to be present at the hearing; they were content to rely on White Willow to put forward the arguments in support of the course of action which White Willow had taken.

31 On behalf of White Willow, Advocate Williams emphasised that the problem in this case was caused by the failure of YT to make the distributions on 18 th September 2015, in accordance with the order of this Court. White Willow was faced with the question of how best to resolve the matter when it assumed office in March 2016, and had done its best to do so in a fair and reasonable manner.

32 We would summarise Advocate Williams' submissions in support of the decision taken by White Willow as follows:

(i) The primary requirement of the Foundation (as now contained in Clause 2 of the 2004 Instrument of Appointment set out above) is that each sub-trust is entitled to an equal 1/8th share of any income.

(ii) The income appointed in relation to the 2013 accounts was (after the variation on 18 th September 2015) the total sum of US$267,744,890. Thus each sub-trust was entitled to an equal 1/8th of that share of that, namely US$33,468,111.

(iii) This was confirmed in the Act of 18 th September, which at paragraph 1 required YT to procure payment of assets to the value of US$33,468,111 to each sub-trust by 4:00 p.m. on 18 th September. The key part of the order was as to the total amount which was to be paid to each sub-trust.

(iv) Given the delay in progressing the distribution by YT and the decline in value of the HSBC shares in the interim period, each RBC sub-trust would in fact have received over US$400,000 less than US$33,468,111 if White Willow had followed the course advocated by Trilogy. Thus they would have received 281,707 HSBC shares (by then worth over US$400,000 less than in September 2015) and they would have received the same amount of cash as each Trilogy sub-trust, namely US$31,270,710. Overall they would therefore have been over US$400,000 worse off than each Trilogy sub-trust and this would not be in accordance with the requirement for equal treatment as set out in Clause 2 of the 2004 Instrument of Appointment. They would not in fact have received the sum of US$33,468,111 referred to in the Act of 18 th September.

(v) The approach adopted by White Willow was also consistent with the resolution of the then directors of JY on 25 th August 2015, where, in the emphasised passages from the minutes quoted at paragraph 14 above, it was stated that each sub-trust should be paid the cash sum less the value of 1/8th of the HSBC shares *'at their date of transfer'*. That was also consistent with paragraph 19 of the affidavit of Advocate Binnington dated 28 th August 2015, where he had spoken of the value of the HSBC shares *'at point of transfer'* being ascertained, with the balance being paid in cash.

(vi) The RBC sub-trusts could at any stage prior to payment of the distribution have opted for a payment entirely in cash. This would have had the same effect upon the balance sheet of JY as the course followed by White Willow and would have resulted in each RBC sub-trust actually receiving US$33,468,111, as had in fact occurred (albeit by a mix of HSBC shares and cash).

(vii) On Trilogy's argument, the RBC sub-trusts would have received a windfall if the HSBC shares had increased in value because they would have received the same number of shares (now worth more) and the same amount of cash as Trilogy. It was hard to imagine that Trilogy would have been content with that course if the shares had in fact increased in value.

(viii) The course proposed by Trilogy would result in accounting difficulties. Because of the decline in value of the HSBC shares, a distribution on the basis advocated by Trilogy to each of the RBC sub-trusts in 2016 would in fact result in a depletion in JY's assets of less than US$33,468,111 for each sub-trust and accordingly, for less than the total amount of the dividends declared by JY for 2013.

(ix) Even if the Court would not have reached the same decision as White Willow, this did not entitle the Court to intervene. Although distribution to the sub-trusts was an imperative power and therefore not a discretionary decision, there remained an element of discretion as to the exact manner in which the distribution was made and this was a matter for White Willow as trustee unless it reached a decision which was outside the band of reasonable decisions. Advocate Williams cited in support Lewin on Trusts (20th Edition) as follows:

> ***"30–109 Where the power is imperative, the principle*** [of non-intervention] ***has a more limited part to play.*** …….
>
> ***30–110 Nonetheless, imperative powers will usually comprise an element of discretion as to the timing or manner of their exercise.*** The court will not overrule trustees who are willing to exercise the power but bona fide decline to do so at a particular time or in a particular manner. Hence, where one of two trustees having an imperative power to invest in realty refused to join in a purchase of a particular estate, but did not refuse to exercise the power altogether, the court would not compel him to do so. Similarly, if the ***trustees have already exercised the power, it is no more open to the court to overrule their decision than if the power had been wholly discretionary."***

(iii) Decision

33 We begin by accepting that White Willow found itself in a difficult position when it discovered in 2016 that the RBC sub-trusts had still not received their distributions as they should have done. It was clear that this posed a problem given the decline in the value of the HSBC shares since September 2015. Faced with this, White Willow listened to submissions from Advocate Baker on behalf of Trilogy as to the correct approach and also received representations on behalf of RBC. For the reasons summarised by Advocate Williams, it concluded that it should top up the cash payment to each of the RBC sub-trusts so as to make up for the loss in value of the HSBC shares and maintain the aggregate value of the distribution to each sub-trust at US$33,468,111 calculated as at the date of receipt by each sub-trust.

34 We have not found this to be an entirely straightforward issue and we can understand why White Willow proceeded as it did. Nevertheless, despite Advocate Williams' persuasive submissions, we have concluded that, for the reasons put forward by Advocate Baker, White Willow was in error and it was not entitled pursuant to the trust deed to make the additional cash payments to the RBC sub-trusts as it did. We would summarise our reasons

as follows:

At the date of the meeting, it was of course not known whether the RBC sub-trusts would opt to receive HSBC shares. However, that election was made by the RBC sub-trusts two days later on 27 th August, and accordingly, by 18 th September, JY/YT was in the position envisaged, namely that all of the sub-trusts had opted to receive HSBC shares and, to achieve fairness, they should all have received them therefore *'on a particular date'*. In our judgment, it was clearly envisaged, as one would imagine, that all the sub-trusts would be treated the same and the HSBC shares would either be valued on the date in question or, if not to be taken in specie, sold that same day, so that the same values were achieved. We do not therefore read the minutes of the meeting of JY as providing support for the proposition that the transfer of the HSBC shares to the sub-trusts could be on differing dates with differing valuations being taken.

(i) We do not accept that the decision involved elements of discretion on the part of White Willow so that the Court cannot intervene merely because it would have reached a different decision. In our judgment, what is required in this case is the correct legal analysis of the position and a decision on whether White Willow's decision was in accordance with the requirements of the trust deed of the Foundation. If it was not, the decision cannot stand and there is no question of a margin of discretion being allowed to White Willow.

(ii) By its Act of 18 th September (amending the Act of 1st September) the Court ordered YT to procure payment of the dividend from JY by 4:00 p.m. that day. This merely put a time scale on the decision which had already been taken by JY and YT. In our judgment, the position crystallised at that point. Each sub-trust had by then elected that the distribution to it should consist of 1/8th of the available HSBC shares held by JY together with the balance in cash and had not withdrawn that election as at 4:00 p.m. on 18 th September.

(iii) It follows that, at that point, JY (and YT) became legally obliged to transfer 281,707 HSBC shares to each sub-trust at their then value, with the balance being paid in cash. Furthermore, that was the entitlement of each sub-trust, nothing more and nothing less. The value of 281,707 HSBC shares at that point was US$2,197,401. Accordingly, JY was legally obliged to transfer 281,707 shares to each sub-trust and to make a cash payment to each sub-trust of US$31,270,710 so as to make a total of US$33,468,111.

(iv) In our judgment, this analysis is required by Clause 2 of the 2004 Instrument Appointment which provides that each sub-trust shall be entitled to an equal 1/8th undivided share of the income of the Foundation.

(v) To the extent that JY continued to carry the HSBC shares and the unpaid cash sum in its books after 18 th September, there was an equal and opposite liability to the unpaid RBC sub-trusts.

(vi) In our judgment, this legal position of debtor and creditor as described above

cannot have been altered simply by the passage of time. The obligation of JY remained to transfer 281,707 shares to each sub-trust and to make a cash payment of US$31,270,710 to each sub-trust. YT should have procured the payment to the RBC sub-trusts of the HSBC shares together with this cash sum at the same time as the transfers to the Trilogy sub-trusts, and RBC could at any stage have demanded the transfer of the 281,707 shares and the payment of this sum from JY in respect of the RBC sub-trusts.

(vii) Advocate Williams submitted that the RBC sub-trusts could at any stage prior to actual payment in 2016, have revoked their election to take HSBC shares in specie and opted to have been paid entirely in cash. We do not accept that submission. As we have said above, the position crystallised as at 18 th September 2015, and each of the RBC sub-trusts was thereafter obliged to receive its share of the 2013 distribution by way of 281,707 HSBC shares and a cash sum of US$31,270,710. After 18 th September, they no longer had the right to opt for an entirely cash payment.

(viii) Advocate Williams placed reliance on the emphasised passages in the minutes of the JY board meeting held on 25 th August, with their references to valuing the HSBC shares *'at their date of transfer'*. We do not consider that they assist him. In the first place, the minutes of a meeting in August cannot affect the legal position which arose as at 18 th September. Secondly, the minutes have to be read in context. In our judgment, it is clear that the board was envisaging any distributions taking place at the same time so that the *'date of transfer'* would be the same for each sub-trust. Thus Advocate Binnington at para 16 of his affidavit of 28 th August 2015, said this:

> *"16.1 One member of the board wished to have clarity about whether each of sub-trusts wanted to receive 1/8th of the HSBC shares in specie or their liquidated proceeds, in order to ensure that the process of paying the 2013 dividend both appeared to be and was as fair as possible.* If all trustees of the sub-trusts had clearly stated their positions, then no real issue would arise because (a) in specie transfers of 1/8th each of the HSBC shares could have been made to the trustees of those sub-trusts wishing to receive them on a particular date and (b) the remaining HSBC shares could have been sold at the same time with the proceeds of sale being used towards payment of the balance of 2013 dividend. All of the sub-trusts would have ended up mutatis mutandis receiving the same value from the HSBC shares and no real issue as to fairness/unfairness of treatment would have arisen." [Emphasis added]

35 We have reached our conclusion solely on the basis of our analysis of the correct legal position as at 18 th September. However, we consider that our analysis also results in a fairer overall outcome. That is for two reasons:

(a) As already mentioned, the consequence of White Willow's course of action is that JY has paid out US$2,191,142 more than it would have done if the distributions had

all been made on 18 th September, as they should have been. The consequence therefore is that this sum no longer remains in JY, so as to be available for future distributions. This will therefore prejudice the Trilogy sub-trusts to the extent of 3/8ths of that sum. This prejudice will occur in circumstances where Trilogy has acted entirely properly and promptly, where the fault lies with YT in not making all the payments on 18 th September and where RBC could – and arguably should – have demanded payment of the distributions at the same time as Trilogy. In circumstances where RBC could have procured payment at any stage, it seems only fair that any loss caused by the delay should be suffered by the RBC sub-trusts rather than the Trilogy sub-trusts.

(b) Secondly, the consequence of what has occurred is that the RBC sub-trusts have effectively been insured against any fall in the value of the HSBC shares at the expense of JY (and indirectly and in part Trilogy). That again does not deem consistent with the requirement in the trust deed to treat the sub-trusts equally. Since 18 th September, any fall in the value of the HSBC shares retained by the Trilogy sub-trusts has been at the risk and cost of those sub-trusts. It is hard to see why the RBC sub-trusts should be compensated by JY for the fall in value of HSBC shares during this period when the Trilogy sub-trusts are not so compensated, particularly in circumstances where it was open to RBC to procure payment of the distributions on 18 th September or at any point thereafter.

36 We accept, of course, that the result of our analysis is that the RBC sub-trusts will not in fact be in receipt of assets worth a total of US$33,468,111 valued as at June/July 2016, because of the fall in the value of the HSBC shares. However, that is a consequence of the delay in those sub-trusts seeking or enforcing distribution. They were entitled to US$33,468,111 calculated as at 18 th September by reference to 281,707 shares in HSBC and US$31,270,710 in cash. That entitlement did not vary by reason of the delay and that is the sum which they should correctly have received as at June/July 2016, even if, by reason of the fall in the value of the HSBC shares, it did not result at that point in assets to the value of US$33,468,111 ending up in their hands.

37 For these reasons, we hold that White Willow was not entitled to make the aggregate top-up payments to the RBC sub-trusts of US$2,191,142.71 as part of the 2013 Distribution.

38 The result is that, strictly speaking, the RBC sub-trusts should repay to JY the aggregate sum of US$2,191,142.71 and Trilogy should repay to JY the sums which have been overpaid to the Trilogy sub-trusts by reason of YT's administrative error in September. Those two sums can then be aggregated in the hands of JY and made the subject of a fresh distribution equally to the eight sub-trusts.

39 We were shown some calculations during the course of the hearing, which suggest that it may be possible for the parties to agree some netting off to achieve the same result as set out in the preceding paragraph. That is a matter which we leave to the parties. Our role is

confined to ruling that each of the RBC sub-trusts has been overpaid to the extent of the top-up cash payments and these sums must therefore be repaid to JY. Trilogy must also repay the sums it was overpaid in September 2015.

40 We should add that during the course of the hearing, Advocate Baker accepted that, if he were successful, the RBC sub-trusts would be entitled to receive any dividends on the HSBC shares which were paid to JY between 18 th September 2015 and the transfer of those shares to the RBC sub-trusts and would also be entitled to interest on the outstanding cash payment of US$31,270,710.03 from 18 th September until date of payment. We agree with that concession.

B Fees

(i) The issues

41 Trilogy has raised certain objections to the fees which have been charged by White Willow and/or Stonehage. The fees of the trustee for the first two years following White Willow's appointment were fixed by the Court (Commissioner Herbert presiding) when the Court appointed White Willow as trustee in place of YT. The relevant judgment is dated 12 th January 2016 ("the January judgment") and the Act giving effect to the judgment is dated 2 nd February 2016 ("the Act"). Trilogy submits that certain of the fees which have been charged are either prohibited by the terms of the Act or, if not prohibited, are nevertheless unreasonable and should be disallowed. White Willow submits that the fees are permitted by the Act and are reasonable. The five RBC sub-trusts do not object to the fees charged.

42 We shall for convenience usually refer simply to the fees as being charged by White Willow although, as a matter of practice, all the fees were in fact charged by Stonehage because all the staff were employed by Stonehage and it was Stonehage that carried out the administration of both the Foundation and the underlying companies, White Willow being a special purpose company formed simply to act as trustee of the Foundation.

43 In briefest summary, Trilogy alleges:

(i) As a matter of construction:

(a) White Willow was prohibited by the Court from charging what the parties had referred to as an annual 'responsibility fee' in respect of JY and the three other companies owned directly or indirectly by the Foundation.

(b) Although the Court authorised White Willow to charge an annual responsibility fee of £50,000 for acting as trustee of the Foundation for the first two years after its appointment, the Court and the trust deed did not authorise the charging of such a fee thereafter.

(c) The Act lays down certain maximum hourly rates to be charged by Stonehage fee earners but those rates have been exceeded in certain respects. The excess has not been lawfully charged and accordingly should be disallowed.

(ii) If, contrary to the above, such responsibility fees are not prohibited as a matter of construction, then:

(a) It was unreasonable to charge responsibility fees for the companies and such fees should be disallowed.

(b) It was unreasonable to charge a responsibility fee for acting as trustee of the Foundation after the two-year period and accordingly such fee should be disallowed.

44 We propose to set out the necessary factual background leading up to White Willow's appointment and also describe the significant events in connection with the administration of the Foundation since White Willow's appointment before turning to consider each of the above issues in turn.

(ii) Background to White Willow's appointment

45 As stated earlier, in the 2014 judgment the Royal Court decided to remove YT as trustee of the Foundation and to appoint a new trustee in its place. However, it left YT in post until a new trustee had been identified and it appointed YT to assist in identifying a new trustee. It is clear from certain observations of the Court in the January judgment that it was not entirely satisfied with the manner in which YT carried out this task and Trilogy was also very critical of the way things were done in this respect. However, for our purposes the key events leading up to White Willow's appointment can be summarised reasonably briefly.

46 Appleby acted for YT and in December 2014, Advocate Dann of that firm approached Stonehage (amongst others) to see if it would be interested in appointment as trustee. Stonehage carried out certain due diligence and subsequently wrote a long letter dated 12th February 2015 setting out its proposal. After describing what it understood the position to be and what would need to be done, it set out its proposal for fees. It proposed to charge a take on fee of £100,000 and thereafter to charge for its ongoing services on a time spent basis subject to a minimum annual fee, which it proposed at £500,000 for the first year, £400,000 for the second year and not less than 0.2% of the value of the trust fund thereafter. As to the time spent aspect, Stonehage named the members of the management team who would be responsible for providing the service. There were six named individuals including three individuals described as directors who would be charged at £500 per hour, a senior manager charged at £400 per hour, another senior manager charged at £300 per hour and a manager charged at £275 per hour. The letter went on to say that the above management team would be supported by a dedicated team of administrators, whose hourly rates varied from £150 to £250.

47 Representatives from Stonehage met with Advocate Dann and Advocate Binnington (as a director of YT) on 18 th February 2015 and, following a request from Advocate Dann as to whether there was any scope for reducing the minimum fees, Mr Lewis, the lead director of Stonehage on this matter, emailed on 19 th February 2015, to amend the fee proposal by reducing the minimum fee for the first year to £430,000 and the minimum fee for the second year to £345,000. The take-on fee and the hourly rates remained the same.

48 Following certain queries, Mr Lewis wrote to Advocate Dann on 11 th May 2015, explaining the thinking behind their proposal and the fact that it was intended to form a private trust company (i.e. White Willow) as part of the Stonehage Group as a special purpose vehicle to act as trustee of the Foundation. The fee proposal remained as previously set out.

49 There was a further hearing before Commissioner Herbert on 19 th May 2015, which was attended by Mr Crosby and Mr Lewis of Stonehage as observers. It appears that during that hearing, the Commissioner raised concerns about the guaranteed minimum fee element of the proposal. Advocate Robertson of Appleby approached Stonehage to see if they would reconsider this element. After discussion, Stonehage proposed an alternative which was set out in an email dated 20 th May 2015, from Mr Lewis to Advocate Robertson and to Advocate Binnington. We think it appropriate to quote the relevant parts of this e-mail in full:

> *"I write to confirm the basis upon which White Willow (Trustees) Limited and the Stonehage Fleming Group would be prepared to accept appointment as trustee to [the Foundation] and to provide administrative services to the Foundation and its group of companies*.
>
> In relation to fees, our proposal is as follows:
>
> > *(i) Take on fee of £100,000 payable on appointment*.
> >
> > *(ii) An annual responsibility fee payable in respect of each of the Foundation and the following subsidiaries:*
> >
> > > *(a) Foundation — £50,000*
> > >
> > > *(b) [JY] — £40,000*
> > >
> > > *(c) [T Limited] — £40,000*
> > >
> > > *(d) [C Limited] — £40,000*
> > >
> > > *(e) [S Limited] — £40,000*
> >
> > *(iii) An additional time spent charge for all services provided to the Foundation and the underlying subsidiaries to include but not limited to the provision of the following services:*

(a) Acting as trustee to the Foundation

(b) Providing directors to White Willow and the subsidiaries (Companies)

(c) Acting as company secretary to the Companies

(d) Acting as registered office to the Companies

(e) Providing book-keeping and accounting services to the Companies

(f) Providing cash management and general administrative services.

We have previously indicated our applicable hourly charges.

For the avoidance of doubt the annual responsibility fee is payable for accepting responsibility for providing the above services.

The Royal Court during its sitting yesterday stated that any order it made would be limited to appointing a new trustee and that it would be up to the new trustee to appoint new directors and service providers to the Companies. We *understand this but wish to make it clear that we will only accept appointment as trustee on the basis that upon appointment steps will be taken to replace the current directors and service providers to all Companies and that members of the Stonehage Fleming Group will be appointed in their place; their appointment will be on the basis of the fees set out above."* [Emphasis added]

50 This was the proposal which went before the Royal Court at its hearing on 23/24 September 2015. YT recommended the appointment of White Willow/Stonehage, although proposals in relation to two other trust companies were also before the Court.

51 Trilogy opposed the appointment of White Willow/Stonehage on a number of grounds, including its proposed level of fees, which Trilogy argued was excessive. However, although with some reluctance about the level of fees (which were higher than the remuneration quoted by the two other trust companies), the Court decided to appoint White Willow as trustee in place of YT.

52 It is apparent that the Court indicated orally following the hearing that it was minded to appoint White Willow provided the terms of appointment were acceptable to it and that a draft judgment would be produced in due course. On 30 th November 2015, Advocate Dann circulated a copy of the Court's draft judgment (together with a draft Act of Court) to Stonehage. Upon reading the draft, Stonehage had concerns about certain paragraphs of the draft judgment. They were paragraphs 38 and 51 which were in the following terms:

38. It also became apparent during the hearing that the proposed fee structure related not only to the remuneration of YT [this is a typographical

error in the original judgment and "YT" should read "trustee"] itself, but also to the remuneration of directors and other employees of [T Limited] and subsidiaries of JY. For example, some of the work covered by the take-on fee appears to be work to be done for [T Limited] or JY. The Court pointed out, however, that neither [T Limited] nor JY nor any of any of its subsidiaries was a party to the proceedings, and that the Court was not in a position to determine or approve the remuneration of directors or employees of those companies. That remuneration will be a matter for those companies themselves, and the new trustee's duty will be to exercise its control over [T Limited] and JY as controlling shareholder in such a manner as will be consonant with its duty to manage the assets of the Foundation in the interests of the eight sub-trusts. The Court also pointed out, while accepting that the trustee's tasks would be carried out under the constant and perhaps critical or hostile gaze of the sub-trustees, that the continuing function of the successor as trustee of the Foundation (after the activities covered by the take-on fee) was essentially relatively simple, consisting of the appointment and supervision of the directors of [T Limited] and of JY, and the immediate distribution to the sub-trusts of any net distributions received from those companies……

51. We have also been invited to make provision in the Act of Court for responsibility fees for the underlying companies. We decline that invitation, since it is not based on evidence of the work which those companies and their directors will undertake. [Stonehage] has declined to give even its own estimate of the work involved, in which case the Court can do no better. We can record [Stonehage's] request for such provision, but in principle any charity trustee accepting trusteeship which includes the supervision as shareholder of one or more investment companies must in our view accept the responsibility of supervising those companies in the interests of their trust, in this case the interests of the eight sub-trusts."

53 Stonehage raised its concerns with Advocate Dann who in turn wrote to the Commissioner on 16 th December 2015, in the following terms: (so far as relevant):

"Further to the provision of the draft judgment and draft Act of Court, we have provided these confidentially to Stonehage/White Willow as directed. White Willow has confirmed that it remains willing to accept the trusteeship of the structure, on the understanding that the effect of paragraphs 38 and 51 of the draft judgment is that the Court does not feel itself in a position to make provision in the Act of Court for the charging of responsibility fees in respect of the administration of the underlying companies. Accordingly, remuneration in relation to the management and administration of those companies (including, if felt appropriate, the charging of responsibility fees) falls to be determined by the new trustee, always acting reasonably and in accordance with its obligations under the trust deed and the Trusts (Jersey) Law. We should therefore be very grateful for confirmation that this properly reflects the intentions of the Court."

[Emphasis added]

That letter was copied to Advocate Baker on behalf of Trilogy, but Trilogy did not comment on the letter.

54 On 16 th December 2015, the Judicial Secretary replied to all parties on behalf of the Commissioner as follows (so far as relevant):

> ***"Commissioner Herbert has asked me to send you the following message and the attached revised Act of Court:***
>
> ***"I can thank Appleby for today's letter, and confirm their understanding of the position in regard to remuneration of the underlying companies.*** I can therefore delete the final recital in square brackets from the draft Act of Court …..".""

55 The deleted recital (which appeared in the draft Act but was removed in accordance with the Commissioner's response from the final Act) read as follows:

> ***"AND UPON the First Respondent having requested the Court to make special provision for the remuneration of directors and other officers and employees of companies whose shares are comprised in the trust fund of the Foundation (but the Court having declined to make such provision)."***

56 The final judgment of the Court was, as mentioned previously, issued on 12 th January 2016, with paragraphs 38 and 51 unaltered.

57 The final Act was issued on 2 nd February and the relevant provisions were as follows:

> ***"IT IS ORDERED that:***
>
> ***1. with effect from the 9th March 2016, [White Willow] is hereby appointed as trustee of the Foundation in place of [YT] (the removal of which is confirmed);***
>
> ***2. on that date [YT] shall take all such steps or further steps as are necessary to vest in [White Willow] the assets comprised in the trust fund of the Foundation …*** ..
>
> ***3. administration of the trusts of the Foundation shall be conducted by [Stonehage] and its participating members on behalf of [White Willow] for the purposes of the Financial Services (Jersey) Law 1998;***
>
> ***4. for the period of two years beginning on the date specified in paragraph 1. above (or until the earlier cessation of its trusteeship or the earlier termination of the trusts of the Foundation) [White Willow]***

shall be entitled to the following remuneration:

> ***(1) a single take-on fee of £100,000 which shall be remuneration for [White Willow] and also of [T Limited] and of [JY] and of its subsidiaries (including the officers and employees of those companies) in respect of the following:***
>
> > ***(a) ……*** .
> >
> > ***(e)***
>
> ***(2) for all other work done and time spent as trustee of the Foundation, fees computed on reasonable hourly rates not exceeding £500 for partners and directors and not exceeding £250 for administrators based on time properly spent on that trusteeship by [White Willow] and its officers, directors and employees;***
>
> ***(3) responsibility fees at the rate of £50,000 per year payable monthly in arrears;***

5. subject as above, and until further order of the Court [White Willow] (or other the trustees or trustee for the time being of the Foundation) shall be entitled to remuneration pursuant to the trust deed of the Foundation……"

(iii) Relevant events following White Willow's appointment

58 Following White Willow's appointment, Mr Lewis and others from White Willow/Stonehage met with Advocate Baker on 12 th April 2016. Mr Lewis stated that the fee structure was to be in accordance with the proposal put to the Court. This was confirmed by letter dated 13 th May 2016, which set out the responsibility fees for both the Foundation and the companies at the same level as in the proposal described at paragraph 49 above. The letter also confirmed that fees would in addition be charged on the basis of time spent at the hourly rates set out in the original proposal.

59 This was queried by Mr Campbell of Trilogy in an email dated 16 th June both in relation to the company responsibility fees and the hourly rates. However, Mr Lewis confirmed on 6 th July that the Court had left the issue of remuneration for the companies to be determined and that the companies had resolved to appoint Stonehage on the terms set out in the proposal before the Court.

60 On 23 rd September 2016, Advocate Baker wrote to Mr Lewis referring to the earlier correspondence and to a meeting which had apparently taken place on 15 th September. The letter was mostly concerned with what work was to be covered by the take on fee of

£100,000 but Advocate Baker noted in the penultimate paragraph that Stonehage was entitled to annual responsibility fees of some £210,000, noting that the Royal Court had said that one of the reasons behind the high level of fees was that the appointment of the new trustee was expected to last only a few years until the properties in an overseas jurisdiction, which we shall anonymise as Ruritania, could be marketed and sold, liabilities discharged and the assets distributed to the sub-trusts.

61 As at the date of White Willow's appointment in March 2016, there were three companies held within the Foundation in addition to JY. The Foundation owned T Limited directly whereas C Limited and S Limited were wholly owned subsidiaries of JY.

62 Apart from liquid investments, the main assets held within the Foundation consisted of three residential tower blocks in Ruritania. These were owned by various combinations of T Limited, C Limited and S Limited. The key action required of White Willow following its appointment was to procure the marketing and sale of the Ruritanian properties with a view thereafter to the companies being wound up, the assets distributed to the sub-trusts and the Foundation ceasing to exist.

63 White Willow set about procuring the marketing and sale of the Ruritanian properties. It eventually received the final proceeds of the sales towards the end of the first half of 2017. From that point the assets of the various companies consisted essentially of cash or cash equivalent investments.

64 C Limited, T Limited and S Limited have all since been dissolved with the respective dates of dissolution being 30 th August 2018, 17 th October 2018 and 19 th November 2018. It follows that the only remaining asset of the Foundation is JY; and JY's assets consist entirely of such part of the cash assets as have not yet been distributed to the sub-trusts.

65 Following the sale of the properties, Trilogy raised concerns as to the continued charging of responsibility fees in respect of the companies, but White Willow considered that the fees were properly payable until dissolution of the companies, which it was hoped would take place fairly shortly. There was correspondence between White Willow and Trilogy extending into 2018. In an email dated 23rd March 2018, and a further email on 29 th May 2018, Advocate Baker confirmed that Trilogy was content for White Willow to continue to charge a responsibility fee in relation to the Foundation, but only if it did not charge any further responsibility fees in respect of the companies. However, White Willow maintained that it was entitled to responsibility fees for the companies until dissolution and we are accordingly called upon to resolve the issue. By email dated 11 th July 2019, Trilogy raised the question of whether White Willow was entitled to charge responsibility fees for the companies even prior to the sale of the properties.

66 Against that background, we turn to consider the issues raised by Trilogy and we shall address the issues of pure construction first.

(iv) Issues of construction

(a) Company responsibility fees

67 Advocate Baker submitted that, as a matter of construction of the Act and the January judgment, responsibility fees cannot be charged in respect of the companies. The Act is silent as to such fees and does not authorise them. Furthermore, paragraphs 38 and 51 of the January judgment (quoted at paragraph 52 above) make it clear that the Court was not willing to authorise such fees.

68 We accept of course that the Act did not expressly authorise the charging of responsibility fees for the companies. However, we have no hesitation in concluding that the charging of such fees is not prohibited by the Act or the January judgment. It was left as a matter for the new trustee (and the boards of the companies) to determine. We summarise our reasons for reaching this conclusion as follows:

(i) The Act is simply silent on the issue. There is no express prohibition of such fees.

(ii) Paragraph 38 of the January judgment states that, because the companies were not parties to the proceedings, the Court did not feel in a position to determine or approve the proposed remuneration in respect of the companies. The remuneration would be a matter for the companies themselves and for the new trustee in its supervisory position as controlling shareholder of the companies.

(iii) We have to say that, for our own part, we would respectfully differ from the Court's view of the limitation on its role as expressed in paragraph 38 of the judgment. It is extremely common for the assets of a trust to consist solely of shares in one or more wholly owned investment companies, which in turn own the underlying assets. The directors of the wholly owned companies are usually employees or corporate nominees of the trustee itself and the trustee also provides the administrative services to the companies. Fee structures put forward by such trustees usually encompass both the trust and the companies and it is the fee package as a whole which will be considered by a settlor or other person considering the fees. It is artificial to regard the remuneration of the companies as being wholly separate when it is employees of the trustee who will constitute the boards of those companies. We see no reason ourselves why the Court could not have considered the overall remuneration package in the same way as would a settlor and indeed that was the way in which the fee proposal was put forward by Stonehage. As one would expect, it had put forward a package to cover both the Foundation and the underlying companies. However, any difference of view as to whether the Court could have ruled on the question of responsibility fees for the companies in the January judgment is beside the point. The fact is that the Court considered that it was not in a position to fix the remuneration of the companies and it expressly said so at paragraph 38. A decision that the Court did not feel in a position to fix the remuneration of the companies is wholly inconsistent

with an assertion that the Court in fact prohibited the charging of responsibility fees in respect of the companies.

(iv) We cannot read paragraph 51 as qualifying the express statement in paragraph 38. Two reasons were given in paragraph 51 for declining the invitation to make provision for company responsibility fees. The first was that there had been no estimate of the amount of work involved. We are not entirely certain that we follow that reason, as a responsibility fee is separate from the time spent on administering the companies and reflects factors other than the time spent. The second reason was that in principle a trustee is responsible for supervising the owned companies. That is of course true, but does not preclude the charging of fixed fees in relation to such companies.

(v) Similarly, the fact that, despite the terms of paragraph 38 of the judgment, the Court did include work done for the companies in the take on fee (see paragraph 4(1) of the Act) does not alter the fact that it simply declined to rule on the question of responsibility fees for the companies.

(vi) It is in our judgment clear from the judgment itself that the Court was simply not deciding on the charging of responsibility fees for the companies. But that was made even more explicit by the Commissioner in the correspondence which followed the circulation of the judgment in draft. In their letter of 16 th December 2015 (quoted at paragraph 53 above) Appleby sought specific confirmation that remuneration in relation to the companies (including, if felt appropriate, the charging of responsibility fees) was to be determined by the new trustee acting reasonably and in accordance with its obligations under the trust deed and the Trusts (Jersey) Law.

(vii) In his response of 16 th December, the Commissioner confirmed Appleby's understanding of the position in regard to remuneration of the companies and decided to delete the recital contained in the draft Act, which had referred to the Court declining to make special provision for remuneration in relation to the companies.

69 Putting these matters together, it is in our judgment clear beyond doubt that the Court did not prohibit the charging of responsibility fees for the companies, which were of course expressly included in the fee proposal put forward by White Willow/Stonehage as representing the terms upon which they were willing to accept appointment. The Court specifically left the matter for the new trustee to determine. The real question therefore is whether the charging of such fees to the companies was reasonable and we shall turn to consider that issue shortly.

(b) Trustee responsibility fee after the two-year period

70 By the Act, the Court expressly permitted the charging of an annual responsibility fee of £50,000 for acting as trustee for the initial two-year period. That period expired on 9 th March 2018. Advocate Baker submits that, as a matter of construction, White Willow is not

entitled to charge a responsibility fee for acting as trustee thereafter.

71 Paragraph 5 of the Act provides that, after the expiry of the two-year period, White Willow (or any other trustee for the time being of the Foundation) is entitled to remuneration pursuant to the trust deed of the Foundation. That was consistent with paragraph 50 of the January judgment where the Court said:

> ***"We shall make no provision for remuneration beyond that two-year period: remuneration after that period would have to be justified in accordance with the general law and on the facts as they then appear."***

72 Advocate Baker submits that the trust deed does not permit the charging of a fixed or responsibility fee; it only permits charging by reference to time spent.

73 The key provision of the trust deed is paragraph (10) of the Third Schedule which is in the following terms:

> ***"Any of the Trustees (other than the Founder or any wife of his) being a banker accountant solicitor or surveyor or other person engaged in any profession or business shall be entitled to charge and be paid out of the Trust Fund or the income thereof, his usual professional or other charges for work or business done or transacted by him or his firm in connection with the affairs of the Trust (including work or business which might be done or transacted by him personally and not requiring the employment of a person engaged in such profession or business)."***

74 This is not in the conventional form of charging clause for a professional corporate trustee, but Advocate Baker accepted that White Willow is an *'other person engaged in any business …'* and is therefore entitled to charge for work or business done by it in connection with the affairs of the trust. However, he submits that the natural meaning of this provision is that White Willow can only charge for work or business done, i.e. on a time spent basis to reflect the work actually done. A fixed or responsibility fee is unrelated to work actually done and therefore does not fall within the charging provision of the trust deed.

75 In our judgment that is an unduly restrictive reading of the provision. If one omits irrelevant wording, paragraph 10 provides:-

> ***"Any of the Trustees….***being a..person engaged in any..business shall be entitled to charge..his usual..charges for work or business done..in connection with the affairs of the Trust…"

76 For the reasons set out below at paragraphs 93–97, we consider that a responsibility fee can be considered as falling within the *'usual charges'* of White Willow/Stonehage.

Although White Willow only acted as trustee of the Foundation, it is part of Stonehage which carries on business as a trustee and raised the actual charges in this case. It would in our judgment be artificial to construe the provision by reference only to White Willow rather than to Stonehage as the company which has actually charged the fees in this case. Furthermore, in our judgment, the expression *'for work or business done…in connection with the affairs of the Trust'* covers the general business of acting as trustee of a trust. The responsibility fee is payable in connection with White Willow acting as trustee of the Foundation and generally undertaking the work or business required of a trustee. Accordingly, we construe paragraph 10 as covering a responsibility fee payable to a trustee. As with the responsibility fees for the companies, the real question therefore is whether such fee is reasonable in the case of the Foundation following the expiry of the two year period.

(c) The hourly rates of fee earners

77 As set out at paragraph 57 above, paragraph 4(2) of the Act of 2 nd February provides as follows in connection with the hourly rate to be charged by fee earners:-

> ***"(2) for all other work done and time spent as trustee of the Foundation, fees computed on reasonable hourly rates not exceeding £500 for partners and directors and not exceeding £250 for administrators based on time properly spent on that trusteeship by [White Willow] and its officers, directors and employees;"***

78 Since taking office in March 2016, White Willow has charged for its fee earners at a maximum rate of £500 for *'directors'* and £250 for administrators. However, it has also charged out at rates between these two sums for members of the management team such as senior managers and managers.

79 Trilogy contends that this is not permitted by virtue of paragraph 4(2). It makes two points:-

(i) The term *'director'* is to be confined to board directors. It does not include persons who are in fact employees but their role has a title of 'director'.

(ii) Fee earners other than board directors (or partners, but that is not relevant) can only be charged out at a maximum rate of £250.

80 We must therefore construe the Act in order to decide whether Trilogy's submissions are correct. As to the principles of construing a document, we were referred to the judgment of Clyde-Smith, Commissioner in *Minister of Infrastructure v Parish of St Helier* [2016] JRC 153 at paras 30 – 41. Those principles were summarised very conveniently and concisely in the judgment of Martin JA in the Court of Appeal in the same case, *Parish of St Helier v Minister for Infrastructure* [2017] JCA 027 at para 12.

81 Both of these decisions make clear that words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time when the document was executed. In the case of an Act of Court, which is intended to give effect to a decision of the Court, a key aspect of the matrix of facts will be the judgment of the Court giving rise to the Act. An Act must be construed in the context of the judgment of the Court.

82 We turn therefore to consider the matrix of facts against which paragraph 4(2) of the Act must be construed.

83 As stated at paragraph 46 above, the letter of 12 th February 2015 from Stonehage set out its fee proposal in some detail and distinguished between the management team and the team of administrators which would support the management team. The management team consisted of six named individuals. Mr Lewis was the lead director and Mr Crosby was named as the managing director. Their hourly rates were given as £500 per hour. There was also a director of legal matters who was also to be charged at £500 an hour, although it is not clear whether he was a board director. There was then a lead manager to be charged at £400 an hour, a senior manager at £300 an hour, and a financial reporting manager at £275 an hour. Having named these six members of the management team, the letter went on to say:-

> *"The management team will be supported by a dedicated team of administrators (hourly rates are from £150 to £250).*
>
> *We will always ensure that staff with the appropriate degree of responsibility, skill and the time required to meet the Foundation's requirements are assigned in dealing with its affairs.* Mark Lewis will have overall responsibility for the delivery and standard of services provided by [Stonehage]."

84 As summarised at paragraphs 47 to 49 above, there were subsequent variations in the fee proposal, but each variation made clear that the hourly rates remained unaltered. The final proposal was that dated 20 th May 2015, summarised at paragraph 49 above. Accordingly, when the matter went before the Royal Court at the hearing on 23 rd/24 th September 2015, the proposal as to hourly rates remained that which had been set out in detail in the letter of 12 th February 2015.

85 The January judgment makes clear that the Court understood that this was the position and was aware of the difference between the management team and the team of administrators. Thus, at paragraph 36, the Court recorded White Willow's original proposal as including *'remuneration based on hourly rates of £150 to £250 an hour for administration and from £275 to £500 an hour for directors and senior professionals…'*.

86 Paragraph 40 of the judgment records that White Willow's proposals were amended in May 2015, but that these included *'hourly rates up to £500 an hour as before'*. Paragraph 41 of

the judgment records that that proposal had not changed by the time of the hearing on 23rd/24th September.

87 Paragraph 50 sets out the Court's decision and the relevant part in relation to hourly rates reads:-

> ***"[The order] will also include provision for maximum hourly rates in accordance with [White Willow's] own proposal*** ." [Emphasis added]

88 We have no hesitation in rejecting Trilogy's submission in relation to hourly rates. We would summarise our reasons as follows:-

(i) It is abundantly clear that White Willow's proposal drew a distinction between the management team and the team of administrators who would provide support to the management team. The management team was to comprise the six named individuals who would have hourly charging rates varying from £275 to £500, and the administrators would be charged at between £150 and £250 per hour.

(ii) This proposal remained unaltered despite other variations, such as the removal of the minimum fee and the introduction of responsibility fees. The Court had clearly accurately understood these proposals (see for example paragraph 36 of the judgment) and stated specifically at paragraph 50 that its order for hourly rates was in accordance with White Willow's own proposal.

(iii) In the circumstances, it is impossible to construe paragraph 4(2) of the Act as Trilogy suggests. It is clear that the Act was simply fixing a maximum hourly rate for the management team and a maximum hourly rate for the administration team which supported the management team. It is not surprising that the Act did not descend to a level of detail which specified the hourly rates for the members of the management team who were charged at below the maximum rate of £500.

(iv) Trilogy's construction would lead to the surprising conclusion that work undertaken by a senior manager or manager, who normally charges at an hourly rate of £400 or £300, would have to be undertaken at the maximum rate for administrators of £250. It is impossible to believe that the Court was making an order which would have such a result when the Court was specifically saying that its order was in accordance with White Willow's own proposal, which included charging managers and senior managers at their normal hourly rates of £400, £300 or £275.

(v) Finally, we see no ground for confining the rate of £500 to a board director as Trilogy submits. The expression 'board director' was not used in the proposal from White Willow and there is reference to a legal director who may or may not have been a board director. In our judgment, White Willow was entitled to charge for persons whose job title included *'director'* at the rate quoted in the proposal.

89 In summary, we reject Trilogy's submissions in relation to the hourly rates which White Willow was permitted to charge pursuant to paragraph 4(2) of the Act.

(v) Were the responsibility fees charged reasonable?

(a) Three preliminary points

90 It was common ground between the parties that, if we did not decide that the responsibility fees were prohibited as a matter of construction, we must go on to consider whether the responsibility fees charged (both at corporate level and at trustee level after the two year period) were unreasonable, either in principle or in amount.

91 In this respect, it is important to differentiate the role which we are undertaking from the role undertaken by the Court at the time of the January judgment. In 2016, the Court was exercising its power to remove a trustee and appoint a new trustee in its place. When appointing a new trustee, it had to consider the question of remuneration for that trustee. In doing so, it had to reach a view as to what it considered to be the correct level of remuneration to approve. It was a matter for the Court to determine. It reached a decision to fix the remuneration for two years, but thereafter it left the matter to the new trustee to fix its own remuneration in accordance with the general law.

92 Our role is different. It is not for us to determine the level of remuneration of the trustee in the same way as we would do if we were appointing a new trustee. The level of remuneration has been determined by White Willow. It was common ground that our task is limited to considering whether the remuneration which it has fixed is unreasonable in accordance with the decision in *Landau v Anburn Trustees Ltd* [2007] JLR 250. In that context, it is well-established that persons can reach different conclusions, both of which can be said to be reasonable (i.e. not unreasonable). It follows that we cannot interfere merely because, if we had been appointing White Willow, we would have fixed different fees from those which have been charged. We can only interfere if the remuneration charged crosses the threshold so as to become unreasonable.

93 A second preliminary point to note at this stage is that responsibility fees – often referred to as fixed fees – are not of themselves unreasonable. On the contrary, they are commonly charged by trustees. For example, Lewin at 23–103 states as follows:-

> ***"23–103 Individual trustees entitled to charge will usually do so by reference to time spent.*** Corporate trustees may charge somewhat differently. They will typically charge an acceptance fee. They will almost invariably also levee recurrent charges in the form of a fixed annual fee coupled with fees based on time spent (or perhaps only fees based on time spent but subject to an annual minimum); alternatively there may be an annual fee calculated as a percentage of the assets under management or, formerly common, income fees calculated by reference to the trust income."

94 In support of this general statement in Lewin, Mr Lewis, in his third affidavit, exhibits documents of three other trust companies (two in Jersey and one in the Isle of Man), all of which envisage charging by way of a combination of a fixed (or responsibility) fee and fees based on time spent. The brochure of one of the trust companies includes the following extract:-

> *"Fixed Charges*
>
> *Fixed Charges will be included in the management and administration charge reflecting the time, complexity, risk and associated responsibilities of the work.* For relationships billed under an ad valorem or regular annual fee arrangement, such fixed charges are incorporated into the overall fee established under such an arrangement.
>
> *For relationships billed on a time spent basis, these fixed charge elements will be in addition to the specific activity fees generated by our fiduciary relationship management professionals."*

95 The same company states later in the brochure that where fees are charged on an ad valorem basis, they will commence at a minimum of 0.5% of the market value of the gross assets under management. The actual rate will depend upon various factors and assumptions including, if not limited to, the nature and value of the assets, the estimated amount and complexity of work involved in the proper management and administration of a managed structure or entity, and the level of risk and responsibility associated with it.

96 Consistently with the passage from Lewin, we note that, as set out in paragraph 39 of the January judgment, both the other applicants for appointment as trustee in 2016 quoted a responsibility fee for acting as trustee as well as fees based upon time spent, albeit that the responsibility fees which they quoted were less than that quoted by Stonehage. They were between £20,000 and £30,000.

97 The question for us therefore is not whether responsibility fees as such are unreasonable. They are not. As we say, it is common for trustees to charge by way of a fixed fee combined with fees based on time spent, with the fixed fee varying according to the size of the trust fund, the complexity of the situation, and the risks and responsibilities in relation to the trust. The issue for us is whether, on the facts of this particular case, it was unreasonable to charge responsibility fees at all and if not, whether the amount and/or duration of the responsibility fees was unreasonable.

98 The third preliminary point we would make relates to the fact that the Foundation is a charitable trust, as are the eight sub-trusts. It might be inferred from certain observations in the January judgment that fees of a trustee of a charitable trust should be less than for a private trust (e.g. para 37). We do not believe that the Court was intending to say this but, if it was, we would respectfully disagree. It is of course always open to a professional trustee

to make its own charitable contribution by agreeing to act pro bono or for a reduced fee in relation to a charitable trust. Indeed, a trust company which behaves in such a way is to be commended. But it remains a matter of choice for the trust company concerned. If the trust company proposes simply to act on a commercial basis, it is entitled to charge at its usual rate and to make no distinction between charitable trusts and private trusts. Accordingly, this Court cannot apply a different standard to charitable trusts from private trusts when deciding whether a particular remuneration package is or is not unreasonable.

(b) The submissions

99 White Willow submits that annual responsibility fees of £40,000 for each company and £50,000 for the Foundation (i.e. £210,000 in total) were reasonable until dissolution of the three companies and since then, responsibility fees of £50,000 for the Foundation and £40,000 for JY (£90,000 in total) have been reasonable. White Willow submits that responsibility fees at this level are reasonable having regard to three factors, namely the complexity of the matter, the risks involved and the value of the assets in the structure.

100 Advocate Williams submitted that, looking at the position when White Willow assumed office, there was considerable complexity. In the first place, the background described in the 2014 judgment and the January judgment showed a long history of internal hostility and dispute within the family. Thus, the Court itself at paragraph 49 of the January judgment said *'such a difficult trusteeship justifies special remuneration.* We accept that the trusteeship may be difficult'.

101 Secondly, what the new trustee was being asked to do was akin to a liquidation rather than a normal trusteeship, in that the trustee was expected to realise the assets and then wind up the structure in early course.

102 Thirdly, there were real difficulties in relation to the three tower blocks in Ruritania. The position was described in detail at paragraphs 66–76 of the January judgment, but in brief, there was a risk that the existing structure infringed the law of Ruritania in relation to the acquisition of property by non-residents. There was also the task of arranging the marketing and sale of the properties together with related issues such as tax.

103 As to risks, there were several. The first and most obvious of these was the risk of criminal prosecution as a result of the ownership structure in relation to the properties. This was not only a financial risk by reason of fines which might be levied, but also a reputational risk to Stonehage.

104 Secondly, the expected short-term nature of the appointment was a commercial risk. Normally, a trust company would expect to develop relationships over a period of many years which could lead to goodwill and further business. That would not be the case here, as it was essentially a liquidation process which was to take place. Furthermore, the need

to devote resources to resolve complex issues without delay on a short-term basis might lead to a shortage of staff being available for other clients with consequent delay to the affairs of those clients. This all had to be reflected in the balance when determining what amounted to reasonable remuneration.

105 Thirdly, given the history, there was a risk of continuing litigation. Advocate Williams pointed out that the Court had accepted at paragraph 38 of the January judgment that the trustee's tasks would be carried out under the *'constant and perhaps critical or hostile gaze of the sub-trustees'*.

106 Finally, as to value the Foundation owned substantial assets. The assets under management were valued at several hundred million US dollars at the end of 2015. They had reduced to well over US$100m by the end of 2016 but were clearly still very substantial. As a result of distributions to the sub-trusts, the assets under management were under US$100m at the end of 2017, tens of millions by the end 2018, and had reduced further thereafter; but the assets were still substantial. The responsibility fees were reasonable and proportionate having regard to the value of the trust fund.

107 In support of his argument that value is always a significant factor when determining the reasonableness of remuneration, Advocate Williams referred to Rule 18.16 of the Insolvency (England and Wales) Rules 2016, which provides that remuneration for a liquidator or trustee in bankruptcy may be fixed by reference to the value of the assets or by reference to the time spent or be a fixed amount or be any combination of these. Given that the role of the trustee in this case was akin to that of a liquidator or trustee in bankruptcy, it was similarly reasonable, said Advocate Williams, to have regard to the value of the assets and to have a mix of responsibility fees and fees based on time spent.

108 Advocate Williams submitted that the position had not really changed after the sale of the properties, the proceeds of which had all been received by June 2017.

109 In terms of complexity, matters of tax relating to the sale had to be finalised and the companies other than JY then had to be wound up. There was a dispute (with the possibility of litigation, which had transpired) over the HSBC share issue and the overpayment to Trilogy by YT; there was the question of whether White Willow should become involved and possibly assume responsibility for the litigation which Trilogy had instituted by way of derivative action in 2017 against some of those involved in the management and administration of YT; and there was the outstanding question of the legal costs incurred by the Trilogy sub-trusts, the RBC sub-trusts and other parties in the earlier litigation, which costs had been ordered to be paid out of the assets of the Foundation. Although efforts to resolve this issue had been made, it had not proved possible for agreement to be reached between the various parties as to the amounts to be paid out of the Foundation to those parties in respect of their costs and accordingly it would be necessary to arrange for some form of taxation or assessment of costs to take place.

110 In terms of risk, whilst the risk of prosecution in relation to the properties had no doubt reduced, it still existed and had to be taken into account. The commercial risk resulting from the short-term nature of the appointment remained, as did the risk of the trustee becoming embroiled in further litigation. In addition, Trilogy was refusing to provide an indemnity in standard form in respect of the next proposed distribution.

111 As to value, whilst the value of the assets under management had reduced over the years because of distributions, the efforts of White Willow and its agents and advisers had achieved a sale price for the properties which was some $27m greater than the expected value. The total remuneration from the assumption of office by White Willow in March 2016 until the end of the third quarter of 2020 came to some $2.8m (comprising both the responsibility fees and the fees based on time spent). The total remuneration therefore amounted to only approximately 10% of the uplift in the value of the properties and could not be said to be unreasonable or disproportionate having regard to the considerable assets in the structure.

112 In summary, it was perfectly reasonable for White Willow to continue to charge responsibility fees for the three companies until dissolution and thereafter to charge responsibility fees for JY and the Foundation.

113 On behalf of Trilogy, Advocate Baker submitted that, although there was a background of litigation and hostility, this was not a particularly complex or risky trust to take on. The main battle had been about whether the underlying assets were to be retained in the JY structure (as MC and Mrs C contended) or distributed to the sub-trusts (as Trilogy contended). This had been decided in favour of Trilogy's position by the 2014 judgment and White Willow's task was simply to put that decision into effect. The fact that the battle was over was shown as early as 6 th October 2015 when Carey Olsen wrote on behalf of Mrs C to explain that she wished the Ruritanian properties to be sold to third parties, not distributed in specie or sold to family members. There was no hint in the letter that Mrs C was opposed to the sale of the properties as such. There was therefore no real risk by then of the battles of the past being continued.

114 Advocate Baker submitted that White Willow had never given any independent consideration to whether responsibility fees should be charged in respect of the companies. It had simply put its fee proposal into effect. Thus, the minutes of the companies appointing Stonehage did not refer to the issue of responsibility fees nor did any of the minutes refer to the point made by the Royal Court at paragraph 51 of the January judgment (quoted at paragraph 52 above) to the effect that any trustee of a trust which owns investment companies must accept the responsibility of supervising those companies. That observation pointed against the charging of responsibility fees for the companies in addition to the Foundation.

115 Insofar as the prosecution risk in relation to the Ruritanian properties was concerned, Advocate Baker pointed out the properties had been owned for many years — we were not

referred to any acquisition date but there is reference in the January judgment to advice on the issue having been received back in 2005, so the properties must have been acquired before then – without any threat of prosecution having materialised. Furthermore, such risk as there may have been became minimal once the properties had been sold and even more so after the dissolution, before the end of 2018, of the three companies which owned the properties.

116 As to other matters, he submitted that the possibility of litigation against those involved with YT had disappeared in June 2018 when Trilogy had informed White Willow that Trilogy was discontinuing the proceedings it had started in 2017. Even before that date, White Willow could always have protected itself by means of a Beddoe application if it had decided to participate in the proceedings.

117 The issue of the outstanding legal costs was not, he submitted, complex and in any event did not carry any risk to White Willow. It was simply a matter of White Willow arranging for a process of taxation to take place, so that the costs to be paid out of the Foundation to the various parties could be quantified. As to the dispute over the HSBC shares, that would be resolved by the decision of the Court in this case.

118 He accepted that Trilogy had raised many issues and questions with White Willow since White Willow's appointment which, it might be argued, was consistent with the *'hostile gaze'* referred to by the Court in the January judgment. But White Willow was entitled to charge for all the time which it took in dealing with such questions and issues and no challenge was being brought by Trilogy to the level of the fees calculated by reference to time spent (other than the point of construction referred to earlier in this judgment).

119 In summary, Advocate Baker submitted that, against the background of the January judgment (when the Court was clearly troubled by the level of proposed fees), it was unreasonable for White Willow to have charged the responsibility fees in respect of the companies. Even if contrary to that submission, it had initially been reasonable to do so, it became unreasonable following the sale of the properties, at which point the assets of the Foundation and the underlying companies consisted solely of cash or cash equivalent investments. Similarly, the charging of the responsibility fee of £50,000 for the Foundation was unreasonable after the expiry of the two-year period in March 2018. At that point, the assets were all in cash or cash equivalent, the companies were shortly to be dissolved and the remaining issues did not justify such a fee on top of the hourly rates for time spent.

120 We should add that, during his oral submissions, Advocate Baker submitted that White Willow had been dilatory over matters since the sale of the properties and that matters such as the HSBC share issue, the assessment of legal costs and further distributions to the sub-trusts should have been dealt with more promptly. Advocate Williams protested that such criticism had not been foreshadowed in the evidence or skeleton arguments before the hearing and that accordingly White Willow had not come prepared to meet such criticism, which it rejected as ill founded.

121 We have not heard White Willow's response to Advocate Baker's criticism and accordingly we are not in a position to rule on whether such criticism is well founded or not. Accordingly, we place no weight on this aspect of Advocate Baker's submissions.

(c) Decision

122 We consider first the question of responsibility fees for the companies of £40,000 per company. We have concluded that it was not unreasonable to charge such fees for the first two years, which for convenience we take as running until 31 st March 2018, i.e. the end of the first quarter of 2018. We would summarise our reasons for reaching this conclusion as follows:

(i) The reasonableness of the fees must be considered against the proposal setting out the terms upon which White Willow was prepared to act. The proposal was quite clear in providing for a fee of £50,000 for the Foundation and a total of £160,000 for JY and the other three companies i.e. £210,000 in total. It is of course the case that the Court did not specifically authorise the company responsibility fees in the January judgment. We have to say that with the benefit of hindsight, it was unfortunate that the Court did not determine the issue, as a decision by the Court one way or the other would have avoided the need for the present proceedings. But the fact is that the Court left the decision to White Willow in circumstances where White Willow had made it clear that it was only willing to act on the basis of the charging of such fees. In the circumstances, it is not surprising that, following the exchanges with the Commissioner after circulation of the draft judgment (which made it clear that the charging of responsibility fees for the companies was a matter for the new trustee to determine), White Willow decided to charge the company responsibility fees which it had included in its fee proposal.

(ii) As discussed earlier, responsibility or fixed fees are common as part of a remuneration package for a trustee which also includes fees for time spent by fee earners. There is therefore nothing unreasonable as such in White Willow wishing to charge a responsibility fee as well as for time spent. The question is whether the overall amount of the responsibility fee was unreasonable.

(iii) Although the fee proposal distinguished between the companies and Foundation, the proposal could equally have quoted simply an overall responsibility fee of £210,000 for the package of acting as trustee and providing directors and administrators to the companies. Viewed holistically, the ultimate effect of the proposal was for a responsibility fee of £210,000.

(iv) White Willow's appointment was in certain respects an unusual form of appointment in that it was expected to last for a comparatively short time. In the January judgment the Court specifically accepted that this was a reason for remuneration being charged at a premium level (see paragraph 44) and went on to

say at paragraph 49:

> ***"In the end we are persuaded that the special circumstances of the Foundation, including the hoped-for short tenure of the trusteeship justify substantial remuneration for the new trustee (using that word, for once, in the broad sense of the trustee and the investment companies which it controls)"*** .

We agree.

(v) In assessing whether responsibility fees at this level were reasonable, it is relevant to have regard to the history of the Foundation. As set out in the various judgments, there is a long history of dispute and of litigation. When White Willow assumed office, there was clearly a substantial risk of further litigation even if, as Advocate Baker correctly said, the main battle, over whether the assets of the Foundation should be realised and distributed, was over. Nevertheless, it was and is apparent that feelings run strongly in the family and that litigation is resorted to without too much hesitation. In our judgment, White Willow was entitled to take the view that it was notionally stepping into the lion's den and that, as the Court said in the January judgment, it would be under the *'perhaps critical and hostile gaze'* of the sub-trusts. The Court specifically accepted at paragraph 49 that it could not deny that the trusteeship might be difficult. There was, in our judgment, a real risk of some or all of the sub-trusts resorting to litigation against the new trustee if it were to do something with which the sub-trusts did not agree. That is a relevant factor to be taken into account when deciding upon the reasonableness of the remuneration charged.

(vi) We are satisfied that White Willow was entitled to take the view that there was a risk of prosecution for breach of the permitted ownership rules in Ruritania; indeed it had received advice to that effect. This was a risk which it would be reasonable to take into account in determining whether remuneration is reasonable, particularly having regard to the risk of reputational damage.

(vii) While, in one sense, the sale of assets comprising real property followed by distribution of the proceeds does not sound too complicated, we accept that the sale of three extremely valuable tower blocks and the need to extract best value on such a sale is not an everyday occurrence for trustees and can be reflected in the level of remuneration. Following receipt of the sale proceeds, there were still issues such as tax which had to be resolved.

(viii) When determining the reasonableness of a responsibility fee, the value of the trust assets is clearly a material factor which can properly be taken into account. Thus, if one has a trust with assets worth £1m and another with assets worth £100m, one would not expect the remuneration of the trustee of the two trusts to be the same even if the time required to be spent in administering each trust was expected to be identical. The remuneration can properly take into account the value of the trust fund and the accompanying responsibility. Indeed, as Lewin states, some trust companies charge solely by means of a scale fee calculated by reference to the value of the trust fund.

(ix) In this case, the trust fund was valued at hundreds of millions of dollars at the end of 2015, over US$100m at the end of 2016 and tens of millions at the end of 2017. On any view, this was a very substantial trust fund with accompanying levels of responsibility.

(x) As noted earlier, it was only the Trilogy sub-trusts which objected to White Willow's proposed remuneration at the time of the January judgment. They have maintained that objection in these proceedings and we must of course consider their objection on its merits. However, we note in passing that the remaining five sub-trusts have not objected to the responsibility fees which White Willow has charged.

(xi) Putting these matters together, it is not in our judgment unreasonable for aggregate annual responsibility (or fixed) fees of £210,000 to have been charged to the structure for the period from appointment until the end of March 2018.

123 However, we consider that it became unreasonable to charge the company responsibility fees (in addition to the trustee responsibility fee of £50,000) after the end of the two-year period. By March 2018, all the properties had been sold and enough time had elapsed to sort out remaining issues such as tax. The assets consisted entirely of cash or cash equivalent investments where there was little investment responsibility. The property owning companies had still to be dissolved, but we do not see that this was a particularly complex or onerous task. The risk of prosecution must be taken to have greatly reduced following the completion of the property sales. In our judgment, by March 2018, the position as to complexity, risk and value in relation to the structure had materially altered as compared to the position at the time White Willow was appointed and no longer justified company responsibility fees in addition to fees for time spent.

124 We turn next to consider the trustee responsibility fee of £50,000. The issue there is whether it is reasonable for such fee to have been charged after the end of the two-year period specifically authorised by the Court in the January judgment. In their submissions, both counsel accepted that the matters to be taken into account in determining the reasonableness of the trustee responsibility fee were similar to those relevant in connection with the company responsibility fees.

125 In our judgment, it was reasonable in all the circumstances for there to be a trustee responsibility fee of £50,000 for a further year after March 2018. Whilst the position was not the same as it had been in 2016, there were still outstanding matters which justified a responsibility fee of £50,000. Thus, the three companies had still to be dissolved and the properties had not been sold that long ago, so that there might still be said to be some risk of prosecution in respect of the Ruritanian properties. Indeed, we note that Trilogy itself, through Advocate Baker, accepted in 2018 that, if no company responsibility fees were charged, there could be a continuing trustee responsibility fee of £50,000 (see paragraph 65 above). In the circumstances, we do not consider that a responsibility fee of £50,000 for a further period of one year was unreasonable.

126 However, we cannot see the justification for a responsibility fee after March 2019. By then:-

(i) The companies had been dissolved. Although under Liberian law it is apparently possible for claims to be brought for up to three years after dissolution – this would affect T Limited – we accept Advocate Baker's submission that, realistically, the risks in relation to the Ruritanian properties had become minimal following the dissolution of the companies.

(ii) The prospect of litigation against the administrators of YT had disappeared because in June 2018, with the agreement of White Willow, Trilogy had discontinued the proceedings which it had instituted in 2017.

(iii) By the end of 2018, the assets under management had reduced to tens of millions of dollars and were entirely in cash or cash equivalent held in JY. Because the plan was to distribute the funds and terminate the Foundation as soon as possible, there was no investment management function or risk falling on White Willow or the directors of JY. The assets were simply to be held in cash until distributed.

(iv) The only outstanding matters were – and remain – as follows:

(a) The HSBC share issue and the Trilogy overpayments needed to be resolved. This simply required resolution by the Court and such resolution will occur upon publication of this judgment. There was no risk to White Willow, on the basis that this was a matter of administration and White Willow would be entitled to reimbursement of its costs out of the trust fund unless it had behaved unreasonably, as to which there can be no realistic possibility on this issue.

(b) The litigation costs of the parties in relation to past litigation needed to be quantified and paid out of the Foundation. Again, this was not a matter where there was any risk to White Willow or where White Willow had to exercise a significant discretion. Orders had been made entitling the parties to payment of certain costs out of the Foundation and it was simply a question of quantification, with White Willow paying any sums found to be due on such quantification. If the matter could not be agreed, it was a question of referring the bills for taxation in accordance with the guidance given in *Landau* (*supra*).

(c) Whilst we were not told when this issue first arose, there is apparently a disagreement about whether the Trilogy sub-trusts have to give an indemnity to White Willow in respect of distributions and, if so, the terms of any such indemnity. Again, this would seem to be a matter of administration. If the terms cannot be agreed, the matter can, we would have thought, be brought swiftly to Court with the Court resolving any dispute over indemnities.

(d) Once the question of the HSBC shares and the Trilogy overpayment together with the litigation costs is resolved, JY will need to be liquidated and the proceeds distributed to the sub-trusts, with the Foundation being wound up. Again, this would not appear to be a complicated matter given that all the assets

are in cash.

127 In our judgment, the matters outstanding as at March 2019 were all comparably straightforward and bore little or no relation to the issues which faced White Willow on assuming the trusteeship in terms of complexity or risk. Furthermore, the value of the Foundation had reduced from hundreds of millions of dollars to tens of millions of dollars by the end of 2018 and has since reduced further. White Willow will continue to be entitled to fees for the time spent in administering the trusteeship and the affairs of JY, and we do not consider a continuing responsibility fee in addition to be reasonable.

128 In reaching this conclusion, we would wish to emphasise the exceptional nature of the situation we are dealing with. First, this is not a case where a settlor or appointor has agreed the basis of a trustee's remuneration and the trustee has assumed office on that basis. In those circumstances, a beneficiary would indeed face an uphill battle in establishing that the basis of remuneration – as opposed to particular time spent etc. – was unreasonable. On the contrary, this is a case where the trustee was appointed by the Court and the Court expressly left the basis of remuneration after the two year period to be determined by the trustee itself. A court is likely to assess the question of reasonableness with some rigour where a trustee is itself determining the whole basis of its own remuneration, particularly where the circumstances are very different from those which existed when the trustee was appointed. Secondly, the position after March 2019 was unusual. Although the trust fund was not insubstantial, it was all in cash and, apart from the few simple outstanding matters mentioned above, all that was required was to wind up the structure and distribute the cash to the sub-trusts. There were virtually none of the usual responsibilities involved in a conventional continuing trust. It follows that our decision is very fact specific and is unlikely to be relevant to other cases save in respect of the general points of principle we have sought to articulate at paras 90–98 above. In particular our decision to disallow any responsibility fee after March 2019 is not to be taken as a commentary on the reasonableness of responsibility (or fixed) fees in any other circumstances than those with which we are presented in this case.

Summary of conclusions

129 In summary, we hold as follows:-

(i) The RBC sub-trusts were not entitled to the aggregate cash top up payments of $2,191,142.71 as part of the 2013 distribution. That sum, together with the overpayments to the Trilogy sub-trusts in September 2015 falls to be distributed equally between the eight sub-trusts. However, the RBC sub-trusts are entitled to any dividends on the HSBC shares received by JY after 18 th September 2015 and to interest on the correct cash sum from 18 th September until date of payment in 2016.

(ii) The company responsibility fees are not prohibited by the Court's decision in the January judgment or the accompanying Act.

(iii) The trustee responsibility fee after the initial two-year period is not prohibited by the terms of the trust deed or the general law.

(iv) The Act of 2 nd February 2016 does not limit the hourly charge out rates of Stonehage employees below the level of board directors to £250 as submitted by Trilogy. The Act permits hourly charge out rates in accordance with the proposal put forward by Stonehage in its letter of 12 th February 2015.

(v) The company responsibility fees of £40,000 per annum are reasonable until the end of March 2018 but any company responsibility fees are unreasonable thereafter.

(vi) The trustee responsibility fee of £50,000 per annum is reasonable until the end of March 2019 but any responsibility fee is unreasonable thereafter.

Postscript

130 As referred to above, the main outstanding matter which needs to be resolved before the Foundation can be wound up is the payment of the legal costs ordered to be paid out of the Foundation in respect of earlier proceedings. Although the matter was only touched upon briefly before us, our understanding is that it has not proved possible for the RBC sub-trusts and the Trilogy sub-trusts to reach agreement on each other's bills of costs in respect of those proceedings.

131 It is ultimately, of course, a matter for the trustees of each sub-trust to decide how to proceed. However, we would urge the parties to be pragmatic in this respect. The assets of the Foundation are held equally for the eight sub-trusts which are in turn all charitable. Thus, all unnecessary expenditure (whether incurred at the Foundation level or at the sub-trust level) is ultimately at the expense of charitable activities. The argument over the legal costs would appear to be an argument on whether legal costs incurred by the sub-trusts should be borne at the Foundation level or at the sub-trust level; but either way, such costs will be payable at the expense of charitable interests.

132 It seems to us highly undesirable therefore for extra expenditure (which would ultimately be at the expense of the charitable interests) to be incurred by becoming involved in a taxation process intended simply to decide whether particular legal costs should be borne at the Foundation or sub-trust level. As was touched upon briefly during the hearing, the course of action likely to cause the least damage to the ultimate charitable interests would be for the costs claimed by the Trilogy sub-trusts and the RBC sub-trusts respectively to be paid in full out of the Foundation, so that no further money is wasted on legal costs in respect of a taxation process and the Foundation can be wound up at the earliest opportunity. We invite the parties to give careful consideration to this possible approach.