Trilogy Management LimitedvYT Charitable Foundation (International) Ltd, AG, OM-LC² Charitable Foundation International, The Empowerment Charitable Trust, The Saving Grace Charitable Trust, OM-VC Charitable Foundation, The Well Trust and Mrc C

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	10 May 2012
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Court:	Royal Court
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Text

[2012] JRC 93

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, **Esq**., Bailiff, **and**Jurats Tibbo**and**Nicolle.

Between
Trilogy Management Limited
Representor

and

(1) YT Charitable Foundation (International) Limited
(2) HM Attorney General
(3) OM – LC2 Charitable Foundation International
(4) The Empowerment Charitable Trust
(5) The Saving Grace Charitable Trust
(6) OM – VC Charitable Foundation
(7) The Well Trust
(8) Mrs C
Respondents

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

Advocate J. P. Speck **for the First Respondent**.

Advocate N. F. Journeaux **for the Eighth Respondent**.

The other Respondents did not appear and was not represented.

Authorities

Companies (Jersey) Law 1991.

Gallagher -v- Jones [1993] STC 537 .

Palmers Company Law Vol. 2.

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

Trust — proceedings to determine whether correct levels of dividend have been declared by an investment company.

The Bailiff

1 These proceedings are concerned with whether the correct level of dividends have been declared by a substantial investment company which is wholly owned by a charitable foundation, which in turn distributes all dividends received by it to eight charitable Sub-Trusts. The background is a dispute amongst the members of the family of the testator whose business acumen built up these very substantial assets.

2 The case was heard over a week in December 2011 and thereafter the Court received written closing submissions spread over January and February 2012, with the final communication being received on 14th March. The Court has three main issues to resolve. Two of them are points of construction in relation to the Articles of Association of the

investment company. The third issue relates to whether a dividend of US$80 million declared in respect of the year 2004 has correctly been counted towards the minimum dividend which the investment company was obliged to declare in respect of that year. This requires the Court to make certain findings of fact in relation to events which took place in 2004.

3 In order to explain the structure of this judgment, we should say that we propose to begin by summarising the bare essentials of the history of this matter so as to set the scene before turning to consider the first two issues. Having done that, we shall then summarise the relevant evidence before making the necessary findings of fact which lead to resolution of the third issue.

The essential background

4 The testator was a successful businessman who built up a substantial fortune. He believed strongly in the importance of philanthropy and prior to his death he established a charitable structure to which he contributed a substantial proportion of his wealth. It is the entities in that structure which are the subject of the dispute in these proceedings.

5 In 1987 he established a Jersey company to which we shall refer as JY. The share capital of JY comprised 40,000 A shares and 10,000 B shares. The A shares carried control of JY, as they conferred upon the holders the right to vote at meetings, appoint directors etc. However, they conferred no economic interest in JY save as to the original capital. At the date of his death, the testator legally or beneficially owned all of the A shares.

6 The B shares carried the economic interest in JY including the right to receive dividends. As set out below, the B shares were held upon charitable trusts.

7 On 28th May 1987 the testator established a Jersey charitable trust to which we shall refer as “the Foundation”. The trustee of the Foundation was and remains the First Respondent, a Jersey company to which we shall refer as YT. YT was legally or beneficially owned entirely by the testator. YT's principal asset was the B shares in JY which it held in its capacity as trustee of the Foundation. As can be seen therefore, the economic interest in JY was held entirely for the benefit of a charitable trust.

8 The testator died on 10th December 2001. He was survived by his widow, the Eighth Respondent to whom we shall refer as ‘Mrs C’ and 8 children, to whom we shall refer by their initials. There were two sons PC and AC and six daughters LC, CC, VC, JC, MC and MI. Four of those children, namely PC, AC, LC and MC were appointed as executors of the testator's Will together with Caroline Garnham of Simmons and Simmons. A grant of probate was obtained from this Court on 17th October 2002.

9 By clause 6 of the Will the testator purported to dispose of his shares in JY and YT.

However, advice from English leading counsel was received that clause 6 might be invalid or of uncertain meaning. That issue, together with a number of other issues, spawned three sets of proceedings issued in Jersey:-

(i) LC and MC issued an Order of Justice on 2nd March 2004 to which their co-executors were the defendants. The principal relief sought was an order requiring the co-executors to join with them in procuring that all the shares in JY and YT owned by the testator at the date of his death were transferred into the joint names of all the executors.

(ii) On 30th March 2004 BNP Paribas Jersey Trust Corporation Limited ("BNP"), which was the trustee of a trust known as the General Distribution Settlement ("GDS"), which was the 99% beneficiary of the residuary estate under the Will, issued a representation seeking the Royal Court's directions in relation to certain matters.

(iii) On 27th April 2004 PC and AC issued their own representation against their co-executors, YT and BNP seeking certain directions in relation to clause 6 of the Will and the future of JY and YT.

10 A hearing was fixed for June 2004. Leading up to and during the hearing, there were complex negotiations between the parties to the litigation. The negotiations also included CC, JC and MI (collectively "the Trilogy Sisters"). They were not parties to any of the proceedings but were represented by counsel who was able to address the Court. Eventually an agreement was reached in relation to JY and YT and this was in due course reflected in an order of the Court dated 11th June (being the date of the hearing), although the terms were only finally agreed and executed on 24th / 25th June. For the purposes of the present proceedings, the effect of the order was as follows:-

(i) Eight charitable Sub-Trusts of the Foundation ("the Sub-Trusts") were created. Each of the Sub-Trusts had as its guardian one of the children of the testator, so that each child could have a significant role in relation to one of the Sub-Trusts in helping to decide what charitable purposes should benefit. All the Sub-Trusts were created by declarations of trust on or before 25th June 2004. The Representor ("Trilogy") is the current trustee of the three Sub-Trusts of which the Trilogy Sisters were the original guardians and brings these proceedings in its capacity as trustee of those three Sub-Trusts ("the Trilogy Sub-Trusts").

(ii) YT, as trustee of the Foundation, executed an instrument of appointment dated 25th June 2004 declaring irrevocably that it held the B shares in JY on trust for the Sub-Trusts in equal shares and would pay any income or capital distributions it received from JY to those Sub-Trusts equally.

(iii) The articles of JY were amended in various ways by a resolution dated 25th June 2004. The most significant amendment was to Article 96, so that it provided for an annual minimum dividend of 75% of the profits of JY of that year. All such dividends would of course be paid to YT as trustee of the Foundation and hence equally to the

eight Sub-Trusts.

(iv) 99% of the A shares in JY (i.e. the shares giving control of the company) were vested in YT as trustee of the Foundation. The remaining 1% of the A shares were vested in Mrs C.

(v) 96% of the shares in YT were vested in a purpose trust with the remaining 4% of the shares being owned as to 3% by BNP as trustee of the GDS and 1% by Mrs C.

(vi) The four children who were executors, namely LC, PC, AC and MC, together with Advocate Alan Binnington, were appointed directors of JY and YT. The articles of YT were amended to provide that decisions of directors had to be unanimous and the articles of JY were amended so that all decisions (save a decision to pay a dividend in excess of 75% of the profits for a year) had to be unanimous.

11 Although this was not reflected in the order of the Court, the Court is satisfied that it was also agreed that an initial dividend of $80m (described as a 'priming the pump' ("PTP") dividend) should be paid by JY to YT so that each of the Sub-Trusts would receive a payment of $10m dollars as initial funding. A more detailed discussion of the PTP dividend is contained later as it is relevant to the third issue.

12 It is clear that there were – and indeed still are – different views about the compromise of the 2004 proceedings. The Trilogy Sisters believe that there should be very substantial distributions from JY so that the Sub-Trusts can apply these monies for charitable purposes. MC, LC and Mrs C, on the other hand, are of the view that the testator wished his charity to continue for generations, so that the main body of assets should be preserved in JY with only more moderate distributions being made to the Sub-Trusts. It is that division of family opinion which has led to the present proceedings.

13 It is convenient at this stage to summarise the position in relation to the accounts of JY. These accounts had always been prepared on the historical cost basis; in other words investments were shown at cost and gains only brought into account when they were realised. The latest accounts available at the date of the June 2004 negotiations were the accounts for the year ended 31st December 2002. These showed investments at cost of some US$56m but the notes showed these as having a market value of some $192m. The difference was largely explained by the fact that JY had for many years had a substantial holding of HSBC Bank shares and these had increased in value over the years. The accounts also showed accumulated profits in the balance sheet of some $271m and that the company was cash rich in that it had bank balances of some $171.8m.

14 Throughout the summer of 2004, pressure mounted for the directors of JY to declare the PTP dividend of $80m. However, this did not take place as quickly as had been hoped and it was only following written resolutions completed by all the directors of JY on or before 1st November 2004 that the dividend was paid. The directors in fact passed two resolutions. The first approved the audited accounts of JY for the year ended 31st December 2003 and

recommended a final dividend of a total of $1.8m (which had already been paid) for that year. A second resolution noted the accounts to 31st December 2003 and resolved to declare an interim dividend of a total of $80m. The accounts to 31st December 2003 were again prepared on the historical cost basis and showed a profit on the income statement of just over $15m. The balance sheet showed accumulated undistributed profits of some $284m.

15 The draft accounts to 31st December 2004 were only made available to the board of JY by the Hong Kong accountant and auditor in September 2005. The accounts showed a profit for the year of $35.1m. The larger than normal profit appears to be explained by a large currency gain. In due course a meeting of the directors was held on 5th December 2005. The meeting noted that there had been an interim dividend in 2004 of $80m and that Article 96 required a distribution of at least 75% of the profits arising in the year. The accounts were approved (other than by MC who did not approve them until 27th June 2006) but a decision as to whether to pay an additional dividend was deferred. The Board never did resolve to declare an additional dividend, on the basis that it had already declared an interim dividend of $80m which comfortably exceeded the profit for the year.

16 In 2005, two important events took place in relation to JY. First, there was a substantial realisation of HSBC shares giving rise to a realised profit (over cost) of over $100m. Secondly, the Board decided to appoint KPMG as auditors. KPMG tendered for the audit on the footing that, if appointed, they would prepare the accounts on the basis of International Financial Reporting Standards ("IFRS"). KPMG were officially appointed as auditors in 2006. IFRS entails, *inter alia*, revaluing the marketable investments of a company each year and taking the change in value as a profit or loss. Thus, if marketable shares are worth £100 on 1st January and £125 on 31st December of the same year, the accounts will show a profit of £25, even if the shares have not been sold; similarly if there is a decrease in value, a loss will be shown. IFRS is therefore very different from the historical cost basis. Although JY had in fact realised a substantial profit on the sale of the HSBC shares during 2005, the market value of the company's investments had declined during the course of the year with the result that, prepared on the IFRS basis, the income statement in the accounts showed a loss of some $2.1m. The directors concluded therefore that there was no obligation to pay any dividend under Article 96, although they did in fact resolve to pay a dividend of $16m. For ease of readability, we shall throughout this judgment round numbers up or down to the nearest tenth of a million save where it is useful to give the exact figure.

The matters in dispute

17 It is convenient at this stage to summarise the nature of the first two issues:-

(i) Trilogy argues that, if one compares the net assets at 31st December 2004 of $239,974,552 (prepared on the historical cost basis) with the net assets as shown in the accounts as at 31st December 2005 (prepared on the IFRS basis) of $463,705,092, the difference of $223,730,540, must be the profit for the year and

therefore 75% of that has to be distributed under Article 96. The Board of JY, on the other hand, took the view that, according to the accounts for 2005, the company made a loss and therefore there was no obligation to pay a dividend under Article 96 in respect of that year.

(ii) The second issue arises purely in relation to the 2003 accounts. These were adopted in October 2004 after the new Article 96 was brought into force on 25th June 2004, although the accounts were of course in respect of a financial year prior to the adoption of the amended Article 96. Trilogy argues that, because the accounts were considered and approved after the adoption of Article 96, they are subject to the mandatory 75% dividend requirement, whereas JY has taken the view that they are not.

18 The parties before the Court were Trilogy, YT and Mrs C, who had been given leave to participate in the proceedings even though not directly involved. By the time of the hearing, YT was adopting a neutral position as its Board of Directors were split on the three issues before the Court and its Articles of Association require decisions to be taken unanimously. Mrs C put forward arguments in opposition to those of Trilogy; YT confined itself to making submissions intended to assist the Court.

19 With that introduction we turn to consider the first issue.

Issue 1 – What are the profits of the year 2005 for the purposes of Article 96 of the Article of Association?

20 Article 96, as introduced on 25th June 2004, is in the following terms:

> " *The profits of the Company available for dividend and resolved to be distributed shall be applied in the payment of dividends to the Members in accordance with their respective rights and priorities.* Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits of that year are available for dividend, recommend to the Company a dividend of not less than 75% of such profits (or such greater amount as a majority of the Directors shall agree, notwithstanding the terms of Article 76), provided always that if the payment of such a dividend would result in the net asset value of the Company, as disclosed in the accounts of the Company for that financial period, reducing to less than 10% of the net asset value of the Company as disclosed in the accounts of the Company for the preceding period, the Directors shall recommend a dividend of not less than 50% of such profits. If the Directors make such a recommendation, the Company in general meeting shall ratify and approve such dividends accordingly." (emphasis added)

21 The relevant provisions of Article 114 of the Companies (Jersey) Law 1991 ("the Companies Law"), as in force at the relevant time, are as follows:-

" ***114 Restrictions on Distributions***

(1) A company shall not make a distribution except in accordance with this Article .

(2) A company may make a distribution at any time:-

(a) out of its realised profits less its realised losses;

(b) out of its realised revenue profits less its revenue losses, whether realised or unrealised, provided the Directors reasonably believe that, immediately after the distribution has been made:-

(i) the company will be able to discharge its liabilities as they fall due; and

(ii) the "realisable" value of the company's assets will not be less than the amount of its liabilities .

(3) …

(4) …

(d) References to profits and losses of any description are to profits and losses of that description ascertained in accordance with generally accepted accounting principles…"

22 As already indicated, the problem over the interpretation of Article 96 arises because of a change in the accounting practice adopted by JY for the year 2005. Up to and including 2004, accounts had been prepared and audited by the accountant in Hong Kong used by the testator. Although the accounts stated that they had been prepared on the IAS basis, it is agreed by all parties that they had in fact been prepared on the historical cost basis. We have already described the effect of that at paragraph 13 above.

23 The 2004 accounts showed an opening balance of retained earnings of $284,422,247. The profit for the year was shown as $35,077,471 and, after payment of the dividend of $80 million, this left retained earnings carried forward as at 31st December 2004 of $239,499,718. The balance sheet therefore showed net assets of $239,974,522 comprising the above figure for retained earnings and share capital of $474,834. The notes to the 2004 accounts showed that the investments were carried at a cost of $41,501,659 but had a market value of $267,314,348. Thus there was an unrealised and unrecorded accrued gain of $225,812,689.

24 Although in error the notes to the 2005 accounts referred at one point to their having been prepared on the historical cost basis, it is agreed that they were in fact prepared on the IFRS basis. We have described the effect of this at paragraph 16. When there is a change in accounting policy, the accounts for the previous year must be restated in accordance with the new policy in order that there is an accurate comparison for the two years of

account. Thus, for the purposes of preparing the 2005 accounts, the comparative figures for 2004 were restated so as to reflect IFRS principles. This involved revaluing the opening net asset figure as at 1st January 2004 by revaluing the investments at their market value. This resulted in an increase of $206,348,264 over the figure shown in the 2004 accounts. The profit for 2004, on this restated basis, showed an increase of $19,464,425, reflecting the gain in the value of the investments held during this period. Thus the profit as shown in the restated accounts for 2004 was $54,541,896 rather than $35,077,471. It followed that the restated net assets as at 31st December 2004 were $465,787,241 rather than the $239,974,552 shown in the actual 2004 accounts.

25 The 2005 accounts themselves prepared on the IFRS basis showed a loss of $2,082,149. This was because, although a substantial gain had been realised on the sale of HSBC shares during the year as compared with the original cost of those shares, there had been a decline in the value of the shares from the beginning of 2005, leading to the loss of $2.1m.

26 The difference between the parties arises in this way. Trilogy's case is that the aggregate revaluation figure of $225,812, 689 (being $206,348,264 as at 1st January 2004 plus the 2004 revaluation figure of $19,464,425) is a profit of 2005 because that is the first occasion on which it appears in the accounts. Allowing for the loss as shown in the accounts of $2,082,149, the actual profit for the purposes of Article 96 for 2005 was $223,730,540 and JY must distribute 75% of that. Mrs C submits that the profit for 2005 is as shown in the accounts, namely a loss of $2,082,149. That was also the view originally taken by the board of JY but PC and AC now consider that to have been wrong and accordingly JY does not have a unanimous view which it is able to put forward.

27 Each side has relied upon the evidence of an accountancy expert and we shall come to their evidence shortly. However, we should first mention briefly certain advice which the board obtained from Mr Victor Joffe QC, an English barrister.

28 According to the evidence of Advocate Binnington, the independent director appointed following the June 2004 compromise, the question of a possible disposal of JY's shares in HSBC was considered towards the end of 2004. At that stage it seemed to him that, if they were to be sold, the sale price less the original cost recorded in the accounts would represent a realised and distributable profit for the year of sale in accordance with Article 96. He communicated this to his fellow directors but MC took a different view and said that the profit would only be the sale price less the market value of the shares at the time of the compromise in June 2004. Not long afterwards BNP raised an issue as to whether, despite the words ‘of that year’ in Article 96, the intention was that Article 96 should apply to all accumulated profits. Accordingly, in March 2005, the board took advice from Mr Joffe. Not surprisingly, Mr Joffe advised that Article 96 provided that the board were obliged to declare a dividend of 75% of the profits ‘of that year’, not the accumulated realised profits of previous years.

29 Not long afterwards, a substantial part of JY's holding in HSBC was realised and Mr Joffe

was consulted again. In briefest outline, Mr Joffe advised that Article 96 required an annual revaluation of all the company's assets and the 'profits of that year' would be the difference in value between the beginning and end of the year adjusted of course by ordinary income and expenditure. JY owns a number of subsidiary companies and Mr Joffe advised that they too would have to be revalued annually.

30 PC did not entirely agree with Mr Joffe's opinion and asked for clarification by reference to the sale of the HSBC shares, arguing that the realised profit for the year on the sale of the shares was the sale price less the original acquisition cost. By email dated 16th May 2007, Mr Joffe agreed with that view. However, following a query by Advocate Binnington as to whether this was not inconsistent with his earlier advice, Mr Joffe reverted to his original view, which stated that the profit (or loss) on the sale of the HSBC shares would be the difference between the value of the shares at the beginning of the year and their value at the date of sale. Mr Joffe was not asked to advise on the effect of the change in accounting policy from the historical cost basis to the IFRS basis. However, it is fair to assume that he would have advised that it made no difference because he was of the view that Article 96 was a stand alone provision and did not depend upon the figure for profit in the accounts; it depended on the difference resulting from the revaluation process carried out each year.

31 We turn therefore to the expert evidence before us. Trilogy called Mr Robert Drennan, an experienced chartered accountant who is a partner with Rawlinson & Hunter. He has been their forensic accounting partner for some 20 years. YT called Mr Patrick Maher, also a chartered accountant, who is a partner of Deloitte & Touche and who has regularly given expert evidence in court. We are satisfied that both gentlemen are extremely well qualified as expert witnesses and indeed we would like to record our gratitude to both of them for their ability to explain matters in clear and simple terms which could be easily understood by all.

32 They have both contributed to a joint report which, in an exemplary manner, sets out their points of agreement and points of disagreement. The clarity of the joint report enables us to deal with matters much more concisely than otherwise would have been the case, as the area of difference between them is in fact a very narrow one.

33 Both agree that it was open to the board of JY to adopt IFRS instead of the historical cost basis. We should add in passing that, at one stage, Trilogy alleged that JY had adopted IFRS specifically with a view to minimising the level of distributions available to the Sub-Trusts. Having seen the contemporaneous emails, minutes etc, we are quite satisfied that that is not the case and Advocate Baker very properly withdrew the suggestion. KPMG tendered for the contract to carry out the audit on the basis that accounts would be prepared on the basis of IFRS. KPMG were subsequently appointed as auditors.

34 Reverting to the expert evidence, neither of them seeks to say that either the historical cost basis or IFRS is not a generally accepted accounting practice for the purposes of Article 114 of the Companies Law. Both agree that IFRS gives a more accurate picture of the

annual performance of a company and there seems to be a general move towards adopting it. Mr Drennan summarised the position as follows in his report and we do not understand Mr Maher to differ from him:

> " *1.6 Under the historical cost basis of accounting the assets acquired were generally kept on the balance sheet at cost.* The change in the underlying value of assets did not affect either the balance sheet or the profit and loss account, as long as the assets were retained by the company. The market value of certain assets would be disclosed in the notes to the accounts. When the assets were sold, the full gain/loss was reflected in one single accounting period in the profit and loss statement, even if that asset had been on the books for many reporting periods.
>
> *1.7 By contrast, under IFRS assets must be recorded at fair value (i.e. marked to market) at the end of each reporting period.* This means that the balance sheet and the profit and loss account would be affected in each reporting period where the underlying value of the asset changes. In that regard IFRS is a more accurate view of the value of a company's assets at any given point in time, albeit probably a more expensive regime to adopt…
>
> *1.8 Under IFRS, providing the accounts are prepared on a consistent basis year on year the amount of dividend should flow consistently as the values of the assets grow rather than only when realisations take place, which is of course solely under the control of the Board…"*

35 Both experts are also agreed that it was necessary to restate the 2004 accounts on the IFRS basis for the purpose of the comparative figures in the 2005 accounts. They agree on the actual figures.

36 They agree also that the sum of $223.7m (shown at para 26 above) resulting from the revaluation of the assets and reflected in the difference between the net asset figure in the balance sheet as at 31st December in the 2004 accounts of $240m and in the 2005 accounts of $463.7m is a profit available for distribution by way of dividend. The sole difference between them is whether it is, for the purposes of Article 96, a profit 'of that year' i.e. of 2005.

37 Mr Drennan argues that 'profit' means a profit recognised in the accounts. He accepts that, under the historical cost basis, an investment may increase in value over many years and therefore, in one sense, the profit has been earned as to a proportion in each of those years. However, it is not reflected in the accounts. The balance sheet will not reflect any increase in value and there will be no 'profit' in the accounts from which a dividend could be declared. Thus, in a very simple case, if a company's sole investment has cost £100 and it has over the years increased in value to £200, the balance sheet will still show net assets of £100 (assuming neutral revenue income and expenditure) and there is therefore no profit to declare a dividend from. It is only when the asset is sold that the accounts will show a profit of £100; and that will be a profit recognised in the year of sale and therefore a profit of

that year for accounting purposes, notwithstanding that it may have accrued over many years.

38 Applying that to the present case, Mr Drennan argued that, if the historical cost basis had continued to be used, there would have been no 'profit' for the purpose of Article 96 in respect of the increase in value of the HSBC shares until they were sold. Once they were sold, a profit would arise which would be a profit of the year of sale, albeit that that profit would reflect the increase in value from the date of acquisition to the date of sale. Under Article 96, the whole of the gain in value (i.e. the profit) would be a profit for the year of sale and therefore 75% would be distributable under Article 96. Although this was not relevant to his opinion, the effect of Mr Maher's opinion would be that there would be a dividend gap, in that profit which would have been compulsorily distributable under Article 96 as and when it was realised by way of sale of the shares would now never become distributable other than on a discretionary basis.

39 He noted that the 2003 and 2004 accounts do not show any profit in respect of the increase in value of the investments of JY. The figures representing that increase are only brought into the accounts of the company for the first time in 2005 by means of the revaluation of $206.3m and $19.5m together with the loss of $2.1m (i.e. net $223.7m). These sums are recognised for the first time in the 2005 accounts and therefore constitute profits of that year. He accepts that they are not brought through the profit and loss account but that is because of the requirements in relation to transitional provisions where there is a change to IFRS. The fact is that there is a difference in the net assets of the company as between 31st December 2004 (as per the 2004 accounts which are the only official accounts of the company for that year) and the 31st December 2005 (as per the 2005 accounts which are the only accounts for that year) of $223.7m and that is therefore a profit of that year because it is recognised for the first time in that year.

40 Mr Maher accepted that the difference in the net assets of the company between 2004 and 2005 of $223.7m was a profit which was available for dividend. However, this was on a discretionary basis because it was not a profit of 2005 and was therefore not caught by the mandatory provisions of Article 96. The whole point of IFRS was to identify the year in which profits arose by reference to changes in market value. The profit of $206.3m (being the revaluation as at 1st January 2004 and the revaluation profit arising in 2004 of $19.5m (i.e. $225.8m in total) had not arisen in 2005; it had arisen as to $206.3m prior to 2004 and as to $19.5m in 2004. These sums were not therefore profits of 2005 for the purposes of Article 96. He argued that 'profits' for the purposes of Article 96 were not profits recognised in that year in the accounts; they were profits arising in that year. Thus, even if the accounts had continued to be prepared on the historical cost basis, he argued that the marketable assets should have been revalued every year for the purposes of Article 96 and any gain on revaluation would be a profit for the purposes of Article 96 even if it was not shown in the accounts because they were prepared under the historical cost basis. To that extent, he agreed with Mr Joffe, although he said that the IFRS basis did not require the revaluation of subsidiary companies and in that respect he differed from him. In short, Mr Maher accepted that the restatement of profits in the aggregate sum of $225.8m was recognised for the first

time in the 2005 accounts but in his opinion, that did not mean that they were ‘profits of 2005', they were profits of earlier years recognised for the first time in 2005.

41 He accepted that, for 2004, the relevant profit figure to which Article 96 had to be applied was therefore the aggregate of $35.1m as per the 2004 accounts plus $19.5m on the revaluation and in 2003 (if Article 96 applied to that year) the relevant profit figure should be increased from $15.1m to $85.6m to take account of the revaluation gain in the investments held during that year.

42 Trilogy relied upon the evidence of Mr Drennan. Advocate Journeaux, on behalf of Mrs C, did not fully support Mr Maher. He accepted that ‘profits of that year’ means the profits of JY for the year in question as specified in accordance with the generally accepted accountancy principles applied by JY from time to time in its formal accounts. Thus for 2004 and, to the extent that it applies, 2003, the figure should be the profit figure in the formal accounts for those years. To that extent he agreed with Mr Drennan rather than Mr Maher. However, he argued that Mr Maher was correct in saying that the 2005 accounts showed a loss of $2.1m and therefore he supported Mr Maher in that respect. As an alternative, he accepted Mr Maher's evidence in relation to earlier years as well as 2005 i.e. that the profits for those years should be recalculated under the IFRS basis in order to calculate the profit of the relevant year for the purposes of Article 96.

43 As indicated earlier, JY is neutral on this point but of course the Court notes that, at the time it considered the 2005 accounts, it took the loss of $2.1m as being the relevant figure for the purposes of Article 96.

44 The Court has carefully considered the detailed reasoning of the experts as set out in their reports and in their evidence and also the closing submissions of the parties, notwithstanding that these are only summarised above.

45 As stated above, the experts are agreed that the figure of $225.8m (representing the revaluation of the JY assets as at 1st January 2004 of $206.3m plus the figure for the increase in fair value during 2004 of $19.5m) constitutes profits and these are profits which were first recognised in the 2005 accounts. They are profits available for distribution. The sole difference of opinion is whether they are profits of 2005 for the purposes of the mandatory distribution provision of Article 96.

46 We have concluded that the evidence of Mr Drennan is to be preferred. We would summarise our reasons as follows.

47 Article 2 of JY's Articles of Association provides:-

> “ *Subject to the preceding Article, any words defined in the Law shall if not inconsistent with the subject or context bear the same meaning in these*

presents."

The 'preceding Article' is the definition Article and contains no definition of 'profit'.

48 As already stated, Article 114(4)(d) of the Companies Law, as in force at the relevant time, provided as follows:—

" ***114(4) In this Part-***

…

(d) references to profits and losses of any description are to profits and losses of that description ascertained in accordance with generally accepted accounting principles."

49 It follows in our judgment that, unless there is something in Article 96 which renders it inconsistent with the subject or context, 'profit' for the purpose of Article 96 is to be ascertained in accordance with generally accepted accounting principles. We are unable to find any such inconsistency as to suggest that it bears a different meaning.

50 This is not a surprising conclusion. In *Gallagher -v- Jones* [1993] STC 537, Sir Thomas Bingham MR said this at 555G:

" ***Despite the length of this judgment, the central issue is at root a very short one.*** The object is to determine, as accurately as possible, the profits or losses of the taxpayers' businesses for the accounting periods in question. Subject to any express or implied statutory rule, of which there is none here, the ordinary way to ascertain the profits or losses of a business is to apply accepted principles of commercial accountancy. That is the very purpose for which such principles are formulated. As has often been pointed out, such principles are not static: they may be modified, refined and elaborated over time as circumstances change and accounting insights sharpen. But so long as such principles remain current and generally accepted, they provide the surest answer to the question which the legislation requires to be answered."

That case was of course a tax case but it seems to us that the principle stated by Sir Thomas Bingham is of general application.

51 It is at this point that we can discount the analysis put forward by Mr Joffe QC. In fact, none of the parties sought to uphold that analysis before us and JY has not applied it. The Joffe analysis requires there to be an annual revaluation of all the assets of the company, including assets such as subsidiary companies. We have not been referred to any generally accepted accounting principle which requires such a revaluation. The historical cost basis certainly does not, nor does IFRS. IFRS requires an annual revaluation of marketable securities but not of assets such as subsidiaries; both KPMG (JY's auditors)

and Mr Maher are agreed on this. On Mr Joffe's analysis, ‘profit’ in Article 96 has a meaning which is different from the meaning of profit under any of the generally accepted accounting principles. We do not think that Article 96 can be interpreted in that way.

52 We return to the difference of opinion between Mr Drennan and Mr Maher. Given our view that ‘profit’ in Article 96 is to be ascertained in accordance with generally accepted accounting principles, the question immediately arises as to which generally accepted accounting principle. Both experts agree that it was perfectly possible and proper for the board to have adopted either the historical cost principle or IFRS. Both were generally accepted accounting principles, albeit that there is gradually a move towards IFRS. In our judgment, the natural conclusion is that ‘profit’ in Article 96 must be construed as meaning the profit as ascertained by the generally accepted accounting principle applied by the company in the preparation of its accounts from time to time. The whole purpose of accounts is to show the financial position of a company, including its profits and its assets and liabilities. It would be surprising if the word ‘profit’ in the Articles of Association dealing with dividends were to bear a different meaning from the profit as ascertained from the company's accounts. In our judgment, it would require some clear wording to conclude that ‘profit’ for the purposes of distributions under Article 96 was to be ascertained using a different accounting principle from that used for the preparation of the company's financial accounts.

53 The consequences, were such an approach to be adopted, are shown by considering the position prior to 2005. It is accepted that the mandatory distribution provision of Article 96 applies to 2004 and Trilogy argues that it also applies to 2003. It is also agreed that the accounts for those two years (and all prior years) did not show any ‘profit’ arising from the increase in value of the company's investments. There was a note to the accounts to show the current market value each year but the accounts themselves did not include any figure for any such ‘profit’.

54 Mr Maher argued that ‘profit’ in Article 96 must be interpreted in accordance with the IFRS model even for these prior years. He said therefore that, for the purposes of Article 96, the profit for 2004 had to be increased by $19.5m (to reflect the relevant gain in the value of investments in that year) and for 2003 by $70.5m (for the same reason). Thus the profits available for distribution under Article 96, on his argument, bear no relation to the profits as shown in the accounts.

55 The point becomes even stronger if one assumes that Article 96 had been in existence for the whole of the company's life. The experts agreed that the accumulated figure to reflect the gain in the value of investments at the beginning of 2005 is $225.8m. Thus, over the years, on Mr Maher's argument, 75% of this would have had to have been distributed had Article 96 been in existence. Yet this figure does not appear anywhere in the accounts. Mr Drennan in evidence said that many chairmen of public and private companies had pressurised him to inflate profits but his view had always been that, if it wasn't on the balance sheet, it could not be distributed. In our judgment that is the correct approach. Article 96 has to be interpreted by reference to the accounts as prepared in accordance

with the generally accepted accounting principle adopted by the company from time to time.

56 It follows that the profit for the purposes of Article 96 for 2004 and (if applicable) 2003 is in each case the figure prepared under the historical cost basis, being the generally accepted accounting principle applied to the preparation of the accounts for those two years.

57 We understand Mr Maher's argument that, as a matter of fact, the profit of $225.8m was earned in the years prior to 2005, in the sense that the increase in value of the investments occurred over many years prior to that date. But, for the reasons we have given, the profit has to be ascertained from the accounts and accordingly, under the historical cost principle, a gain is only a profit for the purposes of Article 96 in the year in which it is brought into the accounts, i.e. the year in which it is realised. Thus, had the historical cost basis still been applied in 2005, the profit would have included the whole of the gain on the sale of the HSBC shares, which would have been reflected as a profit of that year notwithstanding that the gain had in reality accrued over a number of years. Article 96 would therefore have applied to require a distribution of 75% of the total gain after allowance of course for any other profits or losses.

58 It follows, in our view, that the profits for 2006 going forward must, for the purposes of Article 96, be ascertained in accordance with IFRS principles, being the generally accepted accounting principle now adopted by JY. Accordingly, gains and losses arising as a result of increases or decreases in the values of marketable securities retained by the company will be taken into account when calculating the ‘profit’ for the year for Article 96 purposes. There is in fact no disagreement on this and Mr Maher and Mr Drennan do not disagree with the calculations put forward by KPMG for these years. Similarly, the board of JY is agreed on the figures for 2006 onwards.

59 That leaves the question of what the appropriate figure is for 2005. In our judgment, the revaluation figure of $225.8m must be treated as a profit of 2005. For the reasons we have given, it is not a profit for any of the years prior to 2005 because it has not been recognised in any of those accounts. It is recognised and brought into account for the first time in 2005. Just as, under the historical cost basis, a realised profit on the sale of an asset is treated as a profit arising entirely in the year of sale because that is the year that it is first brought into the accounts (even though it may have accrued over many previous years), so the revaluation profit of $225.8m, which is recognised and brought into account for the first time in 2005, must be treated as a profit of that year (even though it may have accrued over many previous years).

60 If it is not treated as a profit of that year, it will not be treated as a profit of any year. That would be wrong. Mr Maher agreed entirely with Mr Drennan that the revaluation figure was a profit and was a profit available for distribution. His argument was that it was a profit of years prior to 2005 whereas, for the reasons we have given, we consider that it was not a profit for any of those years as it was not reflected in the accounts for those years. In our judgment, it must be treated as a profit of 2005.

61 It is true that the figure has not been taken through the profit and loss account for the accounts of 2005. However that is a consequence of the relevant IAS guideline dealing with transition to IFRS. The figure is however reflected in the accounts. If one takes the net assets as shown at 31st December 2004 in the 2004 accounts (prepared under the historic cost basis), and compares this with the net asset figure at 31st December 2005, the difference is $223.7m greater at the end of 2005 than at the end of 2004 (being the revaluation figure of $225.8m less the loss for the year 2005 of $2.1m). That difference in net equity, as both experts agreed, is properly treated as profit. In our judgment it must be regarded as profit of 2005 because that is the only year in which it is recognised in the accounts. It is therefore caught by the provisions of Article 96.

62 We should add for the sake of completeness that both counsel referred us to various IAS provisions but we do not believe that these assist in the interpretation exercise we have to undertake. Advocate Journeaux also referred us to various authorities as to evidence which is admissible in interpreting articles of association. We have not thought it necessary to lengthen this judgment by referring to those. Indeed, as mentioned above, Advocate Journeaux's contention as to what is meant by ‘profits of that year’ accords with our view, in that he submits that it means profits as ascertained in accordance with the generally accepted accounting principles applied by JY from time to time in its formal accounts. The only area where we have differed from him is whether, when considering the 2005 accounts, one is restricted to the figure shown in the profit and loss account (as he submits) or whether one can consider the accounts as a whole, including changes in the net assets, (which is the conclusion we have come to). We have set out in this judgment the reasons for reaching the conclusion we have and we do not believe that we have relied on any inadmissible evidence.

63 For these reasons, we conclude that the correct figure for the profits of 2005, against which the Article 96 calculation for 2005 must be undertaken, is $223,730,540.

Issue 2 – Does Article 96 (as amended) apply to the 2003 accounts?

64 The new Article 96 was adopted on 25th June 2004 following the compromise of the 2004 court proceedings. At that time, the latest accounts of JY which were available were the 2002 accounts. The 2003 accounts were not produced by the Hong Kong auditor until September 2004 and in due course were approved by the Board by resolution signed by four of them on 29th October and by Advocate Binnington on 1st November 2004, which we therefore take as the effective date of the resolution. The issue is whether Article 96 therefore applies to 2003 so as to require 75% of the 2003 profits to be paid as a dividend.

65 This is a short point of construction. We agree with Advocate Journeaux that evidence as to what the parties may or may not have intended as to the commencement of the 75% distribution obligation following the compromise of the June 2004 proceedings is not admissible as an aid to the interpretation of Article 96.

66 YT is neutral on this issue as the board is split. Advocate Journeaux, on behalf of Mrs C, submits that, as Article 96 was only introduced in its current form in the middle of 2004, it cannot apply to 2003. This would be to give it retrospective effect. He points out that the relevant part of the new Article reads:-

> "… *the Directors shall, in any financial year in which profits of that year are available for dividend, recommend to the Company …" (emphasis added).*

67 As the Article was only introduced in 2004, that is the first financial year 'in' which the Directors could do anything under the new Article.

68 In response to Trilogy's point that, unless the new Article 96 applies to the 2004 accounts, the Directors would have no power to declare a dividend in respect of 2003 at all, he submitted that there is a general power under company law to declare a dividend (see Palmers Company Law Vol. 2 para 9.705 and Article 114 of the Companies Law). Furthermore, he said, the first sentence of Article 96 confers a free standing right in the Directors to resolve to pay dividends.

69 In our judgment, as a matter of construction, Article 96 applies to the 2003 accounts because the Board only considered and approved those accounts and resolved to pay a dividend for that year after the incorporation of the amended Article 96 in the Articles of Association.

70 We agree with the evidence of Advocate Binnington that, when considering payment of a dividend, the Directors must look to the Articles of Association. As from 25th June 2004, Article 96 (in its amended form) formed part of the Articles of Association and was binding upon the Directors. Indeed, in one sense Advocate Journeaux conceded this because he argued for a freestanding right to pay a dividend based upon the first sentence of Article 96. We do not understand how the first sentence of the amended Article 96 can be applicable and binding whereas the remaining sentences of the Article are not.

71 In our judgment, unless there are transitional provisions in the Articles or the wording clearly suggests otherwise, any decision of the directors must be taken in accordance with the Articles of Association as in force at the time the decision is taken. Support for this proposition can be found in the fact that the decision to approve the 2003 accounts and declare the final dividend was done by way of written resolution, expressed on its face to be in accordance with Article 82 of the Articles of Association. That can only be a reference to Article 82 in its amended form which was introduced at the same time as the amended Article 96. That is because the previous Article 82 required any written resolution to be passed by the testator and all the other directors.

72 We note the reliance placed by Advocate Journeaux upon the word 'in' in the second sentence of Article 96. However, in our judgment that can only sensibly be interpreted as

shorthand for 'in respect of'. By definition, the directors will not know the profits for a financial year and therefore be able to calculate 75% of those profits until after the conclusion of the financial year. They will therefore inevitably have to undertake the Article 96 exercise in respect of a financial year after the conclusion of that year. They cannot therefore undertake the exercise 'in' (i.e. during) a financial year.

73 Given that the directors did not receive the 2003 accounts until September 2004 and did not approve them until 1st November 2004, they had to undertake that exercise in accordance with Article 96 as it was then in effect. They were, in our judgment, caught fairly and squarely by the second sentence of Article 96 because it was in force at the time that they were considering the accounts for 2003 and what dividend should be paid in respect of 2003. The fact that the payment of $1.8m had been made earlier is irrelevant because the decision to recommend a dividend for 2003 was taken after the incorporation of the amended Article 96.

74 For these reasons we hold that Article 96 applied and that the Board was obliged to declare a dividend of not less than 75% of the profits for 2003 as taken from the accounts, i.e. 75% of $15,068,491. We should add that, as will appear from our review of the evidence under issue 3, we believe it may well not have been the subjective intention of the parties to the 2004 compromise that the 75% dividend requirement should apply to 2003 but, as Advocate Journeaux properly argued, that is not admissible and the Court must simply interpret Article 96 from the wording of the Article.

Issue 3 – Could the PTP dividend of $80m properly be counted against the 75% distribution requirement of 2004?

75 As previously stated, the profit shown in the 2004 accounts was $35,077,471. There is no dispute that the 75% distribution requirement under Article 96 applies to 2004. Thus, on the basis of the accounts, JY had to declare a dividend of at least $26,308,103, which would in turn be distributed equally between the eight Sub-Trusts i.e. $3,288,513 each. However, the Board of JY declared the PTP dividend of $80m as an interim dividend in 2004 and concluded therefore that the company had paid a dividend in excess of 75% of the profits for that year and there was therefore no need to declare any further dividend.

76 Trilogy argues that it was part of the compromise of the 2004 proceedings that the PTP dividend should be paid out of earlier profits and that JY (and YT as its controlling shareholder) were acting contrary to that agreement by crediting the PTP dividend against the obligation to distribute 75% in respect of 2004. If Trilogy is right, the consequence would be that a further dividend of $26,308,103 (i.e. 75% of $35,077,471) should be declared.

77 This dispute requires the Court to consider what, if anything was agreed or understood in this respect between the parties to the 2004 compromise. The Court was provided with over 20 files of material and we have not read everything in those files. However, we have

considered all the witness statements, all the documents to which we were specifically referred and all the oral testimony. Even this material ranged over a number of matters and we propose to confine ourselves in this judgment to summarising those parts of the evidence which we think necessary to resolve the limited point at issue.

78 We propose to begin by setting out the broad shape of the 2004 compromise as it emerges from uncontentious evidence or from contemporaneous documents before turning to consider the evidence of the witnesses before us.

(a) The background to the 2004 compromise

79 The Court has already described at para 9 above the general nature of the proceedings before the Court in 2004. At that time, the family, between them, were instructing many of the leading private client solicitors in London together with chancery counsel as well as Jersey advocates. PC and AC were represented by Mr Richard Moyse of Boodle Hatfield, MC by Mr Robert Hunter of Allen and Overy, LC by Mr John Wood of Herbert Smith and MI by Mr Martyn Gowar of Lawrence Graham.

80 It is clear that, in the lead up to the proceedings in Jersey in June 2004, there was considerable discussion between the solicitors to the various parties. The idea of creating the eight Sub-Trusts, with the monies from JY flowing through to those Sub-Trusts, was already envisaged. Thus, in a letter dated 4th June 2004 to Mr Hunter (on behalf of MC) and Mr Wood (on behalf of LC) Mr Moyse (on behalf of PC and AC) enclosed an amended draft outline of a global settlement proposal dated 3rd June. Paragraph 3(d) of that said:-

> " *In order to 'prime the pump', there should be a substantial initial distribution from the accumulated profits of JY to YT and on to the eight individual units in equal shares.* It is suggested that the boards of JY/YT should consider and formulate proposals for continuing distributions as and when assets are realised over the years. It is the intention that ultimately all the income and capital from JY/YT will have been fully distributed. …"

In his covering letter of 4th June, Mr Moyse said:-

> " *It is certainly the view of AC and PC which I believe is supported by some other members of the family that there should be an orderly disposal of the assets of JY/YT over a period not exceeding 15 years.* Given that the family will now have their own individual units for their own charitable giving, I would like to suggest that as soon as possible after the court hearing next week there should be an immediate distribution of equal amounts to the eight individual units which would use up the available cash currently held by JY."

81 It is clear that this was simply a suggestion by Mr Moyse on behalf of PC/AC and had not been agreed by the other parties involved. In particular MC and LC did not and do not agree with the idea of distributing all of JY's assets to the Sub-Trusts over a period. It is also

important to appreciate that, although we shall be concentrating on the only issue which we have to consider, namely the payment of the PTP dividend, the negotiations which were going on were extremely complex and dealt with a variety of matters which eventually found their way into the consent order of 11th June.

82 It seems clear from the material we have seen that discussions continued prior to the proceedings before the Court in Jersey and that the idea was gradually evolving of a substantial PTP payment, but no consideration at that stage had been given to the amount.

83 The proceedings came before this Court on the afternoon of 10th June 2004. It was explained that the parties were in the course of complex negotiations and an outline of some of the matters was given to the Court. It was agreed that there should be an adjournment overnight to enable negotiations to continue and for settlement documents to be drafted. Those represented before the Court were the five executors, BNP and YT. The Trilogy sisters and Mrs C were present in Court and their counsel were subsequently allowed to address the Court.

84 Complex negotiations clearly took place overnight. The executors' side met at about 6pm and we have seen the notes of that meeting. The amount of the proposed initial endowment of the Sub-Trusts was discussed. It was noted that JY was worth about $400m with an annual income of $20m or so and some accumulated income. Mr Wood and Mr Taube, QC both suggested that it might be appropriate to make a distribution representing some or all of the income which had built up since the testator's death. It appears that overnight a suggestion of $40m was put to those representing the Trilogy Sisters together with 50% of the profits for future years. However, that was not accepted and further discussions took place.

85 By the time the Court resumed on the afternoon of 11th June, the amount of the PTP dividend had been increased to $80m and the commitment thereafter to 75% of future profits. During the course of the morning, as matters progressed, Ms Saker, a colleague of Mr Hunter, drafted a ‘Memorandum of Understanding’ (“MOU”) to reflect the ongoing discussions.

86 Trilogy placed much reliance on this document and accordingly we think it helpful to quote the relevant part:-

> “ *We, the undersigned, are four of the five executors of the Will of the late [the testator] and are the First and Second Representors and First and Second Respondents to the Representation of [PC].*
>
> *Pursuant to the terms of a compromise intended to be entered into on or shortly after 11th June 2004 between us and Caroline.*. Garnham, [YT] and [BNP], it is also intended that we should be directors (together with Alan Binnington) of YT and of [JY] and …

We now wish to record our mutual understanding and intention with regard to certain aspects of the intended compromise.

Initial and continuing funding of the eight charitable sub-funds.

It is the intention of us all that the eight charitable sub-funds to be appointed immediately following the compromise should be given a substantial initial endowment by means of the directors of JY procuring a dividend to be paid (with the consent of YT as 99% shareholder of JY) to its shareholders. Under the terms of the deed of appointment intended (as part of the compromise) to be made by YT, any such dividend received by YT shall be paid in eight equal shares to the eight charitable sub-funds.

At present neither LC nor MC are directors of JY or YT and accordingly it is not within their powers to give a binding commitment to exercise their future powers as directors in a particular manner. However, both they and PC and AC strongly wish to record their intention that, upon being appointed as directors of JY and YT, they should procure the payment of a dividend from JY representing as an intended minimum the accumulated undistributed profits of JY since the date of death of [the testator]. Subject to professional advice as to the profits properly available for distribution (which on the information available at the date of this letter would appear to be US$88 million), our joint intention would be to declare a dividend equal to US$10 million per charitable sub-trust.

We have separately agreed that the articles of association of JY shall (as part of the compromise) be amended to stipulate that, each year, not less than 75% of the distributable profits of JY in that year shall be distributed by way of dividend to YT (and therefore in equal shares to each of the eight sub-funds). However, if the amount proposed to be distributed represents 10% or more of the Net Asset Value of JY in the relevant year, the amount required to be distributed by way of dividend shall not be more than 50% of the distributable profits in that year."

87 The MOU then went on to deal with matters such as directorships, the enforcer committee of the purpose trust etc.

88 The Court reconvened on the afternoon of 11th June. The transcript of the proceedings is no longer available but we were provided with two sets of notes of the proceedings taken by English solicitors who were present. Naturally, they do not agree word for word but they substantially agree on what occurred. For present purposes, we are satisfied that the following relevant matters occurred at the Court hearing:-

In relation to (iii) above, we should add that, at the hearing the day before, Advocate Robinson had informed the Court that, because of the trust structure, the Sub-Trusts would have the standing to return to Court if YT as trustee did not adequately fund the Sub-Trusts.

(i) Advocate Robinson, acting for PC/AC reported on the outcome of the overnight

negotiations and stated that the parties were very close to agreement. He then went on to summarise the effect of the negotiations and took the Court through the various documents which would effect the agreement.

(ii) In the course of reviewing the position, Advocate Robinson produced the draft MOU referred to above, which he described as representing the fruit of the morning's discussion although there was reference to the fact that this was only concluded at 2.10 p.m. He said that, whereas last night the position of the executors had been for a PTP payment of $40m, reflecting profits in JY since the testator's death and an assured 50% of annual profit, that had now been increased by the executors moving closer to the position of the Trilogy Sisters and he read out what was said on this aspect in the Memorandum of Understanding as referred to in para 86 above.

(iii) Advocate Journeaux, who acted for MC and LC, emphasised to the Court that this was not a gesture but a huge commitment on the part of the Executors to the task of operating the charities. It went beyond a funding exercise. There was a commitment to involve the siblings (i.e. the non-executors) and he emphasised that matters were in black and white and represented legal commitments and assurances. This should comfort the Court that the compromise was one which should be followed even if it did not accommodate every wish of all the various family members.

(iv) At the end of the hearing, the Court summarised the position by saying that counsel would work on the final drafts of the various documents with a view to a final order being agreed.

89 That was as far as matters went at the time of the proceedings and it is not disputed that the draft MOU had not been shared with the Trilogy Sisters or those representing them at that time. It simply purported to represent the then current state of negotiations. As we know, the Court order was subsequently agreed by all the parties to the proceedings and issued. That did not specifically mention the PTP payment although it did deal with the amendment of Article 96 to include the 75% dividend requirement.

90 The Court has been taken through the lengthy correspondence which followed the Court hearing. It is clear that everyone proceeded on the basis that there was an obligation to pay a PTP dividend of $80m and there was a general feeling that this should be paid promptly, with much pressure being exerted to that effect, although MC and to an extent LC wished to defer declaring the dividend until they had received the 2003 accounts. MC also raised matters concerning the funding of the Felix Scholarship and clarification of certain potential issues in relation to the holding of Singapore property by the subsidiaries. It is fair to say that after a while, she was alone and all the other directors wished to make the payment more promptly. However it was eventually agreed on 1st November 2004 as referred to earlier.

91 The only correspondence in relation to the PTP payment which we think it necessary to refer to is as follows. On 15th June, Mr Gowar sent an email to Boodle Hatfield recording that he had that morning seen the MOU and he had certain queries about its accuracy.

Having raised a point concerning the proviso to the proposed Article 96, he said the following:-

> " *In the paragraph preceding the one that I have just mentioned, the intention of declaring a dividend of over $80m of the $88m which was thought to be available is noted but I believe that the figure of $88m is only part of the profits properly available for distribution, as it represents the US dollar balance.* If the figure is greatly larger than that, then the logic of distributing the bulk should apply to the correct figure. I would urge you to review that figure substantially upwards to the level of the underlying concept of distributing the profits properly available for distribution. We certainly discussed that accounts need to be prepared but I believe that there is information currently available to support that much larger figure."

This was copied to all of the lawyers involved.

92 Mr Moyse of Boodle Hatfield replied on 16th June. He stated that, as Mr Wood and he were the two who had been having discussions with Mr Gowar on the telephone, the reply was sent on behalf of himself and Mr Wood, who was LC's lawyer. He agreed the point about the proviso and responded as follows in relation to the PTP payment:-

> " *Para 3. It was agreed on Friday and explained to the Judge that each of the Sub-Trusts would receive US$10m to prime the pump. This reflected broadly the level of accumulated profits which had accrued in JY since [the testator's] death. Given that two of the Executors are not directors of JY we suggested it should be a matter for management to consider whether a larger distribution is appropriate. This is a matter for consideration by the new board and we indicated it would be an item placed on the agenda for the first meeting."*

His reply was copied to all the lawyers.

93 On 13th September 2004, Mrs C sent a letter to Advocate Binnington. The letter contained the following passage:-

> " *The compromise agreement reached at the time of the court hearings in Jersey in June this year contained provisions about the distribution of profits by JY by way of dividend, which in turn would be distributable by the JY Charity equally among eight newly established charitable Sub-Trusts.* The distributions were to comprise in effect an initial sum of US$80 million ($10 million per sub-trust); and thereafter distributions each year equal to not less than 75% of the distributable profit of JY earned in that year.
>
> *My understanding is that this arrangement was reached after hard negotiations as to the basis of the immediate and future distributions.* It was never agreed, despite the protestations of three of my daughters, that any of the profits earned in JY up to the date of my late husband's death should be distributed, let alone any of JY's original capital. So far as the $80 million initial distribution is

concerned, that is in breach of my husband's principle of retaining JY's asset base intact, because it could not, of course, be paid without impinging on the accumulated profit; as such, it was a concession made purely for the purpose of securing agreement. No relaxation of the principle beyond that sum was agreed."

94 Finally, on 26th November 2004, MC sent an email to her fellow directors of JY and YT which contained the following passage:—

> " *May I emphasise that at Jersey in June 2004, I, as well as my mother, were of the understanding that apart from the US$80m initial funding for the Sub-Trusts, all other assets were to remain intact and further distribution to the Sub-Trusts are no less than 75% of future profits each year.* With this understanding, I and my mother were then agreeable to the compromise which was effected from date of the Court order. My mother had reiterated my father's wishes and her position in her letter to you as trustee and director of JY/YT dated 13th September 2004."

(b) The evidence

95 None of the parties disputes that it was agreed to pay a PTP dividend out of JY of $80m and this has of course been paid. What is at issue is whether there was any agreement or understanding between the parties as to the source of this dividend and its relationship with the commitment to pay out 75% of profits in future. We turn therefore to consider the oral evidence which we have heard on this aspect. The evidence ranged widely, particularly into the delay in paying the PTP dividend and MC's responsibility for that delay; but we do not think it necessary to rehearse that part of the evidence for the purposes of reaching a decision on the limited issue before us.

96 Mr Martyn Gowar was a solicitor with Lawrence Graham and was called by Trilogy. He had only formally been instructed by MI but he was in effect also representing the interests of the other two Trilogy Sisters. In his witness statement, he said that, although he had not seen it until after the hearing, the MOU was reflective of what had been agreed. His understanding was that the obligation to distribute the $80m PTP dividend was in respect of accumulated profits in JY. The only accounts that were available at that time were the 2002 accounts and there certainly could not have been the intention to make the PTP payment from the 2004 profits, as they were unknown at the time of the compromise.

97 In cross examination, he said that the offer on the first day of the court proceedings had been $40m and this had increased by the time of the hearing on the second day to $80m. He did not know how this figure had been reached. At one stage in cross examination he said that the PTP dividend was to be paid from profits accumulated since the beginning of the company, but subsequently he accepted the suggestion from Advocate Journeaux that it could have been from profits accumulated from the date of the testator's death up to the date of the compromise in June 2004. But later, he rather retracted that, not least because

there were insufficient profits between the date of the testator's death and the date of the compromise to make such a payment. It was clear that all the lawyers had been under a misapprehension as to this. He agreed that it was surprising that the PTP payment of $80m was not mentioned in the Court order but said that it was just a ‘given’ that everyone had agreed it. On further questioning, he said that he was of the view that the arrangement was for a PTP payment of $80m with 75% dividends going forward. As the 2003 accounts had not been completed at the date of the compromise, he felt that 2003 and 2004 were covered by the 75% requirement and the PTP dividend was separate. However he accepted that there were no emails or other exchanges about whether the 75% rule would apply to the 2003 accounts. Nevertheless he was clear that there were two separate matters, the PTP dividend of $80m and the additional obligation to distribute 75% of annual profits going forward.

98 MI gave evidence on behalf of Trilogy. In her affidavit, she explained the family disharmony in some detail and said that her objective had always been for the JY/YT structure to be dismantled over a period with all the funds being transferred to the eight Sub-Trusts. She felt that too much power rested with the Executors. She had been present at the negotiations in Jersey and recalled the initial offer being one of $40m, with this being increased overnight to $80m and the additional distribution of 75% of profits. However, her clear understanding following negotiations on the morning of the 11th June was that the guaranteed annual distributions to the eight Sub-Trusts would include accumulated profits and that a distribution of $10m would be made to each of the Sub-Trusts to ‘prime the pump’ followed by another more substantial distribution when the 2003 accounts had been prepared. When, after the event, she received a copy of the MOU, she realised that the document did not reflect any commitment from the Executors to declare sizable dividends to the Sub-Trusts. The wording of the proviso to the proposed Article 96 was also wrong. Her concerns led to Mr Gowar's email of 15th June, to which we have already referred at paragraph 91 above. Her understanding was that the $80m PTP dividend was an interim distribution from the profits of JY accumulated to the date of the hearing and on the basis that the only financial statements of JY available were those for 2002. She said it was therefore incorrect to say that the PTP dividend could be paid out of the 2003 or the 2004 profits. She asserted that the four family executors who became directors intended the PTP dividend to be paid from profits accumulated since the testator's death and it was therefore quite wrong for them now to seek to credit it against the obligation to distribute 75% in 2004.

99 In cross examination, she said that when she saw the MOU, she realised that the figure of $88m mentioned in it was clearly wrong; she was aware that the 2002 accounts showed a profit of about $15 —20m. The profits were running at approximately $15m per year and accordingly it was impossible for $88m to have accumulated between the testator's death and the time of the compromise. In response to a question from Advocate Journeaux as to whether it was her understanding that the PTP dividend would be from accumulated profits of JY from the date of the testator's death up to 11th June 2004, she replied that it was not, because only the 2002 accounts had been prepared. It was not known what the 2003 or 2004 profits were. All that was known was that there was $270m – at one point the transcript shows her as referring to $207m whereas elsewhere she refers to $270m which was the correct figure; it seems likely that the first figure was simply a mis-statement or an

error in transcription —sitting in retained earnings of JY, so declaring a dividend of $80m was sensible. So far as she was concerned, the $80m would come from the accumulated profits and she understood that there would be another substantial distribution when the accounts for 2003 were prepared. In another part of her evidence, when it was suggested to her by Advocate Journeaux that her objective for the PTP dividend encompassed the 2003 profits, she replied that in a way that was true only because, although the profit for 2003 was not known, 2003 had already been passed at the time of the compromise. She expected that when the 2003 accounts were prepared in due course, there would be an additional $20m of profit on top of the existing figure of $270m. Later in re-examination, she said that Article 96 appeared to have been worded so that arguably the 2003 profits were not covered by it but, after some slightly ambiguous comments, she ended up by repeating that she had not expected the $80m PTP dividend to wipe out what the Sub-Trusts expected to receive out of the 2003 and 2004 profits.

100 Trilogy also tendered witness statements by CC and JC, but they take the matter no further and they did not give oral evidence.

101 The first witness tendered by YT was Advocate Binnington. He was not party to the negotiations, (although he had been in court on the second day of the hearing having been approached as a possible independent director) and was therefore unable to assist on what had actually been agreed. He said that, as far as he was concerned, it was logical that the $80m PTP dividend should have been declared in respect of 2004 as that was the year in which the compromise was reached. At the time, none of the directors considered that it was wrong to count the PTP dividend against the Article 96 obligation for 2004, but he understood PC now considered it to have been an error. He was cross examined at some length about the delay in paying the PTP dividend but we do not consider that to be relevant to the issue which we have to decide.

102 The next witness called by YT was PC. In his affirmation, he explained his involvement in the negotiations and that he was aware of the suggestion of a ‘prime the pump’ payment as suggested in the document referred to at para 80 above. He said that on the first day of the hearing, he was given the task of finding out from the Hong Kong accountant whether there was sufficient cash in JY to make a substantial distribution. He spoke to the accountant who assured PC that, based on the 2002 accounts, JY had over $200m in accumulated undistributed profits and at least $80m in cash. In fact, as we know, it had considerably more in cash (see para 13 above).

103 PC explained how the initial offer of $5m per Sub-Trust was increased to $10m on the morning of 11th June. So far as he was concerned, the source of such payment had to be the accumulated profits of JY because the only profits available for distribution at that time were the pre-2004 accumulated profits. The MOU more or less captured the agreement up to that point in time and he considered it to be morally binding if not legally binding (about which he could not comment). He considered that all of the family executors had agreed to what was set out in the MOU in terms of the PTP dividend of $80m. He understood the expression ‘the accumulated undistributed profits of JY since the death of [the testator]’ to

refer to the historical profits accumulated in JY before 2004. Although he accepted that he had agreed to the $80m being counted against the Article 96 obligation for 2004, he considered now that this was an error and did not reflect the understanding which had been reached at the time of the compromise. He was personally in favour of revisiting the decision and declaring a dividend for 2004 based on the Article 96 regime requiring a 75% distribution of the profits for that year.

104 In cross examination Advocate Journeaux referred to the minute of the meeting of the directors of JY on 5th December 2005 where the following was stated:-

> " *IT WAS NOTED that an interim dividend of US$80,000,000 has already been paid for 2004 and therefore the company has satisfied the requirement to distribute more than 75% of its profits for the year.* However Alan Binnington in his capacity as director of [YT] noted that it has been suggested by the guardians for three of the Sub-Trusts that US$80,000,000 was an initial priming amount required by the Sub-Trusts and therefore 75% of the profits for the year should be distributed in addition to the amount. IT WAS HOWEVER NOTED that none of the documentation produced pursuant to the compromise of the Jersey litigation supports that view."

PC was asked why the MOU was not referred to at that stage, but was unable to explain why this was the case.

105 In answer to questions from Advocate Baker, he explained that he thought he was the cause of the misunderstanding in the MOU in its reference to $88m. He had telephoned the accountant in Hong Kong and had told the lawyers that there was $88m in cash and he felt that this had been misunderstood and perhaps he had not made the position clear. PC said that the 75% distribution requirement was quite separate from the PTP dividend and this was reflected in the MOU.

106 He confirmed that in June 2004 he was general manager of JY and that AC was director of JY. He and AC were both directors of YT. AC had written letters instructing Advocate O'Connell to act on behalf of both YT and JY. He did not know the limit of his authority but so far as he was concerned he intended to bind himself and bind JY in relation to the PTP dividend.

107 At the end of his evidence, in answer to questions from the Bailiff, PC reiterated that there was an agreement for a PTP payment of $80m and a separate agreement for 75% of future profits. When pressed as to why, if he felt that this was the case, he had not said so at the time of the board meeting of JY when it was decided not to pay any additional dividend for 2004, he explained that it had really taken a lot of effort to get the PTP dividend paid and that it had been hard to get MC to agree to it. He was asked by Advocate Baker whether one of the reasons that he had not raised the matter of the 2004 dividend was because he was shy of raising the issue of the compromise again with MC, to which PC replied, with some feeling, ' *I think generally I chose my battles, I suppose, I would say.* Yes.'

108 AC also gave evidence on behalf of YT. His affirmation confined itself to confirming that he agreed entirely with the contents of the affirmation of PC. In cross examination by Advocate Journeaux, he was pressed on why, if he was now of the view that the PTP dividend should not be counted against the 2004 profits, he had said nothing at the time of the relevant board meeting in December 2005. AC explained that he was relying very much on Advocate Binnington's recommendation as the professional adviser. He also referred to the fact that the family directors had got into arguments at times about the PTP payment and other matters as well.

109 In cross examination by Advocate Baker, he confirmed that he understood the PTP dividend of $80m to be a separate obligation from the 75% dividend obligation under Article 96. He did not consider it fair to have treated the PTP payment as satisfying the 75% requirement for the 2004 dividend. He confirmed that, at the time of the compromise, he intended to be bound by what was said in the MOU and he intended YT to be bound as well. He had instructed Advocate O'Connell to act for JY and YT and Advocate O'Connell was present at the relevant court hearings. He had also heard the various statements made to the Court that the Sub-Trusts would be able to come back to Court to enforce what was agreed. On further questioning he said that the PTP dividend of $80m could only have come from the accumulated profits to the end of 2002 as that was the latest set of accounts available. He accepted that LC and MC might well have a different view about what profits the $80m should be allocated to and he also agreed, in answer to a question from Advocate Journeaux, that the MOU was a snapshot of the negotiations at a point on that morning.

110 LC was the next witness called by YT. In her affirmation, she helpfully summarised her evidence at paragraph 10. It was to the effect that the MOU was not intended to be a legally binding document; it was simply a working guide for the four family executors as to the broad terms of what they believed would be the terms of the eventual compromise that was being worked towards. She accepted that there was an understanding that $10m should be the amount of the initial endowment for each Sub-Trust and this was based on what was perceived to be the available cash within JY at the time. It would have been inappropriate for the amount of the dividend comprising this initial endowment to have been made a binding obligation on JY or YT as that could only be a matter for the directors of JY to decide. Neither she nor MC had been appointed as a director of JY or YT at the time and therefore could not give any binding commitment. In effect, her understanding was that, once the boards of JY and YT had been appointed as anticipated in the compromise, the board of JY would then consider the available funds from which to declare a dividend and, once declared, the board of YT would distribute such funds to the eight Sub-Trusts. She believed that the dividend would be in the sum of $80m although this might be subject to any significant changes in the funds established as being available as at the time the board met to declare the dividend. She did not see the sum of $80m as being binding upon the board but presumed that there would have needed to have been a significant reason why it should be a different sum. She did not believe that anyone (including the parties' legal advisers) had formally discussed or agreed from which accounting period the PTP dividend

would be declared. In fact the directors of JY in due course unanimously declared that the $80m dividend was to be paid as a dividend for the year 2004.

111 In oral evidence, she explained that reaching the compromise had involved a difficult moral decision for her as it involved a departure from her father's wishes as expressed in the will. Her mother (Mrs C) was continuing to criticise her (LC) for the fact that she had agreed to this departure. However, she had felt that it was important that the siblings who were not executors should have a role to play in relation to charitable activities. So she had agreed the compromise, but she had not appreciated that the Trilogy Sisters wished to have the whole of the JY assets distributed to the eight Sub-Trusts over a ten year period.

112 In cross examination by Advocate Baker she said that her understanding at the time was that there was a compromise, that JY would be discussing the $80m endowment at the first directors' meeting and then would subsequently also distribute a minimum of 75% of the net profit every year to the Sub-Trusts. She agreed that that was promised to the Court.

113 Advocate Baker pressed her in relation to the e-mail sent by Mr Moyse on behalf of himself and Mr Wood on 16th June in which it was said that it had been agreed that $10m would be paid to each Sub-Trust and that management would consider a further payment at the first meeting of JY. LC conceded that she would have to agree that this was the case as it was in black and white in the e-mail.

114 MC was the final witness for YT. In her affirmation, she explained the history of the negotiations in some detail. She confirmed that the idea of establishing the Sub-Trusts had been discussed during the lead-up to the June court proceedings and the discussions during the court proceedings included what amount should be paid by way of initial endowment of the Sub-Trusts. She confirmed the evidence of others that, following the hearing on the afternoon of the first day, the executors met amongst themselves and, by the end of that meeting, had agreed to make some sort of substantial initial endowment to the Sub-Trusts. She accepted that, later on, although she was not aware of this, the figure of $40m had been put forward together with 50% of the profits of future years. Further discussions had taken place the next morning and in due course the figure had been increased to $80m and 75% of future profits. She emphasised that the MOU was not a legally binding document; it simply recorded the discussions on the executors' side and the reason for this was partly that MC and LC were not directors of JY or YT at the time and it was felt that there should be a clear understanding of what should happen when they did become directors. She summarised her approach conveniently in paragraph 41 of her affirmation which we think it helpful to quote:-

> " *41. In fact, I was unhappy that we offered to distribute that much. I was reluctant to agree to the idea of the Sub-Trusts at all, because that was never intended by [the testator]. As everyone knows, it is very important to me to follow [the testator's] wishes, but I agreed to the Sub-Trusts so that [PC], [AC], [LC] and I, together with an independent professional could all be the directors of JY/YT as [the testator] had intended (if we had not agreed to create the Sub-Trusts,*

then there would have been no Compromise and it was likely that independent professionals would have been appointed to run JY/YT.) My initial suggestion to the other executors (which I believe I made during the meeting referred to in paragraph 29) was that $1m, (which was not an insignificant amount) should be given to each Sub-Trust, to be treated as a capital sum because my father was always very cautious about giving out money to charities – he preferred not to write a big cheque but to give only the money necessary for a specific project. I only agreed $10m in order to achieve a compromise. Because the accounts of JY/YT were not up to date, we were simply told by the former directors that there were substantial profits in the structure. My understanding (and I believe my mother and [LC] thought the same) was that all the assets in YT at the time of the compromise were going to be treated as capital (which we would not distribute, except the 'prime the pump' amount), and only the profits arising after the hearing would be available for distribution in future years. I can see that, in the meeting notes headed 'Draft post court 10/6 6.05pm, I eventually agreed with Simon Taube QC's comment that we would say the $10m represents net accumulated income; for me any intention to distribute JY's accrued profits ended there."

115 She said that although the MOU and Mr Moyse's e-mail referred to accumulated profits in JY since the testator's death, there had never been any discussion that some fixed percentage of the profits realised since the testator's death should be distributed, nor was there any suggestion that the profits realised since the testator's death should form the sole basis of the PTP dividend. At most they were a broad guide to the cash available to fund the goodwill gesture of the PTP payment. The figure of $10m per Sub-Trust was just a symbolic number, which was intended to be a sign of goodwill rather than a precise calculation and it was known that there was enough cash available in JY to pay this amount.

116 In short, she had reluctantly agreed that, if she became a director of JY as envisaged under the compromise, she intended to vote in favour of an initial dividend of $10 million to each of the Sub-Trusts and she did not believe that anyone (including the parties' legal advisers) had formally discussed or agreed from which accounting period the PTP dividend would be declared. She did not recall any suggestion that there would be a further distribution once JY's 2003 accounts had been finalised and she would have opposed this. So far as she was concerned the PTP dividend was paid in 2004 and she saw no reason why the decision of the board to count the PTP dividend against the Article 96 obligation for that year should be impugned.

117 In cross-examination, she reaffirmed that she would have preferred not to have agreed to the compromise. However, she felt that, faced with the possibility of removal as an executor, she had no choice because if she had been removed, her father's wishes would have been bypassed. She confirmed on more than one occasion during cross-examination that it had been agreed that there would be a $10m PTP payment for each Sub-Trust but she did not agree that a larger distribution would be considered once the 2003 accounts

were available. She agreed that the Court had been told in June 2004 that there would be a payment of $10m and 75% of profits and that this was a promise made in the face of the Court. However, she did not believe that she had not kept that promise. She was pressed by Advocate Baker as to whether it was consistent with that to seek to count the PTP payment of $80m against the 75% obligation for 2004 and, shortly after that, the following exchange took place:-

> " *MC —Sir, I feel very difficult to, to be, to explain myself because they are very technical to me and I cannot comprehend the concept of it together at that time.* Because I was not a director I was never involved in the company or accounts. I don't, I cannot, you know, understand, you know to put 75% into the 80 million is rather complex to me.
>
> *Bailiff – Yes. I think, I think what's being put to you is that what, what everyone intended at the time of the compromise was that there was 80 million, that was the priming the pump and that was to be paid out of the assets that were then in the company*.
>
> *MC – Yes*
>
> *Bailiff – And then there was going to be 75% of the profits going forward*.
>
> *MC – Yes*
>
> *Bailiff – Do you agree that that was what was agreed?*
>
> *MC – Yes*
>
> *Bailiff – So I think what is then put to you is that it's then rather against that to say that we will count the 80 million as being towards the 75% in 2004 which was of course after the compromise.* Do you understand?
>
> *MC – Yes I do, thank you.* I have to say I did not know what and how the 80 million composed of because, while I am here to be cross-examined, I think one of the questions is to ask me how do I look at the 80 million, where did it come from and I was not a director, I was never involved in the company, I did not know the accounts, I barely have any information about my abilities or expense in order to come up with the 80 million figure whether it is, should be part of the 75% to be calculated at 2004. So I hope I have not been very confused to the Court."

118 Later, in answer to a question from Advocate Baker, she repeated that she was really incapable of answering whether the $80m was inclusive of the 75% for 2004. She confirmed that she had never disputed that she had agreed to the $80m payment at the time of the compromise and she confirmed that this had been promised to the Court.

119 She was then cross-examined at some length about the reasons for the delay in the payment of the $80m PTP dividend. She accepted that she had raised a number of

concerns relating to the accounts, the distributions to the Felix Scholarship and issues in relation to the properties of the subsidiaries in Singapore. She agreed that, towards the end, she was being advised by Advocate Binnington and others that there was no good reason not to pay the $80m and that she eventually agreed to the payment after speaking to Sir Jeremiah Harman, a trusted former advisor of the testator. She explained that she had been on a steep learning curve following her appointment as a director of JY and YT following the compromise and she wished to be assured that things were done properly.

120 YT also produced a witness statement from Advocate O'Connell, who had been instructed by PC and AC on behalf of YT and JY at the time of the June 2004 proceedings. He confirmed that a compromise was reached which was reflected in the Court order and agreed that the MOU had been produced to the Court although Advocate James, on behalf of the Trilogy Sisters, had stated to the Court that, although the MOU reflected certain aspects of the parties' negotiations, agreement had not been reached in all areas. He said that he was unable to assist on the source from which the PTP payment was to be made, nor in relation to any agreement concerning the ongoing annual dividends from JY.

Legal analysis

121 There was some discussion in the submissions to the Court as to whether a legally binding agreement had been reached in relation to the payment of the PTP dividend. Further questions were raised as to whether, if there was such an agreement, who were the parties to it? Was YT a party? If so was PC and/or AC authorised to bind YT? And was Trilogy in a position to enforce any such agreement if it existed?

122 We do not consider it necessary to resolve these issues. Trilogy, in its capacity as trustee of the three Trilogy Sub-Trusts, is a beneficiary of the Foundation. YT is the trustee of the Foundation. Trilogy, as a beneficiary, is entitled to bring proceedings before the Court in relation to the Foundation in the same way that any beneficiary can bring before the Court a matter concerning the trust of which that person is a beneficiary. Indeed, the Court in 2004 was specifically assured that the Sub-Trusts would be able to enforce the compromise.

123 At the time of the 2004 proceedings, there were a number of matters in dispute. The family was riven by disagreement. The Court has no doubt that the 2004 compromise was intended to try and resolve these differences. There was a general understanding that all concerned would take whatever action they had to take in order to put the compromise into effect. Whether or not YT was strictly a party to the compromise, the four family members who were to become its directors were party to the compromise and it was clearly intended that they should procure that YT should take such steps as were necessary as to give effect to the compromise.

124 Although the PTP dividend was not included in the Court order of 11th June 2004, we have no doubt from the evidence that the PTP payment formed part of the overall compromise; indeed it was an essential part of the compromise and none of the witnesses

in the end disputed that there was an agreement to pay an initial endowment to the Sub-Trusts totalling $80m.

125 In our judgment, to the extent that there was an agreement or understanding concerning the relationship between the PTP dividend and the 75% distribution obligation introduced by Article 96, it was the duty of YT to give effect to that agreement or understanding and any refusal or failure to do so in its capacity as trustee of the Foundation would, in the absence of some fundamental change of circumstances, amount to a decision to which no reasonable trustee could come and would therefore be liable to be overturned by the Court. See *S v L, E and Bedell Cristin Trustees Limited* [2005] JRC 109 at para 23.

126 The boards of YT and JY are identical and YT is in a position to enforce its will over JY. It follows that a decision by YT to allow JY to act contrary to any agreement or understanding in relation to the 2004 compromise would be similarly unreasonable.

127 It follows that the factual issue for resolution by the Court is whether there was some agreement or understanding concerning the relationship between the PTP dividend and the Article 96 obligation for 2004 such that YT's decision to permit JY to count the PTP dividend against the Article 96 obligation for 2004 was unreasonable.

Decision

128 The Court is in no doubt that the compromise involved two completely separate matters. In the first place, there was to be a PTP dividend of $80m; and in the second place there was to be an obligation going forward to distribute 75% of annual profits. They were separate matters and in our judgment, if the question had been posed of all the participants at the time of the compromise as to whether the PTP dividend could be credited against a 75% obligation in respect of future profits, all would have replied in the negative.

129 In the first place, it was the evidence of all those involved in the compromise who gave evidence before us that the two matters were separate; see para 97 above in relation to Mr Gowar, paras 98—99 in relation to MI, para 105 in respect of PC, para 109 in respect of AC, para 112 in respect of LC and para 117 in respect of MC.

130 Secondly, it is consistent with the terms of the MOU which, having referred to the PTP payment in one paragraph, goes on to refer to the 75% obligation in the next paragraph which begins with the words " *We have separately agreed that…"* The Court appreciates that the MOU was only a draft document but, from all the evidence we have heard, we are satisfied that on this aspect it reflects accurately what all the executors had agreed.

131 Thirdly the fact that the two matters were separate is reflected in contemporaneous documents from both MC and Mrs C, who, together with LC are the main proponents of the argument that the PTP dividend can be counted against the Article 96 obligation for 2004.

Mrs C's letter of 13th September 2004 to Advocate Binnington (quoted at para 93 above) contains the following sentence:-

> " *The distributions were to comprise in effect an initial sum of US$80 million ($10 million per sub-trust); and thereafter distributions each year equal to not less than 75% of the distributable profit of JY earned in that year."* ***[Emphasis added]***

Similarly, in her e-mail of 26th November 2004 to the other directors of JY quoted at para 94, MC said:-

> " *May I emphasise that at Jersey in June 2004, I, as well as my mother, were of the understanding that apart from the US$80m initial funding for the Sub-Trusts, all other assets were to remain intact and further distribution to the Sub-Trusts are no less than 75% of future profits each year."* [emphasis added]

132 That is consistent with paragraph 41 of MC's affirmation quoted at para 114 above where she states that the assets in JY at the time of the compromise would not be distributed 'except the prime the pump amount'. She then went on to say that only profits arising after the hearing would be available for distribution in future years. This clearly envisages two separate matters, namely (as an exception) payment of the PTP dividend out of assets at the time of the compromise and the 75% obligation in relation to future profits, albeit that she asserted that the cut-off between past and future profits was the date of the compromise.

133 We are also quite satisfied that the parties must be taken to have agreed that Article 96 would apply to 2004. In the first place, because the compromise took place in the first half of 2004, it was inevitable that much of the 2004 profit would arise after the compromise and was therefore future profit. Secondly the order of 11th June 2004 provided that, as soon as reasonably practicable, the articles of JY would be amended in the form of the draft annexed to the order and that draft contained the new Article 96. It must therefore be taken as agreed that the amended Article 96 would come into effect very shortly and certainly well before the end of 2004, so that it would apply to the financial year 2004. Indeed no one has suggested at any stage that Article 96 was not intended to apply to 2004. The parties must therefore be taken to have agreed and understood that the PTP dividend of $80m was something separate from the obligation to distribute 75% of the profits arising in 2004.

134 That is not inconsistent with the other evidence. We accept that there was no agreement as to exactly what period the PTP dividend would be in respect of. Some, like Mr Gowar, thought that it would be in respect of the period prior to 31st December 2002 because the 2002 accounts were the latest accounts available. Others referred to it being payable out of profits which had accrued since the testator's death. That is referred to in the MOU itself and also in Mr Moyse's e-mail of 16th June 2004. However it is clear that that was a misunderstanding on the part of the lawyers as there were simply insufficient profits in that period to permit the payment of $80 million from the profits arising in that period. What was clearly understood by all was that the $80m dividend was to be payable out of profits

accumulated prior to the compromise. Despite MC's assertion in her affirmation described in paragraph 132 above, we are satisfied that there was no suggestion at the time that there should be some form of apportionment up to 11th June and we are satisfied that that would not have been in anyone's mind. The figure of $80 million was simply an agreed figure to be paid from accumulated profits. We have no doubt that the parties must be taken to have agreed and understood that that meant profits accrued prior to 2004, being the year in which the compromise was reached. Having seen and heard the witnesses, we reject the evidence of those such as MC who now, perhaps with the benefit of hindsight, contend otherwise.

135 It follows, in our judgment, that the board of JY acted contrary to what was agreed by counting the PTP dividend towards the obligation to distribute 75% of the 2004 profits. As discussed at paragraph 125, the decision of YT to permit this action by JY was therefore a decision to which no reasonable trustee could come and should be overturned.

136 However, Trilogy goes further. It contends that JY must also distribute 75% of the profits for 2003. We have already held that, as a matter of construction, the amended Article 96 applies to 2003. But, as indicated earlier, unlike in respect of 2004 we are not satisfied that there was any general agreement or understanding in relation to 2003. Some of the participants in the negotiations believed that the PTP dividend would be paid from profits arising before 31st December 2002 (being the date of the latest accounts available at the date of the compromise);.but others believed that the PTP dividend would merely have to be paid out of profits arising before 2004 i.e. it could be paid out of profits arising in 2003. In those circumstances, we do not consider that there was any form of consensus or understanding in relation to 2003.

137 Thus, although as a matter of construction we have held that the amended Article 96 applies to 2003, there was no consensus to this effect. The only agreement was that the 75% obligation would apply to future profits but there was no consensus as to what constituted future profits other than that they were profits arising in 2004 and later. If asked specifically at the time of the compromise whether the 75% obligation would apply in respect of 2003, we conclude that some, such as Mr Gowar and MI might have replied in the affirmative but most of the others would probably not have.

138 In those circumstances, we consider that it is open to the board of JY to decide that, in the absence of any agreement or understanding to the contrary, JY could pay the PTP dividend in respect of 2003 and count that dividend against the 75% obligation under Article 96. It is equally open to it to decide not to do so. Neither course could be said to be unreasonable as neither course would involve acting contrary to something which was clearly agreed or understood as part of the compromise. It follows that any decision of YT to permit JY to take either of these alternative courses would similarly not be unreasonable.

Conclusion

139 We shall ask counsel to address us on the exact form of the order but the consequence of our decision on the third issue is that JY must declare an additional dividend of $26,308,103 for 2004 and YT must procure that this happens.

140 As to 2003, as a result of our decision on the second issue, JY must prima facie declare an additional dividend of $9,501,368 for that year (being 75% of the profit for that year of $15,068,491, less the $1.8m already paid by way of dividend). However, subject to consideration of whether it is possible for the board to re-open the accounts and declare the PTP dividend in respect of the 2003 accounts – as to which we express no opinion as we have heard no argument on the point – it will be up to the board to decide how it wishes to proceed. It may choose simply to declare the additional dividend for 2003 in accordance with the obligation under Article 96. On the other hand, if it is advised that this is legally possible, it may choose to re-open the various accounts and take such action as will enable it to count the PTP dividend against the Article 96 obligation for 2003. Which of these courses is followed is entirely a matter for the board. We should add in passing that it is clear from the evidence that at certain times, there was a majority within the board of JY for paying a dividend greater than that which was in fact paid but that the board proceeded on the erroneous basis that any such decision had to be unanimous. In fact, Article 96 allows a decision to pay a dividend in excess of the 75% minimum to be taken by majority vote.

141 As stated above at paragraph 63 giving our decision on the first issue, JY must declare a dividend for 2005 on the basis of 75% of $223,730,540 less any dividend already paid in respect of that year.

Postscript

142 We cannot leave this judgment without offering a few observations in relation to this litigation.

143 It is clear that the testator was a man of enormous ability who built up a substantial fortune and was much respected. It is also clear that he wished charitable causes to benefit from the assets which he had built up. We have no doubt that he would be dismayed and saddened by the disunity which has broken out amongst his family. Not only is there litigation relating to this case; there is also a dispute in relation to the main body of the estate which has led to another judgment of this Court.

144 All the assets which are the subject of this case are destined ultimately for charitable purposes. This litigation will have incurred enormous legal and accountancy fees and, to the extent that any costs are ordered to be paid out of the assets of JY, those costs will be payable ultimately by the eight Sub-Trusts. Thus, money intended for charitable causes will have been diverted into the hands of lawyers and accountants.

145 We understand that there are differing views amongst the family which are strongly and

sincerely held. But those views have now been put before the Court and the Court has ruled on the points at issue. We urge all the members of the family to endeavour to put litigation behind them and to concentrate on the business of administering the assets of JY and the Sub-Trusts for the benefit of charitable causes.