(1) A(Representors) v (1) K

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Bailiff, Jurats Pitman, Christensen, William Bailhache
Judgment Date:	30 June 2017
Neutral Citation:	[2017] JRC 100
Reported In:	2017 (1) JLR 266
Date:	30 June 2017
Court:	Royal Court

Text

Royal Court

(Samedi)

Before:

Sir William Bailhache, Bailiff, and Jurats Pitman and Christensen.

In the Matter of the Representation of the Y Trust and the Z Trust

And in the Matter of the Trusts (Jersey) Law 1984.

Between
(1) A
(2) B
(3) C
(4) D
(5) E
(6) F
(7) G
(8) H

(9) I
(10) J
Representors

–v–
(1) K
(2) L
(3) M
(4) N
(5) O
(6) P
(7) Q
(8) R and the family charitable beneficiaries
Respondents

Advocate E. C. P. Mackereth **for the Representors**.

Advocate M. P. Cushing **for the Third, Fourth and Fifth Respondents**.

Advocate A. Kistler **as Guardian ad Litem for the Minor Beneficiaries**.

Advocate O. A. Blakeley **as Amicus Curiae**.

Authorities

Re Osias Settlements [1987 – 1988] JLR 389.

Variation of Trusts Act 1958.

Re Seale's Marriage Settlement (1961) Ch 574.

Re Holt's Settlement (1969) 1 Ch 100.

Re Ball's Settlement Trusts [1968] 1 WLR 899.

Underhill's Law of Trusts and Trustees, 13th edition.

Re Weston's Settlements [1969] 1 Ch 223.

In the matter of the Representation of N and N [1999] JLR 86.

In the matter of Douglas [2000] JLR 73.

In the matter of the DDD (1976) Settlement and other Settlements [2012] (1) JLR Note 8.

In the matter of Quorum Trustees Limited 2002/61.

X Trustees Limited v W and A [2015] JRC 136.

Goulding and another v James and another [1997] 2 All ER 239.

Chapman v Chapman [1954] AC 429.

Saunders v Vautier (1841) 4 Beav 115.

Re Holmden's Settlement Trusts [1968] AC 685.

Pemberton v Pemberton and others [2016] EWHC 2345 (Ch).

Re Beard [1908] 1 Ch 383.

Re Edgar [1939] 83 SJ 154.

Wills and Succession (Jersey) Law 1993.

Civil Partnership (Jersey) Law 2012.

Human Rights (Jersey) Law 2000.

Discrimination (Jersey) Law 2013.

Trust — reasons relating to orders regarding approval of variations and additional new foundation.

THE BAILIFF:

1 At a hearing of the Representors' representation in private on 11 th April, 2017, the Court made orders in the exercise of its discretion approving on behalf of the minor unborn and unascertained beneficiaries a variation of the Y Trust and the Z Trust in accordance with the terms set out in Schedules 5, 6 and 7 of the representation, and an order adding a new foundation called the X Foundation, a company limited by guarantee registered in England as a charitable beneficiary of the Y Trust. We indicated that our reasons would be reserved and this judgment expresses those reasons. Although the hearing took place in private, we think the reasons for the exercise of the Court's discretion may be of interest to those as yet unborn and the other minor beneficiaries of the two trusts as and when they attain their majority and indeed they are entitled to know why it is that the Court has made the orders which it has. In redacted form the judgment is being published because, given the small number of judgments in relation to the exercise of the Court's powers in Jersey to vary a trust, it is in the public interest to do so.

Background

2 The Y Trust and the Z Trust are two of the major settlements forming part of a large group of settlements (“the General Family Trusts”), all of which were settled directly by W (“the Settlor”) or by the trustees of trusts which he had previously established with funds either

originating from him or from trusts which he had established. The trust provisions are complex, but will be set out later to the extent that they are relevant to the current proceedings. The value of the trust property within all of the General Family Trusts is very substantial indeed. This wealth has enabled the family through the trusts to make very substantial annual charitable donations.

3 The Settlor died some years ago. He was married several times and had a large family.

The Y Trust

4 The Y Trust was established by a settlement governed by the proper law of Jersey and made by the Settlor on 31 st December, 1993. The trust fund and income of this settlement was divided into seven equal shares representing each of the Settlor's surviving children, with each share being held in trust for the benefit of that child and his or her issue (as defined in the settlement), the trustees holding each such share as to capital and income on discretionary trusts in relation to the relevant branch of the family. After the death of the Settlor, the Trust Fund was to be held on discretionary trusts for the Settlor's descendants (as defined), his widow and the charitable organisations listed in the seventh schedule — the trustees have power to accumulate income and either pay income, accumulated income or capital, with the prior written consent of the special trustee, to any one or more of the beneficiaries. The discretion of the trustees goes both to whether to make such payments and as to quantum if in their discretion they deem it appropriate. Some of the powers contained in the settlement are subject to the obligation to obtain the written consent of the protectors, but this is not relevant for present purposes. There is no power to add beneficiaries and paragraph 22 of the settlement deed contains this provision:-

> *"The Trustees, with the prior written consent of the protector, may amend this Settlement in order to (i) clarify the provisions thereof; (ii) modify the administrative provisions thereof; or (iii) cause such clarifications which are required or appropriate for the effective implementation of this Settlement.* This power shall not be exercised so as to add any beneficiaries, alter the beneficial interests of the beneficiaries, add or modify a power or create an interest which would cause the Settlor to be treated as the owner of any portion of the trust for the purposes of sub-part E of sub-chapter J of the [United States Internal Revenue Code of 1986 as amended], permit the Settlor or the Settlor's spouse to be appointed as a Trustee, Special Trustee or Protector, or allow any portion of the trust to be used to discharge any obligation of the Settlor or the Settlor's spouse."

5 One provision relevant to the present application is to be found in the interpretation paragraph of the Settlement at 1(M):-

> *"For the purpose of this Settlement and in the interpretation and construction of each and every provision hereof all references to 'child' or 'issue' or 'descendant' shall mean only a person who:-*

i) Is born a legitimate child of his father and mother;

ii) Is a child who is legitimised by the subsequent marriage of his father and mother;

iii) Is adopted to a situation where a congenital male and a congenital female, married to each other, and there not having been a child born of the marriage, adopt a person under the age of two years in accordance with the law of the ordinary residence of the adoptive parents at the time of the adoption; or

iv) Is a child which is the result of an artificial insemination where the donor or the recipient is issue (within the meanings of sub-paragraph (i) or sub-paragraph (ii) hereof only) of the Settlor and such child is adopted by such issue under the law of ordinary residence of such issue at the time of the adoption.

No other person shall be included in the definition of 'child' or 'issue' or 'descendant' for the purposes of this settlement."

The Z Trust

6 The Z Trust was made by settlement deed dated 8 th June, 1990, and executed by the Settlor and L as trustee. It is governed by the proper law of Jersey. The beneficiaries are named as A, the first named Representor, and any issue of the parents of the Settlor, other than the Settlor himself; and a number of named charitable institutions. There are various protector powers which are not relevant for the purposes of the present application. There is a limited power to add to the class of beneficiaries, subject to the prior written consent of the Settlor, or after his death or in the event of his incapacity, subject to the prior written consent of the protector. The trustees hold the trust fund as to capital and income on discretionary trusts for the benefit of the beneficiaries (other than the Settlor) for the time being in existence. The third schedule, which defines the beneficiaries uses the word 'issue' and that is defined as follows:-

"1(L) For the purposes of this Settlement and in the interpretation and construction of each and every provision hereof all references to 'issue' shall include a person who either

i) Is adopted into a normal situation wherein a congenital male and a congenital female lawfully married to each other wish to adopt a person under the age of two years because they are biologically unable to have children of their own; or

ii) Is a child which is the result of artificial insemination where the donor or the recipient is a lineal descendant of the Settlor and the child is legally adopted by such lineal descendant or is otherwise legally recognised as

the child of the donor or donee. Nevertheless, during the Settlor's lifetime, the Settlor may by instrument in writing delivered to the trustees amend the definition of 'issue' contained herein to include a legally adopted child of any lineal descendant of the Settlor provided in each instance that the adoptee is under the age of two (2) years at the time of adoption."

7 The Settlor did amend the interpretation of the word *'issue'* because the provisions set out above was amended in the restated Z Trust by deed dated 22 nd April, 1997, and without deciding it, we proceed on the assumption that those changes are operative. By clause (1)(A)(i) 'beneficiaries' means all and any of the persons specified in the third schedule, and the trustees of such trusts for such persons as may be selected. The third schedule defines beneficiaries as the Settlor, A, now the widow of the Settlor, and 'the issue (whether now living or yet to be born) of [the Settlor].

8 At clause 1(m) there appears the following:-

"A.

In the interpretation and construction of each and every provision of this Settlement all references to 'Issue' shall mean any persons falling within one or more of the following descriptions; the expression 'Issue of the Settlor' shall be construed accordingly:-

i) [The Representors] and Q and R;

ii) A person who, subject to the provisions of Clause B hereof, is conceived or born within the structure of a married heterosexual relationship between a congenital male and congenital female, one of whom is of the bloodline of the Settlor;

iii) A person who is conceived or born within the structure of an unmarried heterosexual relationship of a two year minimum continuous period between a congenital male and a congenital female, one of whom is of the bloodline of the Settlor, PROVIDED THAT:

a) Such person is proven to the satisfaction of the Trustees to be of the bloodline of the Settlor; and

b) The parent who is of the bloodline of the Settlor or any adult beneficiary requests the trustees by instrument in writing to treat such person as issue of the Settlor;

iv) A person who is adopted in accordance with the law of the ordinary residence of either of the adoptive parents who are a congenital male and congenital female one of whom is of the bloodline of Settlor either married to each other for at least two years or who have cohabited for a minimum continuous period of two years in both cases at the commencement of the

adoption proceedings and in each case who are either unable to have a child or further children of their own or are advised for medical reasons not to have a or another child PROVIDED THAT such person is under the age of two years at the commencement of the adoption proceedings;

v) A person proven to the satisfaction of the Trustees to be of the bloodline of the Settlor who has demonstrated normal educational and social behaviour as determined exclusively by the Trustees PROVIDED THAT such a person is or is proven to be Issue of the Settlor and only if either the parent of such person who is of the bloodline of the Settlor requests it or at least two other adult Beneficiaries request the Trustees by instrument in writing to treat such person as Issue of the Settlor and in each case the Protectors consent in writing to such treatment;

vi) A child born as a result of artificial insemination either (a) where the donor is proven to the satisfaction of the Trustees to be a member of the male bloodline of the Settlor and who is either married to or has cohabited with the recipient congenital female for a minimum continuous period of two years immediately prior to artificial insemination or (b) where the recipient is proven to the satisfaction of the Trustees to be a member of the female bloodline of the Settlor and who is either married to or who has cohabited with a congenital male for a minimum continuous period of two years immediately prior to artificial insemination;

vii) A child born to a surrogate mother where the donor of the ovum is proven to the satisfaction of the Trustees to be a member of the female bloodline of the Settlor PROVIDED THAT:-

a) The donor of the ovum is either married to or has cohabited with a congenital male for a minimum continuous period of two years immediately prior to such donation; and

b) Either the donor of the ovum requests it or at least two other adult Beneficiaries request the Trustees by instrument in writing to treat such child as Issue of the Settlor and the Protectors consent in writing to such treatment.

B In the event that any adult Beneficiary requests the Trustees in writing to establish that a person other than any person named in paragraph A(i) hereof who is conceived or born within the structure of a married heterosexual relationship is of the bloodline of the Settlor that person will be excluded from the definition of issue if it is proven to the satisfaction of the Trustees that he or she is not of the bloodline of the Settlor. Any request as aforesaid shall not be capable of being exercised so as to derogate from any interest to which such person has previously become indefeasibly entitled whether in possession or in reversion or otherwise.

C Only a person descended from the Settlor shall be included in the definition of

Issue. References to the bloodline of the Settlor shall include only persons descended from the Settlor. No other person shall be included in the definition of Issue for the purposes of this Settlement.

D Nevertheless, during the Settlor's lifetime, the Settlor may by instrument in writing delivered to the Trustees amend the definition of Issue contained herein in such a manner as he shall in his absolute discretion think fit."

9 Other amendments have been made to the Z Trust over the years since it was made. One amendment of interest is that made on 18 th September, 1996, as a result of which the trustees were required to pay the income to or on the order or direction of the Settlor.

Summary of effective position

10 Advocate S is a director of K and L, the trustees of the Y Trust and the Z Trust respectively and in his affidavit in support of the present application, he confirms that the comments which he makes have the knowledge and approval of the other three members of the respective boards of K and L. All four of the directors of the respective boards have had long-standing professional relationships with the Settlor, and knew him well. From this position, Advocate S was able to say in his affidavit:-

"79. The Settlor had particular views as to what relationships should be considered familial for the purposes of including or excluding beneficiaries and these views can be seen as reflected in the definitions of "Issue" (and "descendants") found in the Y Trust and the Z Trust and were previously reflected in the definitions contained in the other General Family Trusts before the 2014, the 2016 and the 2017 Appointments [making amendments to all the trusts of the General Family Trusts with the exception of the Y Trust and the Z Trust] were made.

80. Although advanced in the sense of showing an awareness of developing practice in relation to IVF techniques and surrogacy, and not of the view that the birth of a child out of wedlock was necessarily to be a bar to qualification as a beneficiary in all circumstances, the Settlor nevertheless:

(a) had firm views on children born into homosexual relationships, consistently referring to the issue of a "congenital" male and a "congenital" female so as to leave no room for doubts; and further

(b) sought to constrain the circumstances in which an adopted person might qualify as a child (the heterosexual adopters have to be unable to have children and the adoptee has to be no more than 2 years old at the commencement of the adoption proceedings);

(c) imposed conditions on children born out of wedlock requiring the relationship between the congenital male and congenital female to be of a two

year minimum continuous period (the restriction was not clear as to how one should determine the continuous period); and

(d) variously conditioned qualification for beneficiary status on the existence of beneficiary or Protector approval, and/or the exhibiting of "normal educational and social behaviour" [sic]"

11 The definitions of *"issue"* and *"descendant"* contained in the two trusts which are now under consideration have caused both administrative and family difficulty for reasons which will now become apparent.

Family relationships

12 As a result of the provisions set out at paragraphs 4 to 8 above, a number of family members are excluded from benefit from the Y Trust and the Z Trust. Despite that, from birth they have been brought up as grandchildren of the Settlor as much as their cousins. The evidence is that despite the trust provisions set out above, the Settlor treated them as his grandchildren. For all the other trusts in the General Family Trusts, this anomaly around the definition of *"issue"* and *"descendants"* has been put right by the 2014 and 2016 appointments. For the purposes of this judgment, we shall refer to the excluded descendants as *"the excluded family members"*.

The representation

13 The purposes of the representation are threefold:-

(i) The first purpose is to ask the Court to adjust the definition of *"issue"* and *"descendants"* in the Y Trust and the Z Trust, thus bringing the trust provisions into alignment with the General Family Trusts. This will enable the excluded family members to become beneficiaries.

(ii) Insofar as the Z Trust is concerned, an amending deed in the year 2000 removed the power of the trustees with the prior or simultaneous written consent of the protectors to pay or apply the whole or any part of the capital of the trust fund to or for the benefit of all or any one or more of the beneficiaries to the exclusion of the other or others in such respective amounts if more than one and generally in such manner as the trustees should in their absolute discretion think fit. It is said that this was a mistaken omission in that 2000 amending deed and the Court is asked to put it right, not as a rectification but as a variation application.

(iii) As a result of changes in the requirements of the Charity Commissioners of England and Wales as regards to the presence of a majority of UK resident persons on the trustee board of a registered private charity, a new family foundation ("The X Foundation") was established in the form of a company limited by guarantee ("the

New Foundation"). All of the members of the board of the New Foundation are principal beneficiaries of the General Family Trusts, and the family charitable giving, previously channelled through [a different foundation], is now being channelled through the New Foundation. All of the General Family Trusts, other than the Y Trust have power to channel charitable giving through the New Foundation. In the case of the Y Trust, the trustees are constrained by having a list of charitable bodies which they can benefit. It is potentially inconvenient and inefficient to bypass the New Foundation and adds an additional layer of administrative complexity to what is otherwise a streamlined process and it is submitted accordingly that the New Foundation should be added as a specific object of the Y Trust.

The family approach

14 It is clear from the affidavit evidence put before us that it was the Settlor's wish that after his death, in the administration of the General Family Trusts, the trustee and protector group should consult where appropriate with the beneficiaries over the age of 21 years who have been appointed to the Family Council. This Family Council is not formally constituted as a body under the General Family Trust instruments; however, the Family Council are the Representors in the present proceedings, and include not only the Settlor's widow but also each of his children and some of his grandchildren.

15 The affidavit evidence also establishes that the Family Council have had a series of lengthy discussions as to how the beneficiary definitions under the General Family Trusts might be modernised. The members of the Family Council recognise the need to reach a consensus in relation to a definition which not only was critical to the exercise of trustee discretions, but also significant having regard to the family nature of the exercise in question. The deliberations of the Family Council extended over almost three years, with different iterations of provisions addressed to particular scenarios considered and debated. The Settlor's widow has also filed an affidavit in these proceedings. In it she describes how she and the Settlor, who had children together, were determined that the family would be as close and cohesive as possible and in that context that *"the family"* included the surviving children from the Settlor's previous marriage.

16 The Settlor's widow describes in her affidavit that the decision to apply to modernise the Settlor's definition of *"issue"* and *"descendants"* was not a decision taken lightly. Furthermore the Family Council was well aware that the wealth in the General Family Trusts has ultimately flowed from the Settlor and that in proceeding as they have, the members of the Family Council were departing from the Settlor's wishes. She describes how at meetings of the Family Council more than one view was initially tabled at its meetings, and all the different views were deliberated on and debated over a long period of time. Perhaps unusually, the family consulted a psychoanalyst who has provided consultancy services to the family on a number of issues for several years for advice on how to keep the family together after the death of the Settlor, recognising that in very wealthy families this can sometimes be a problem. The family's approach is a united one. Indeed family harmony is one of the major factors behind the present application and the

fact that it is a joint approach is indicative of the family sense of self, and its unity. It is said that leaving the present arrangements in place would simply leave a basis for unhappiness and dissension.

17 The revised definition of issue, if approved by the Court preserves the feature of naming living *"issue"* intended to fall within its ambit, and then defines *"issue"* by reference to their standing in the requisite relationship with their forbears. The definition thus provides for:-

(i) An equal recognition of issue of same sex relationships;

(ii) A general recognition of illegitimate children (via the concept of bloodline) subject to a safeguard machinery in relation to male parenthood through the "beneficiary committee".

(iii) Recognition of the possibility of beneficiary status for a person treated as a child subject to the safeguard machinery;

(iv) A relaxation of the age threshold for adopted persons to qualify, without the requirement for compliance with the safeguard machinery.

18 The safeguard machinery relates to the establishment of the beneficiary committee which ensures that the definition of *"issue"* and *"descendant"* are subject to family review on a footing designed to ensure a reasonable outcome, the committee being composed of an adult representative in each family branch, including the Settlor's widow during her lifetime, in each case reaching decisions by a majority.

Parties

19 A convening hearing in relation to this application was held on 10 th March, 2017. In accordance with the request of the Representors, K as trustee of the Y Trust and L as trustee of the Z Trust were convened; also the protectors and special trustees of the Y Trust and the protector of the Z Trust. Advocate Kistler was appointed as *guardian ad litem* to represent *inter alia* the interests of all the minor beneficiaries; the adult beneficiaries who were not members of the Family Council and various charitable foundations were also convened. Finally, at the request of the Representors, the trustees were asked to represent the unborn and unascertained beneficiaries of the trusts under consideration.

20 It was apparent to the Court at that time that it was likely that the representation, presented as it was by a united family, would not be contested. As a result of that, the Court appointed an *amicus curiae* to assist the Court in respect of two matters – the degree to which the Settlor's intentions should be key to the Court's determination of the application, and the extent to which the trust deed should be upheld or not by the Court in 2017. The latter point was concerned with the public policy, as a matter of Jersey law, in upholding provisions in trust deeds, whether of the kind actually put in place by the Settlor or of the kind

contemplated by the application. The Court is grateful to the *amicus* for his contribution in this respect, and indeed grateful to all counsel for the arguments presented.

The law on variation

21 Article 47 of the Trusts (Jersey) Law 1984 (as amended) ("the Trust Law") provides that:-

> ***"(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –***
>
> ***(a) a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust;***
>
> ***(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;***
>
> ***(c) any person unborn; or***
>
> ***(d) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined*** ,
>
> ***any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property*** .
>
> ***(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person."***

22 Accordingly, the Court has jurisdiction to approve an arrangement on behalf of minors and those who might become entitled to an interest under the trust, including any person unborn, which varies or revokes the terms of the trust or enlarges the powers of the trustee. Paragraph (2) makes it plain that the Court should not approve the arrangement unless it concludes that the variation is for the benefit of the minor unborn and unascertained beneficiaries, and of course it must be satisfied that the case is a fit and proper one in which to exercise its discretion to make the order.

23 There has been a limited number of applications to the Royal Court for approval to variations. Indeed, only six such cases have been cited to us. The seminal case is in *Re Osias Settlements* [1987–1988] JLR 389. That was an application under what was then Article 43 of the Trusts Law, seeking the Court's approval of an arrangement varying the

trusts of two settlements governed by Jersey law such that the trusts would be constituted under Florida Law and the funds in Jersey transferred to trustees resident in the United States. The reason for the application was that the holding of the trust assets in companies incorporated in Jersey turned out to be disadvantageous to the primary beneficiaries and potentially to the unborn and unascertained beneficiaries since they would be liable to pay US income tax, and that the holding of the trust assets for the issue on irrevocable trusts governed by Florida law would be for the benefit of all beneficiaries.

24 The Court granted the prayer to the representation and, following a wide ranging review of English authority, Tomes DB gave the reasons of the Court as follows:-

> (i) The jurisdiction of Article 43 (now Article 47) of the Trusts Law is as wide-ranging and beneficial as that conferred on the English courts under the Variation of Trusts Act 1958, and subject to one reservation, the Royal Court should adopt the principles set out in *Re Seale's Marriage Settlement* (1961) Ch 574, in *Re Holt's Settlement* (1969) 1 Ch 100 and in *Re Ball's Settlement Trusts* [1968] 1 WLR 899. The reservation which the Court expressed related to the sub-stratum doctrine which if applied, would suggest that the Court should not approve an arrangement if the result of doing so would be to remove the whole sub-stratum of the original trust. In *Re Osias* Tomes DB identified reservations which the Court had about the sub-stratum doctrine. We do not need to go into that today because it does not arise in the present case.
>
> (ii) The Court was required to consider whether the arrangement was for the ***"benefit"*** of the minor, unascertained and unborn beneficiaries. In *Re Osias*, Tomes DB accepted the principle that in deciding whether a scheme is for a person's benefit, the Court would consider the matter as a whole, noting that the word " ***benefit***" was not to be narrowly interpreted or restricted to financial benefit – see Underhill's Law of Trusts and Trustees, 13th ed., at 395 (1979), and in *Re Weston's Settlements* [1969] 1 Ch 223 at pages 243 – 245. There, Lord Denning MR had said:-
>
> > ***"Two propositions are clear:-***
> >
> > ***In exercising its discretion, the function of the Court is to protect those who cannot protect themselves.*** It must do what is truly for their benefit .
> >
> > ***It can give its consent to a scheme to avoid death duties or other taxes.*** Nearly every variation that has come before the Court has tax avoidance for its principal object: and no one has ever suggested that it is undesirable or contrary to public policy .
> >
> > ***But I think it is necessary to add this third proposition:***
> >
> > ***The Court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit.*** There are many things in life more worthwhile than money. One of

> these things is to be brought up in this our England, which is still "the envy of less happier lands". I do not believe it is for the benefit of children to be uprooted from England and transported to another country (Jersey) simply to avoid tax. It was very different with the children of the Seale family, which Buckley J considered. That family had emigrated to Canada many years before, with no thought of tax avoidance, and had brought up the children there as Canadians. It was very proper that the trust should be transferred to Canada."

(iii) On the facts therefore in *Re Osias*, the Court applied these principles in approving the proposed variation.

25 The other Jersey cases to which we have been referred are *In the matter of the Representation of N and N* [1999] JLR 86, *In the matter of Douglas* [2000] JLR 73, *In the matter of the DD 1976 Settlement and other Settlements* [2012] 1 JLR Note 8, [2011] JRC 243, *In the matter of Quorum Trustees Limited* [2002] JRC 61 and *X Trustees Limited v W and A* [2015] JRC 136 the Court has applied the principles of *Re Osias*; most of these cases had tax benefits attached to the proposed variations and it was noted that the Royal Court had said in *Re Douglas* at page 77:-

> ***"The Court sees no reason to adopt a different approach in Jersey to that of the English Court in relation to the equivalent legislation in the United Kingdom.*** Accordingly, despite any implied reservation in *Osias Settlements*, ***the Court is quite satisfied that the avoidance, minimisation or deferral of taxation is capable of being of benefit and that, as in the English courts the fact that such avoidance, minimisation or deferral is the principal object of the variation is not a reason for the Court to refuse to give its consent if satisfied that the arrangement is for the benefit of the persons concerned."***

26 The question of tax benefit is not relevant in the current case and the Jersey cases which follow *Re Osias*, with one exception, do not seem to be very relevant in the present context.

27 The exception is *In the matter of the Representation of N and N*. In that case, although the Court was concerned with the approval of a tax efficient variation, its reasoning was expressed in this way at pages 92/93:-

> ***"The word 'benefit' in Art 43(2) is to be widely construed***
>
> *In Re Osias Settlements*, ***the Court spoke of the 'infinite varieties of fact situations which may arise'.*** It is clear, however, from that case that there is no need for there to be a financial benefit, nor is a financial benefit in itself sufficient. The Court should also consider the educational and the social benefit of what is proposed.
>
> ***When we look at the proposal, the financial advantage may be thought to be to the disadvantage of the three youngest children.*** They would, it

appears, receive £2.5M after tax as compared with £4.97M if the arrangement did not proceed. We can only be guided by counsel on that point. The position of the settlors is not our concern but in the context of this close knit family, where two of the children are suffering from Gaucher's disease, it seems to us that the children, if adult, would be mindful of a moral obligation not to exploit the advantage which the Finance Act of 1998 has somewhat fortuitously conferred on them. The parents might well be put into financial disarray by having to meet a substantial and unexpected tax payment: the trust fund has been accumulated only because of the financial acumen of the settlors. If the settlors sought to recover tax liabilities in excess of £2M, the children would find themselves in litigation with their parents. The avoidance of such an unnecessary internecine war we view as a significant factor .

The shortfall to the minor children, who are represented by Advocate Martin, should be more than compensated for as more gains are realised in the proposed UK resident settlement .

In our view, apart from the social matters to which we have referred, the proposed arrangement provides flexibility and a framework more suited to such a large trust fund …"

28 Having in mind therefore that benefit means any kind of benefit – whether financial, physical, educational or social – it is of interest to look at two of the English cases, which touch also on the possibility of conflict between the wishes of the settlor or testator on the one hand and the assessment of benefit on the other. In *Goulding and another v James and another* [1997] 2 All ER 239, the Court was considering an application to vary a will of the testatrix, who had left her residuary estate on trust for her daughter for her lifetime and thereafter on trust for her grandson absolutely if he survived to the age of 40 and also survived his mother. If he died before reaching the age of 40 or predeceased his mother whether he had reached the age of 40 or not, his children living at the date of death would take his interest absolutely. The daughter and grandson applied for a variation of the will such that 45% should be held for the daughter absolutely, 45% for the grandson absolutely and the remaining 10% held on the trusts of a grandchildren's trust fund which in effect would benefit the unborn great-grandchildren of the testatrix. At first instance, the judge dismissed the application on the grounds that to vary the trusts as requested would be contrary to the intentions of the testatrix, in particular because the daughter should not be able to touch the capital at any time and the grandson should not be able to touch it until he reached the age of 40. Both the daughter and the grandson appealed.

29 It was apparent that the Court of Appeal considered that there was no issue as to whether the arrangement was for the benefit of the class of persons on whose behalf the Court was empowered to approve the arrangement. The Court noted that the only reason for withholding approval below was that the varied arrangements would be inconsistent with the very firm intentions of the testatrix. Mummery LJ noted at page 243G that in his judgment below, the judge had said this:-

> ***"In exercising the discretion which I have under the Variation of Trusts Act, it seems to me that it is not enough for me to look only at the formalities; I must look at the practical consequences.*** The proposal which Mr Green has put before me today seem to me to offend against the Settlor's firm wishes to the same extent as the one which I would not sanction last week. In saying this I accept …. that the Settlor's intentions do not represent a binding fetter on the Court; they merely represent a factor, and perhaps an important factor, which the Court can take into consideration when exercising the discretion. So, I approach this in the same way as I approach the first variation … and [because the arrangement was the complete opposite of what was provided for under ***the will and the settled intention of the testatrix] I am not prepared to sanction this variation either."***

30 Before the passage of the 1958 Act, it was established that the Court did not have inherent jurisdiction to sanction on behalf of infant beneficiaries and unborn persons a rearrangement of the trusts of the settlement for no other purpose than to secure a benefit not available under the structure of the present trusts – see *Chapman v Chapman* [1954] AC 429 and the dicta of Lord Simmonds LC at page 446. The absence of such jurisdiction was unaffected by the fact that if all the beneficiaries were *sui juris*, they were absolutely entitled to determine a trust or to resettle the trust property upon altered rights as determined in *Saunders v Vautier* (1841) 4 Beav 115. That was changed by the 1958 Act, the effect of which was summarised in *Re Holmden's Settlement Trusts* [1968] AC 685 at page 701 by Lord Reid:-

> ***"Under the Variation of Trusts Act 1958, the Court does not itself amend or vary the trusts of the original settlement.*** The beneficiaries are not bound by variations because the Court has made the variation. Each beneficiary is bound because he has consented to the variation. If he was not of full age when the arrangement was made he is bound because the Court was authorised by the Act of 1958 to approve of it on his behalf and did so by making an order. If he was of full age and did not in fact consent he is not affected by the order of the Court and he is not bound. So the arrangement must be regarded as an arrangement made by the beneficiaries themselves. The Court merely acted on behalf of or as representing those beneficiaries who were not in a position to give their own consent and approval."

31 In the same case, Lord Wilberforce at page 713 put it this way:-

> ***"If all the beneficiaries under the settlement had been sui juris, they could, in my opinion have joined together with the trustees and declared different trusts which would supersede those originally contained in the settlement.*** Those new trusts would operate proprio vigore by virtue of a self-contained instrument – namely, the deed of arrangement or variation. The original settlement would have lost any force or relevance. The effect of an order made under the Variation of Trusts Act, 1958, is to make good by act of the court any want of capacity to enter into a binding arrangement of any beneficiary not

capable of binding himself and of any beneficiary unborn: the nature and effect of any arrangement so sanctioned is the same as that I have described."

32 Mummery LJ in *Goulding v James* went on to summarise it in this way at page 247E:-

> ***"First, what varies a trust is not the Court but the agreement or consensus of the beneficiaries.*** Secondly, there is no real difference in principle in the rearrangement of the trusts between the case where the Court is exercising its jurisdiction on behalf of the specified class under the 1958 Act and the case where the re-settlement is made by virtue of the doctrine in *Saunders v Vautier* (1841) 4 Beav 115 ***and by all the adult beneficiaries joining together.*** Thirdly, the Court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. The 1958 Act has thus been viewed by the Courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*. ***The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to over bear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument***.
>
> ***The role of the Court is not to stand in as, or for, a settlor in varying the trusts …"***

33 In *Pemberton v Pemberton and others* [2016] EWHC 2345 (Ch) the Court was considering an application for approval of a variation agreed by all the adult beneficiaries which would: (a) set a new perpetuity period, (b) confer on the trustees additional administrative powers, particularly wider investment powers, (c) preserve all existing interests in possession in the settled property but additionally create reversionary life interests for the surviving ***'spouses'*** of the claimant and his son and two daughters – in this context ' ***spouses***' was defined so as to include any civil partner or spouse in a same sex marriage, (d) to create in substitution for the present trusts discretionary trusts for the remainder of the trust period for the benefit of grandchildren, remoter issue and their *'spouses*' and (e) ensure that the Settled Land Act 1925 no longer applied to the settlement. At paragraph 29 of his judgment, Judge Hodge QC said this:-

> ***"Again, the correct approach was considered by the Chancellor at paragraph 13 of his judgment in*** *DC v AC* [2016] EWHC 477. ***Adopting wording in earlier cases, the Chancellor considered that the proper approach of the Court was to take a practical and business like consideration of each proposed arrangement – in that case there were in fact four arrangements for the Court to consider, unlike in the present case – including the total amounts of the advantages which the various parties obtained and their bargaining strength***, ***and to ask whether a prudent adult, motivated by intelligent self-interest, would be likely to accept the proposal."***

34 It seems to us to be legitimate to look at the English cases under the 1958 Act not least because the phraseology of that Act is very similar substantively to Article 47 of the Law. It may well be that a distinction needs to be drawn between those cases which fall within Article 47(1)(d) of the Law and other cases which fall in the earlier sub-paragraphs, but this present case does not concern an application under Article 47(1)(d).

35 The consistent theme of the English decisions is that the Court, in considering whether to exercise its discretion, will have some regard to but will not necessarily follow the wishes of the settlor but only where those wishes are relevant to the question of whether the proposed arrangement is beneficial to those for whom the Court is concerned. The other way of putting that test is that where the Court is satisfied that a proposed arrangement is beneficial to those on whose behalf it is asked to sanction the variation, the fact that the variation might be contrary to the wishes of the settlor or testator is not material.

36 We accept and apply that analysis in Jersey. The Court is grateful for the submissions of all counsel, but particularly those of Advocate Mackereth on behalf of the Representors in relation to this issue of the importance or otherwise of the intentions of the settlor in the exercise of the Court's discretion as to whether it should or should not approve a proposed variation. This is a point which has not hitherto arisen in Jersey as far as we are aware and it was important that it should receive appropriate attention.

Public Policy

37 The second issue which is raised by this application for an endorsement of the variation on behalf of those without capacity is the policy point in relation to the importance of the trust industry in Jersey's financial services offering – should the Court, in the exercise of its discretion, have regard to the desirability, if it be so, of practitioners being able to reassure putative settlors that their wishes will be resolutely enforced by Jersey courts? It might be said that such a result would encourage the formation of Jersey trusts and therefore would be to the advantage of the Island. Policy reasons can, of course, influence the Court's approach to an exercise of discretion. In England, for example, a condition divesting the interest of a devisee or legatee if he entered military service was determined to be void as against public policy (*Re Beard* [1908] 1 Ch 383), and similarly a trust discouraging the beneficiary from undertaking public office (*Re Edgar* [1939] 83 SJ 154). We have no doubt that the same public policies would apply in Jersey, recognising, as has been frequently said, that policy is an unruly horse.

38 It seems to us that there are a number of answers which can be applied to that question. The first, and conclusive answer is that policy follows the law. If the Court is to have exclusive regard to the interests of the settlor or testator, it would be in effect having regard to the views of a person whose interests are not contemplated by Article 47(1) as relevant to the interests which had to be considered. Of course one can see that the settlor might be convened in the case of a protective trust so as to indicate why the protection had been

thought by the settlor necessary to put in place, and whether that protection was still needed; but in that case the Court is still considering whether or not to approve the variation by having regard to the interests of the persons on whose behalf that approval would be given or withheld. Article 47(1) is concerned with those who have beneficial interests under the trust, and not with those who settled the interests in the first instance. On a proper construction of the Article, it appears to us that it is wrong in principle to have regard to the intentions of a settlor who is not or is no longer a beneficiary, except to the extent that those intentions bear upon the interests of the beneficiaries.

39 The second reason why the policy point could be disregarded is that there are competing public policy requirements which point in the opposite direction. It follows therefore that there would be circumstances in which a declared intention on the part of the Settlor comes up against ideas or concepts which form an important part of the policy of the Court at the time the variation comes to be considered. We think this applies to the present case.

40 The Settlor has determined that the trusts are to be governed by the proper law of Jersey. That involves consideration of the whole of our law. Historically, of course, the law of Jersey was *inter alia* against upholding the validity of a gift in favour of a concubine or a person born out of wedlock. No doubt that would also have extended to the product of a same sex union had such an outcome been possible centuries ago. Those rules of customary law applied because they met the requirements of the society which then existed. That is, however, no longer the position in Jersey. Part 3A of the Wills and Succession (Jersey) Law 1993, which was inserted by the amendment adopted by the States in 2010 provides at Article 8C that a child born out of wedlock has the same rights of succession as if he or she were the legitimate issue of his or her parents. Similarly, the estate of a person born outside wedlock no longer devolves upon the Crown in intestacy, but by Article 8C(2), a person has the same rights of succession to the estate of a child born out of wedlock as if that child had been the legitimate issue of his or her parents. Customary laws of succession were therefore amended.

41 In 1990, the States adopted the Sexual Offences (Jersey) Law, which provided that, notwithstanding the customary law, a homosexual act in private would not be punishable as sodomy if the parties to that act had consented and attained the age of 21 years. In 1995 the qualifying age was reduced to 18 years. Further amendments in relation to grooming offences and offences in breach of trust were introduced in 2007 as part of the protection of children, but nonetheless established the direction of travel in relation to the acceptance of same sex relationships. Indeed the Civil Partnership (Jersey) Law 2012 makes detailed provision for civil partnerships, and for the jurisdiction of the Court to make orders on a dissolution or annulment of such partnerships. The States of Jersey has in principle adopted the proposition that there should be legislation for same sex marriages.

42 In relation to public authorities, the direction of travel is firmly established by the adoption of the Human Rights (Jersey) Law 2000. Under that law, all public authorities, including the Court are obliged to act compatibly with rights created under the European Convention on Human Rights. Although it is not a stand-alone right under the

European Convention, Article 14 is in these terms:-

> ***"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."***

43 Going outside the legislation adopted by the States of Jersey, the Island is bound by the United Kingdom's ratification on the Island's behalf of the International Covenant for Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, multilateral treaties adopted by the United Nations in General Assembly. These covenants guarantee the civil and political rights set out therein to all men and women.

44 The Discrimination (Jersey) Law 2013 makes it plain that both gender and sexual orientation are protected characteristics in respect of which the anti-discrimination provisions in that law apply.

45 We have no hesitation therefore in saying that the policy argument, that the financial services industry might be able to encourage trust business by indicating to putative settlors that if they wanted to discriminate against those born out of wedlock or those of same sex sexual orientation those wishes would be respected on an Article 47 application, is outweighed by the policy statement of where this Island currently stands in relation to such issues, as is demonstrated by the legislation referred to above and the international treaties by which the Island is bound. Obviously, those whose rights come to be adjudicated in a court can expect the rights to be adjudicated in accordance with the law, but to the extent that the law includes policy considerations in the exercise of judicial discretion on an application under Article 47, the Court's policy is one of tolerance towards and acceptance of the rights of others, acting within the law, to live their lives as they see fit. There may well be occasions where it is appropriate to have regard to the cultural and religious norms of the beneficiaries in the assessment of what is in the interests of the minor and unborn beneficiaries – and indeed we have done so in this case — but that is a separate question to the policy question now under consideration. This question engages the principle of non-discrimination, exemplified by the European Convention on Human Rights and other international instruments and, for policy purposes, it has primacy over any other policy considerations of the type under discussion.

Conclusion

46 We return therefore to the three variations which we are asked to approve on behalf of the minor unascertained and unborn beneficiaries.

47 We take into account the following considerations:-

(i) We take into account only the interests of those who are existing or potential beneficiaries. We do not take into account the interests of the excluded grandchildren or any other future family members who may be excluded from benefit from the Y Trust and the Z Trust as a result of the provisions which we have described.

(ii) The significant wealth in the two trusts in question means that any financial dilution of benefit is likely to be insignificant. We do not regard therefore financial considerations of benefit to be material in this case.

(iii) We consider that the approach which the Representors and the wider family have taken to the present issue to be exemplary. The objective of seeking family harmony is an extremely laudable one – and, following on naturally from the debate above of international instruments, it is noteworthy that many of those instruments place emphasis on the importance of the family. A strong family provides support and cohesion to family members throughout their lives, and is an important social benefit to which the Court should have regard. We accept the submission that leaving the present arrangements in place is likely to cause unhappiness and dissention in the family in the future, and in this context, we have regard in the definition of 'family' only to the family beneficiaries of the two trusts; but we do not discount at all the possibility that at some future date there may be family beneficiaries who are cousins who fall out as a result of excluded family members who are not entitled to become beneficiaries.

(iv) We also take into account that existing family beneficiaries might themselves find in the future that those whom they would regard as their children are disentitled to benefit either because they are the product of a same sex union or because they are adopted at too old an age or because they are born out of wedlock. It is in the interests of minor unascertained and unborn family beneficiaries that their children in such circumstances should be entitled to benefit.

48 The family have decided that though they have great respect for the view of the Settlor, those views are out of step with modern thinking especially in the areas in which this family substantially operate, particularly New York and London.

49 For all these reasons, the first application for variation is approved as being in the interests of the unascertained minor and unborn beneficiaries of the Y Trust and the Z Trust.

50 The second application concerning only the Z Trust arises from the inadvertent deletion of capital powers. Originally this trust contained the same capital powers as the other General Family Trusts, but the clause regarding powers of appointment and application of the capital was inadvertently deleted in 2000. In our judgment there is no reason not to exercise discretion to reinstate that power. In *X Trustees Limited v W and A* (supra), the Royal Court accepted that although there was no apparent benefit to the minor unborn and unascertained beneficiaries if the settlement were to be varied to introduce a power (in that case to accumulate) at that stage, the addition of that power would provide flexibility in the management of the trust, which would be beneficial to minor and unborn beneficiaries in

the future. We accept for the purposes of this case that the inadvertent deletion of capital powers could cause inconvenience in the future and that it is right to give our approval on behalf of the minor unascertained and unborn beneficiaries to the agreement of the sui juris beneficiaries to reinstate that power now.

51 As to the third application, which is the addition of the New Foundation as a beneficiary of the Y Trust, we note that the Foundation already exists and makes charitable donations. We note also that the board of the Foundation is comprised of family members, and that there is a positive advantage in family members being directly connected with the charitable giving of the General Family Trusts including the Y Trust through the New Foundation. The efficient administration of the charitable giving can be of benefit, and it is one we take into account. Very wealthy people – and the members of this family fall into that category – can better discharge their philanthropic obligations if in doing so they are closely connected with the giving and the giving can be done efficiently. We see every reason why it is in the interests of the minor unborn and unascertained beneficiaries that approval should be given to the addition of the New Foundation as a beneficiary to the Y Trust, a course which the *sui generis* beneficiaries have agreed.

52 As we have said, we are grateful to counsel. We record that not only the Representors but also the trustees and counsel for the minor beneficiaries have supported the application and the amicus has also made submissions which supports the Court's jurisdiction to make the orders in question.

53 For all these reasons, the application to approve the variations to the two trusts as described is granted.