Mubarak v Mubarik

Jurisdiction:	Jersey
Judge:	McNeill JA, Beloff JA, Montgomery JA
Judgment Date:	19 November 2008
Neutral Citation:	[2008] JCA 196
Reported In:	[2008] JCA 196
Court:	Court of Appeal
Date:	19 November 2008

Text

[2008] JCA 196

COURT OF APPEAL

Before:

The Hon. Michael Beloff, **Q.C., President**;

J. W. McNeill, **Esq., Q.C., and**;

Miss C. Montgomery, **Q.C**..

Between
Aaliya Mubarak
Representor/ First Respondent
and
Iqbal Mubarik
First Respondent/Appellant
The Craven Trust Company Limited
Second Respondent

Salem Mubarak and Noor Mubarak
Third Respondent
Advocate M. P. Renouf (as guardian ad litem of the minor beneficiairies Osman Mubarak and Hamza Mubarak and representative of the unborn or unascertained beneficiaries)
Fourth Respondent

Advocate A. P. Begg **for the Appellant**.

Advocate C. G. P. Lakeman **for the First Respondent**.

Advocate J. M. P. Gleeson **for the Second Respondent**.

Advocate M. P. Renouf **in person**.

Authorities

Trusts (Jersey) Law 1984.

Matrimonial Causes Act 1973.

In Re Fountain Trust [2005] JLR 359 .

In re B Trust [2006] JLR 562 .

In re H Trust [2007] JRC 187 .

Thoday v. Thoday [1964] P. 181, 198 .

AG v Barker [2000] 1 FLR 759 .

Saunders v Vautier (1841) 4 Beav. 115 .

In re Christie-Miller's Marriage Settlement [1961] 1 WLR 462 .

In Re Courtauld's Settlement [1965] 1 WLR 1385 .

Colville, Petitioner 1962 SLT 45 .

Law and Others, Petitioners , 1962 SLT 377.

Lewin on Trusts (18th Edn).

Changing the Terms of Trusts, Emily Campbell.

In re Gulbenkian's Settlement [1970] AC 508 .

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

Re T's Settlement Trust [1964] 1 Ch. 158 .

IRC v. Holmden [1968] AC 685 .

In Re Osias Settlements [1987-88] JLR 389 .

Trusts (Scotland) Act 1961.

In re Steed's Will Trusts [1960] 1 All ER at 492 .

In re Seale's Marriage Settlement [1961] Ch 574 .

In re Holt's Settlement [1969] 1 Ch 100 .

In Re N [1999] JLR 86 .

In Re Sangle-Ferriere Children's Settlement [2007] JLR N 8 .

In Re Douglas [2000] JLR 73 .

In Re T's Settlement [2002] JLR 204 .

In Re Druce's Settlement [1962] 1 WLR 363 .

Court of Appeal (Jersey) Law 1961.

Court of Appeal (Civil) Rules 1964.

Schmidt v Rosewood Trust Ltd [2003] 2 AC 709 .

Mourant & Co. Trustees Limited v. Magnus [2004] JRC 056 .

Phillips and others, Petitioners 1964 SC 141, 148 .

In Re Tinkers Settlement [1960] 1 WLR 1011 .

Matrimonial Causes Act 1973.

Appeal by the First Respondent/Appellant heard on 24th September, 2008, against orders of the Royal Court dated 15th and 17th April, 2008.

McNeill JA

1 Throughout this judgment Aaliya Mubarak will be referred to as the First Respondent and Iqbal Mubarik will be referred to as the Appellant.

2 The scheme of this judgment is as follows:-

Paras.

Introduction

3 There are two Appeals and a Respondent's Notice before this court. The proceedings in the Royal Court (Samedi Division) below arose as **a by-product** much litigation following the divorce in England of the Appellant and First Respondent. They concern a Jersey Trust.

4 The First Notice of Appeal was withdrawn during the hearing before this court. It sought to appeal decisions made during a hearing before the Royal Court which was held on 14 to 17 April 2008, the salient parts of which, for the purposes of that Appeal, took place on 15 April 2008. The reasoning behind those decisions was issued by the Deputy Bailiff on 15 August 2008, at the same time as the judgment on the substantive issues. In that Notice the Appellant had sought, principally, declarations as to how the hearing should have been conducted. It was pointed out to the Appellant's Advocate that courts did not, in practice, give advice on academic questions and Advocate Begg for the Appellant agreed that answering the issues in the first Appeal would have no practical consequences **and withdrew** that Appeal. **However, in so doing**, Advocate Begg asked us to note, however, that his client's position was that non-attendance by Advocate Begg at the hearing from and after 15 April was as a result of those decisions.

5 The Second Notice of Appeal presents appeals in respect of substantive Orders made by the Royal Court on 17 April 2008, and on which judgment was issued by the Deputy Bailiff on 15 August 2008. By that Notice, the Appellant seeks, among other matters the dismissal of certain orders whereby the Court (a) approved, under Article 47 (1) of the Trusts (Jersey) Law 1984 ("the 1984 Law"), an arrangement varying a Jersey trust, (b) appointed receivers for the trust and (c) made certain ancillary orders.

6 The Respondent's Notice seeks to reargue an alternative line of argument rejected by the court below. The First Respondent also raised, by a separate Summons before us, an issue as to whether the Appellant should be barred from bringing his appeals by reason of lack of *locus standi*, estoppel or abuse of process.

Factual background

7 The hearing which took place in April 2008 was in respect of a Jersey trust known as the IMK Family Trust ("the Trust"). It proceeded upon a Representation by the First Respondent for an order enforcing or giving effect to an order made on 30 March 2007 in the Family Division of the High Court in England by Holman J. By that order, made pursuant to Section 24(1)(c) of the Matrimonial Causes Act 1973 ("the 1973 Act"), the High Court sought to vary the Trust so as to require the trustees to pay to the First Respondent all sums owing to her under an order made in the Family Division on 10 December 1999 by Bodey J., the total amount being £4,875,000 as at 1999.

8 The Appellant and First Respondent had been husband and wife, having married in 1983. Over the ensuing years, the Appellant's business interests expanded and in 1994 he caused a holding company, Twenty First Century Holdings Limited ("TFCH") to be incorporated in Bermuda; TFCH owning, directly or indirectly, shares in relevant subsidiary companies.

9 The Third Respondents are the adult children of the marriage. They did not appear in this court or at the proceedings below in the Royal Court, but wrote stating that they supported the First Respondent's application. The Fourth Respondent is the guardian *ad litem* for the minor children of the marriage, and they, together with the unborn and unascertained beneficiaries, were represented by him at the Hearings below and before this court. The Second Respondent was the Trustee of the Trust until the orders of April 2008 and was represented below and before us; on both occasions taking a neutral stance but seeking to assist the Court.

10 In 1997 the family moved to live in London and at that time there was a corporate re-organisation in relation to TFCH. As part of that reorganisation it was agreed that TFCH would repurchase most of the shares which had been issued to the Appellant and to the First Respondent. It did so, but the purchase price remains unpaid.

11 The Trust was created in 1997. The Deed of Trust is dated 2 September 1997 (hereinafter "the Trust Deed") The settlors were the Appellant and the First Respondent. It is a discretionary trust governed by the law of Jersey. The principal beneficiaries are described as the settlors, their children Salem, Noor and Osman together with any other children or remoter issue of the settlors born thereafter. The Appellant has power to add and exclude beneficiaries, to appoint and remove the Protector and to appoint new or additional trustees. The Protector is the Appellant's father and he has the power to remove a trustee.

12 On the same day as the trust was constituted, the Appellant and the First Respondent transferred the residue of their shareholdings in TFCH to the trustee to hold under the terms of the Trust. They did not transfer to the trust the debts owed to them by TFCH resulting from of the unpaid purchase price. In consequence the value of TFCH as at September 1997 was retained by the Appellant (and, to a limited extent, by the First Respondent). Accordingly, only the benefit of any subsequent increase in value would accrue for the

benefit of the trust.

13 The parties ceased cohabitation in March 1998 and at about the same time the Appellant revocably excluded the First Respondent as a beneficiary under the trust. There were two letters of wishes in relation to the trust. One letter of wishes was dated 2 September 1997 and signed by both the Appellant and the First Respondent. A Second letter of wishes was signed by the Appellant on 8 July 1998 and was described as clarification of the earlier letter. In that same month the First Respondent had instituted divorce proceedings in England.

The Divorce Proceedings

14 Divorce Proceedings were commenced in July 1998 and decree nisi was duly pronounced. As already noted, by an order made on 10 December 1999 the Appellant was ordered to pay the wife a lump sum of £4.875m with periodical payments until payment of the lump sum. Essentially, the lump sum remains unpaid and the total amount due to the First Respondent has increased greatly because of unpaid periodical payments.

15 There have been extensive proceedings in England. As Holman J. observed, a time span of seven years resulted in appearances before at least thirty judges in England, with twenty transcribed and five reported judgments. The order of 30 March 2007 by Holman J. was the subject of an application for leave to appeal to the Court of Appeal. In refusing leave, the Court of Appeal made clear the **difference** with which the **now notorious** litigation is viewed by the judiciary in England. The order of 30 March 2007 had been made after a lengthy hearing and, as indicated, purported to vary the terms of the Trust so as to require the Trustee to pay to the First Respondent amounts owed by the Appellant under the earlier orders of the Family Division.

16 I turn now to the issues before this court

I. Whether the extant Appeal is an abuse of process

17 By her Summons of August 2008, the First Respondent raised issues as to lack of *locus standi*, estoppel or abuse of process.

18 Shortly after the judgment and reasoning of the court below had been issued, the First Respondent applied by Summons to have the Appellant prevented from bringing his appeals on the grounds of (a) abuse of process, (b) estoppel and (c) want of *locus standi*. The essence of the argument under each head was that the Appellant should be barred from proceeding further with these appeals as he had chosen not to represent himself or instruct legal representatives to appear on his behalf at the substantive hearing in the court below in April of this year. This court determined that submissions on these matters should

be made at the outset of the hearing before this court.

General considerations

19 It is a matter of judicial knowledge, and a matter welcomed by these courts, that there are occasions when one of a number of parties to judicial proceedings intimates to the court that, subject to the views of the court, he is content to rest his position either upon written submissions or in adopting, in advance, the submissions to be made by another party with a similar interest. Properly arranged, such an approach saves judicial time and can save costs not only of the party who proposes to do so, but also of the others **by reason of the consequent abbreviation** proceedings. However, in proceedings - whether truly adversarial or otherwise - where such an approach is desiderated, it does not lie at the hand of the party simply to withdraw: advocates are officers of the court, their presence is required to assist the court, and it is a matter entirely for the court as to how an individual case is managed.

20 In modern practice there may be a case management conference or some other arrangement whereby parties and the court agree that an application shall be dealt with by written submissions. But, even with the detailed and helpful written submissions with which the courts in this jurisdiction are **normally** favoured, it will be rare that the court will not wish to hear from one or other or both parties' representatives where substantive issues are involved. Where a hearing is arranged for an application and the parties are informed of the arrangements for the hearing through their representatives, the courts will expect those representatives to attend in order to assist the court in whatever way the court might indicate.

21 Court Hearings are arranged, generally, a material time in advance and, except as regards urgent applications, there will be perfectly adequate **opportunity** for a party who seeks to do so to have his or her advocate seek the leave of the court not to be represented at that hearing. There are also occasions where a parting of the ways occurs between a party and his legal representatives. When this is intimated to the court, it will take steps to ensure that the individual party is aware of the procedure being adopted by the court and have adequate time either to instruct further legal representation or to represent himself or herself.

The salient circumstances

22 What occurred in this matter on the morning and early afternoon of 14 April 2008 is, I hope, unique. The hearing was due to commence at 10 am. The Appellant's Skeleton Argument was due to be lodged on 8 April. It was lodged late, and in the wrong court offices, (those of the Court of Appeal) on the morning of 14 April. The Hearing was put back to 2.30pm. However, by e-mails sent by his secretary at 2.02 pm and 2.03 pm to the advocate for the trustee, to the court through the Bailiff's Judicial Secretary, and copied to other

representatives, the Appellant's advocate intimated an undated letter from the Appellant to the trustee relating to the hearing due to take place that day. In that letter the Appellant intimated his decision to "disinstruct" his advocate. The thrust of the letter was that he had no wish to incur further legal costs and expense to instruct a representative to attend at a Hearing where the representative would, he said he understood, be allowed by the court to put forward very little of what the Appellant wished him to say. He asked the trustee to inform the court at the hearing of his views. In his e-mails, however, the Appellant's advocate intimated that the Appellant was still party to the proceedings and asked the court to take account of the arguments which had been put forward at previous hearings and as set out in the Skeleton Argument which he had filed that morning.

23 In passing I confess surprise that, even with the flexibility regularly shown by the courts in this jurisdiction, the Deputy Bailiff was prepared to accept a situation which had been presented not only as a *fait accompli* but also with staggering informality. The Appellant's Skeleton Argument confirmed that the proceedings were viewed as adversarial so far as the Appellant was concerned and there was no other party to the proceedings with a comparable interest. The children's interests were identical to that of the First Respondent, Advocate Renouf was adverse to the Appellant and the trustee was neutral. In my view, not only should the Appellant's advocate, as an officer of the court, have shown courtesy by attending at 2.30 pm to explain the position to the court and seek the court's views, rather than sending e-mails to court staff and other advocates, but the court should have insisted upon the Appellant's advocate's attendance in order to ascertain, beyond doubt, what the position of the Appellant and his advocate were in respect of responding to the submissions of the First Respondent and the other parties.

24 There are other factors which may be of importance in seeking to understand and appraise the circumstances surrounding the action of the Appellant in April. First is a comparison between the Skeleton Argument submitted for the Appellant for the February hearing and that submitted for the April hearing. Whilst entitled a "Skeleton Argument", the February document is excessively discursive and far from what is expected in such a document, namely, a clear and tolerably concise series of statements of the relevant facts, circumstances and legal arguments upon which the submitting party intends to rely.

25 Apart from a short paragraph contending that the Royal Court was not bound by the High Court's findings of fact or Orders made, and certain reliance upon selected parts of the Skeleton Argument of the neutral trustee, the principal argument appears to be that set out in Section 3. It is to the effect that the First Respondent should, before seeking her present Orders, first exhaust her remedies against assets within the jurisdiction of the High Court, or in Bermuda where TFCH is incorporated. No systematic approach to factual circumstances or legal arguments is offered. Within that section of the Skeleton Argument however there sits, somewhat incongruously, a sentence ' *The First Respondent ... contends that for a UK Court to vary the terms of a Jersey Trust would be an "exorbitant jurisdiction"*.' Apart from the reference within that sentence to "the *Minwalla* judgement", there is no indication of the line of argument or citation of authority which the Appellant has in mind. Indeed, even assuming the reference to "the *Minwalla* judgement" to be a reference to *In Re Fountain*

Trust [2005] JLR 359, although no citation is given, the short rehearsal is misleading in that it fails properly to reflect what was said by the learned Bailiff in paragraphs 18 and 27 where he refers **more precisely** to possible exorbitant exercises of jurisdiction.

26 Turning to the Skeleton Argument lodged on 14 April 2008, I note the following.

27 First, there are certain " *supplementary contentions*" at the end where the Appellant seeks to echo concern expressed by the trustee with regard to the problems inherent in carrying out the terms of the Order of Holman J. and supports the trustee's contention that the Protector should be convened. It has to be observed that the latter approach is somewhat surprising given that on 9 April there had been a hearing where the First Respondent had sought to have the Protector convened, but withdrew his application, whereupon the Appellant sought an award of costs.

28 Second, in the opening section headed "Challenge to findings of fact by the High Court" there is, I take it, a short reference to the potential argument on behalf of the Appellant that he was forced into certain actions in order to participate in the English proceedings. Standing the terms of Mr. Mubarik's letter, intimated on 14 April, one might have expected a detailed analysis of the facts and circumstances surrounding his participation in this aspect of the English proceedings but there is no more than a single sentence of relevance to this point where it is stated " *the First Respondent ... submits that it is wrong, in principle, for a court to stipulate, as a condition for a party to have the right to participate further in the proceedings, that he should do things (in this case, give instructions to the trustee of a trust of which he is Settlor to comply with an Order made by the court which would entail breaking up that Trust) before the court has fully heard his contentions*." **Even on the assumption** that this argument was to be developed in oral submission **which it was, barely, if at all**, there is no indication whatsoever as to which salient circumstances were to be referred to and what arguments in law were to be deployed.

29 The real surprise, to my mind, comes in the third section. Whilst still headed "Enforcement of High Court Orders elsewhere before Jersey" and whilst that matter is dealt with in the concluding paragraph of the section, the section now contains over ten pages of detailed argument contending that the court, on this occasion, should distinguish the decisions in the *In re B Trust* [2006] JLR 562 and *In re H Trust* [2007] JRC 187, or find them to be contrary to the proper interpretation of Article 9 of the 1984 Law, as amended in 2006. As it happens, however, these submissions are, for the most part, merely direct quotations from the views expressed by Professor Jonathan Harris in his article in the June 2007 issue of the Jersey and Guernsey Law Review at page 184.

Discussion

30 Those views of Professor Harris had been directly available in this jurisdiction some six months before the Skeleton Arguments of February 2008. Clearly, they were wholly

germane to the representation of the First Respondent which the Appellant sought to oppose. It is **very** surprising that nothing was made of them in the Appellant's Skeleton Argument of February 2008 and indeed that no jurisdictional point was taken in that skeleton.

31 But what is perplexing is that, the arguments having played such an important part in the April 2008 Skeleton Argument for the Appellant, the Appellant chose to withdraw instructions from his advocate to make submissions at that hearing where, one must assume, Professor Harris's arguments would have played a significant part. Yet the Appellant did choose to withdraw instructions; giving as his reason a different point, namely a perceived reluctance on the part of the Deputy Bailiff to entertain arguments in respect of the Appellant's contentions that he was forced, inappropriately, into certain actions in the proceedings before the High Court.

32 If the Appellant had been advised by his advocate that Professor Harris's arguments (a) came from a sound and respected source and (b) would be of importance whatever the Deputy Bailiff's views on the Appellant's acts before the High Court, the Appellant chose not to accept that advice. Alternatively it might be that the Appellant had determined, quite simply, that the court was likely to take an adverse view to his interests and so declined to be represented at the hearing.

33 Either of those stances might be thought to create an extremely serious obstacle for the Appellant in seeking now to prosecute his Appeals. But Advocate Begg confirmed to us that he had had no direct contact with the Appellant. Even so, the matters raised in the April 2008 Skeleton Argument were of considerable importance, as Professor Harris's article makes clear, and assuming that someone representing the Appellant had advice on the importance of those arguments, it is nothing short of astonishing that, having been involved in such lengthy, extensive and protracted litigation, **at the very last possible moment**, the Appellant was not prepared, to let his Advocate present those submissions to the court below, respond to such submissions as were made by Advocate Lakeman, and give such further assistance to the court as might be available.

34 The hurdle facing the Appellant is even greater if his determination was, simply, that he faced a court which he perceived to be unlikely to favour his arguments. Even more so does it not lie in the decision of a litigant whether to avoid part of the decision making process of a jurisdiction. The interests of justice in any jurisdiction comprise not only the interests of individual parties to litigation, and the State within which the jurisdiction is exercised but, also, all those with access to the jurisdiction within that State and the State itself. Whilst certain jurisdictions allow those commencing litigation some element of choice as to in which court, within the levels of court structure, to commence litigation, it is not within judicial knowledge that any jurisdiction allows an individual litigant the decision whether or not to be represented before one of its lower courts and to allow the arguments in his or her favour properly to be tested only in a higher court.

35 This Court of Appeal is a court principally of review of the arguments and decisions presented and taken below, and hearings before it ought properly to proceed upon the presentation and decision below. It does not lie in the hands of respondents in Jersey to decide at which level of the Court structure they wish to engage.

36 The contentions for the First Respondent in respect of the circumstances to which I have just referred rely upon (a) allegations of abuse of process, (b) contentions in respect of estoppel and (c) contentions in respect of want of *locus standi*. Advocate Lakeman for the First Respondent indicated that, essentially, his argument was based on abuse of process. I consider that a correct approach. In my opinion contentions in respect of *locus standi* could not be supported as the Appellant remained, at least technically, a party to the proceedings before the court of first instance. Equally, I would not have been persuaded that the doctrine of estoppel applied here in the sense of estoppel *per rem judicatam*: see *Thoday v. Thoday* [1964] P. 181, 198 (Diplock L.J. (as he then was)). The matter raised by the First Respondent was a matter of " *issue estoppel*", but, as a generality, arguments presented before the lower court are not prescriptive of arguments presented before a higher court. In my view the matter of importance here is as to the manner in which the Appellant conducted his approach towards the April hearing before the Royal Court.

37 In *AG v Barker* [2000] 1 FLR 759, Lord Bingham of Cornhill stated that although the term " *abuse of the Court's process*" is not defined in the rules or practice directions of Courts, it can be considered as " *using the process for a purpose or in any way significantly different from its ordinary proper use*.". In my opinion, whilst the approach of the Appellant cannot be described as either frivolous or vexatious, or as delaying the fair trial of the action, or as disclosing no reasonable cause of action, his approach to this particular part of the litigation before the Jersey Courts is open to the argument that it might be an abuse of process.

38 The Appellant's participation in the proceedings below has been extremely singular, if not unique, and I am in no doubt that the way in which the Appellant has approached this portion of litigation in Jersey is one in which he has sought to manipulate the processes of the court and to attempt to have matters considered in accordance with his own directions. In particular I refer to (a) his presenting fundamentally different arguments only on the morning of the proposed hearing in April 2008 when they could have been presented in February, (b) his withdrawing instructions from his advocate on that morning thus rendering proper debate impossible, (c) his now suggesting that those arguments should be considered by this court at this time and (d) his attempt now to have reviewed by this court arguments which arose during the Hearing below and as to which he refused to allow the court the assistance of his advocate.

39 As I have said it does not lie in the hands or gift of a respondent to determine that his arguments will be addressed, adversarialy, only in the appellate court and not in the court of first instance, or that he will dictate the timetable. But in my view, the approach of the Appellant in these Jersey proceedings for these appeals cannot be characterised as an abuse of process. Except insofar as he presented written argument in the court below, the proper characterisation of the Appellant's stance there might be as throwing himself upon

the mercy of the court. In other words, when he decided that he would not allow his advocate to attend he decided that he would not make any further submissions whether in response to the First Appellant's representations or in response to the court's own views as the Hearing developed. Equally, however, his approach might be thought to be either an attempt to derail the proceedings with late submissions or an attempt to create a filibuster by making late submissions on important matters and thus cause any judgment to be delayed and be able to use the existence of the delay to his advantage in other proceedings around the world. Notwithstanding all that I have said, however, I am of the opinion that the conduct of the Appellant falls short of abuse of process in the sense of conduct so reprehensible that the Appellant should be denied the right to participate in further proceedings following on from the decision below. The Appellant's approach to the courts below raises many questions. But, just as the Deputy Bailiff below was prepared to accept the Appellant's continuing status as a party to the litigation, I feel constrained to take the view that **his** conduct does not disbar the Appellant.

II. The Second Appeal

The Notice

40 In the Second Notice, the Appellant appeals in respect of Orders made by the Royal Court on 17 April 2008, and on which judgment was issued by the Deputy Bailiff on 15 August 2008. By that Notice, the Appellant sought, among other matters, the dismissal of certain orders including:-

(i) Dismissal of an order varying a Trust pursuant to Article 47 of the Trusts (Jersey) Law 1984;

(ii) Dismissal of an order removing the Second Respondent as trustee of that trust; and

(iii) Dismissal of an order appointing two individuals as Receivers and Managers of the assets of that trust under Article 51 of the Trusts (Jersey) Law 1984.

41 The 1984 Law provides, among other matters:-

" ***47 Variation of terms of a Jersey trust by the court and approval of particular transactions***

(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 .

(3) .....

(4) An application to the court under this Article may be made by any person referred to in Article 51(3) .

51 Applications to and certain powers of the court

(1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit .

(2) The court may, if it thinks fit -

(a) make an order concerning -

(i) the execution or the administration of any trust ,

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee..... .

(iii) a beneficiary or any person having a connection with the trust, or

(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;

(b) make a declaration as to the validity or the enforceability of a trust;

(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration .

(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with leave of the court, by any other person."

42 The provisions of the Trust Deed, germane for present purposes, appear to be the following:-

" *1. INTERPRETATION*

...

(a) "Beneficiaries" means all and any of the persons described in the Second Schedule hereto and any person declared to be a Beneficiary pursuant to Clause 9 hereof. "Beneficiary" shall have a corresponding meaning.

...

(d) "Excluded Persons" means:-

(i) All and any of the persons specified in the Third Schedule hereto and

(ii) Any person constituted an Excluded Person pursuant to Clause 10 hereof.

...

...

4. TRUSTS OF INCOME AND CAPITAL

THE Trustees shall stand possessed of the Trust Fund and the income thereof:-

(a) UPON TRUST during the Trust period to accumulate the income of the Trust Fund and add such accumulations to the capital thereof and

(b) At the expiration of the Trust period UPON TRUST as to both capital and income of the Trust Fund for all or such one or more exclusive of the other or others of the Beneficiaries in such shares and proportions if more than one and generally in such manner as the Trustees shall prior to or on the date of such expiration in their absolute discretion determine and in default of and subject to such determination UPON TRUST for such of the Beneficiaries as shall then be living in equal shares absolutely.

(c) Notwithstanding the trusts and provisions hereinbefore declared and contained the Trustees may at any time or times during the Trust Period in their absolute discretion pay appropriate or apply the whole or such part or parts of the income of the Trust Fund as the Trustees may in their absolute discretion think fit to or for the maintenance or otherwise for the benefit of all or such one or more exclusive of the other or others of the Beneficiaries in such shares and proportions if more than one and generally in such manner as the Trustees shall

in their absolute discretion think fit ...

...

5. POWERS OF APPOINTMENT

NOTWITHSTANDING the trusts powers and provisions hereinbefore declared and contained the Trustees may at any time or times during the Trust Period if in their absolute discretion they shall so think fit:-

(a) By any deed or deeds revocable during the Trust Period or irrevocable appoint such new or other trusts powers and provisions governed by the law of any part of the world of and concerning the Trust Fund or any part or parts thereof for the benefit of the Beneficiaries or any one or more of them exclusive of the other or others ...

(b) ...

(c) Pay or transfer the whole or any part or parts of the capital or income of the Trust Fund to the trustees for the time being of any other trust wheresoever established or existing and whether governed by the law of the Island of Jersey or by the law of any other state or territory under which any one or more of the Beneficiaries are interested ...

...

6. FINAL DEFAULT GIFT

SUBJECT to all the trusts powers and provisions aforesaid the Trustees shall stand possessed of the capital and income of the Trust Fund upon trust for the last survivor of the Settlors or his or her estate or assigns.

7. ...

8. PAYMENTS TO CHARITY AND TO INFANTS

(a) IN exercise of the trusts and powers hereinbefore contained the Trustees may at the request of any Beneficiary if they in their absolute discretion shall so think fit pay or apply any part of the capital or income of the Trust Fund to or for the benefit of any charitable institution or other charitable objects or purposes approved by such Beneficiary and any such payment or application shall be deemed to be for the benefit of such a Beneficiary ...

(b) ...

9. POWER OF ADDITION

(a) THE Husband or (if the Husband shall release the power herein conferred) the Protector during the Husband's lifetime and after the Husband's death the Trustees during the Trust Period shall have power from time to time to add to the

class of Beneficiaries in respect of all or any part or parts of the Trust Fund such one or more persons (not being an Excluded Person or Excluded Persons) as the Husband (or the Protector) or the Trustees shall in his or their absolute discretion respectively determine.

(b) ...

10. POWERS OF EXCLUSION

(a) THE Husband or (if he shall release the power hereby conferred) the Protector may during the husband's lifetime and after his death the Trustees may during the Trust Period by declaration in writing made from time to time declare that the person or persons or members of a class named or specified (whether or not ascertained) in such declaration who are would or might but for this Clause be or become a Beneficiary or Beneficiaries or be otherwise able to benefit hereunder as the case may be:-

(i) shall be wholly or partially excluded from future benefit hereunder; or

(ii) shall cease to be a Beneficiary or Beneficiaries; or

(iii) shall be an Excluded Person or Persons; and any such declaration may be irrevocable or revocable during the Trust Period...

...

PROVISIONS AS TO EXCLUDED PERSONS

NO Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement and in particular.....

THE SECOND SCHEDULE hereinbefore referred to

(The Beneficiaries)

(i) The Settlors

(ii) The Settlors' present children namely SALEM MUBARAK, NOOR MUBARAK and OSMAN MUBARAK.

(iii) All other children or remoter issue of the marriage of the Settlors born after the date hereof and prior to the expiry of the Trust Period.

THE THIRD SCHEDULE (hereinbefore referred to

(Excluded Persons)

1. The Trustees

2. Any director officer or employee for the time being of the Trustees

3. The Protector for the time being."

43 The Order below, so far as relevant to this Appeal provides:

" *1. upon the Court being satisfied that the variation hereinafter referred to is for the benefit of the unborn and minor beneficiaries of the IMK family trust ("the Trust") dated 2nd September 1997, and that the adult beneficiaries of the Trust including the First Respondent ("IM") have consented to the same (in IM's case the Court relying upon the request in his letter to the Second Respondent of 25th August, 2006) it is ordered pursuant to Article 47 of the Trusts (Jersey) Law 1984 that the Trust be varied as follows, having regard to the terms set out in paragraphs 4 and 5 of the Order of the English High Court of Justice made on 12th January 2007 in Action No 5332 of 1998 ("the Divorce Proceedings") by Mr. Justice Holman in the High Court of Justice, Family Division ("the Holman Order"):-*

(i) The Trust is hereby varied forthwith for the benefit of the Representor so as to empower and require the trustee to pay to the Representor or to her order (subject always to paragraph (vi)) an amount equal to the following sums:-

(a) Any balance due from IM to the Representor under the lump sum order made by paragraph 1 of the order of Bodey J dated 10 th December 1999 in the Divorce Proceedings; and

(b) Any arrears of periodical payments pursuant to paragraph 2 of the said order of 10th December 1999 as varied by paragraph 9(a) of the order of Bodey J dated 20th January 2000, including any arrears which may accrue after the date of the Holman Order or after the date of this Order; and

(c) Any balance of costs still due from IM to the Representor, after assessment or agreement and after taking into account any costs orders made in IM's favour.

(ii) Until her interest in the Trust pursuant to this variation is satisfied the Representor shall not be an Excluded Person and shall be a Beneficiary for the purposes of the Trust; and

(iii) Until the Representor's interest in the Trust pursuant to this variation is satisfied, any powers conferred by the Trust upon IM or the Protector shall be suspended, and any requirement for the consent of IM or the Protector shall be dispensed with.

(iv) For the avoidance of doubt, the trustee is not required to pay to the Representor or to her order any sum which exceeds the total value of the trust assets after its reasonable costs and expenses and after the costs and expenses of securing or liquidating such assets and complying with this order.

(v) Any sums paid to the Representor or to her order pursuant to this order must be accepted by the Representor in pound for pound satisfaction of and

reduction of all sums due from IM to her.

(vi) Any sums paid by or on behalf of IM himself must be accepted by the Representor in pound for pound satisfaction and reduction of all sums due from the Trust to her pursuant to this order.

2. The Second Representor [sic] ("the Trustee") is hereby forthwith removed as trustee of the Trust until such time as the appointment of the Receivers hereunder shall terminate or until further order of the court ...

3.1 Pursuant to Article 51 of the Trusts (Jersey) Law 1984 (Revised Edition) and its inherent jurisdiction Kevin Mawer and Richard Dixon Fleming are appointed as Receivers and Managers of the assets of the Trust ("the Trust Fund") ("the Receivers") pending the appointment by the court of new trustees of the Trust or further order for the purpose of preserving the value of the Trust Fund.

The Receivers are authorised and directed to take such steps as they shall consider necessary to realise sufficient sums from the Trust Fund to pay the sums payable to the Representor in accordance with paragraph 1(i)(a) - (c) of this Order (such sums together being referred to as the [sic] "the Debt")."

The position of the parties below

44 Advocate Lakeman, for the First Appellant (as then Representor) had put his application on the following alternative grounds:-

(i) that the Royal Court had power to enforce the order of Holman J. on the grounds of comity and therefore had power to vary the Trust in accordance with the Holman order; and

(ii) that for the purposes of the rule in *Saunders v Vautier* (1841) 4 Beav. 115, (i) the Royal Court should treat all the adult beneficiaries as having agreed to a variation of the Trust in the terms contained in the Holman order and (ii) the Court therefore should approve the variation pursuant to Article 47 of the 1984 Law.

45 The position of the other parties before the Royal Court on these matters as at April 2008 was as follows. The two adult beneficiaries had consented to an alteration in terms of the Holman order and were not represented. The Appellant had lodged a Skeleton Argument, objecting to the enforcement of the Holman order.

46 The then trustee (the present Second Respondent) had lodged a Skeleton Argument maintaining neutrality but seeking to assist the court in respect of the Article 9 jurisdiction issue. Its position was that, if it did have power to benefit the First Respondent, then it would exercise its discretion in such manner as the Royal Court might direct. It suggested that the court might have power to approve a variation under Article 47 of the 1984 Law. It

identified certain practical concerns but also expressed the firm view that, if the court were minded to approve a variation of the trust, it should be replaced as trustee of the trust by some more suitable person which might be tasked with the potentially multi-jurisdictional process of ingathering trust assets.

47 Advocate Renouf's skeleton clearly submitted that it was just and in the best interests not only of the First respondent but also of the minor and unascertained beneficiaries for the Appellant finally to be required to make the payments due by him and that it was a clear case where the Royal Court should exercise its discretion to give effect to the English judgment, using all relevant powers at its disposal (see paragraph 21 of the skeleton). In the conclusion of the skeleton he endorsed and supported the application by the First Respondent and asked the Royal Court either to recognise and give effect to the Holman order, or to make such orders as would be appropriate to progress the payments due from the Appellant.

The decision below

48 As to the first of those grounds the learned Deputy Bailiff summarised the position of the Royal Court in paragraph 76 of the judgment below. It found that, by reason of Article 9(4) of the 1984 Law, the Royal Court could not enforce a judgment of the Family Division varying or altering a Jersey trust under the 1973 Act. The Royal Court considered that certain types of order of the Family Division might be such that the Royal Court could give directions, under Article 51 of the 1984 Law, having the effect of achieving the objectives of the English judgment; but that whether the Royal Court would do so in a particular case was a matter of discretion having regard to the interests of the beneficiaries. Otherwise it considered that there was no jurisdiction in the Royal Court to give directions under Article 51 to authorise or direct the trustees to act in a manner outside the powers conferred on them by the Deed of Trust.

49 In applying those views to the facts before it, the Royal Court noted that on 20 April 1998 the husband had exercised the power conferred upon him under Clause 10(a) of the Deed of Trust revocably to declare that from that date the First Respondent was an Excluded Person. Therefore, by reason of Clause 23 of the Deed of Trust, the First Respondent was not capable of taking any benefit of any kind under the Trust. The Royal Court noted also that the power to add beneficiaries by virtue of Clause 9 could not be exercised in favour of an Excluded Person. The Royal Court therefore considered that the Holman order, insofar as directing various sums to be paid out of the Trust to the wife, amounted to something which the Trustee did not have power to do under the Trust Deed. The Royal Court therefore considered the Holman order to direct something which the Court could not **purport to** direct the trustee to do. Accordingly the Royal Court could not direct the Trustee, under Article 51, to comply with the Holman order.

50 In relation to the Second ground put forward by Advocate Lakeman, the Royal Court noted the terms of Article 47 of the 1984 Law. The Court further noted that Article 51(3) referred to

an application to the court by the Attorney General, by the trustee, enforcer or beneficiary or, with leave of the court, by any other person. It noted that the application before it was being brought by the wife (as Representor) who, being an Excluded Person, was not then a beneficiary. The Court was prepared, however, to grant leave to the now First Respondent to bring the application.

51 Having regard to the position of the various parties, the view of the Royal Court below was (put simply and without disrespect to the arguments with which I shall deal later) that the issues before it were: (i) should the Appellant be treated as having consented to an Article 47 application and (ii) if so, should the Court grant approval under that Article? As to the first question, the Royal Court took the view that the Appellant's letter of 25 August 2006 ("the 2006 letter") to the trustee constituted consent to the alteration of the trust in the manner contemplated by the Holman order. As regards the second question, the court itself considered the practical consequences on those for whom its approval was sought of any order it might make and determined that it would be to their benefit for the trust to be altered. It therefore gave its approval under Article 47(1) to the alteration of the Deed of Trust.

52 In paragraph 108 of the judgment below The Royal Court concluded by summarising its views:-

> (i) It did not have jurisdiction to enforce the Holman order, nor did it have jurisdiction to give directions under Article 51;
>
> (ii) Treating the 2006 letter as being the Appellant's consent to the alteration and noting that the other adult beneficiaries agreed to the alteration, it approved of the alteration as being for the benefit of the potential and existing beneficiaries unable to provide consent; and
>
> (iii) Having removed the trustee, it appointed two representatives from KPMG as receivers of the Trust with defined powers.

Submissions to this Court

(i) The former trustee

53 It is appropriate to commence with the helpful submission of authorities on behalf of the former trustee, which, as I have said, continued to maintain its neutrality. Advocate Gleeson referred us to the decisions in *In re Christie-Miller's Marriage Settlement* [1961] 1 WLR 462; *In Re Courtauld's Settlement* [1965] 1 WLR 1385; *Colville, Petitioner* 1962 SLT 45; and *Law and Others, Petitioners*, 1962 SLT 377. He also referred us to Lewin on Trusts (18th Edn) (hereinafter " Lewin") at chapters 24 and 45 and to certain passages from Chapter 2 of " Changing the Terms of Trusts" by Emily Campbell, barrister.

54 The decision in *Colville, Petitioner* is a reminder that proceedings for approval of Trust Arrangements are to some extent administrative. The particular emphasis placed by Lord

President Clyde was that the court is not bound to adhere to particular - and perhaps strict - rules of evidence, but may accept documents without further proof together with the submissions of counsel. However this is a timely reminder of a number of matters. First, procedure in such applications is in the hands of the Court. It has the opportunity to be much more flexible than in ordinary adversarial Court procedure. Thus, with Lord Clyde's particular point, the more simple Court procedures can allow a determination to be made upon a less formal consideration of documents and the submissions of the counsel. This has the possible consequence of saving delay and expense where at times (but not invariably) the costs of all parties to the proceedings are borne by the trust estate.

55 The decision in Law and Others, from the same appellate division in Scotland, is a reminder, albeit in very special circumstances, that a court granting approval under the relevant legislation is able to determine that it may be appropriate for an Applicant to seek approval on behalf only of certain classes of contingent beneficiaries. The decision in *In re Christie-Miller's Marriage Settlement* is to a similar effect and confirms that it is possible for a settlor, through counsel, to release a power of appointment and thereby extinguish the possible interests of issue, or others, who might otherwise have to consent, or have approval provided by the Court. In *In re Courtauld's Settlement*, Plowman J was satisfied that the fact that the donee of a power of appointment was himself propounding the arrangement was sufficient evidence to indicate that the donee disavowed the continued exercise of the power after the approval.

56 In the circumstances I do not think that I need to add anything from the well presented work by Emily Campbell; except to to say that its clarity and accessibility - but not at the expense of precision - is a welcome addition to a field of law in respect of which a view is held that there is undue narrowness and technicality: see *In re Gulbenkian's Settlement* [1970] AC 508, 519-520 (Lord Reid). The salient portions from Lewin are dealt with below.

(ii) the Appellant

57 The amended written submissions for the Appellant, lodged after the judgments of 15 August 2008 had been issued, dwelt, for a great part, on the matters covered by the First Appeal and what was thought to be important background information. In dealing with the Second Appeal, a significant portion of the submissions were taken up with support for the Deputy Bailiff's views on Articles 9 and 51 of the 1984 Law. Insofar as the submissions challenged the views expressed by the learned Deputy Bailiff the first point, expressed somewhat shortly in the submissions, was that his use of Article 47 of the 1984 Law undermined Articles 9 and 51 of the 1984 Law. As it was put, what was intended by Article 9 was to ensure that a variation order made in the courts of England and Wales could not be given almost automatic legal effect in Jersey. For the main part, the submissions concentrated on the 2006 letter and contended that it could not be relied on for the purposes of Article 47 (i) because it had been written in contemplation of an unenforceable English order, (ii) because, given the surrounding circumstances, it could not be held to be a free consent to variation of the trust in England and (iii) because, even if there was

consent in respect of English proceedings, there was no consent to variation of the trust for the purposes of Jersey proceedings. As I shall explain below, in the event the arguments presented during the oral hearing in this Court raised many issues other than the extent to which the 2006 letter could properly be used in the Article 47 appraisal.

58 I consider it important to record, as I understood the various submissions made by Advocate Begg, how these very late, and potentially important, changes to the submissions came about. Before doing so, it is to be borne in mind that the Appellant and his advisers had been aware of the potential use and actual use of Article 47 for a very long time. So far as I can see, the use of Article 47 had first been suggested in the Skeleton Argument for the then trustee, which Advocate Begg had received on 10 April 2008. The actual use of Article 47 was clear from the Act of Court dated 17 April 2008, which was available to the Appellant, after the embargo had expired, on 26 April 2008. Shortly thereafter, as I understood it, some general advice had been sought from counsel in London, Mr. Jonathan Harris, Professor of International Commercial Law at the University of Birmingham, and author of the articles in the Jersey and Guernsey Law Review to which I have referred. However, again as I understood it from Advocate Begg, on the Friday preceding the hearing before this court, an individual point had been put, by one or other of the London firms of solicitors instructed by the Appellant, to a different counsel in London, experienced in giving advice on trust matters.

59 As it was put to us, that counsel not only advised on the individual point raised but also suggested consideration of certain further potential issues. By e-mail timed at 20:22 on the evening of Tuesday 23 September (in effect one day before the substantive hearing before this court was due to commence) Advocate Begg wrote to Advocate Renouf, with copies to the other parties and the court, indicating an "unassailable" point that the hearing in April had failed to give consideration to the unascertained beneficiaries and that it was not possible for Advocate Renouf, as a matter of law, to represent the unascertained beneficiaries. On the morning of Thursday 25 September, shortly before the substantive hearing was due to take place before this Court, the further written submissions on behalf of the Appellant "in relation to points on validity of variation under Article 47" were presented both to this court and to the other parties. Whilst amounting only to some seven pages, the points were presented in very short form and without any developed reasoning consonant with the points being put forward. Their aim, as regards points of law, was much wider ranging than **that of** the discursive submissions lodged at earlier stages in this process. The argument in respect of the proper approach to the 2006 letter remained.

60 I understood the Appellant's arguments before this court essentially to be the ones set out in those latest written submissions. It is as to those, therefore, that I shall endeavour to express my understanding and attempt to deal. Before doing so, I record my personal gratitude to Advocate Gleeson on behalf of the former trustee, and to Advocate Renouf, for their ability to respond at such short notice to the issues raised so late on behalf of the Appellant; and to be able to do so with clarity, precision and thoroughness.

61 I now take the Appellant's submissions in the order which seems to me most logical.

62 The Appellant presented a number of arguments under the broad contention that the provisions of Article 47 of the 1984 Law did not give power to the Royal Court to make the principal orders set out in the Act of Court of 17 April 2008. I deal with them in turn.

(1) Is the proposal properly to be characterised as a wholesale resettlement and thus precluded by the general ambit of the use of Article 47?

63 Article 47(1), set out at paragraph 41 above, states, among others that "... ***the Court may, if it thinks fit, by order approve... any arrangement.....*** varying or revoking all or any of the terms of the trust...."

64 For the Appellant it was contended that the proposal amounted to a complete resettlement of the trust and, as such, constituted neither a variation nor revocation of the terms of the trust. Thus the court had no power to grant approval under Article 47. Advocate Begg referred us to *Re Ball's Settlement Trusts* [1968] 1 WLR 899 and to *Re T's Settlement Trust* [1964] 1 Ch. 158. Advocate Gleeson had also referred us to *Colville, Petitioner* 1962 SLT 45. For my own part I also to bear in mind certain comments in *IRC v. Holmden* [1968] AC 685.

65 In Advocate Begg's submission, the arrangement set out in the orders of the learned Deputy Bailiff amounted to a complete resettlement because the effect would be that the whole fund would be paid absolutely to an Excluded Person, namely the First Respondent. In making these submissions, Advocate Begg suggested that certain views expressed by the then Deputy Bailiff Tomes in *In Re Osias Settlements* [1987-88] JLR 389, 408 were pronounced *obiter* or were wrongly decided.

Discussion of the general ambit of the use of Article 47

66 I take the authorities in chronological order.

67 In *Colville*, Petitioner, cited above, the opinion of the Court was delivered by Lord President Clyde. The decision was in respect of an early application under the recently enacted Section 1 of the Trusts (Scotland) Act, 1961 (c. 57) ("the 1961 Act) for approval and authorisation by the Court of an arrangement altering the provisions of a Scottish will. The terms of the salient parts of Section 1 of the 1961 Act are, for present purposes, almost identical to the equivalent terms of Article 47 of the 1984 Law. It provides a power to the court to grant approval to " ***any arrangement.....varying or revoking all or any of the trust purposes...***" At page 51, column 1, Lord President Clyde said this:- ***"***Section 1 does not entitle the Court to make a new will or a new purpose in a will which would completely supersede the old and be effective against***all possible claimants.*** It merely affords

machinery for giving effective approval to a variation on the part of beneficiaries who owing to age or incapacity, ... could not otherwise approve.".

68 In *In Re T's Settlement Trust*, cited above, an early application under Section 1 of the Variation of Trusts Act, 1958 (c. 53) ("the 1958 Act) for an order approving, on behalf of an infant, a proposal for variation of trusts, Wilberforce, J. (as he then was) had to consider a proposal that the existing trustees should transfer the infant's share under the trust to new trustees, who would hold it on protective trusts for the infant for life, and with extensive powers of advancement. In considering submissions as to the width of the powers of the Court under the 1958 Act (again, for present purposes, almost identical to the terms of Article 47 of the 1984 Law) Wilberforce, J. expressed the following views (at pp161-162):-

> ***"... It seems to me necessary to bear in mind the following considerations.*** The Court of Chancery has never claimed for itself a power to direct a settlement of an infant's property. Indeed, it has more than once been stated authoritatively that it cannot do so (see, for example , *In re Leigh*). ***It acquired in 1855 under the Infant Settlements Act a limited jurisdiction to settle an infant's property on marriage, but this has not been extended to other cases.*** There is no reason to suppose that the absence of the wider jurisdiction was part of the mischief which the Act of 1958 was intended to remedy, and, in view of the well-accepted limits upon the Court's jurisdiction laid down by statute and authority, it seems unlikely that it was. I am certainly reluctant to suppose that a whole new jurisdiction has been incidentally conferred by the use of general words.
>
> ... ***It is obviously not possible to define exactly the point at which the jurisdiction of the Court under the Variation of Trusts Act stops or should not be exercised.*** Moreover, I have no desire to cut down the very useful jurisdiction which this Act has conferred upon the Court. But I am satisfied that the proposal as originally made to me falls outside it. Though presented as "a variation" it is in truth a complete new resettlement. The former trust funds were to be got in from the former trustees and held upon wholly new trusts such as might be made by an absolute owner of the funds. I do not think that the court can approve this. Alternatively, if it can, I think it should not do so, because to do so represents a departure from well and soundly established principles."

69 In a short passage in his speech in *IRC v. Holmden*, cited above, Lord Guest said this (at p. 710):-

> ***"... The power of the court under the Act of 1958 is to approve of an arrangement, inter alia, 'varying or revoking the trusts.'*** It must be a matter of construction in each case whether the arrangement in question varies or revokes the trusts. While there may be cases where an arrangement revokes the trust, I have no doubt in the present case that the arrangement merely varied the original trust by inserting an extended terminal date for the exercise of the discretionary powers."

70 In *In Re Ball's Settlement Trusts*, cited above, Megarry J. had had the advantage of considering the speeches of their Lordships in *IRC v Holmden* as well as recollecting the latter part of the passage which I have quoted above from *In Re T's Settlement Trust*. He said this (at p. 903):-

> ***"The word "resettling" or its equivalent nowhere appears [in Section 1 of the 1958 Act].*** Accordingly, while there is plainly jurisdiction to approve the arrangement insofar as it revokes the trust, in my view there is equally plainly no jurisdiction to approve the arrangement as regards "resettling" the property, at any rate eo nomine ...
>
> ***It seems to me that the originating summons correctly describes what is sought to be done in this case, and so described there is clearly no jurisdiction for the Court to approve the arrangement.*** But it does not follow that merely because an arrangement can correctly be described as effecting a revocation and resettlement, it cannot also be correctly described as effecting a variation of the trust. The question then is whether the arrangement in this case can be so described. In the course of argument I indicated that it seemed desirable for the summons to be amended by substituting the word "varying" for the word "revoking" and delete the reference to "resettling" and that I would give leave for this amendment to be made. On the summons as so amended the question is thus whether the arrangement can fairly be said to be covered by the word "varying" so that the Court has power to approve it."

71 It was against the background of these authorities that the Royal Court in *In Re Osias Settlements Ltd*, cited above, had to consider an application, made by a trustee under what was then Article 43 of the 1984 Law, seeking the court's approval of an arrangement varying the trusts of two settlements governed by Jersey law so that all the trusts would be constituted under Florida law and the funds in Jersey transferred to trustees resident in the United States. The application was a complex one and appears to have been the first application of its kind under Article 43 (as it then stood) of the 1984 Law: (see p. 400 lines 6 to 10). For that reason it appears the court had felt it right to hear the application in full, to consider in some detail the authorities before it and to put the whole reasoning into its formal decision. The Royal Court was also able to express its thanks to all counsel for their assistance, particularly in the quality of the preparation of the papers. Tomes, D.B. continued (p.400, line 21):-

> ***"The first point which we wish to make is that those were not idle thanks.*** It is of paramount importance that, in relation to all applications under the Trusts (Jersey) Law 1984, there should be the same full and frank disclosure as this court has insisted upon in cases where injunctions are sought. Furthermore, it is of the highest importance that any revenue ramifications involved in the application should be fully canvassed with the court. This will be all the more important when applications come before us which contain implications regarding claims or potential claims from the UK revenue authorities."

72 I add the reference to these comments of Tomes, DB firstly because they are as relevant in 2008 as they were in 1987 and, for my own part, I commend them to practitioners today; I add it secondly, because the words emphasise the care with which the Royal Court, in 1987, was addressing the issues before it. To my own mind, the suggestion on behalf of the Appellant that the views in *In Re Osias Settlements* on the salient matters should be disregarded as mere *obiter dicta* can be characterised, least pejoratively, as jejune.

73 In proceeding to consider the 1984 Law and its application, Tomes, D.B., stated (p. 402, line 39):-

> ***"The relevant parts of art. 43 of the Law are very similar to s.1(1) of the Variation of Trusts Act 1958.*** Although, as has often been said in this court, the courts of this Island are not bound by judgments of the English courts, we feel that, in this instance, we should have a close regard to English authorities. However, it must be borne in mind that the law of England and the law of Jersey, on this part of the law, are not in all respects identical."

74 The learned Deputy Bailiff then noted that Article 43(1)(b) was in a more truncated form from that of Section 1(1)(b) of the 1958 Act, and in a form preferred by certain Canadian provinces as avoiding certain problems of construction which had been encountered in England. He continued (at p. 403, line 26):-

> ***"Both art. 43 of the Law and s.1(1) of the Variation of Trusts Act, 1958, empower the Court to approve "any arrangement."***. Lord Evershed, M.R. in *In re Steed's Will Trusts* ***said*** ([1960] 1 All E.R. at 492): ***"I think that the word ... is deliberately used in the widest possible sense so as to cover any proposalwhich any person may put forward for varying or revoking the trust."***. We respectfully agree that a very wide meaning must be given to the word "arrangement."

75 The Royal Court then went on to consider *In re Seale's Marriage Settlement* [1961] Ch 574 where Buckley, J. (as he then was) held that, having regard to the fact that the court could approve an arrangement revoking all the trusts of a settlement, the court had jurisdiction, under the 1958 Act, to approve an arrangement which, in effect, revoked all the trusts of the English settlement in the event of the trust property becoming subject to the trusts of a settlement which would be recognised and enforced in some other jurisdiction.

76 The Royal Court then turned to *In re Holt's Settlement* [1969] 1 Ch 100 and certain views of Megarry, J. including the following (at 117B-D):-

> ***"The section, it is argued, says nothing of establishing new trusts for old.*** As a matter of principle, however, I do not really think that there is anything in this point, at all events in this case. Here the new trusts are in many respects similar to the old. In my judgment, the old trusts may fairly be said to have been varied by the arrangement whether the variation is effected directly, by leaving

some of the old words standing and altering others, or indirectly, by revoking all the old words and then setting up new trusts partly, though not wholly, in the likeness of the old. One must not confuse machinery with substance; and it is the substance that matters. Comparing the position before and after the arrangement takes effect, I am satisfied that the result is a variation of the old trust, even though effected by the machinery of revocation and resettlement."

77 The Royal Court then turned to the decision in *In Re Ball's Settlement Trusts*, cited above. The Court noted, in some detail, the further views of Megarry, J., including the following (at page 905):-

> ***"If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust.*** But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."

78 The Royal Court proceeded to note that in *In Re Holt's Settlement* (which, although reported in [1969] 1 Ch, was a decision which predated his own decision in *In Re Ball's Settlement Trusts*) Megarry, J. had no difficulty in distinguishing the decision of Wilberforce, J. in *In Re T's Settlement Trusts* on the ground that, in the latter case, the existing trusts were at the very end of their operating lives and, in substance, what was proposed was to make a new settlement of what was on the point of becoming an absolute unfettered interest.

79 Having considered all these views, the Royal Court continued (at p. 408, line 26):-

> ***"This court proposes, subject to one important reservation, to adopt the principles enunciated in*** *In Re Seale's Marriage Settlement* , ***in*** *In Re Holt's Settlement* ***and in*** *In Re Ball's Settlement Trusts*. ***The jurisdiction of art. 43 of the Law is as beneficial as the Act of 1958 and, in the court's judgment, should be construed widely.*** The one reservation that the court has relates to the substratum doctrine. It seems to us that there are two problems with this doctrine. The first is the practical difficulty of deciding when the substratum has been changed. Different judges may come to different conclusions on the same facts. ... If, as we said earlier, the court under art. 43, is merely supplying the consent on behalf of beneficiaries which they are not in a position themselves to give, and if all beneficiaries being sui juris can put an end to the trust and re-settle the trust property as they please, whether the substratum of the new trust be the same as the old or not, we can see no justification for implying a limit on the scope of the arrangement to which the court can give approval beyond the words of the article itself. The article says nothing about substrata and indeed refers to "varying or revoking the terms of the trust." The only limitation on the court's power to give consent is that contained in art. 43(2), i.e. that the carrying

> out of the arrangement appears to be for the benefit of the person on whose behalf the court's approval is being given. The court has power to convert a Jersey trust into a trust governed by some other system of law and, therefore, in the instant case, into a trust governed by the law of Florida. The court has power to approve an arrangement which effectively revokes and then sets up new trusts."

80 The decision in *In Re Osias Settlements* has been applied in subsequent cases. Examples are *In Re N* [1999] JLR 86, (as regards the construction of the word "benefit") and *In Re Sangle-Ferriere Children's Settlement* [2007] JLR N 8. It was considered also in *In Re Douglas* [2000] JLR 73 and in *In Re T's Settlement* [2002] JLR 204; both, again, as regards the concept of "benefit".

Conclusion on the general ambit of the use of Article 47

81 The circumstances in which the views in *In Re Osias* were expressed, as explained by Tomes, D.B., must mean that the decision will have been acted upon by advisers in this Island and reflected upon by the Royal Court in respect of many applications for approval under what is now Article 47. Only were I of the opinion that, having regard to the terms of Article 47, it was not open to the Royal Court in *In Re Osias* to reach those views, would I seek to suggest that the point had been wrongly decided. I do not; **although** I shall express a qualification. Further, for all the foregoing reasons, I consider that the passage cannot be treated as an *obiter dictum*.

82 Whilst, depending upon the Revenue regime in force at a particular time, there may be tax implications for transferring funds from one trust to another or for resettling a trust, it would seem strange that, having a power to approve a revocation and having a power to approve a variation (the magnitude of which is not restricted), the court would not have power to approve a far reaching arrangement whereby a trust structure remained, where the trust assets remained dedicated to trust purposes and where the issue as to benefit was favourable to the application.

83 In my opinion, therefore, Article 47 empowers approval of an arrangement even although the arrangement might be so extensive as to leave little of the existing trust provisions extant; but so long as those benefiting were within the ambit of the settlor's expressed bounty. Under the 1958, and the 1961 Acts and the 1984 Law, trusts have been substantially altered, brought to an end and distributed. So long as the arrangement is to some extent to the benefit of those entitled to the Court's protection (or, in Scotland, not prejudicial to their interests) the court may grant approval. My qualification arises from the learned Deputy Bailiff's rejection of the 'substratum' argument. In the first place, for my own part, whilst, as I have said, there can be a cessation as well as a revocation, it seems to me that, if the trust is not to come to an end, the assets must remain dedicated to some form of trust purposes. I would not see it as within the power of the court to allow trust assets to be held in some way that the beneficiaries could not call on a court for protection. I would not

immediately be inclined to allow assets to be transferred to the private patrimony of an individual against whom the beneficiaries stood only as creditors. In the second place I note that in *In re Osias*, the Royal Court was prepared to allow the trust assets to be transferred to be held in another trust jurisdiction. I would think it a matter for careful consideration in individual cases where approval of an expatriation was sought as to whether **that transferee** allowed broadly similar protections to that of this Island.

84 Turning now to the circumstances before this court, it again seems to me that the submissions on behalf of the appellant are not well founded. It is not the case that the proposals constitute a complete resettlement. Put shortly, the revocable exclusion of the First Respondent is revoked, as a reinstated Beneficiary she is given a particular interest restricted to the extent of her entitlement under the Orders made in the divorce proceedings in England and, after those amounts had been satisfied, the receivers are to apply to the court for directions. Her entitlement remains one under the trust. The trust assets are not being diverted out of the separate patrimony of the trust estate. The trust assets are not being transferred to the First respondent or to be held to her order. Accordingly, if it be the case that the trust estate ingathered by the receivers exceeds the amount due to the First Respondent, whether by a large or small amount, the remaining trust funds will be held for the existing trust purposes. The whole trust structure remains. If there are other trust assets not yet gathered in, and the Appellant is content for them to be gathered in, new trustees can do so and apply them for the trust purposes.

(2) Reinstatement of an Excluded Person

85 Advocate Begg argued that, in reality, the effect of the order was to provide for payment of all of the trust funds absolutely to the First Respondent, an Excluded Person. But there is no satisfactory evidence before the court to show that that is the case: see paragraph 84 above.

86 In continuing his submissions under this head, Advocate Begg urged caution in the court being prepared to approve an arrangement under article 47 whereby an Excluded Person could be reinstated to any benefit under the trust. He suggested that there might be serious adverse tax effects. Whilst tax considerations are very often important issues in Applications such as the present, they tend to be either (a) that the proposed arrangement will be beneficial by putting off an otherwise immediate charge to tax or (b) that although the arrangement might appear beneficial to certain members of the family, there are adverse tax consequences for those on behalf of whom approval is sought. Many United Kingdom applications will seek to avoid any benefit reverting to a Settlor; but here the Settlors are within the class of beneficiaries. Those persons wholly excluded are those in the Third Schedule. It seems to me that only in the case where a member of the class had been excluded irrevocably for tax purposes and those purposes had been achieved might there be concern as to reinstating the beneficiary under a Scheme of Arrangement. Even so, the circumstances of the family might have been so changed that even a less favourable tax status might be acceptable because of the need for a different trust matrix.

87 But, even if there are tax considerations when there is a proposal for the reinstatement of an Excluded Person, there are other considerations too. There are many trusts, such as the present, where a power is granted to exclude a beneficiary, either revocably or irrevocably, from an interest under the trust. There are many permutations on the detail of such powers. Here, whilst the circumstances here might have been somewhat singular, there was a revocable exclusion of the First Respondent. Revocable exclusions are made regularly and frequently where the trustees (or others in whom the power is vested) have in mind a particular division of the trust estate but appreciate that it is too early in the lives of the family to make that decision irrevocably. Where such an exclusion can be made revocably, as here, I see no reason in principle why the revocation of that exclusion cannot be one part of the arrangement which is proposed if all the parties so determine and the court approves. Indeed, it would seem a wholly unfortunate imposition on trusts and trustees to suggest that, an individual having been excluded revocably, that circumstance precluded the reinstatement of that beneficiary for other valid reasons.

(3) Approval on behalf of unascertained beneficiaries below

88 For the Appellant, Advocate Begg contended that the learned Deputy Bailiff had not granted approval on behalf of the unascertained beneficiaries. He said that the papers did not appear to include a Representation Order and that, even assuming Advocate Renouf to have been validly appointed to act on behalf of minors, unborn and unascertained beneficiaries, no argument had been addressed to the Deputy Bailiff as to the position of the unascertained beneficiaries.

89 More specifically, he contended, there had been no consideration of the potential beneficiaries under Clauses 8 or 9 of the Trust Deed. He went on to contend that the Royal Court could not have approved the arrangement on behalf of the beneficiaries under clause 9 or on behalf of the beneficiaries under Clause 8 of the Trust Deed. He contended further that it was open to serious doubt whether the court had power under Article 47 to approve an arrangement on behalf of such a wide class, that the powers contained in clauses 8 and 9 had not been released by the Appellant's letter of 25 August 2006 and that the arrangement set out in the order provided no benefit to the unascertained beneficiaries.

Discussion and conclusion

90 In my opinion, this submission is without substance. It is correct that, according to its terms, the first paragraph of the orders set out in the Act of Court of 17 April 2008 refers only to the court having been satisfied as to the benefit to the "unborn and minor beneficiaries of the IMK Family Trust". I note also that in almost every official document either in or presented to the Royal Court in this matter, the identification of the fourth respondents is as follows: "(4) Osman Mubarak and Hamza Mubarak (the minor and unascertained beneficiaries)". This is **an** infelicitous **description of their status in the proceedings**. These two individuals are, of course, the minor beneficiaries but not unascertained; and, as minors, cannot themselves

be parties to this application. But their interests were covered by the Act of Court dated 28 November 2007 where, among other matters, the Royal Court directed that service upon the minor and unascertained beneficiaries should be effected by delivery to Advocate Renouf.

91 The identification and designation set out in the heading of the judgment of the learned Deputy Bailiff of 15 August 2008 is: "Advocate M P Renouf (as guardian ad litem of the minor beneficiaries Osman Mubarak and Hamza Mubarak and representative of the unborn or unascertained beneficiaries)". Notwithstanding that designation, I note that in paragraphs 91 and 101 of the judgment issued by the Deputy Bailiff, reference is made only to the minor and unborn beneficiaries as being represented by Advocate Renouf. Advocate Renouf, confirmed to us in his oral submissions that the letter of service on him indicated instruction to consider the interests of the minor and unascertained beneficiaries just as the Act of Court of 28 November 2007 ordered service on the "minor and unascertained beneficiaries". His Skeleton Argument for the April hearing was stated to be "on behalf of the minor and unascertained beneficiaries". Advocate Renouf explained to us that he was under no doubt that he was being instructed to consider the interests of the unascertained beneficiaries, as well as the interests of those in minority. Further, in paragraph 21 of that skeleton Advocate Renouf specifically submitted that it was just and in the best interests not only of the First Respondent but also of the minor and unascertained beneficiaries for the Appellant finally to be required to make payments.

92 It is a matter for individual courts in individual jurisdictions such as Scotland, England and Wales and Jersey, which allow variation of trusts, as to how to provide for the representation of persons without legal capacity, unascertained, or those as yet unborn. The importance of individual representation before the Jersey courts, where there was the slightest possibility of a conflict of interest, was specifically dealt with by Tomes D.B. in *In Re Osias Settlements* (see p.401, line 39 to p. 402, line 22). There he noted, and accepted, that one advocate had not only appeared for the applicant trustee but also for the unascertained and unborn beneficiaries. He noted with approval that the minor beneficiaries had been independently represented. Nonetheless he went on to express the view that it would be preferable, in general, in future cases of this kind, for the main adult beneficiaries to be the representors, leaving the trustee to concentrate on its primary function of protecting the unascertained and unborn beneficiaries. On this point he referred to *In Re Druce's Settlement* [1962] 1 WLR 363.

93 On the information before this court, it seems to me that the interests of all relevant parties were considered in the court below; although certain phrases (such as 'minor and unborn' or 'minor and unascertained') may have been used, unfortunately, as perhaps interchangeable shorthand for the various persons who were not capable of consenting. For my own part I entertain some doubt as to whether a representative ought to be appointed to consider the interests of either a non-existent person (an unborn) or an unascertainable person; but if there is to be representation for those interests I am inclined to accept the persuasiveness of the views of Tomes DB that it is perhaps best covered by the trustee or trustees, unless their position is not neutral. But there seems no doubt that

Advocate Renouf was directed to represent, among others, the unascertained beneficiaries and that his Skeleton Argument set out to do so. At no stage before then had any party (particularly, for example, the Appellant) sought to identify to the Royal Court that it was inappropriate for Advocate Renouf to represent the unascertained beneficiaries as well as the minor beneficiaries, or indeed the unborn beneficiaries. Everything which is set out in his Skeleton Argument is, on one view, applicable to each of the minor, unborn and unascertained beneficiaries, as he sought to identify in oral submission before this court.

94 It seems to me therefore that, on one view of the procedures to which I have referred, the lack of reference to the unascertained beneficiaries in the substantive order in the Court below is a mere slip which, had this been a more traditional application for approval of an arrangement, would have been spotted immediately by an experienced trust solicitor and corrected in the determining Court. Returning therefore to the arguments listed in paragraph 89 above, I consider that the order for service was, to all intents and purposes, a Representation Order, that Advocate Renouf was validly appointed to act on behalf of minors, unborn and unascertained beneficiaries, that his argument, as addressed to the Deputy Bailiff, was made on behalf of all and therefore that the approval granted by the Royal Court was intended to include that on behalf of the unascertained beneficiaries.

95 But I have to accept that a different view of the proceedings below is **possible** namely that the words 'unascertained' beneficiaries might have been used to cover merely the unborn beneficiaries within the Second Schedule class. However, even if that is the correct appraisal of the proceedings below, under and in terms of Article 12(1) of the Court of Appeal (Jersey) Law 1961, there is vested in this Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number when exercising appellate jurisdiction. In addition Rule 12 of the Court of Appeal (Civil) Rules 1964 provides:-

> " ***(1) The Court shall have full discretionary power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before the Viscount or on commission:***
>
> ***Provided that in the case of an appeal from a judgment after hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds*** .
>
> ***(2) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require*** .
>
> ***(3) The powers of the Court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the***

Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

96 This Court may therefore itself consider, under Rule 12(2), the position of the unascertained beneficiaries and determine whether approval ought to be granted. This therefore brings me to the next question.

(4) Are the circumstances, having particular regard to the terms of Clauses 8 and 9, adequate to allow this Court to grant approval on behalf of unascertained beneficiaries?

97 Before proceeding further, it is appropriate for me to confirm that, having heard from Advocate Renouf during this hearing, and on the basis of his Skeleton in the Court below, and for the same reasons as put forward by the learned Deputy Bailiff, for my own part I am satisfied that the present application is for the benefit of the minor beneficiaries and any unborn beneficiaries within the class of the Second Schedule, namely the remoter issue of the marriage.

98 Whilst Mr. Begg sought to contend, as noted at paragraph 89 above, that the Jersey courts had no power to grant approval as there was no benefit in this arrangement for the Clause 8 or 9 beneficiaries I am persuaded for numerous reasons that this is not the case.

99 I deal first with Clause 8. In my opinion, the interests of the potential charitable recipients do not require to be considered by the Court from whom approval is sought. Those protected under Article 47(1)(b) are " ***person[s] ...who may become entitled...to an interest under the trust..."***. In other words, whether precisely or colloquially, one might say 'Beneficiaries'. But the Trust Deed is quite specific in this regard. The definition of 'Beneficiaries' in Clause 1 includes Clause 9 nominees but not Clause 8 nominees. And Clause 8 makes it clear that, not withstanding a request, the payment is deemed to be for the benefit of the Beneficiary not the Charity. No Charity could receive anything except by the direction of the Beneficiary who passes what he would otherwise received. Indeed, on one view Clause 8(a) is unnecessary. A vested Beneficiary can always direct that his entitlement is to be given directly to another. That other does not become entitled to an interest under the trust; he, she or it becomes entitled to what would otherwise go to the Beneficary as result of the Beneficiary's interest. I therefore consider that Advocate Begg's contentions in respect of Article 8 Charities are not well founded. As a matter of practicality, his submissions would mean that such a trust could never be varied as every Charity in the world would have to consent. Such a result I find absurd.

100 I turn now to deal with Clause 9. It seems to me important to note that the power under Clause 9 is, in reality, the Settlor's power to have added to the class of beneficiaries any of his appointees. Further, the trustees still have an absolute discretion under Clause 4 as to

which beneficiary or beneficiaries are to benefit from the capital. At a practical level I see no reason why such potential interested parties should be treated as having any interest different - or separate - from that of the Settlor whose bounty they receive. Thus, if the Settlor - whose consent is, in a trust with provisions such as the present, required - consents to the arrangement, it is impossible to see that his future appointees have any different interest. But I shall deal below with powers and their release more fully. There is, however, a more directly reasoned answer to Advocate Begg's submissions. It is that the potential to benefit is not taken away from the potential appointees under Clause 9.

101 Whilst we were referred to *In Re Ball's Settlement Trusts* and other related cases, in those cases the particular concerns were as to whether or not a power had been released and, if not, whether, having regard to the nature of the arrangement, the court could grant approval to an arrangement which included the extinction of the power. For example, in *In Re Ball's Settlement Trusts*, the Court had before it an application where the arrangement might have taken away from persons the possibility of benefit without providing compensation. As was said by Megarry, J. (at p.902) "On the facts as they stand, the prospects of any such appointment being made to any particular object may indeed be remote; but I cannot see how it could be said that it is for the benefit of a person to destroy even the smallest hope of receiving a beneficial interest if nothing is put in its place.". In my view such concerns do not arise in the present matter, properly understood,

102 With the proposal put forward here, it is, to my mind, important to note that it does not seek to extinguish the power of adding beneficiaries; rather, under sub paragraph (iii) of paragraph 1 of the learned Deputy Bailiff's orders, such powers are merely suspended until the First Respondent's interest is satisfied. Secondly, the satisfaction of the First Respondent's interest, in my view, can properly be characterised as a permutation of what occurs in many trust variations where, for example, a life interest is expanded to an interest in capital or where one of the terms of the Arrangement is an actual appointment from a discretionary class. Whilst Courts might withhold approval from an arrangement if one of the terms was an appointment which might be a fraud on a power, it is likely to do so only if there is a fair case for investigation, but will not require *prima facie* evidence: see Lewin on Trusts (18th edition) 45-58. Here what is being done is that the revocable exclusion is being revoked and an appointment is being made in respect of the First Respondent. In the whole circumstances it is plain that there is no question of a fraud on a power. Under the trust provisions as they stand, because of the wide discretion given to the trustees, even once there has been an addition, the newly added member of the class may be defeated by an absolute appointment to other beneficiaries. Rather it seems to me that, given that the whole general class comprises the Appellant and his issue (together with the First Respondent), any addition by the Appellant now under Clause 9 would be in the expectation of having an appointment outwith the family. Whilst an eventuality can arise because of the perceived incapacity of a potential beneficiary, the usual wide powers within the trust would seem capable of dealing with family members unable to look after their affairs properly. Any addition, which as I have noted of course does not in itself give rise to an appointment, could only be for the purpose of defeating the interests of the present beneficiaries. A future spouse of the Appellant is, of course, a possible candidate, but her position is little different in this respect from every other person, natural or legal, in the

world. In any event, such matters do not require to be taken into account: having regard to the *Re Ball's Settlement* considerations, there is, simply, no exclusion of the unascertained beneficiaries.

103 I incline to the view therefore, subject to the views which I shall proceed to express in the ensuing paragraphs, that it would be appropriate for this Court of Appeal, which has had the orders below placed before it for review, at least to clarify, if not determine under Rule 12, that approval is granted on behalf of the unascertained beneficiaries. Advocate Gleeson, on behalf of the former trustee, which might otherwise have been the party charged with protection of the unborn and unascertained beneficiaries, also counselled this clarification.

(5) Do the Jersey Courts have power to grant approval on behalf of unascertained beneficiaries where there is an unreleased power?

104 Advocate Begg, however, submitted that there were a number of other reasons why there could not be approval of the arrangement on behalf of unascertained beneficiaries. Because of the views which I have already expressed, I shall restrict my references to Clause 9.

105 In Advocate Begg's submission, there were possible Clause 9 beneficiaries, as yet, unascertained in that it appeared that there was a power which would cover anyone in the world apart from an excluded person and, of course, the existing beneficiaries (the settlors, their present children and all other children or remoter issue of the marriage born after the date of the deed and prior to the expiry of the trust period).

106 As regards the Clause 9 beneficiaries, Advocate Begg suggested that it was open to serious doubt whether the Court had power under Article 47 to approve an arrangement on behalf of such a wide class. More specifically, he submitted that Clause 9 contained a power which had not been released by the first donee of the power (the Appellant), that the letter of 25 August 2006 could not be construed as a consent to release the power and that the present, therefore, was not a case where the Court could approve on behalf of the Clause 8 or 9 beneficiaries.

107 For my own part, I think that there are a number of matters, requiring more detailed analysis than that given to this Court on behalf of the Appellant, which must be considered reaching conclusions on those issues. These are (a) the statutory provisions in Jersey, and (b) the nature of the right of unascertained beneficiaries under clauses 8 and 9,

(a) What is the proper interpretation of the statutory provisions in Jersey?

108 Although not clearly expressed in the written submissions or in the oral presentation, I

understood that consideration of whether approval could be granted where there were extant powers and no specific release was based upon certain earlier discussions in authorities such as *Re Christie-Miller's Marriage Settlement*, *Re Courtauld's Settlement* and *Re Ball's Settlement Trusts*, all cited above. I think, however, that the slightly different statutory basis as between that in Jersey on the one hand and those in England and in Scotland, on the other, has to be borne in mind. In paragraph 74 above, I noted in passing that Tomes DB, in *In re Osias* had observed that what was then Article 43(1)(b) was enacted in a more truncated form than that of Section 1(1)(b) of the 1958 Act. That sub-section in the 1958 Act contains a proviso (as it happens, in identical terms to the comparable Scottish provision in the 1961 Act) as follows: "so however that this paragraph shall not include any person who is capable of assenting and would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the presentation of the petition to the court". In other words, on at least one reading of the proviso, the courts in Scotland and England have no power to grant approval on behalf of unascertained but existing persons. That consideration may have instructed the English decisions to which I have referred; but, as there is no such statutory restriction in the Jersey Law, it seems to me that, on an ordinary reading of the Jersey Law, the courts in this Island have power to grant approval on behalf of unascertained beneficiaries even although a potential member of the relevant class is in existence. However, even if I am well **justified** in that view, the ensuing **question** may arise.

(b) What is the nature of the right of unascertained beneficiaries under clause 9?

109 As I understood Advocate Begg's submissions, because there had been no release of the clause 9 power by the Appellant, (or indeed of the clause 8 power by any beneficiary), the Jersey Courts could not grant approval. It seems to me that this argument might be thought to arise even if the views which I have just expressed as to the power of the courts in Jersey are correct. In other words, the argument could run that, even if approval can be granted on behalf of unascertained persons, in appropriate circumstances, because of the unrestricted terms of Article 47(1)(b), the existence of an unreleased power prevents the Court from exercising its own power, even in circumstances otherwise appropriate.

110 Assuming that consideration has to be given to the power in existence here, it is pertinent to note that in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709. Lord Walker of Gestingthorpe, giving the judgment of the Privy Council (in a matter emanating from the Isle of Man), stated:-

> " ***40 This passage [In re Baden's Trust Deeds [1971] AC 424, at 448-449] gives a very clear and eminently realistic account of both the points of difference and the similarities between a discretionary trust and a fiduciary dispositive power.*** The outstanding point of difference is of course that under a discretionary trust of income distribution of income (within a reasonable time) is mandatory, the trustees' discretion being limited to the choice of the recipients and the shares in which they are to take. If there is a small, closed class of

discretionary objects who are all sui juris, their collective entitlement gives them a limited power of disposition over the income subject to the discretionary trust, as is illustrated by *In re Smith* [1928] Ch 915 ***and*** *In re Nelson* ***(1918) reported as a note to*** *In re Smith*, ***at p 920.*** But the possibility of such a collective disposition will be rare, and on his own the object of a discretionary trust has no more of an assignable or transmissible interest than the object of a mere power.

41 Apart from the test for certainty being the same and the fact that an individual's interest or right is non-assignable, there are other practical similarities between the positions of the two types of object. Either has the negative power to block a family arrangement or similar transaction proposed to be effected under the rule in *Saunders v Vautier* (1841) 4 Beav 115 ***(unless in the case of a power the trustees are specially authorised to release, that is to say extinguish, it).*** Both have a right to have their claims properly considered by the trustees. But if the discretion is exercisable in favour of a very wide class the trustees need not survey mankind from China to Peru (as Harman J, echoing Dr Johnson, said in *In re Gestetner Settlement* [1953] Ch 672, 688-689) ***if it is clear who are the prime candidates for the exercise of the trustees' discretion."***

111 Lord Walker therefore indicates - albeit in a passage which is, I think, *obiter*, and in an Isle of Man context - that the object of a fiduciary power has the ability to block an arrangement unless the trustees have authority to release the power granted to them, For my own part I would be inclined to express qualified agreement in respect of a trust governed by the law of Jersey where, so far as I am aware, there has not yet been consideration of this point. The Royal Court continues to emphasise its own power to police the activities of any fiduciary in relation to a trust: see *Mourant & Co.* Trustees Limited v. Magnus [2004] JRC 056 at paragraph 7. It may therefore be considered only consistent to require protection of the object of a fiduciary power in the context of a proposed variation.

112 But the importance of the particular context must be borne in mind. The context will be an application for approval on behalf of, usually among others, the unascertained beneficiaries: on the hypothesis that there are unascertained beneficiaries there cannot be a valid variation without Court approval. In Jersey, however, as I indicated in paragraph 108 above, I am of the view that the Court can grant approval even although a potential beneficiary is in life and of full age and capacity. That unascertained beneficiary, in my view, does not have power to block an arrangement presented in respect of a Jersey Trust presented for approval under article 47. The court may take his or her contentions into account; but if, as I think will usually be the case, he or she will not be the sole member (or they the complete members) of the potential class, the court would be bound to take into account the interests of the class as a whole. Accordingly, and with the greatest respect to the views expressed by Lord Walker, I am of the view that only where the Jersey court was considering either (a) the position of a single default beneficiary or (b) a restricted class from whom one or more must be chosen, and all of whom agree in objecting, could it be said that the object of a fiduciary power would have power to block an application for approval.

113 For my own part, I am not persuaded that where there is a wide power of appointment, such as one covering all persons throughout the whole world, the mere existence of the power, without release, in effect bars approval of an arrangement. I am not at all persuaded that such a power can properly be characterised as fiduciary in that there is no defined class within which there are individuals who have the right to expect their interests to be taken into account by the person in whom the power is vested. I note that it is observed in Lewin, at page 1874, that there are no reported cases considering the extent to which, if at all, section 1(1)(b) of the 1958 Act allows the court to grant approval where there is a power of appointment to the whole world excepting the settlor. In Scotland, on the other hand, albeit that the statutory provisions are all but to the same effect as in England and Wales, the Court has said that the statutory provisions must be given a reasonable construction and the approval provisions "can never have been intended to include persons whose interest is so remote as to be negligible.": see *Phillips and others, Petitioners* 1964 SC 141, 148 (Lord President Clyde). Many such Arrangements have been approved, sometimes with and sometimes without formal actuarial calculations, and none of the resultant variations challenged as ineffective on the ground that there was a lack of complete consent.

114 Even if I am wrong in that view, it seems to me that upon a proper construction of the clause 9 power (whether it is to be exercised by the Appellant, by the protector or by the trustees), it is not a fiduciary power of the nature envisaged by Lord Walker and therefore not a bar to approval. The clause 9 power is not a power to benefit a person or persons, but merely to have his, her or their name added to the list of beneficiaries whom the trustees may choose to benefit. The trustees still have an absolute discretion under Clause 4 as to which beneficiary or beneficiaries are to benefit from the capital.

115 But if I am again wrong, and perhaps the appropriate characterisation is that it is the combination of the power to nominate and the resultant membership of the discretionary class which constitutes the fiduciary position, it would follow that the court could not grant approval unless the power had been released. From that it would follow that detailed consideration has to be given to the 2006 letter, not only for the purpose of identifying whether or not the Appellant himself should be treated as having consented but also for the purpose of identifying whether his position was inconsistent with the continued existence of the power. For the reasons given in the ensuing section I consider that, upon a proper construction of the 2006 letter, it indicates consent to variation. In the whole circumstances I consider that must bring with it release of any power. For all these reasons, therefore, I am not persuaded that the existence of the provisions of Clause 9 (or indeed Clause 8) precludes the Court from granting approval on behalf of the unascertained beneficiaries.

(6) The Appellant's letter of 25 August 2006

116 Advocate Begg, for the Appellant, submitted that, in the view of the Deputy Bailiff the consent of the Appellant was a necessary precondition to the making of his order. I agree.

As I read the order of the Deputy Bailiff, it sets out to give effect to two particular determinations. The first was to identify whether, in the whole circumstances which had occurred, the Appellant should be treated as having consented to a variation of trust purposes in accordance with those proposed in the Holman order and, Secondly, to approve such a variation on behalf of the beneficiaries incapable of giving consent: see paragraph 108(ii) below. As regards the first matter, the Royal Court was clearly concerned to do what it could to bring matters in this unfortunate saga as close to a conclusion as was possible. To that end it was looking to the rule in *Saunders v. Vautier* to identify whether, taking into account the approval which it intended to grant, all parties consented. Clearly the consent of the Appellant was a necessary part of this process.

117 As is, of course, well known, the Appellant had decided that there would be no participation on his behalf in the hearing before the learned Deputy Bailiff even although this very issue had been highlighted in paragraph 16 of the Skeleton Argument for the trustee which was in the following terms:-

> *"If the Court lacks jurisdiction to make the order noted above against Mr. Mubarik, an alternative would be that the adult children (Salem and Noor) consent to a variation of the Trust to give effect to the Holman order and Mr. Mubarik also consents, or can be treated in the circumstances as having consented (having regard to the content of his letter dated 25 August 2006 to the trustee).* The Court has power to approve a variation under Article 47 of the Law if it is satisfied that it is for the benefit of the minor beneficiary and the unborn remoter issue."

118 The learned Deputy Bailiff dealt with the matter in this way. At paragraph 85 he noted that the question had arisen as to whether the husband should be permitted to participate in the hearing before Holman J., given his failure to comply with the order for payment of the lump sum. That issue came before Bodey J. in May 2006 when the Appellant was represented by leading and junior counsel and the matter was fully and strongly argued. The learned Deputy Bailiff noted that Bodey J. found the husband to be in contempt of Court and held, in accordance with the Hadkinson principle, that the husband should not be permitted to participate in the hearing before Holman J. unless he took certain steps, including writing to the Trustee in the terms of the 2006 letter. The husband had appealed against that decision but the appeal was dismissed. The learned Deputy Bailiff proceeded:-

> ***"86. The husband had a choice at that stage. He could refuse to write the letter, in which event he would not be able to participate in the hearing before Holman J. Alternatively, he could write the letter, in which event he would be able to participate. It was a matter entirely for him. He chose the latter course. He wrote the letter. He therefore obtained the advantage of appearing before Holman J and he did this by leading and junior counsel who argued strongly against the wife's application. It is of interest that the hearing before Holman J. apparently took nine days*** .
>
> ***87. The terms of the August 2006 letter are clear. The husband confirms***

that he is bound by the Holman order and wishes the trustee to give effect to it i.e. he wishes effect to be given to the alteration to the trust made by Holman J. Is he now to be allowed to renege on that letter? I do not think so. The husband chose to write the letter and to participate in the hearing before Holman J. The whole purpose of the Hadkinson order made by Bodey J was to require the husband to agree to be bound by the outcome of the hearing before Holman J if he wished to participate. In exchange for this assurance, the husband was permitted to participate in the hearing and to seek to persuade Holman J. not to accede to the wife's application. In this respect he was successful on two out of three heads of application described in paragraph 22. He therefore obtained a tangible advantage by agreeing to write the August 2006 letter .

88. I strongly deprecate the idea that, having obtained this advantage, he should now be permitted to disown the August 2006 letter as, for example, he has sought to do in a recent undated letter to the Trustee indicating that he opposes the wife's application to this Court. He has made his choice and he is bound by it. I therefore have no hesitation in finding that he should be treated as consenting to the alteration to the Trust contained in the Holman order notwithstanding his later attempt to renege .

89. I would emphasise that our decision to treat the husband as having consented on the basis of the August 2006 letter is wholly exceptional in the light of the particular circumstances of this case. Firstly, the husband was in flagrant and longstanding contempt of the English order, but Secondly and most importantly, he exercised his free will in choosing to write the letter. This was not a case of an overseas Court ordering the husband to write a letter or making him to do under duress. He was given a free choice by the Family Division and he chose to do so. ..."

119 In his written contentions, Advocate Begg sought to suggest that the husband's actions had to be analysed under normal principles of contract law and, in particular, offer and acceptance. This thinking, doubtless, also underlay the suggestion that the concept of duress, which was stressed in oral submission, ought to be considered. I do not agree. In my opinion, the terms of the letter indicate otherwise. The salient terms of the letter are as follows:-

"The Craven Trust Company

25 August 2006

Dear Sirs,

IMK Family Trust

I refer to my letter to you dated 20 July 2006 relating to the Order made by Mr. Justice Bodey on 9 May 2006. I confirm by this letter that I now wish you to disregard it completely and to rely instead solely on the contents of this letter.

I write this letter intending its terms to be irrevocable.

I wish to inform you of the following matters:

(i) That I accept that I am bound, as a matter of English law, by the Court's Orders awards and findings of 10 December 1999 (save to the extent that these have been subsequently revised) and that I cannot go behind them (including the finding that Mr. Wani has no interest in the trust assets);

(ii) That I wish you, the trustees, to assist me in meeting my obligations under the Orders of the Court and wish you not to take any steps having the effect of making it more difficult for me to do so; and

(iii) That I accept that (subject to appeal) I will be bound as a matter of English law by whatever Orders the Court may make on my former wife's pending applications in December 2006 and that (again) I wish you, the trustees, to give effect to those orders.

I enclose with this letter a further copy of the Order dated 10 December 1999 and that dated 9th May 2006 and that dated 25 August 2006.

Yours faithfully,

Iqbal Mubarik"

120 It is patently clear that this letter was written as a matter of choice. It is also patently clear that this letter is not part of a contract. The Appellant had failed to comply with the English orders. A Hadkinson order had been made against him and, if he wished to participate in the proceedings, the *quid pro quo* was that he agreed to be bound by certain matters. As Advocate Lakeman explained to us, the terms of this letter had been settled between the parties.

121 On a proper construction, this letter is an instruction to the trustee of the trust. As with many such instructions it is perfectly possible for a party giving instructions to determine that they should be irrevocable. In the particular circumstances here, there was no point whatsoever in allowing the Appellant to avoid the effects of the Hadkinson order simply by giving revocable instructions. The essence of the instructions here is that the trustee is to do what is necessary to assist the Appellant in meeting the orders by which he accepted he was bound. In particular he accepted that he would be bound by whatever order or orders were to be made in December 2006. It is also perfectly clear that those December 2006 orders would not merely restate the December 1999 order (as to which there would be no point) but would be seeking a structure whereby practical results of some sort would be achieved in order to attempt to secure payment of the lump sum ordered in 1999. As narrated by the learned Deputy Bailiff at paragraph 22 of the decision below, the wife's application had sought various orders and the husband's representation at the December 2006 hearing had generated some success. What remained, however, was an order to vary

the trust.

122 In all these circumstances, a variation of the trust having been determined upon as the appropriate way of dealing with the dispute, the only proper response on behalf of the trustee to the 2006 letter was not to thwart that approach. The trustee, of course, had to be neutral except insofar as looking after the interests of those unable to speak for themselves. But what is confirmed by the letter is that, in the event of whatever order was proposed in December 2006, the trustee did not require to enquire of the Appellant whether he consented to that order: the letter told them that, irrevocably, he did.

123 As I have indicated, I see no basis in the circumstances here for treating this letter as some portion of a contract where there might be an offer and acceptance. But even if I were wrong in that view, and this letter did constitute an offer to all those involved in the proceedings, it was accepted by the first respondent accepting that the terms of the letter were adequate to avoid the disabling effect of the Hadkinson order. Separately, if one looks to the English doctrine of consideration, the consideration given was permission to participate in the December proceedings. Advocate Begg sought to suggest that the Appellant's position before us would merely lead to a breach of contract and the remedy would be damages. If contract is the appropriate characterisation here, I see no reason why the Court should not enforce a contract where it can do so. For all these reasons I consider that the Court below was perfectly entitled to proceed, as it did, upon the basis that, in these wholly exceptional circumstances, the Appellant was to be treated as having consented to such order as Holman J. pronounced which, in the event, posited a trust variation. That consent was stated to be irrevocable and, even if I were minded to reach the view that those words were not to be given their ordinary meaning, I would be unable to do so, for the same reasons as given by the learned Deputy Bailiff below.

124 In the particular circumstances here it seems to me of no moment that the letter does not state either that the Appellant consents to a particular trust variation or that he consents to a particular trust variation in the context of an application to a Jersey Court. Advocate Begg had been at pains to emphasise, as I agree, that the proper characterisation of the determination of a Court in an application under such as Article 47 of the 1984 Law is not to vary the trust but, rather, to supply the missing consent. Whilst matters are, of course, different in an ordinary application for approval, the essence of this point is that the Court must be satisfied that those adults of full age and capacity who are indicating their consent are doing so in respect of the same arrangement as to which the Court is being asked to grant approval on behalf of those who cannot give their consent. Here, the Appellant was required, in advance, irrevocably to submit to being bound by such proposals as were set out in the Holman order. It is those very proposals which the orders below sought to give effect to.

Unborn Beneficiaries

125 In addition to the foregoing arguments, Advocate Begg contended that, in granting

approval on behalf of unborn beneficiaries, the Royal Court acted in a way contrary to the views expressed in *In Re Tinkers Settlement* [1960] 1 WLR 1011. His somewhat bald written contention was "There is no reason why payment to the wife provides a benefit to the great grandchildren of the children. A benefit must be provided to every beneficiary."

126 It is well known that in family arrangements, different levels of benefit will enure to different levels of potential beneficiaries. Here, the principal concern is the position of the First Respondent and the children. But if additional funds are ingathered, those enure to the benefit of all potential beneficiaries. The views expressed by the learned Deputy Bailiff at the end of paragraph 101 are equally apposite for the unborn beneficiaries. In his words "They are more likely to benefit in this way than from leaving the trust fund in the control of the husband in the vague hope that one day the Trust might acquire some residual value (after repayment of the loan) and that this might be applied for their benefit.".

127 For the reasons given at paragraph 97 above, I do not consider Advocate Begg's arguments well founded.

Removal of Trustee

128 Advocate Begg did not press this point with any great vigour. Given that the trustee had argued that, in the event of the court determining that a variation could be approved, it would only be appropriate for replacement in order that a more qualified person be put in place to seek to ingather the trust estate, Advocate Begg's position seems to me unarguable.

Appointment of Receivers and Ancillary Orders

129 In written argument the Appellant had questioned the jurisdiction of the Royal Court to appoint a receiver in a matter such as this and the appropriateness of various of the orders. In oral argument, however, Advocate Begg accepted that the terms of Article 51 of the 1984 Law were adequate to give jurisdiction to make such orders but contended that the exercise of jurisdiction was excessive.

130 The learned Deputy Bailiff set out the reasoning of the court at paragraphs 102 to 107 in the judgment below and Advocate Begg pointed to no error of inclusion or omission in the reasoning or any other basis upon which it might be said that the exercise of jurisdiction was excessive. Without a very clear foundation for such a contention, it is not for this court simply to take the view that it, for its own part, would not have granted such an order. As it happens, I am in entire agreement with the reasoning of the learned Deputy Bailiff in paragraphs 102 to 107 below.

Conclusion on the Second Appeal

131 For all the reasons which I have given, the submissions made to us on behalf of the Appellant are insufficient to my mind to suggest that the learned Deputy Bailiff was wrong on his use of Article 47, on the appointment of receivers or on the supplementary orders and it follows that, in my opinion, the appeal fails. Given certain of the submissions before us, however, and as the orders below are before us on review, I propose that this Court determine that approval on behalf of unascertained beneficiaries is unnecessary, but that, as there is no disbenefit to unascertained beneficiaries, approval be granted. Accordingly I have certain suggestions to make as to the appropriate orders from this Court which I shall set out at the end of this judgment in order to attempt to ensure that there can be no continuing doubt on the matters brought before this court.

Respondent's Notice

132 Apart from the matter of appropriate orders from this Court, were I wrong in my views as to the disposal of the appeal, the issues raised in the Respondent's Notice would arise. Put simply, this would re-raise the issues of law below and, in particular, the impact of Article 9(4) of the 1984 Law. On this matter, as indicated by the learned Deputy Bailiff, a debate has emerged, at least in the academic field and which has been carried out in the Jersey and Guernsey Law Review. The position of the parties before us was that each relied on the protagonist whose views were in his favour that is, Professor Harris for the Appellant and Mr. Hochberg for the Respondent. The articles are found at (2007) 11 JGLR 9, (2007) 11 JGLR 20 and (2007) 11 JGLR 184.

133 Given that the arguments were addressed in this way, I do not find it necessary or appropriate to express, in this litigation, a view on the issue under Article 9(4) of the 1984 Law as to whether or not the Royal Court can enforce a judgment of the Family Division varying or altering a Jersey trust under the Matrimonial Causes Act 1973.

Conduct of Litigation

134 Regrettably, I cannot conclude without making some remarks about the conduct of Appeals before this court. By and large this court is favoured with advocacy, both oral and written, where the breadth and depth of research is not presented at the expense of clarity and precision; and where documents are timeously produced. Whilst other appeals in the September sitting were models of this approach, the presentation in this appeal, both for the Appellant and for the First Respondent, fell very far short of what this court is entitled to expect. Out of the many comments which I could make, there are three which seem to me to be of fundamental importance.

135 Case Preparation. Advocates are officers of the Court. They are expected to act responsibly to their clients, to each other and to the court. The excessive use, in this case, of e-mail communication where petty squabbles are made the subject of continuous exchanges on which the Greffier substitute is expected to take note, participate or even

referee will not be tolerated. Such an approach constitutes an **unacceptable**, and in this case preposterous, intrusion on the workload of the court and has an adverse impact on the ability of the court staff to handle the many other appeals which it has to process. During one 9 day period some 100 emails were sent or copied to the Greffier substitute; many apparently requiring to be put before at least a Single Judge of this court. Almost all were unnecessary.

136 Written Cases. These are meant to be concise statements of fact and law, set out in some systematic fashion. They are also expected to be to the points of the appeal, not to be discursive on wholly peripheral matters and to be clerically accurate. Cases and other prepared documents as discursive, tendentious and riddled with errors as some of the papers in this appeal are likely to attract sanctions.

137 Expertise. This Court well recognises that, in mixed jurisdictions of modest size such as Jersey, much is expected of its advocates. Almost all rise to the challenge and many excel in the production of arguments of clarity and well thought out lines of reasoning which is of great assistance to the courts of the Island. Advocates in this jurisdiction must be prepared to act in a wide range of matters. Often they will be assisted by advocates from another jurisdiction; but the presentation of the case is theirs and the right of audience is theirs. If the area of law is one with which they are not in regular use to be instructed, it is inevitable that they will require to spend more time in preparation of the case and, naturally, in reminding themselves of the area of law from which their propositions are going to be drawn. On occasion, it may indeed be the duty of the advocate to the client and to the court to pass on the case to a practitioner of appropriate experience. But in a modest sized jurisdiction such as this, it is vital that advocates maintain a general knowledge of current legal issues in their broad sphere of operation. Among other matters, it is the maintenance of this general knowledge within the domain of the legal profession here which is the purpose of the Jersey and Guernsey Law Review. It is an affront to the hard work of those who provide material for the JGLR for an advocate to suggest to this Court, as did Advocate Begg, that he did not really have time to read the JGLR. Doubtless, as with all jurisdictions, increasing continuous professional development will be high on the agenda of the legal profession here. But this court will not be slow in expecting a proper standard of advocacy from those who appear before it.

Determination

138 For all the foregoing reasons I would dismiss the Second Appeal. However, as I have indicated, the Appellant having raised a query as to whether the Act below gives approval on behalf of the Unascertained beneficiaries and as Advocate Gleeson for the Second Respondent (the former Trustee) recognised the theoretical possibility that such a point might be raised at a later stage by unascertained beneficiaries, I consider it proper, in the whole circumstances aired before this Court, for this Court to correct any such error of expression.

139 Further, as this is an unusual application of Article 47 because it has been contentious, it seems to me appropriate that this court confirm that, all necessary consents having been given, the Trust has been varied. As I have said, approval under Article 47 does not in itself vary a trust; it is the full combination of consents which does that. Indeed, it is because of that very point that the Courts will not grant approval to arrangements under the 1984 Law, or under the 1958 or 1961 Acts, where all the required consents are not before them. There would be no point in granting approval to something which was not going to come into effect. But this helps one realise that, as the approval under, here, Article 47, is the last juridical act in the creation of the variation, it is, in a sense, the court which varies the trust. If, for whatever reason, parties required confirmation that the trust had been varied, the court would undoubtedly grant a declaration to that effect. In my view the Order of this court should make it clear that it considers the trust to have been varied.

140 I therefore propose that the Order contained in paragraphs 1, 2, 3.1 and 3.2 of the Act of Court of 17 April 2008 be recast under the power vested in this Court by Article 12(2) of the Court of Appeal Rules. In my view the Act of this court should set out the whole of the arrangement approved below, as amended, including the Appendix. The amended portions of the order, in my view, should now read as follows, all other portions remaining as in the Act of Court of 17 April 2008 (for the purposes of this judgment I have underlined the changes from the order below):-

> " ***1. Upon the Court being satisfied that the arrangement set out in the following paragraphs ("the arrangement") of the IMK Family Trust dated 2nd September 1997 ("the Trust") is for the benefit of the minor, unborn and unascertained beneficiaries of the Trust, and that the adult beneficiaries of the Trust including Iqbal Mubarik ("IM") have consented to the same (in IM's case the Court relying upon the request in his letter to the Second Respondent of 25th August, 2006) it is ordered pursuant to Article 47 of the Trusts (Jersey) Law 1984 that the arrangement is hereby approved on behalf of the minor, unborn and unascertained beneficiaries of the Trust and it is declared accordingly that, having regard to the terms set out in paragraphs 4 and 5 of the Order of the English High Court of Justice made on 12th January 2007 in Action No 5332 of 1998 ("the Divorce Proceedings") by Mr. Justice Holman in the High Court of Justice, Family Division ("the Holman Order"), the Trust now stands varied in accordance with the arrangement set out as follows:-***
>
> ***(i) The Trust is to be held for the benefit of the Representor in the first instance so as to empower and require payment to the Representor or to her order (subject always to paragraph (vi)) of an amount equal to the following sums:-***
>
> ***(a) any balance due from IM to the Representor under the lump sum order made by paragraph 1 of the order of Bodey J dated 10 th December 1999 in the Divorce Proceedings; and***
>
> ***(b) any arrears of periodical payments pursuant to paragraph 2 of the said***

order of 10th December 1999 as varied by paragraph 9(a) of the order of Bodey J dated 20th January 2000, including any arrears which may accrue after the date of the Holman Order or after the date of this Order; and

(c) any balance of costs still due from IM to the Representor, after assessment or agreement and after taking into account any costs orders made in IM's favour .

(ii) Until her interest in the Trust pursuant to paragraph (i) above is satisfied the Representor shall not be an Excluded Person and shall be a Beneficiary for the purposes of the Trust; and

(iii) Until the Representor's interest in the Trust pursuant to paragraph 1 above is satisfied, any powers conferred by the Trust upon IM or the Protector shall be suspended, and any requirement for the consent of IM or the Protector shall be dispensed with .

(iv) For the avoidance of doubt, the Representor is not entitled to payment to her or to her order of any sum which exceeds the total value of the trust assets after deduction of reasonable administration costs and expenses and after the costs and expenses of securing or liquidating such assets and complying with this order .

(v) Any sums paid to the Representor or to her order pursuant to this order must be accepted by the Representor in pound for pound satisfaction of and reduction of all sums due from IM to her .

(vi) Any sums paid by or on behalf of IM himself must be accepted by the Representor in pound for pound satisfaction and reduction of all sums due from the Trust to her pursuant to this order .

2. The Second Respondent is hereby forthwith removed as trustee of the Trust until such time as the appointment of the Receivers hereunder shall terminate or until further order of the court .....

3.1 Pursuant to Article 51 of the Trusts (Jersey) Law 1984 (Revised Edition) and its inherent jurisdiction Kevin Mawer and Richard Dixon Fleming are appointed as Receivers and Managers of the assets of the Trust ("the Trust Fund") ("the Receivers") pending the appointment by the court of new trustees of the Trust or further order for the purpose of preserving the value of the Trust Fund .

3.2 The Receivers are authorised and directed to take such steps as they shall consider necessary to realise sufficient sums from the Trust Fund to pay the sums payable to the Representor in accordance with paragraph 1(i)(a) - (c) of this Order (such sums together being referred to as "the Debt") .

Beloff JA **(President):**

141 I agree.

Montgomery JA

142 I also agree.