IQ EQ (Jersey) Ltd v R

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Ramsden, Averty, William Bailhache
Judgment Date:	14 May 2021
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Text

[2021] JRC 137

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Commissioner, and Jurats Ramsden and Averty

In the Matter of the May Trust

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law, as Amended

Between
IQ EQ (Jersey) Limited
Representor
and
R
First Respondent
S

Second Respondent
T
Third Respondent
U
Fourth Respondent
V
Fifth Respondent
W
Sixth Respondent
Advocate Andreas Kistler representing the minor and unborn beneficiaries
Seventh Respondent

Advocate N. M. Sanders **for the Representor**.

Advocate A. Kistler **for the Seventh Respondent**.

The First to Sixth Respondents did not appear.

Authorities

Re Holt's Trust [1969] 1 Ch 100.

Brian Monroe Limited Trust 1995 / 154 [Royal Court 28th July 1995].

Marc Bolan Charitable Trust [1981] JJ 117.

Re Osias Trusts [1987–88] JLR 389.

Re N [1999] JLR 86.

Esteem Settlement and the Number 52 Trust [2001] JLR 7.

Y Trust and the Z Trust [2017] (1) JLR 266.

The Wigwam Trust [2020] JRC 228.

Trusts (Jersey) Law 1984.

Re Clore's Settlement Trusts [1966] 1 WLR 955.

X and Another v A and Others [2006] 1 WLR 741.

In re DDD 1976 Settlement [2012] (1) JLR Note 8.

In the Matter of the T Settlement [2002] JLR 204.

Re Hampden Trust Trusts [2001] WTLR 195.

Re Esteem [2001] JLR 540.

Pilkington v Inland Revenue Commissioners [1964] A.C.612

S Settlement 2001/154.

Trust — blessing of a momentous decision

THE COMMISSIONER:

Introduction

1 The Representor presented a Representation to the Royal Court on 5th February 2021, as a result of which the Court made orders that the Representation should be heard in private until further order and that the Respondents should be convened for 10am on 3rd March 2021 when the Representation would receive further consideration. Advocate Kistler was appointed as guardian *ad litem* for the minor beneficiaries and as the representative of the interests of unborn and remoter issue in respect of the trust referred to below. In addition, a UK registered charitable foundation (the "Foundation") was given notice of the proceedings by service of the relevant documentation on the First Respondent, and the trustee of a further related trust (the "XYT") were also to be given notice of the proceedings. Neither the Foundation nor the XYT trustee have applied to be joined as parties to the proceedings.

2 The Representor (sometimes referred to herein as the "Trustees") is a Jersey incorporated trustee which provides trustee and related fiduciary services. It is the sole present trustee of a discretionary trust ("the Trust"), which is governed by Jersey law and was established by a Deed of Appointment dated 22nd May 2000 (the "Trust Deed") made between the trustee of a pre-existing trust (the "Appointing Trust)" and, a predecessor trustee of the Trust. The Representor, then known as Basel Trust Corporation Limited, was appointed in place of the predecessor trustee on 6th July 2010. W has been appointed as protector of the Trust and is the sole present protector. He supports the Trustees' principal application.

3 The application on 3rd March was twofold:-

(i) An application to amend the Representation;

(ii) An application seeking the Royal Court's approval and / or sanction to the in principle decision of the Trustees to make a Proposed Distribution in an amount equal to almost 50% of the current value of the Trust, namely £75 million, to the First Respondent, described as the principal beneficiary, for onward transfer to the Foundation ("the Proposed Distribution"). The First Respondent and the Second Respondent (his wife) are the trustees of the Foundation. The Third, Fourth and Fifth Respondents are their children. The Fourth Respondent has three minor children; the Fifth Respondent has one child, born in 2020. The First and Second Respondents, their children and grandchildren are together referred to as the "Family").

4 In addition to the Family, the Foundation is a beneficiary. When the Representation was first issued, the XYT was also a beneficiary. However, on 19 th February 2021, after the date the Representation was first presented to Court but before the hearing date, the XYT was removed as a beneficiary in exercise of the Representor's powers as trustee under the Trust. The proposed amendments were principally concerned with reflecting a name change of the Foundation and the removal of the XYT.

Process and Amendment

5 We were initially concerned that a beneficiary had been removed from the Trust after the Court had ordered it be served with the Representation and, it turns out, has not been served at all. When that point was put to Advocate Sanders, he explained that the first affidavit sworn on behalf of the Representor in this case had not been sworn until 10 th February, after the Representation was first presented to the Royal Court. At paragraph 10 of that affidavit, Ms Le Chevalier deposes that the XYT was added as a beneficiary of the Trust in order that the Family could make charitable distributions through it, thus continuing the philanthropic legacy of the original economic settlor. That Deed of Addition by which the XYT became a beneficiary was dated 19 th December 2017 and its purposes had now been accomplished. Given that the XYT had received the aggregate donation amount originally intended, it was not due to receive any further donations from the Representor as trustee of the Trust.

6 Advocate Sanders explained that as the affidavit was not before the Court on 5 th February, the Bailiff had understandably assumed that all the beneficiaries of the Trust should be convened as parties, given the momentous decision which is envisaged by the Representation. It was submitted that, had he appreciated the true position, he would not have ordered that the XYT be convened. Accordingly Advocate Sanders submitted that in substance no wrong had been done and he told us that no disrespect to the Court had been intended. We accept that that is so and we revoke the order of 5 th February that the XYT be convened as a party to these proceedings.

7 In the light of the evidence before us, we have accepted that leave to amend should be granted and we so order. At the same time, this series of events demonstrates that affidavits in support of representations of this kind ought to be before the Court on the first occasion on which they are presented.

The facts

8 We now turn to the substance of the application.

9 The background is that the Appointing Trust was established in 1982 between the First

Respondent's father and original trustees based in Cayman Islands. That trust was established for the benefit of the First Respondent, his parents, his siblings and their respective wives, children and remoter issue. The wealth of the Appointing Trust is substantially derived from successful business activities of the First Respondent's predecessors and today of the current wider family, which now operates worldwide.

10 The Trust was created under the law of the Cayman Islands but, in view of the fact that the Trustees are resident in Jersey, it was agreed that the proper law of the Trust should be changed to Jersey law, and that has happened.

11 There is a separate fund within the main Trust Fund, the purpose of which is to provide a protective life interest for the First Respondent, but is otherwise on the same terms. The value of the separate fund is approximately £4.7 million.

12 The class of beneficiaries of the Trust has been subject to a number of changes. Various charitable beneficiaries have been added and removed over the period since 2008. In particular, since 2014, sums in excess of £8 million have been distributed to charities, as well as relatively small sums totalling not more than £100,000 to members of the Family. However, the Representor indicates that each of the Third, Fourth and Fifth Respondents are expected to receive distributions of £5 million in cash in the near future, together with a number of shares in the income generating company in the wider family business. We are told that the Second, Third, Fourth and Fifth Respondents fully support the activities of the Foundation and support the proposal that the assets of the trust should be distributed to the First Respondent so that a portion of that may be passed on to the Foundation to enable it to continue its philanthropic activities. This is said to mirror the principles of The Giving Pledge, a commitment by the world's wealthiest individuals and families to dedicate the majority of their wealth to giving back.

13 Before going into the detail of the Proposed Distribution a little further, we note that the Foundation was incorporated as a charitable incorporated organisation with the Charity Commission in England. Apart from the First and Second Respondents, there is one independent trustee of the Foundation.

14 The Trustees have power under the Trust Deed to appoint capital. The dispositive provisions are in these terms:-

> *"3. (3)(a) The Trustees shall stand possessed of the Trust Fund and the future income thereof upon such trusts for the benefit of the Beneficiaries or any one or more of them to the exclusion of the other or others in such shares and at such age or time or respective ages or times and upon and subject to such terms and conditions and with and subject to such provisions for maintenance, education or advancement or for the accumulation of income for any period and for any purpose authorised by law or for forfeiture in the event of bankruptcy or otherwise and with such discretionary trusts and powers exercisable by such*

persons and generally with such provisions of a beneficial or administrative nature as the Trustees shall from time to time by instrument or instruments in writing revocable or irrevocable signed or sealed before the Vesting Day but without infringing any rule against perpetuities appoint.

……

(4) Subject to any such appointment as aforesaid and until the Vesting Day the Trustees shall have power in their absolute and unfettered discretion to pay or apply the whole or any part of the capital of the Trust Fund to or for the benefit of such one or more of the beneficiaries for the time being living in such shares if more than one and in such manner as the Trustees shall in their absolute discretion think fit.

……

(6) On the Vesting Day the Trustees shall (subject to the foregoing trusts and powers and to every and any exercise of such powers) hold the Trust Fund and the income thereof upon trust for such of the beneficiaries as shall then be living or any one or more of them to the exclusion of the other or others and in such shares as the Trustees shall with the consent of the Protector before or within six months after the Vesting Day determine and in default of determination in equal shares absolutely.

…..

(4) If the trusts hereunder shall fail or determine then the assets remaining in the Trust Fund shall be held for the absolute benefit of such of the children and issue of [the First Respondent] as shall be alive at the date of the said failure or determination of and if more than one in equal shares absolutely."

15 At this point in the narrative, one might think that there was nothing particularly unusual in the application being made. It is not inappropriate for trustees to want to have blessed by the Court a decision to appoint approximately one half of a very substantial trust fund to one beneficiary out of many, whether that be an individual or a charity. In the present case, the intention is primarily to benefit the Foundation, one of the named beneficiaries, and the proposal has the support of all the adult beneficiaries. Having regard to the family ethos, Advocate Kistler also supports the proposal on behalf of the minor beneficiaries and unborn remoter issue.

16 Similarly, although the appointment is proposed to be made to the First Respondent in order that he can make a substantial donation to the Foundation, there is perhaps nothing very remarkable about that either. It is very natural that some wealthy individuals might want the satisfaction of making charitable donations personally. The Trustees would naturally have to take into account that the result of an appointment to the First Respondent was that he alone could choose what he wished to do with the proceeds of that appointment. In other words, the Trustees would have to be satisfied that he was a proper

recipient of the bounty of the Trust and that they were minded to make that appointment for his benefit, whatever he might choose to do with it — notwithstanding that he might not in fact keep all of the assets so appointed. Of course, trustees would be expected to have some regard to the purpose for which the beneficiary wished to receive the appointment in question – if it were for an unlawful or improper purpose, the trustees would be hard put to justify such an appointment and the Court would in any normal circumstances not be expected to sanction it.

17 What, however, is unusual about the proposed appointment is that not all of the Proposed Distribution will end up in the hands of either the First Respondent or the Foundation. The First Respondent has specifically requested the Trustees to consider making the Proposed Distribution to him on the basis that a part of that distribution will ultimately attract tax in the United Kingdom and only after that tax has been paid will the net amount then be transferred to the Foundation. This request follows from a number of discussions with consultants and advisers following which the Family agreed a briefing note setting out their purposes and values, specifically including values related to charity and philanthropy. It is said to us that the Family believe it to be appropriate for UK tax to be paid on at least a part of the sum which is to be made available on the basis that the payment of that tax enables government to provide a broader social benefit.

18 Essentially, in so far as is relevant to the Trust, the Family have undertaken a wealth review process, that review going beyond the assets of the Trust and therefore including all assets generally available to the Family, following which it was agreed that the majority of the assets held by the Representor should be applied as follows:-

(i) Approximately 50% of the current value for philanthropic purposes, namely UK tax and to the Foundation; and

(ii) Approximately 20% of current value for future charitable causes to be chosen by the Third, Fourth and Fifth Respondents.

19 Thus, the Representor has, in accordance with its duty of full and frank disclosure to the Court, indicated that it anticipates a formal future request in relation to the distribution of an additional £30 million to charitable causes as a second phase of the Family's overall plans.

20 The Representor is minded to make the appointment requested by the First Respondent.

The tax position

21 The advice sought by the Family confirms that there will be no income or capital gains tax consequences directly as a result of the Proposed Distribution from the Representor to the First Respondent. However, the request which the First Respondent has made is based on the proposition that he would then donate the funds in two tranches to the Foundation. The

first tranche will contain a percentage, yet to be determined, of the total available for distribution and gift aid relief will not be claimed on that amount such that tax at 45% will be payable on the donation and the balance will be gifted to the charity. The second tranche will contain the balance of the funds available for distribution and will be the subject of a gift aid claim, ensuring that the total amount of that tranche will be received by the Foundation. The effective tax rate as a percentage of the funds advanced under the Proposed Distribution is anticipated to be 25%.

22 The First Respondent, being a UK resident beneficiary, pays income tax at the rate of 45%. If no gift aid relief is claimed, the result is that the First Respondent will in effect have a tax liability for 45% of the amount of the first tranche, whatever that may be. We are told that by virtue of his income he already has a high profile with Her Majesty's Revenue and Customs, and his tax filings are likely to be looked after by the HMRC High Net Worth Unit, who are familiar with this type of tax filing.

Discussion

23 The very substantial wealth which is found in the Trust has been generated by a successful business operating worldwide but run in the United Kingdom. We assume that tax has been paid in the usual way on the profits of that business. Those profits, however, have been more than sufficient for the needs of the wider family which benefits from it. As a result, there have been accumulations of profit which themselves have generated further income, and that income has not been subject to United Kingdom tax, either at all or at any rate to the same degree as would have been the case if the various trust arrangements offshore had not been made by the First Respondent's father.

24 It is unusual in this Court that we are invited to approve an arrangement, the purpose of which is to pay tax in the United Kingdom. We are not uncommonly faced with applications to set aside transfers of assets into trust on the grounds of mistake because the tax consequences were such that the transferors would not have made the gifts into trust had they been aware of the true tax consequences; and similarly we have frequently been asked to undo appointments made by trustees in exercise of their powers under the relevant trust deed because of the unexpectedly penal tax consequences that had followed. In these various applications, the Court has on a number of occasions indicated that ordinary trust principles would be applied to the different requests made to strike down the gift into trust or the transfer made by the trustee as the case might be, notwithstanding that the result of the Court approving the proposed arrangement might be an avoidance of those tax consequences. This has not always been an entirely comfortable exercise as far as this Court is concerned. It is no part of this Court's function to enable taxpayers, whether in the United Kingdom or elsewhere, to avoid tax which they are due to pay in their country of residence.

25 On the other hand, we take it as axiomatic that just as the Court has no function of ensuring that proper amounts of tax are paid, we also have no function of ensuring that proper

amounts of tax are not paid. Revenue authorities, wherever situate, are entitled to expect the Court to apply the law and not to act as the agents of either the revenue authority or indeed the taxpayer.

26 It is right to recognise that approach in the particular circumstances of this case, where it has to be said that, perhaps slightly unusually, the tax consequences for the First Respondent and HMRC of the arrangement we are asked to endorse, are that it will be up to the First Respondent to decide how much tax he wishes to pay – because the amount of tax will depend in part on his income and in part on the extent to which gift aid relief is claimed. In his engaging way, Advocate Sanders submitted that the payment of funds to the First Respondent, in order that he might pay tax, is consistent with the First Respondent's ethos and understanding of his obligation to do so; but that does rather overlook the fact that the quantum of tax paid will be significantly under his control, a privilege not available to all taxpayers.

27 In the circumstances it seems to us that just as tax may be a relevant feature on the facts in mistake, Hastings-Bass, rectification or variation applications, as it is here, we should approach the present question in strict trust law terms, construing the relevant provisions in the Trust Deed and applying usual principles as to what might be thought to be a proper appointment for the benefit of a beneficiary.

28 We have noted that the Proposed Distribution is capable of being accommodated from within the assets of the Trust Fund without causing any practical or administrative difficulty. We have also noted that apart from the power vested in the Trustees to receive additional assets into the Trust Fund, which are an accretion to the capital of the Trust Fund, the Trustees also have power to accumulate income and hold accumulated income as an accretion to the capital of the Trust Fund for all purposes. For these reasons, we have approached the Proposed Distribution on the basis that it will be an appointment solely out of capital, and that clause 3(4) of the Trust Deed applies.

29 Accordingly, the Representor has an absolute discretion to apply the capital of the Trust Fund in making the Proposed Distribution to the First Respondent if it is for his benefit. It has power to make a distribution to one beneficiary notwithstanding that there are other beneficiaries who will take no benefit, at least on this occasion. Elsewhere in the Trust Deed there is express provision that the Trustees have a power to ignore the interests of the other Beneficiaries in considering whether to exercise a power or discretion for the benefit of one beneficiary.

Benefit

30 So the question is whether or not the Proposed Distribution is for the benefit of the First Respondent.

31 What is clear is that " *benefit*" is not confined to financial benefit. This was certainly the conclusion of Megarry J in *Re Holt's Trust* [1969] 1 Ch 100 at page 121, and indeed as was said by this Court in the *Brian Monroe Limited Trust* 1995 / 154 [Royal Court 28th July 1995]:-

> ***"The Court should, in our judgment, look at the question of benefit to the children and remoter issue in the round and not be confined to the financial aspect of any benefit."***

32 That wide view of benefit had been applied in this island for many years. Indeed, in the matter of the *Marc Bolan Charitable Trust* [1981] JJ 117 the Royal Court found on the facts of that case that it was in the interests of the beneficiaries that a payment should be made to the UK taxation authorities, then the Inland Revenue. On behalf of the adult beneficiaries, Advocate Baker had submitted that it would not be a breach of trust to make the payment in question but it should be seen as an application of part of the Trust Fund for the benefit of the beneficiaries, for reasons particular to that case. That approach was one that the Royal Court endorsed when Crill, DB, said:-

> ***"I have come to the conclusion that it would be in the best interests of the trust, in the sense of that of the beneficiaries, if I made the order asked for, and I accordingly do so."***

33 In *Re Osias Trusts* [1987–88] JLR 389, Tomes DB adopted the principles set out in Re Holt's Trust [supra] and accepted the principle that in deciding whether a variation was for a person's benefit, the Court would consider the matter as a whole, noting that the word "benefit" was not to be narrowly interpreted or restricted to financial benefit.

34 In *Re N* [1999] JLR 86, the Court was considering an application for a variation of a trust, the consequences of which would be to remove considerable financial benefit from the minor children. In doing so, financial advantage might be conferred on others. Hamon DB, having referred to Re Osias, when considering the question of benefit said this:-

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

35 The Court then went on to make the order varying the trust as one which was for the benefit of the minor beneficiaries.

36 In the matter of the *Esteem Settlement and the Number 52 Trust* [2001] JLR 7, Birt DB said:-

> ***"The wide meaning to be given to the word 'benefit' has been adopted in Jersey in the case of Re N (12).*** That case concerned an application to vary the terms of a Trust pursuant to Art. 43 of the Trusts (Jersey) Law 1984, which gives the Court power to approve a variation if it appears to the Court to be for ***the benefit of those beneficiaries whose interests the Court is considering.*** The Court held that the word was to be widely construed. It was not restricted to financial benefit but also included educational and social benefit."

37 In the matter of the representation of the *Y Trust and the Z Trust* [2017] (1) JLR 266, the Court was considering an application for a variation of trusts which would enable issue and remoter issue of the settlor, who were excluded from benefit by virtue of their legitimacy, their age when adopted and/or their birth to or adoption by parents in a same-sex relationship, nonetheless to gain benefit from those trusts. The application had the support of the entire family. At paragraph 47, the Court said this:-

> ***"We take into account the following considerations:***
>
> ***(i) We take into account only the interests of those who are existing or potential beneficiaries.*** We do not take into account the interests of the excluded grandchildren or any other future family members who may be excluded from benefit from the Y Trust and the Z Trust as a result of the provisions which we have described .
>
> ***(ii) The significant wealth in the two trusts in question means that any financial dilution of benefit is likely to be insignificant.*** We do not regard, therefore, the financial considerations of benefit to be material in this case .
>
> ***(iii) We consider that the approach which the Representors and the wider family have taken to the present issue to be exemplary.*** The objective of seeking family harmony is an extremely laudable one – and, following on naturally from the debate above of international instruments, it is noteworthy that many of those instruments place emphasis on the importance of the family. A strong family provides support and cohesion to family members throughout their lives and is an important social benefit to which the Court should have regard. We accept the submission that leaving the present arrangements in place is likely to cause unhappiness and dissension in the family in the future, and in this context we have regard in the definition of 'family' only to the family beneficiaries of the two trusts, but we do not discount at all the possibility that at some future date there may be family beneficiaries who are cousins who fall out

as a result of excluded family members who are not entitled to become beneficiaries .

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

38 On that basis variations to the terms of the trusts were approved.

39 In the matter of *The Wigwam Trust* [2020] JRC 228, MacRae DB set out at paragraphs 30 to 42 of his judgment, a summary of the approach of the Royal Court to questions of benefit for the purposes of Article 47 of the Trusts (Jersey) Law 1984 ("the Law") in relation to applications to the Court to approve variations of a trust deed. In our judgment, the word "*benefit*" carries the same meaning unless the terms of the deed qualify it, in the context of an application under Article 47 or in consideration by a trustee as to whether a particular appointment of income or capital is for the beneficiary's benefit.

40 In the *Wigwam Trust*, it was submitted that the proposed distribution would not be to the direct financial benefit of some of the beneficiaries represented in that case, but was nonetheless to their benefit. This was because:-

(i) Future generations were likely to be able to become involved in the programmes operated by the charities which could only benefit such individuals.

(ii) The cooperation agreement, which had been made by many of the adult beneficiaries of the family and to which many corporate entities were party, dealt with the governance of the relevant foundation and showed a broad and deep family engagement with the purposes of that foundation. It was accordingly submitted that the proposed distribution would not leave the family for all purposes, but would be part of its patrimony and this would be beneficial to the family in the broadest sense of the word.

(iii) Thirdly it was submitted that the work of that foundation was admirable; and anyone connected with it would be proud to be so connected.

41 The Court found that this was a solid legal basis on which to conclude that the proposed distribution was for the benefit of the minor and unborn beneficiaries, and although it was not necessary for other reasons to make such a finding, it would have done so.

42 We adopt the wide definition of benefit which has been adopted previously in this island in

cases of this nature. Against that background, we must now address the question as to whether the Proposed Distribution is for the benefit of the First Respondent.

43 The first point to note in this respect is that a payment to the First Respondent in order that he may make payments to the Foundation cannot amount to a fraud on a power, assuming the Representor would have been prepared to benefit the Foundation directly, because the Foundation is itself a beneficiary. Those arguments therefore do not arise in this case, although, even if the Foundation had not been a beneficiary, it would be a question of judgment as to whether a payment to a beneficiary for transmission to a non-beneficiary was for the beneficiary's benefit – if it was, the fact that a non-beneficiary would be the ultimate recipient of the assets in question would not, so it seems to us, be an impediment to making the payment.

44 This is demonstrated by two English cases. The first is in *Re Clore's Settlement Trusts* [1966] 1 WLR 955. In that case, the trust fund being very large, and the trustees being empowered to advance up to two-thirds of the expectant, presumptive or vested share in the Trust Fund of any person aged twenty-one or over, the question arose as to whether the trustees could, with the approval of the son of the settlor who was over twenty-one, raise one-seventh of his share and pay it to a named charity in the exercise of the power of advancement. The charity was the Charles Clore Foundation, and it was not a beneficiary. Pennycuick J accepted that the trustees had power to do so. Having noted that the improvement of the material situation of a beneficiary is not confined to his direct financial advantage, the judge amplified that proposition by saying that it included the discharge of certain moral or social obligations on the part of the beneficiary, for example towards dependants. The Court there also accepted the third proposition put before it, which it recognised was the crux of the application – it was that the Court has always recognised that a wealthy person has a moral obligation to make appropriate charitable donations. Part of the analysis was that if the beneficiary recognised that moral obligation himself, he would no doubt make payments to charity out of his own resources and once that proposition was accepted, then the matching of those resources out of the Trust Fund would clearly be a course of action which would improve the material situation of the beneficiary. Although this perhaps seems somewhat artificial, it emphasises the proposition, accepted by Pennycuick J, that it is essential to the valid exercise of the power that the beneficiary himself should recognise the moral obligation. As the judge said:-

> ***"It is not open to the trustees to pay away the beneficiary's prospective capital over his head or against his will in discharge of what they consider to be his moral obligations."***

45 Finally the judge noted that there was no advantage to be gained by making the payment to the beneficiary, Mr Alan Clore, on terms that he pays the sum over to the trustees of the foundation, when the trustees could make the capital payment directly.

46 The Clore case is of interest in one further respect. At pages 958/9, there appears the following extract from the judgment:-

> ***"The precise amount which the trustees can in any given case apply for this purpose must depend, I think, on the particular circumstances, and in this respect quantum is a necessary ingredient in the proper exercise of the power.*** It is difficult, for example, to see how the trustees under a power such as that in clause 8 could validly pay over the whole authorised two-thirds to charitable purposes. On the other hand, it is certainly not for the Court to say precisely where the line is to be drawn. In the present case, having regard to all the circumstances, I think the proposed proportion of one-seventh can fairly be regarded as on the right side of the line. It appears from the evidence that Alan Clore recognises that he is under a moral obligation to make payments to charity. He has not yet been subjected to any public or social pressure in this respect, though he believes that it may come about in the future. Once he recognises this obligation the trustees may properly regard it as improving his material situation to discharge the obligation out of the Trust Fund, and as I have said, the proportion they propose to apply for this purpose is not excessive."

47 This passage gave rise to consideration of the same issue by the Chancery Division in *X and Another v A and Others* [2006] 1 WLR 741. In that case, the proposed advance was found not to relieve the beneficiary of an obligation she would otherwise have had to discharge out of her own resources because the amount proposed to be advanced exceeded the amount of her own free resources. In those circumstances, Hart J considered that it was not open to the trustees to make the proposed advance. He considered at paragraph 40 the submission that the only questions to be answered were whether the beneficiary was reasonably entitled to regard herself as being under a moral obligation to make the proposed gift to charity and whether she did in fact recognise the obligation. It was said by counsel that as long as the beneficiary's view was one she could reasonably take, that was sufficient. Hart J rejected those submissions and having regard to the extracts from In Re Clore cited above, he went on:-

> ***"42. That passage emphasised the potentially limiting effect of the requirement (from which none of the authorities have departed) that there be some sense in which the beneficiary's material situation can be said to be improved by the situation….in the present case I find it impossible to see how this requirement can be satisfied. It cannot be said that the proposed advance is relieving the wife of an obligation she would otherwise have to discharge out of her own resources if only because the amount proposed to be advanced exceeds the amount of her own free resources. In any event the Court has no reason to suppose that, in relation to her free assets, she will regard the advance as having discharged her moral obligation…*** .
>
> ***43. I entirely accept that in distinguishing between the objective existence of a moral obligation on the one hand and the beneficiary's own recognition of it on the other there is a danger of the Court being cast adrift in an open sea. How, as Mr Le Poidevin asked rhetorically, can the***

Court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary's own views on the subject? That is certainly not a question to which the Court can give an abstract answer, whether by reference to the Bible or to Bentham, to Cant or the Koran. The answer has to be found in the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth. No such case goes anywhere near recognising the existence of a moral obligation of the extent in question here."

48 The question of whether the trustees should have regard to the views of adult beneficiaries as to what their moral obligation is was considered by this Court *In the Matter of the DDD 1976 Settlement*, the *DDD 1979 Settlement* and the *DDD 2005 Settlement* [2012] (1) JLR Note 8. At paragraphs 22–23 of its judgment, having referred in the preceding paragraphs to *In the Matter of the T Settlement* [2020] JLR 204 and Re Clore, the Court said this:

"22. In the matter of the T Settlement, the Court considered that the views of the adult beneficiaries were also in effect to be imputed to the unborn children. At paragraph 19, the Court said this:

"If 17 or so adults of the same family are unanimous in their moral obligation to Mrs T and do not wish her to be jeopardised or put in fear of jeopardy as a result of her generosity then we agree with Advocate Le Cocq that the ethos is morally right no matter to what generation the ethos applies."

23. As we have said, this seems to imply that the Court is bound by the views of the adult beneficiaries as to what their moral obligation is. If that is the proper construction of the Court's judgment in that case, we do not associate ourselves with that reasoning. In our judgment, an objective test has to be applied by the Court to the question as to whether a moral obligation arises in the circumstances of the decision the Court is asked to reach. The fact that the adult beneficiaries may consider a moral obligation has arisen may well be useful to the Court in its objective assessment as to whether the unborn beneficiaries should be considered to be subject to the same moral obligation – but it nonetheless remains for the objective assessment of the Court."

49 For the avoidance of doubt the Court in these extracts from the judgment in *Re DDD Settlements* was considering whether the views of adult beneficiaries could be imputed to the unborn children and would be binding upon the Court. Given that it was the position of unborn children which was under consideration, it is unsurprising that the subjective test was impracticable. Inevitably, therefore, the focus was on the objective assessment which the Court had to make.

50 In his submissions, Advocate Kistler said that *X v A* should be distinguished. He gave essentially these reasons:-

> (i) It was an authority of such age that we should recognise society has moved on.
>
> (ii) The offshore context is different because settlors frequently place in offshore trusts a substantial proportion of the family assets, whether for asset protection reasons, the defence of inheritance claims, tax protection or privacy. None of this however removed the moral obligation to benefit charity and Jersey law should not put up obstacles to charitable giving. He therefore submitted that benefit should not be limited to a fractional approach as contemplated by *Re Hampden Trust Trusts* [2001] WTLR 195, *Re Clore* [supra] and *X v A*.

51 In his submission, wealthy families could be seen to be under a moral obligation to give to charity and as long as they recognised that themselves, which was the position here, the subjective test is satisfied. The right approach in his submission was not to limit the extent to which the discharge of a moral obligation by considering whether the obligation would otherwise be met by the beneficiary out of his or her own assets, but instead to determine that it was sufficient that the beneficiary recognised the obligation and wanted it discharged through an appointment of income or capital from the trust in question either to him or directly to the charity on his behalf. The submission was made that *X v A* was very much influenced by the particular facts of that case – the settlor was in Holy Orders in the Church of England and both he and his wife were rich by most standards, although they maintained a modest standard of living based upon a pension income received from the church, the settlor having retired. They gave effect to their beliefs principally through the charity and the wife donated the predominant part of her income from the Trust to that charity. Unless the appointment were made to the wife, the Trust Fund would be held on discretionary trusts for the benefit of the children and remoter issue of the marriage and their spouses.

52 In *re Esteem* [supra] at paragraph 60(b) Birt, DB said this:

> ***"Can the fact that the debt arose out of fraud make a payment of benefit to a debtor in circumstances where it would not be of benefit to a non-fraudulent debtor?*** In our view it cannot …….. the Law does not, for example, differentiate between claims in bankruptcy arising out of fraud and those arising out of ordinary trade. To do so would be impossible. Once one started imposing a moral standard, where would the line be drawn? This was shown in the course of the hearing. As mentioned earlier, both GT and the trustee initially submitted that it was the fact that this debt arose out of fraud which made it so wholly exceptional. Yet on probing, it became clear that there was no logical justification for distinguishing fraud from other morally bad conduct. Morality has an infinite number of shades and can on occasions be very subjective. Where would the line be drawn between those cases where the court held that it would be of benefit for the debtor (despite his refusal) to acknowledge his conduct and make recompense by reducing his debt and those were the nature of the debt were did not lead to such a result? In our view, to adopt such an approach

would not be consistent with the case of *Re Clore* ***[supra] where the court made it clear that it was not for a trustee to determine what the beneficiary's moral obligations were.*** The position is of course, different here, in that there is a legal obligation, but it seems to us that the arguments of GT and the trustee would lead to an assessment of benefit depending upon the moral case for making the debtor repay part of his debt. To that extent, Clore is relevant. Mr Journeaux said that, although it was not necessary for this argument, he would not shrink from suggesting that, if appropriate, the court should not follow Clore. However, we declined to do that. It seems to us an important principle that a trustee should not be able to impose his sense of morality upon an adult beneficiary."

53 This part of the Royal Court's judgment was considered in the Court of Appeal in *Re Esteem* [2001] JLR 540 where one of the appellants criticised the reliance by the Royal Court on the statement in Re Clore that:

> ***"41….it is not open to the trustees to pay away the beneficiary's respective capital over his head or against his will in discharge of what they consider to be his moral obligations."***

54 It was submitted in that case that in *Pilkington v Inland Revenue Commissioners* [1964] A.C.612 and in other authorities there had been dicta to the effect that a payment can be made over the head of a beneficiary if the trustee thinks it for the benefit of a beneficiary to do so. Gloucester JA, with whom Rokison JA agreed, said:

> ***"I would accept that, in appropriate circumstances, a trustee may properly conclude that the discharge of a moral obligation (whether or not it also involved the discharge of a legal obligation – for example, the support of an adult child) might be for the benefit of a beneficiary, notwithstanding the objections of that beneficiary.*** To this extent, I would not, perhaps, go so far as the Royal Court in its reliance upon the statement in *Re Clore*.
>
> ***43. But, in my judgment, both in*** *Re Clore* ***and the statement of Megarry VC in*** *Cowan v Scargill* [1985 CH270] ***(emphasising the need for beneficiary recognition of the perceived moral obligation where otherwise there would be no material improvement in the beneficiary's situation), clearly justify the Royal Court's conclusion that, in the circumstances of this case, where Sheik Fahad clearly does not recognise any moral benefit to himself in the reduction of his debt, and where otherwise there would be no material improvement in his situation as a result of payment to GT, there can be no real benefit, or no sufficient benefit, to justify the making of the proposed distribution. It is at this juncture, that, in my view, the second and third issues overlap. Even if it could be said that there was a notional or theoretical benefit to Sheik Fahad in being compelled to start out on the long journey towards moral regeneration, the fact that he has no perception of his obligations, and the absence of any other improvement***

in his situation as a result of the payment, clearly entitle the Royal Court to decide, in the exercise of the trustees' discretion, that no distribution should be made."

55 We deliberately leave over, because it does not arise on the facts of this case, the question as to whether a trustee can impose his view of the moral obligations of the beneficiary in determining whether a particular payment is for the benefit of that beneficiary. However, in this case the position is different. We are required to consider circumstances where the beneficiary concerned has reached a view as to where the moral imperatives lie in relation to benefits which he might reasonably expect from the Trust. While the Court may have a natural concern as to whether it should authorise trustees to proceed on the basis of their determination of how the moral obligations of the beneficiary ought to be met, the counterpart position which relies upon the beneficiary's own assessment of his moral obligations may have a different outcome. This was indeed one question with which Hart J grappled in *X v A*.

56 In our judgment *X v A* is not an authority which the Courts of Jersey should follow in this respect. Our reasons for reaching this view are not dissimilar to those advanced by Advocate Kistler. We agree that *X v A* was much influenced by the particular facts of that case. We can also have regard to the nature of what we may call the trust industry in Jersey. Over the last 40 years or so, it has been increasingly the case that in private trusts – not the trusts upon which commercial arrangements are sometimes constructed – the trust document is almost invariably a fully discretionary trust with a wide class of beneficiaries, powers to exclude, powers to add and with a lengthy or indefinite trust period. Sometimes these discretionary powers are qualified by protector powers. Flexibility has been the key in all such arrangements. The trust has become the modern vehicle by which very wealthy people have managed to avoid what they perceive to be the undesirable consequences of a tax regime, restrictions on succession by their own personal law, or the protection of their assets in the case of business disaster or the threat of kidnapping. This is a development which it is neither necessary to approve or disapprove: it is a fact and it would be artificial to ignore it. A similar approach can be taken as to the identification of the main beneficiaries of a discretionary trust. In this very case, for example, Advocate Sanders described the First Respondent as the principal beneficiary; but nowhere in the trust documentation is such a description to be found – all the individuals forming the class of beneficiaries are theoretically equal.

57 At the heart of the debate is the nature of a trust which, as a result of the trustees' legal ownership of an asset, is focussed on how that asset should be managed in the interests of the beneficial owners. It is therefore inevitable and right that trustees should identify who those beneficial owners should realistically be and look at the broader interests of those beneficiaries which must be viewed both from an objective and a subjective standard.

58 In considering the question of benefit, both the Court and the trustee must be able to identify objectively the benefit which it is said would arise from the exercise of a power legitimately conferred upon the trustee.

59 Secondly, there is a subjective element, namely the wishes of the beneficiary in question, which is bound to be a relevant consideration, to be weighed with and against all other relevant considerations. Absent compelling reasons, one would not expect an appointment to be made for the benefit of the beneficiary who did not want that appointment to be made. We conceive that such an appointment is not impossible in principle and, leaving aside this question of moral obligations, there may well be circumstances where it would be legitimate.

60 It seems to us to follow from this analysis that to consider the question of benefit against a test of whether the moral obligation was one that could have been met out of the personal assets of the beneficiary is to ask the wrong question: it asks the wrong question because it has its genesis in cases where it has been thought necessary to find some financial benefit for justifying an appointment which on a standalone basis creates no such benefit. It is unclear to us as to why this should be necessary, which perhaps we can illustrate from a simple example. Let us suppose a trust fund is held on discretionary trusts for the benefit of A during his lifetime and thereafter for the benefit of B absolutely. A, in adulthood, has made a good enough living that he does not require all the income from the trust. However, A is obsessively concerned about the welfare of mules in Somalia. It has reached the point where, if he does not feel he has done everything he can to alleviate their hardship, he is likely to suffer mental health difficulties. In our judgment, a trustee could perfectly legitimately reach the conclusion that a payment to a charity for the protection of mules in Somalia was a payment for A's benefit. Given A's subjective views, objectively, such a payment can be justified.

61 In summary, the decision of a trustee that a particular appointment is for the benefit of a beneficiary in the case of a discretionary trust must of course be one to which the trustee could reasonably arrive having regard to the terms of the deed. In making that journey, the trustee will have regard to the law which is to the effect that “benefit” is to be widely construed. Thus, unless the deed otherwise provides, “benefit” as a matter of principle:

(i) goes wider than financial benefit and includes donations to charity (*Re Wigwam*), the payment of debts to HM Revenue (*Re Bolan*) and avoiding the detriment of parents of beneficiaries facing large tax claims arising from the transfers into the trust which they have made (*Re N*).

(ii) may include the application of trust monies to provide social or educational benefits for the beneficiary in question.

(iii) may include the application of trust monies in discharge of a moral obligation which the beneficiary, in receipt of the appointment which the trustees have resolved to make in his favour, accepts is one that should be discharged from that appointment.

The Proposed Distribution

62 In approaching this, we remind ourselves that it is necessary to address these questions:-

(i) is the Proposed Distribution for the benefit of the proposed appointee?

(ii) is the quantum of the Proposed Distribution such that it would be an unreasonable exercise of the power, even given the power to ignore interests and the full and unfettered discretion afforded to the Trustees, such that it would be inappropriate having regard to the obligations of the Trustees towards the other beneficiaries?

63 In considering these questions, we should first refer to the jurisdiction which the Court is being asked to exercise. This is well established, and a line of cases in Jersey has followed the summary of Birt DB in the matter of the *S Settlement* 2001/154.

64 As was the position in that case, the current application is not one where the trustee is surrendering its discretion to the Court. The application falls into the second category mentioned in *Public Trustee v Cooper*, an unreported decision of Hart J on 20 December 1999, where the trustees wished to obtain the blessing of the Court for the action on which they have resolved and which is within their powers. As Birt DB said in *Re S*, there are three issues which the Court needs to consider when fulfilling its role under this second category:

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

(ii) Are we satisfied that the opinion which the Trustees have formed is one which a reasonable trustee, properly instructed, could have formed?

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

65 There is no suggestion from any quarter that the Trustees have not formed their view in good faith and indeed, the extensive consultations which have been carried out with the Family in order to reach the statement of the Family's ethos demonstrates that the whole approach has been one taken in good faith. Furthermore there is no question that the decision at which the Trustees have provisionally arrived is not vitiated by any actual or potential conflict of interest. Accordingly, we need to consider the two questions set out at paragraph 62 above against the test of whether the opinion which the Trustees have formed is one at which a reasonable trustee properly instructed could have arrived.

66 Given the philanthropic donations which have been made from the trust in the years to date, which far exceed in quantum any distributions which have been made to individual beneficiaries, there is in our judgment no doubt that the provisional decision to make the

proposed distribution is one at which the Trustees could properly have arrived. The Foundation is an acknowledged charity and is one with which the First and Second Respondents are closely connected as trustees. The payment of monies to the First Respondent in order that he may settle those monies on the Foundation enables the First and Second Respondents to continue their philanthropic work through the Foundation which is itself a beneficiary of the Trust. The fact that the arrangements which the First Respondent intends to make in claiming tax relief on the payment made by him to the Foundation does not detract from the purpose of making the payment which is nonetheless to benefit the Foundation. Equally, however, the decision not to claim tax relief in respect of some of the money to be paid to the Foundation also fits the social justice aspirations of the Family. All these features are matters which the Trustees could reasonably consider, as is clear that they have in the present case, support this conclusion that this Proposed Distribution would be for the benefit of the First Respondent.

67 We turn next to the second question which is whether the quantum of the Proposed Distribution is such that it would be an unreasonable exercise of the power. In considering this question, we take into account that although we have not approved any further distributions to the Third, Fourth and Fifth Respondents upon the basis they will make like payments to charities of their choice, we have to consider the present application in the knowledge of this information which has been given to us. The overall effect is that a considerable part of the Trust Fund will have been distributed if that second set of distributions is made.

68 In considering this question we recognise that although the Trust Deed contains a power to ignore the interests of other beneficiaries and make a payment to one beneficiary alone, which is a power which lies in the full and unfettered discretion given to the Trustees, reasonable trustees would undoubtedly need to have regard to the obligations which they owed to the other beneficiaries before exercising that power to ignore interests. What falls to be considered in this respect? Clearly, one matter which is obviously relevant is the extent of the Trust Fund which remains, and the number of potential claimants against it. In that context, the Trust Fund, although much depleted, will still have approximately £50m available for the benefit of the Beneficiaries. In circumstances where the evidence available to us suggests that the First and Second Respondents will not in the anticipated course of things have much if any call on the Trust Fund for their own support and maintenance, that is an obviously relevant feature. Furthermore, the evidence before us suggests that the Trust fund is likely to receive further distributions from the Appointing Trust of up to £1.5m per annum, in addition to which there is envisaged a transfer of shares in the underlying family business into the names, inter alia, of the Third, Fourth and Fifth Respondents in the not too distant future.

69 In those circumstances, given the acceptance by all adult Beneficiaries of the Family values and ethos of philanthropic giving, and their support for the Proposed Distribution, it seems to us to be not unreasonable that the Trustees should reach the conclusion that they can properly rely on the power to ignore interests notwithstanding the requirement that they have regard to their obligations towards the other Beneficiaries.

70 For all these reasons, we are satisfied that the decision which the Trustees have provisionally reached to make the Proposed Distribution is one which falls properly within their power and it is accordingly one which we are willing to bless as a momentous decision. In doing so, we order that the costs of all parties be paid out of the fund on the Alhamrani basis.