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Declan Hearne and Mark Crowther v Advocate Nuno Santos-Costa representing the ascertained beneficiaries and Advocate Simon Franckel representing the unascertained beneficiaries

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Marett-Crosby, Milner
Judgment Date:	17 October 2013
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Text

[2013] JRC 201

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Marett-Crosby **and** Milner.

Between

IN THE MATTER OF A TRUST KNOWN AS THE GREVILLE BATHE FUND

AND IN THE MATTER OF ARTICLES 26, 45, 47 AND 51 OF THE TRUSTS (JERSEY)

LAW 1984 (AS AMENDED).

Declan Hearne and Mark Crowther
Representors
and

Advocate Nuno Santos-Costa representing the ascertained beneficiaries
First Respondent

and

Advocate Simon Franckel representing the unascertained beneficiaries
Second Respondent

Advocate G. S. Robinson **for the Representors.**

Advocate D. P. Le Maistre **for the First Respondent.**

Advocate S. A. Franckel **appeared in person.**

Authorities

Trusts (Jersey) Law 1984 (as amended).

Royal Court Rules 2004.

Meaker -v- Picot [\[1972\] JJ 2161](#) .

Statute of Charitable Uses 1601.

Income Tax Special Purposes Commissioners -v- Pemsel [1981] AC 531 HL .

Oppenheim -v- Tobacco Securities Trust [\[1951\] AC 297](#) .

Baker -v- National Trust Co [\[1955\] AC 627](#) .

Alhamrani -v- Alhamrani [\[2005\] JLR 236](#) .

Trustee Act 1925.

Alexander -v- Alexander and others [2011] EWHC 2721 .

Royal Melbourne Hospital -v- Equity Trustees [\[2007\] VSCA 162](#) .

Australian Trustee Act.

Lewin on Trusts 18th edition.

Sutton and others -v- English and others [2009] EWCA 327 Ch .

Landau -v- Anburn Trustees Limited and others [\[2007\] JLR 250](#) .

In re Duke of Norfolk Settlement Trusts [\[1982\] Ch 61](#) .

Trust — clarification sought regarding the objects and purposes of the fund and administrative powers of the trustees

THE COMMISSIONER:

- 1 The representors are the current trustees of the Greville Bathe Fund (“the Fund”) and seek clarification from the Court as to the objects and purposes of the Fund and to bring the administrative powers of the trustees into line with modern trusts.

Origins of the Fund

- 2 At a meeting of the directors of Ann Street Brewery Company Limited and now known as Citann Limited (“the Company”) on 20th June, 1919, they recorded their decision to establish an employees' pension fund in the following terms:—

“It has been decided to set aside out of the current year's profit a sum of one thousand pounds which shall be invested as a special fund in the names of the directors as trustees for the purpose of creating an employees' pension fund under the absolute control of the said trustees.”

- 3 On 4th February, 1948, the trustees of the Employees' Pension Fund (being the directors from time to time of the Company) recorded a donation of £500 from Greville Inverness Bathe (“the settlor”) who was the son of the Company's founder, the late Inverness John Bathe. The minute of the trustees of the Employees' Pension Fund of 4th February, 1948, states as follows:—

“A letter from Mr Greville Bathe was read, in which he expressed a wish to donate the sum of £500 (five hundred pounds) to the Employees' Pension Fund, the disposal of such gift to be left to the discretion of the trustees. It was resolved that such sum be used as a specific reserve to meet contingent grants allowed to pensioners who are in receipt of pensions from the Fund.”

- 4 Subsequently, at a meeting held on 4th May, 1949, the trustees of the Employees' Pension Fund resolved that the minute of 4th February, 1948, be rescinded and resolved instead:—

“that the amount of £500 donated by Mr Greville Bathe be placed to a separate Fund, to be known as the Greville Bathe Fund [and] ... that such Fund be used for the general welfare of pensioners and employees, and that such distribution at all times to be at the discretion of the trustees of the Ann Street Brewery Employees Pension Fund.”

- 5 As a consequence the Fund was established and the trustees of the Fund from time to time comprised the directors of the Company (less any of the directors who expressly renounced such trusteeship).
- 6 The settlor made a further contribution of £500 to the Fund on or around 8th September, 1954. By letter dated 24th March, 1956, Mr E F Le Gresley, as attorney of the settlor, wrote to the secretary of the Company particularising the settlor's intention in making the two gifts in the following terms:—

“As Attorney of Mr Greville Bathe, who has on two occasions made donations to the Company to create and maintain a special fund, I have to inform you that no specific directions were given by me on behalf of Mr Bathe in regard to the disposal or distribution thereof, it being intended and understood that the monies would be administered at the absolute and unfettered discretion on the part of the Board of the Company for the relief in cases of hardship or other causes affecting the Company's pensioners, employees and any other persons in a subordinate position to the Company, victims of hardship in the ordinary course of business or employment with the Company. As Attorney, as aforesaid, I accordingly advise the Company in order to correct or rectify any misinterpretation.”

- 7 The settlor made a further donation of £500 to the Greville Bathe Fund on or around March 1960. He died in 1964. By his last will and testament of personal estate executed on 9th October, 1961, in the United States of America the settlor, in addition to making other testamentary dispositions, constituted a trust (the “Will Trust”) the only beneficiaries of which were the trustees from time to time of the Fund (in that capacity). In so far as is material for the present purposes it stated as follows:—

“I give and bequeath to Samuel Alec Godrich, Horace Sherman Le Marquand, Philip Percy McElwee and Sidney John Gasston for themselves and the survivor or survivors, in Trust one-sixth share of my said holdings of and in the said share capital of the said Company [i.e. Ann Street Brewery Company Limited] to hold the same and further upon Trust to place the dividends and income derived from the said share capital to a Benevolent Fund called “The Greville Bathe Fund” which has been established by me with the Trustees of the said fund, for the relief in cases of hardship, sickness and other causes affecting the Ann Street Brewery Company's pensioners and employees, and any other persons in a subordinate position to the Company, victims of hardship in the ordinary course of employment and business with the Company.” [emphasis added]

- 8 On 26th November, 2003, the then trustees of the Fund and therefore the only beneficiaries of the Will Trust in existence and ascertained and not being interdicts or minors, exercised

their power under Article 39(3) of the Trusts (Jersey) Law 1984 (as amended) (“the Trusts Law”) to terminate the Will Trust and have the assets of the Will Trust transferred to them to hold on the terms of the Fund. That transfer did not in fact take place until 24th October, 2007.

- 9 Up until 2007, the Company owned numerous licensed premises in Jersey most of which were held through subsidiaries, which bore the name of the property concerned, and most of which were tenanted. It was therefore the holding company of a substantial group. Following a corporate reorganisation in 2007, the Company ceased to be the holding company and to have any subsidiaries. It is now numbered amongst numerous sister companies within the Liberation Group of companies. It continues to be a major employer, but as a consequence of the re-structuring, there are a number of employees within the Liberation Group who were formerly beneficiaries of the Fund, by virtue of being employed by subsidiary companies, who are no longer beneficiaries of the Fund. Persons who have been employed since then within other companies within the Group who would have been beneficiaries under the old structure, because those companies would have been subsidiaries of the Company, and are no longer eligible to benefit.
- 10 As a further consequence of this corporate activity, the Fund's holding of shares in the Company was converted to cash; some £3.5M as at December 2011. The representors took legal advice from Appleby with a view to both modernising the Fund and addressing the inadvertent consequences of this corporate activity, which left some employees outwith the beneficial class. Appleby in turn sought the assistance of English Counsel, namely David Brownbill QC (“English Counsel”).
- 11 In its original representation of 15th December, 2011, the representors sought to vary the Fund by extending the beneficial class to all of the employees within the Liberation Group. That variation would have required the consent of all of the ascertained beneficiaries of the Fund, with the Court being asked to give its approval on behalf of the unascertained beneficiaries, pursuant to Article 47(1) of the Trusts Law. In his opinion of 29th October, 2012, English Counsel advised that the Court would need to be satisfied that a complete list can and had been made of all of the beneficiaries and that they had all consented, which he could see would be a very substantial task and could well prove practically impossible.
- 12 Many of the ascertained beneficiaries are only employed by the Company on a part-time or temporary seasonal basis and do not have English as their first language. Without going into the history of the steps taken by the representors to attempt to obtain their consent, it was eventually concluded in the latter part of 2012 that it was not going to be practically feasible to proceed with the variation and this accounts for the delay between the date upon which the original representation was brought before the Court and the final hearing of the representors' application on 13th May, 2013, when the Court was asked to clarify the objects and purposes of the trust and to bring the administrative powers of the trust into line with modern trusts.

- 13 Because of the numbers of ascertained beneficiaries and the fluid nature of that class, the Court appointed Mr Santos-Costa to represent all of them pursuant to Rule 4/4(1) of the Royal Court Rules 2004, on the basis that although the beneficiaries could be ascertained at any one time, it was expedient, having regard to all of the circumstances, to have them represented by one person. The Court also appointed Mr Franckel to represent the unascertained beneficiaries.
- 14 There were no issues at the hearing as to what the representors were sensibly trying to achieve and the Court was very much assisted by the submissions of Jersey Counsel and by the advice of English Counsel upon which it has drawn extensively for the purposes of this judgment. This judgment has been delayed because the Court required further assistance and advice, mainly in connection with the definition of the beneficial class.

History of administration

- 15 In his affidavit of 18th December, 2011, Mr Declan Hearne sets out the history of the Fund's administration which shows that historically there have been five categories of beneficiaries who have benefited from the Fund:–
- (i) Employees and pensioners of the Company on an *ad hoc* basis in response to the trustees becoming aware of specific needs of such individuals, such grants being principally to meet costs of medical treatment (the first such *ad hoc* grant appears to have been made on 4th May, 1949).
 - (ii) Retired employees of the Company (or, if they have died, their spouses) who had retired prior to 1st July, 1972, without a pension. A formal scheme was only introduced in 1972. There are only two members in this category and they are aged 87 and 92 respectively.
 - (iii) Persons receiving grants under paragraph (ii) above and (iv) below and all other pensioners of the Company at Christmas in respect of an amount equal to that paid by the Company to its then employees by way of Christmas bonus.
 - (iv) Retired employees of the Company (or, if they had died, their spouses) who received a pension on their retirement but where the amount of such pension did not increase post-retirement. Such grants were and are intended to recognise inflation and are reviewed annually.
 - (v) Certain employees of the Company and of certain of its subsidiaries by way of contributions and premiums payable to the Westfield Contributory Health Scheme by which employees are able to make claims in respect of a range of basic medical and similar needs.

- 16 In his opinion, English Counsel makes the observation that the automatic payment of Christmas bonuses would not fall within any of the heads of relief under the Fund (which we consider below) but could be justified if they did so.
- 17 There were a number of points for consideration in relation to the objects and purposes of the Fund which we take in turn.

Exclusively charitable

- 18 It was the advice of English Counsel, with which Jersey Counsel concurred, that the Fund is not exclusively charitable. Following *Meaker -v- Picot* [1972] JJ 2161, the Jersey Courts have looked to English law as to the definition of charity and the general essentials of charitable gifts. There are three areas of relief set out in the Will Trust, namely hardship, sickness and “*other causes affecting*” the objects. “Hardship” is in this context a word connoting poverty or want and it falls within the object of relief of “**aged, impotent and poor people**” in the preamble to the *Statute of Charitable Uses 1601* and the first of the categories set out in *Income Tax Special Purposes Commissioners -v- Pemsel* [1981] AC 531 HL at page 583 (see *Meaker* at page 2175).
- 19 The objects themselves comprise the Company's pensioners and employees, and any other persons in a subordinate position to the company (the meaning of which we consider below), victims of hardship in the ordinary course of employment and business with the Company.
- 20 The class of objects is therefore defined by reference to their relationship with the Company. In order to be a valid charitable trust, the trust's purposes must be exclusively charitable and for the public benefit (see *Meaker* at page 2169 and 2176–7). An otherwise charitable purpose will not satisfy the “**public**” benefit requirement and therefore will not be a valid charitable trust if it does not benefit the community or an appreciably important class of the community. Employment by a common employer does not, as a general rule, constitute the objects of the purpose an appreciably important class of the community (*Oppenheim -v- Tobacco Securities Trust* [1951] AC 297).
- 21 A trust solely for the relief of poverty, even if restricted to employees or ex-employees of the Company, will constitute a valid charitable trust that might otherwise fail to satisfy the “*section of the community*” aspect of the “*public benefit*” requirement. However, that is because trusts for the relief of poverty are “**anomalous**” in this regard (see *Oppenheim* at page 305–308). So far as the other heads of charity are concerned, both aspects of the public benefit requirement must be met.
- 22 An employees' trust whose objects can include any charitable purpose other than the relief of poverty will not be exclusively charitable (*Baker -v- National Trust Co* [1955] AC 627 at page 638). Thus, a trust for the relief of sickness plainly may be charitable (if it benefits the

community or an appreciably important section of the community) but will not be charitable if restricted to a class defined by reference to a relationship with a “**single propositus or several propositi**” using the language of Lord Simonds in *Oppenheim*.

- 23 It follows therefore that the inclusion in the trust of the relief of “sickness” would prevent this gift from being exclusively charitable. That argument is reinforced by the fact that the clause goes on to refer to “*relief ... of other causes affecting*” the class. In context, and also in the light of its inclusion in what is plainly intended to be a trust for the welfare of employees, it is clear that these words are referring to other causes of personal distress or difficulty. It is not unlimited and should be read *ejusdem generis* with the other two elements of the clause, relief of poverty and relief of sickness; hence the reference to personal difficulties. Nonetheless these “other causes” will not be restricted to the relief of poverty, so that the clause as a whole will still have the consequence referred to above.
- 24 As English counsel points out an argument could be made that the final part of the clause—“victims of hardship in the ordinary course of employment and business with the Company”—qualifies the rest of the description of the beneficiaries. The argument would run that the relief of poverty was the overarching purpose of the gift and that references to hardship and sickness are simply subsidiary to that overarching purpose. However he concludes that these words are merely descriptive and are not intended to qualify or cut down the class. It would have made little sense for the settlor to have identified clear objects of relief only to cut this down by a subsequent reference to “hardship”—the word “victims” clearly supports treating these as words of emphasis.
- 25 English Counsel also considered whether these words — “victims of hardship in the ordinary course of employment and business with the Company” — operates to place a temporal or causal restriction on the ambit of the beneficial class but this again would make little sense as it would substantially limit the scope of relief for pensioners and he could see no reason for this.
- 26 The principal difference between the letter written by Mr Le Gresley and the terms of the Will Trust is that the latter includes relief of “sickness”. English Counsel considered whether the terms of the letter were more likely to be exclusively charitable but concluded that the expression “*relief in cases of hardship and other causes affecting*” in the letter would encompass assistance in cases of sickness and, indeed, would seem precisely the kind of personal difficulty that the expression “other causes” was intended to encompass.
- 27 We accept the advice of English Counsel that for the reasons set out more fully in his opinion and as summarised above, the Fund is not exclusively charitable.

Persons in a subordinate position to the Company

- 28 The settlor's intention by the use of these words has to be construed against the

background circumstances or matrix of facts (see *Alhamrani -v- Alhamrani* [2005] JLR 236). At the time the objects were established (both originally and in the Will Trust) the evidence shows that a substantial number of persons who were working for the Company were in the position of agents and other self-employed persons, such as publicans who were running the various pubs. The evidence also shows that the business of the Company was already organised into a number of wholly owned subsidiaries with separate companies owning some of the pubs in the Group. This would have been known to the settlor.

- 29 The settlor would have been aware that a significant number of persons who were working (in a loose sense) for the Company were not strictly employees of the Company. This included persons actually employed by subsidiaries companies and the tenants of the various pubs themselves held through separate subsidiaries. The tenants were working more or less full-time for the Company and, as with employees of the individual subsidiary companies, were dependent on it. This has to be contrasted with persons, such as professionals and others, (e.g. a builder or plumber) providing *ad hoc* services to the Company and who are neither dependent on the Company nor solely dedicated to it.
- 30 We agree with English Counsel that in using the expression “*persons in a subordinate position*” the settlor was seeking to refer to persons in an equivalent position to employees of the Company, “*employee-like*” as we might say today; in this context employees of the subsidiaries and the tenants of the pubs.

Dependents

- 31 The reference to pensioners, employees and other persons in a subordinate position should not be seen as limiting the scope of relief to those persons. Instead, these references should be seen as defining the occasion for relief (i.e. hardship, etc. affecting pensioner, employees and other persons in a subordinate position) with the object of the Fund, by necessary implication, being to provide relief to persons affected by such hardship. This would inevitably include pensioners, employees and other persons in a subordinate position suffering the hardship but, read in context, would also include dependents of these persons. It would thus include widows or widowers of deceased pensioners and employees and also minor and disabled children who were dependent upon the deceased. The “*hardship*” must still affect the pensioners, employees and other persons in the subordinate position and have some relevant connection to their employment etc. with the Company. This might be temporal (i.e. something occurring during the course of the employment or whilst a pensioner) or directly causative (some illness or disability deriving from the employment, such as an industrial accident). Thus, relief could be made available to the widow of a pensioner, provided the trustees are satisfied that the widow's needs derive from hardship etc. affecting the pensioner.

Former employees

32 It cannot have been the intention of the settlor that a person would be assisted by the Fund only during a period during which he or she was either an employee or a pensioner. If the hardship or illness has arisen during the employment or as a result of the employment that should be sufficient to enable the trustees to exercise their discretion in favour of such a person. The length of the employment would be relevant to the exercise of the trustees' discretion in particular as to the quantum of any benefit to be provided. We would not suggest a mechanical application of such a factor; rather it is one of the factors which the trustees may have to consider, taking into account all other relevant factors, such as the nature of the hardship or illness and its cause.

Definition of objects and purposes

33 Working from a draft provided by Appleby and, following discussion, settled by English Counsel the Court determines that on the true construction of the terms of the Fund, the beneficiaries of the Fund comprise the following:—

“(1) The present and former employees and pensioners from time to time of the Company, together with the present and former tenants of any public houses owned by the Company;

(2) The present and former employees and pensioners from time to time of any companies, wherever incorporated, which are subsidiaries of the Company, together with the present and former tenants of any public houses owned by the said subsidiary companies.

(3) The dependants of any such employees, pensioners or tenants who are deceased.

(4) In paragraphs (1)–(3) above, “pensioners” means any person who, by virtue or in consequence of his employment with the Company or any subsidiary of the Company, is a member of a pension scheme or is otherwise entitled to a pension (whether a Company pension scheme and any other pension scheme or arrangement, by whomever provided, and whether or not contributed to by the Company or any subsidiary of the Company).”

34 The Court determines that on the true construction of the terms of the Fund the purposes can be defined as follows:—

“The trustees of the Fund in the execution of the trust of the Fund may pay or apply the capital and income of the Fund to or for the benefit of any beneficiaries of the Fund for the purpose of relieving the consequences of hardship, sickness and other causes of personal distress or difficulty affecting a present or former employee, pensioner or tenant which has arisen:

(a) (in the case of a beneficiary who is a present or former employee, pensioner or tenant) out of, in connection with or during their

employment or tenancy with the Company, or subsidiary thereof, or whilst they were a pensioner; and

(b) (in the case of a beneficiary who is a dependant) out of, in connection with or during the employment or tenancy with the Company or subsidiary thereof, of the person upon whom the dependant's claim is based or whilst that person was a pensioner.

And, without prejudice to the generality of the foregoing, relief may be provided by way of the following:—

1. To supplement the income of any beneficiary who has retired from the Company or one of its subsidiaries and who is of pensionable age, but who does not receive a pension from the Company or its subsidiaries;

2. To supplement the income of any beneficiary who has retired from the Company or one of its subsidiaries and who received a pension from the Company or one of its subsidiaries which does not rise in line with inflation;

3. To pay a Christmas bonus to any retired member of staff of the Company or one of its subsidiaries who satisfies such means test as the Trustees may deem appropriate

4. To pay the premiums attributable to any beneficiary who is a member of the Westfield Contributory Health Scheme or similar scheme.”

Consolidated Trust Instrument

35 The trustees of the Fund are handicapped in the exercise of their duties by the complete absence of a trust instrument or deed to which to refer. Whilst they have a number of powers vested in them pursuant to the terms of the Trusts Law, they sensibly propose to bring a preamble as to the history of the Fund, its objects and purposes as determined by the Court, those administrative powers which they have under the Trusts Law and those additional powers which they seek (and to which we refer below) together into a single consolidated document which they can be directed to treat as the trust instrument.

36 That consolidated trust instrument has been drafted by Appleby and settled by English Counsel following certain observations of the Court and we will not set it out in full in this judgment. It will, of course, be signed by one of the representors and lodged with the Court when this judgment is handed down.

37 It is helpfully divided into three parts: part A, containing the history of the Fund and its objects and purposes as determined by the Court; part B containing the trustees'

administrative powers and part C containing provisions relating to the trustees and the proposed protector.

- 38 With regard to the provisions which reflect the powers already vested in the trustees expressly or impliedly under the Trusts Law, we have no difficulty in confirming their application to the provisions of the Fund and this pursuant to Article 51(2)(a)(i) and (ii) of the Trusts Law and our inherent jurisdiction.
- 39 Further administrative powers are sought by the representors under Article 47(3) of the Trusts Law. That Article is in the following terms:–

“(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law the court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the court thinks fit and may direct in what manner and from what property any money authorised to be expended and the costs of any transaction are to be paid or borne.”

- 40 There is no guidance to be derived on this Article from Jersey case law, but it is similar to section 57(1) of the Trustee Act 1925. In *Alexander -v- Alexander and others* [2011] EWHC 2721 it was held that there are three matters to be considered in an application under section 57(1). The first is whether the court has jurisdiction to act under that sub-section. The second is whether it is expedient to confer the power which is sought. The third is whether the court should, in the exercise of its discretion, confer that power.
- 41 Reference was made in that case to what is described as the helpful authority of *Royal Melbourne Hospital -v- Equity Trustees* [2007] VSCA 162 where the Supreme Court of Victoria described section 63(1) of the Australian Trustee Act (which is in similar terms) as being written in very wide and beneficial terms “***that must be liberally construed***”. Quoting from paragraph 150 of the judgment:–

“The words “management or administration” in s 63(1) are, I think, of wide import and pick up everything that a trustee may need to do in practical or legal terms in respect of trust property. Thus, as to the English provision, it has been held the words refer to “the managerial supervision and control of trust property on behalf of beneficiaries.” As to the similar New South Wales provision, it has been held the words refer to “both the manner in which trust property is managed, administered, handled, directed or controlled and the actual carrying out of those functions.” As to the Victorian provision, in general terms, “management” has been taken to include commercial and practical

matters and “administration” all the legal powers and duties that a trustee may need. The words management and administration largely overlap, but the linking word is “or”. It was inserted to ensure that an unduly narrow interpretation was not adopted.”

- 42 At paragraph 154 of that judgment, the court emphasised the width of the term “**expedient**”, describing it as anything that would “**benefit**” the trust as a whole. Clearly, these powers cannot be used to alter the beneficial trusts (see Lewin on Trusts 18th edition, paragraph 45–15).
- 43 In *Sutton and others -v- English and others* [2009] EWCA 327 Ch, the court was concerned with a trust established in 1940, which had few useful administrative powers. The trustees wished to have what modern trustees were generally equipped with, based on a standard precedent used by Charles Russell LLP, the solicitors for the trustees in that litigation. With one exception, the court was prepared to exercise its powers under section 57(1) for that purpose, approving the modern standard precedent.
- 44 The representors sought the following administrative powers under Article 47(3), which we will not set out in full, namely the power to borrow money, the power to guarantee, the power to appoint a protector, the extension to the statutory powers relating to the appointment and retirement of trustees and outgoing trustees, the power to release and restrict powers, the power to vary specified administrative provisions and powers in relation to disclosure.
- 45 These are all administrative provisions which are found in modern trust deeds and we were therefore satisfied that the Court had the jurisdiction to act. Furthermore, we were satisfied that it would be of real benefit to the administration of the Fund to have these additional powers and that we should exercise our discretion to confer those powers.
- 46 We wish to make the following observations, however, in respect of the power to appoint a protector. Initially, the representors proposed that they should resign as trustees in favour of a professional trustee company who would be independent of the Company, but with a facility of consultation through a person or persons having detailed knowledge of the Company's business and personnel, i.e. a protector.
- 47 It seemed to the Court that it was the settlor's intention that directors of the Company should act as trustees without charging for their services; indeed there was no power for them to charge. Thus the settlor envisaged that the Fund would, in effect, be administered by the Company without any cost to the Fund and that is how it has been administered to the present day. The directors of the Company are and would always be likely to be experienced businessmen more than capable of obtaining the investment, legal or other advice required for the Fund (and for which, of course, the Fund must pay) and they have an intimate on-going knowledge of the Company's current and former employees and

pensioners; they seem ideally placed to act as trustees. The appointment of a professional trust company in place of the directors would inevitably give rise to substantial fees that would eat into the income of the trust fund, thus materially reducing the funds available for the beneficiaries and potentially shortening the life of the Fund.

- 48 The Court felt that it would be a matter of some regret if the settlor's wishes in this respect were not followed for so long as reasonably possible. The representors have reflected on this and indicated that, provided they are able to have a consolidated trust instrument to work with, then they will continue in office for the foreseeable future. It is acknowledged, however, that there could be circumstances where there may be a good reason for the appointment of a professional trust company, in which case the consolidated trust instrument contains provisions enabling the Company to appoint a protector in that eventuality. It will not be a remunerated office and because it will be occupied by volunteers who have a knowledge of the Company's employees and pensioners willing to assume the role, it is thought appropriate to confer the widest protection upon the office holder(s) permissible in law.
- 49 It is the hope of the Court, and we feel would have been that of the settlor, that in so far as it is reasonably practical to do so, the directors of the Company from time to time (or some of them) should continue to act as trustees of the Fund.
- 50 In addition to the administrative provisions referred to above, the representors also asked the Court for provisions:—

(i) Relating to the trustees' liability and this under the Court's inherent power.

(ii) Relating to the remuneration of the trustees and this pursuant to the Court's inherent power and Article 26(1)(c) of the Trusts Law, which provides that unless authorised by any order of the Court, the trustee shall not be entitled to remuneration for his or her services.

- 51 In *Landau -v- Anburn Trustees Limited and others* [2007] JLR 250, the Court, citing with approval *In re Duke of Norfolk Settlement Trusts* [1982] Ch 61, confirmed the supervisory jurisdiction of the Court to authorise, increase or vary the amount of remuneration provided for in a trust deed. Fox LJ in *Duke of Norfolk Settlement Trusts* explained the basis of the power as follows at 78:—

“When the court authorises payment of remuneration to a trustee under its inherent jurisdiction it is, I think, exercising its ancient jurisdiction to secure the competent administration of the trust property just as it has done when it appoints or removes a trustee under its inherent jurisdiction.”

He went on to say this at 79:—

“I appreciate that the ambit of the court’s inherent jurisdiction in any sphere may, for historical reasons, be irrational and that logical extensions are not necessarily permissible. But I think that it is the basis of the jurisdiction that one has to consider. The basis, in my view, in relation to a trustee’s remuneration is the good administration of trusts. The fact that in earlier times, with more stable currencies and with a plenitude of persons with the leisure and resources to take on unremunerated trusteeships, the particular problem of increasing remuneration may not have arisen, does not, in my view, prevent us from concluding that a logical extension of admitted law and which is wholly consistent with the apparent purpose of the jurisdiction is permissible. If the increase of remuneration be beneficial to the trust administration, I do not see any objection to that in principle.

...I conclude that the court has an inherent jurisdiction to authorise the payment of remuneration of trustees and that that jurisdiction extends to increasing the remuneration authorised by the trust instrument. In exercising that jurisdiction the court has to balance two influences which are to some extent in conflict. The first is that the office of trustee is, as such, gratuitous; the court will accordingly be careful to protect the interests of the beneficiaries against claims by the trustees. The second is that it is of great importance to the beneficiaries that the trust should be well administered. If therefore the court concludes, having regard to the nature of the trust, the experience and skill of a particular trustee and to the amounts which he seeks to charge when compared with what other trustees might require to be paid for their services and to all the other circumstances of the case, that it would be in the interests of the beneficiaries to increase the remuneration, then the court may properly do so.”

52 We accept that the good administration of the Fund applies to the provisions sought here. They are now almost universal in Jersey trusts. Indeed, Article 26 of the Trusts Law has now been amended so that under Article 26(1)(A), even where the terms of a trust are silent as to remuneration, a professional trustee is entitled to reasonable remuneration. Whilst the Fund may have directors acting as trustees at the moment, it may become necessary to appoint a professional trust company or potentially an individual professional trustee to act along with the directors and no professional trustee would undertake that office without remuneration. The same point arises in relation to the proposed provision limiting the liability of trustees to breaches of trust arising from fraud, wilful misconduct or gross negligence on the part of the trustee sought to be made liable. In our view, these provisions are standard today and are required to ensure the good administration of the Fund.

53 In conclusion, we approve the consolidated trust instrument with the additional powers it contains and will direct the representors and their successors as trustees to administer the Fund henceforth on that basis.

Relief under Article 45 of the Trusts Law

54 Following the obtaining of advice from English Counsel, it would seem that the representors and their predecessors may have inadvertently made payments which were either outside their powers or to persons who it transpires were not beneficiaries (essentially employees of companies in the Group which were not subsidiaries of the Company following the reconstruction); in doing so, they were following the practice and custom that had been adopted by previous trustees.

55 Article 45 of the Trusts Law is in the following terms:—

“(1) The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that –

(a) the trustee is or may be personally liable for the breach of trust;

(b) the trustee has acted honestly and reasonably;

(c) the trustee ought fairly to be excused –

(i) for the breach of trust, or

(ii) for omitting to obtain the directions of the court in the matter in which such breach arose.”

56 We have no doubt that the representors and their predecessors were acting honestly and reasonably in respect of the Fund whose objects and purpose were unclear. Advice has now been taken and this application made, bringing, we hope, clarity to the objects and purposes of the Fund and giving the representors and their successors a modern consolidated trust instrument upon which to rely in the future. In our view, the representors and their predecessors as trustees ought fairly to be excused from such inadvertent breaches and we will make an order to that effect.