Neutral Citation Number: [2021] EWHC 1425 (Ch)

Case No: PT-2021-BRS-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 27/05/21

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) LYNN SMITH	**Claimants**
(2) PATRICK MICHAEL GASKINS	
- and -	
(1) MICHELMORES TRUST CORPORATION LTD	**Defendants**
(2) MICHAEL PATRICK	
(3) SIMON DENNAR CRAWSHAY	
(4) ARTHUR JOHN MORRIS CRAWSHAY	

- -
- -

Oliver Wooding (instructed by **Kitsons**) for the **Claimants**
Evan Price (instructed by **Athena Law**) for the **Fourth Defendant**
The other defendants were neither present nor represented

Hearing date: 14 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. On 14 May 2021, I heard and determined a claim under CPR Part 8 issued only one week before, on 7 May 2021, for an order that the Court give its approval to a proposed distribution by the claimants out of a discretionary trust created by the will of the late Hope Crawshay, of which trust the claimants are the present trustees. The hearing was conducted remotely, using the MS Teams video-conferencing platform. At the end of the hearing, conscious of a deadline which expired the next day (explained below), I indicated that I would not give the court's approval, but that I would give my reasons subsequently in writing. These are those reasons.

Background

2. Hope Crawshay ("the deceased", or "the testatrix") and her husband Darryl had four children: Sarah (born 1942), Simon (born 1944), Deena (born 1950) and John (born 1953). For the sake of convenience, but without intending any disrespect, I shall refer to them by their first names. Darryl died in 1978. The deceased died on 3 November 2010, having by her last will, dated 24 May 1999, appointed Deena and the partners of Kitsons solicitors as her executors. She further left the residue of her estate on trust to divide it into four equal shares, one each for Sarah, Simon and Deena (though, in this last case, with a substitutionary gift for Deena's children in case she did not survive the testatrix), and one upon discretionary trusts for the benefit of a class consisting of John, his children and remoter issue. I shall come back later to the precise terms of the trusts and the reasons for this difference of treatment.

3. All four of the testatrix's children survived her, though Sarah died on 22 May 2020 (and her estate is administered by the first defendant), and Deena died on 26 December 2020 (and her estate is administered by the second defendant). The other two children are the third and fourth defendants respectively. Because of the terms of the discretionary trust created by the will, I should note that the fourth defendant currently has three children, Simon (now aged 48), Catherine (now aged 28) and Harriet (now aged 27). Harriet herself has a child, Alfie (now aged six), the fourth defendant's grandchild. There may of course be further issue in future.

4. The net value of the estate for probate was said to be £370,019. Probate was taken out on 7 November 2011 by Deena and the first claimant, then a partner in Kitsons (and, as it happens, the solicitor who had drafted the will). A revaluation of the estate exhibited to the first claimant's first witness statement shows the estate now to have a value of £753,394.79, net of inheritance tax, less expenses of £251,726.17, leaving a net value for distribution of £501,668.62. I will come back shortly to the assets of which the estate is comprised. On 7 May 2021, after the death of Deena, the first claimant as surviving trustee of the will appointed the second claimant as co-trustee. She continues as sole surviving personal representative of the estate.

The partnership litigation

5. After the testatrix died, there was some difficulty in the administration of her estate, because during the last years of her life she had been in partnership with her youngest child John (the fourth defendant) in the business of property development, and the affairs of the partnership were not settled by the date of her death. Indeed, they sadly led to litigation between the executors and John, which came to trial before me in May 2019. I delivered my judgment on that trial in September 2019, under neutral citation number [2019] EWHC 2507 (Ch).

6. In broad terms I resolved all the points in contention in favour of the estate and against John. I ordered him to pay the executors the sum of £391,417.51, plus costs to be assessed (with a payment on account of £97,500). There was also an earlier costs order made against John by DJ Watkins on 25 March 2019 in the sum of £16,898. John sought permission to appeal against my decision, firstly from me, which was refused, and then also from the Court of Appeal, which too was refused, by Lewison LJ on 15 January 2020. Those judgment debts were accordingly assets of the testatrix's estate.

The fourth defendant's bankruptcy

7. The debts not having been satisfied, on 19 March 2020 the executors presented a petition for John's bankruptcy, based on a statutory demand in the sum of £505,815.51. On 15 May 2020 he was duly adjudged bankrupt, and on 9 June 2020 trustees in bankruptcy were appointed. His discharge from bankruptcy, unless suspended, would therefore take place on 15 May 2021: see Insolvency Act 1986, section 279. (The correspondence in evidence before me shows that the question of suspension was indeed considered, if only as a matter of course. The fact that it has not been pursued suggests that no basis for applying for suspension was found.) The discharge from bankruptcy was the deadline referred to in the first paragraph above, and led directly to the hearing of this claim on 14 May.

8. According to an email dated 26 March 2021, sent on behalf of the trustees in bankruptcy, the bankrupt estate had an interest in the matrimonial home, said to be worth £500,000 to £550,000. However, this property appears to be subject to a prior charge in favour of John's solicitors Athena Law to secure a claim for £211,006 for legal fees from the earlier litigation. John's wife also claims to be entitled to a 50% share of the property, though this is disputed. There is a claim by the trustees in bankruptcy in respect of a transfer by John to his wife of a business for no or no sufficient consideration. The value of this claim is estimated to be between £20,000 and £50,000. The testatrix's estate is the major creditor in the bankruptcy, but there are also claims to further legal fees (unsecured) in the sum of about £115,000 from John's solicitors, and a claim from a former landlord of John's in the sum of about £3,000.

The proposed appointment

9. Apart from the claim in John's bankruptcy arising out of the judgment debts, which on the material before me at present will not be paid in full, the only other significant asset of the testatrix's estate is the sum of £233,833.66 held in Kitsons' client account.

10. The email from the trustees in bankruptcy dated 26 March 2021 shows that it was suggested (apparently by them) that the trustees of the will discretionary trust appoint

the whole of the one quarter share of the residue to John while he remained an undischarged bankrupt, on the basis that this would then vest in the trustees in bankruptcy as after acquired property. (As I say later, this is not in fact the present law.) Since John was due to be discharged from his bankruptcy on 15 May 2021, this left little time for action to be taken. Nevertheless, the first claimant as surviving executrix of the estate resolved to make a distribution of £220,000 to the four persons or estates under the will before 15 May 2021, therefore amounting to £55,000 per quarter share.

11. That distribution decision in itself would not of course exercise the power of appointment in favour of John. That is part of the administration of the estate, and has nothing to do with the working-out of the discretionary trust. It would merely advance the quarter share out of the hands of the estate to the hands of the trustees of the will trust (that is, the first claimant and her recently appointed co-trustee, the second claimant). There is therefore in evidence a draft deed of appointment by the latter in favour of John absolutely, attached to a minute dated 7 May 2021, recording the will trustees' intention to execute that deed although seeking the "blessing of the court before making such a distribution". I emphasise that the trustees in this case were not surrendering their discretion to the court. Instead they asked the court to approve their proposed course of action.

12. The date of John's discharge from bankruptcy could in principle have been predicted from a year before. It was somewhat disconcerting, therefore, that the decision of the trustees of the discretionary will trust to make an appointment in favour of John absolutely should have been formally reached and minuted only as recently as 7 May 2021, just eight days before John's expected discharge from bankruptcy. These proceedings were issued the same day. Fortunately the court was able to accommodate a hearing of the claim one week later on 14 May, just before this deadline, in the process having to abridge time for the service of evidence. It was equally disconcerting that these proceedings should have been sent (unsealed) by email to John on 7 May, without any prior discussion with or warning to him. In addition, when I looked at the constitution of the proceedings issued, I found that that was unsatisfactory too.

The discretionary trust

The will

13. But, before I can deal with that, I need to set out the terms themselves of the discretionary trust. Clause 6(d) of the testatrix's will sets out the terms of that trust of a one quarter share of the residue of the estate. It provides as follows:

> "(d) as to one such share upon the following trusts: –
>
> (1) IN this clause where the context so permits the following expressions shall have the following meanings:
>
> (i) "the Beneficiaries" shall mean:
>
> (aa) my son JOHN MORRIS CRAWSHAY

(bb) his children and remoter issue

(ii) "the trust period" shall mean the period commencing with the date of my death and ending Eighty years thereafter and such period of Eighty years shall be the perpetuity period applicable to the disposition made by this clause PROVIDED THAT my Trustees may declare by irrevocable deed that the trust period (but not the said perpetuity period) shall terminate on such date as they may specify therein (such date of termination to be earlier than the end of the said period of Eighty years but the same as or later than the date of such deed)

(iii) "the accumulation period" shall mean the period commencing with the date of my death and ending Twenty-one years thereafter or on the earlier termination of the trust period

(2) My Trustees shall hold this share of my residuary estate and the income thereof upon such trusts for the benefit of all or any one or more exclusive of the others or other of the Beneficiaries and if more than one in such shares and with such trusts powers and provisions (including discretionary or protective trusts and powers relating to capital or income exercisable by my Trustees or by any other person or persons and administrative provisions) and generally in such manner as my Trustees may in their absolute discretion by any deed or deeds revocable or irrevocable appoint PROVIDED THAT no appointment shall be made and no revocable appointment shall be revoked after the expiration of the trust period.

(3) Subject to any or every exercise of the foregoing power my Trustees shall during the trust period shall hold this share of my residuary estate upon trust to pay or apply the income thereof to or for the maintenance education or benefit of all or any one or more of the Beneficiaries for the time being living in such shares if more than one and generally in such manner as they think fit PROVIDED THAT my Trustees may during the accumulation period accumulate the whole or any part of the income of my residuary estate by investing the same (and the resulting income thereof) in or upon any of the investments authorised by this Will and any accumulations of income so made shall form part of the capital of my residuary estate for all purposes

(4) Subject to the foregoing trust and to any or every exercise of the foregoing powers my Trustees shall hold this share of my residuary estate and the income thereof upon trust for my son the said JOHN MORRIS CRAWSHAY

(5) My Trustees may exercise any or all of the powers contained in this clause notwithstanding that the administration of my estate may then be incomplete and my residuary estate not by then established and notwithstanding that probate of this Will may not have been granted

(6) Any of my Trustees may join in exercising the powers and discretions conferred by this clause notwithstanding that such trustee may be personally interested as a beneficiary".

14. It will be noted that subclause (2) creates a power of appointment among a class of objects comprising John, his children and his remoter issue. The evidence shows that

he presently has three children and one grandchild. The trustees proposed to exercise this power in favour of John alone, thus excluding the children and grandchild, as well as any future children or remoter issue he might have. The claim form did not seek to join John's existing children and grandchild as parties to the claim. However, by paragraph 8(c) of the Details of Claim, it *did* seek the appointment of a person "to represent the interests of the unborn and unascertained beneficiaries of the Will Trust pursuant to CPR r. 19.7(2)".

The letter of wishes

15. Before going further, I should also mention that the testatrix produced a handwritten letter of wishes, intended to explain why she had decided to create a discretionary trust of a one quarter share of her estate for the benefit of John and his issue, rather than giving him an absolute one quarter share, as she had done with her other three children. This letter is dated 28 May 1999 (some four days after the will) and is headed "My letter of wishes to the Executors of my Discretionary Trust".

16. In substance it reads as follows:

> "I would like to make it clear that I have created the discretionary trust in clause 6D of my will with simple and sole intention of safeguarding the share of my Estate for John Morris Crawshay, or in the event of his death his children's sole benefit.
>
> It is also my sincere wish that requests by John for funds from the trust are met without question or interference and furthermore all the funds in the trust to be transferred to him and the trust dissolved upon his request to you."

17. As I found in the earlier litigation, at the time that this will was made, John's first wife had left him and taken their children with her. In these circumstances, the testatrix was concerned to preserve his inheritance against claims made by the former wife (see the earlier judgment at [48]). She therefore gave her other three children absolute interests in residue, but subjected the share intended for John to a discretionary trust. As can be seen, the letter of wishes contains rather bold wording, providing not only a sincere wish that 'requests' by John by met "without question", but also that "all the funds in the trust to be transferred to him and the trust dissolved upon his request to you". Despite this strong language, no suggestion was made, either in the previous proceedings or in these, that the discretionary trust was a sham, and that in reality John was absolutely entitled to a one quarter share from the outset. Given that the draftsman of the will was the first claimant, I could see that any such suggestion would have presented certain practical problems. I therefore proceeded on the basis that this was a genuine discretionary trust.

The evidence

18. The evidence for this claim was contained in the witness statements, two from the first claimant, one from the second (essentially confirming and agreeing with the first claimant's first witness statement), and one from the fourth defendant. No request was made for any of the witnesses to be cross-examined on their statements, and no cross examination took place.

19. The first claimant's first witness statement exhibited the essential documentation involved in this claim, including the will, letter of wishes and probate, the court orders from the partnership litigation, interim estate accounts, the bankruptcy petition and order, the appointment of the second claimant as co-trustee of the trust, the trustees' minute and draft appointment proposed, and certain correspondence. The second witness statement of the first claimant stated that the trustees had taken into account the interests of the discretionary objects other than John, and sought to meet other points made by John in his witness statement.

20. John's witness statement complained of his having been given inadequate notice of claim, and the lack of any pre-action communication. He provided some family information about his children and grandchild, and commented adversely on the constitution of the proceedings. Finally, he made clear that he did not want this money to be transferred to him so that it could be used as part of his bankrupt estate. He made clear that that would mean that he would not receive any benefit from it whatsoever.

Procedure and constitution of the proceedings

Procedural rules

21. CPR rule 64.1 relevantly provides that

> "(1) This Part contains rules –
>
> (a) in Section I, about claims relating to –
>
> (i) the administration of estates of deceased persons, and
>
> (ii) trusts; … "

22. CPR rule 64.4 (in Section I) relevantly provides that

> "(1) In a claim to which this Section applies, other than an application under section 48 of the Administration of Justice Act 1985 –
>
> (a) all the trustees must be parties;
>
> (b) if the claim is made by trustees, any of them who does not consent to being a claimant must be made a defendant; and
>
> (c) the claimant may make parties to the claim any persons with an interest in or claim against the estate, or an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought."

23. Finally, Practice Direction 64B relevantly provides:

> "4.1. Rule 64.4(1)(c) deals with the joining of beneficiaries as defendants. Often, especially in the case of a private trust, it will be clear that some, and which, beneficiaries need to be joined as defendants. Sometimes, if there are only two views of the appropriate course, and one is advocated by one beneficiary who will be joined, it may not be necessary for other beneficiaries to be joined since the

> trustees may be able to present the other arguments. Equally, in the case of pension trust, it may not be necessary for a member of every possible different class of beneficiaries to be joined.
>
> 4.2. In some cases the court may be able to assess whether or not to give the directions sought, or what directions to give, without hearing from any party other than the trustees. If the trustees consider that their case is in that category they may apply to the court to issue the claim form without naming any defendants under rule 8.2A. They must apply to the court before the claim form is issued (rule 8.2A(2)) and include a copy of the claim form that they propose to issue (rule 8.2A(3)(b)).
>
> 4.3. In other cases the trustees may know that beneficiaries need to be joined as defendants, or to be given notice, but may be in doubt as to which. Examples could include a case concerning a pension scheme with many beneficiaries and a number of different categories of interest, especially if they may be differently affected by the action for which directions are sought, or a private trust with a large class of discretionary beneficiaries. In those cases the trustees may apply to issue the claim form without naming any defendants under rule 8.2A. The application may be combined with an application to the court for directions as to which persons to join as parties or to give notice to under rule 19.8A."

This case

24. It is clear that John's children and remoter issue, whether in being or not, as objects of the power have an interest under the trust, and therefore in the estate (*cf Rosewood Trust Company Ltd v Schmidt* [2003] 2 AC 709, [37]-[42]). However, none of those children or remoter issue in being was joined, even though three of them are adults, and the claimants' own evidence was that they were aware of their existence. Indeed, I was told that John's son Simon only learned for the first time on 12 May that he was in fact entitled to a small pecuniary legacy under his grandmother's will. On the other hand, John was joined, and it was proposed that a representation order be made in respect of "unborn and unascertained beneficiaries of the Will Trust" (though not, apparently, the minor grandchild). But the existing children and grandchild appeared to me to be in a different factual position from John, who at the date of the hearing was an undischarged bankrupt. They could benefit directly in a way that John (until 15 May) could not. Yet as I say they were not parties, or even proposed to be represented. This struck me as a defect, certainly if the order was intended to bind them: *cf Vandervell Trustees Ltd v White* [1971] AC 912, HL, 931, 932, 937, 941-42.

25. However, when this point was raised during the argument, the claimants' counsel, Mr Wooding, told me that his clients accepted that John's children and remoter issue, not having been joined, would not be bound by any order made. They could still bring any claims they wished against the claimants. But they contended that it was John who was the real focus of these proceedings, As the first claimant put it in her second witness statement,

> "8. … Mr Crawshay was joined because he has a potential … interest in the Estate, and because of the particular circumstances it was anticipated that he would object to the decision."

Discussion

26. In my judgment this reasoning proved too much. Mr Crawshay, although an undischarged bankrupt, as an object of the power created by the discretionary trust in the will had in law exactly the same rights as his children and remoter issue. Moreover, there was no basis for supposing that, if he objected to the decision (as it was clear from his witness statement he did), they took a different view from him as to the propriety of the proposed appointment. So I did not understand why, if these things made it proper to join *him*, they did not also make it right to join *them*, or at least make provision for their representation. What was sauce for the goose was surely sauce for the gander.

27. I accept, of course, that, as a general rule, claimants are entitled to pursue which defendants they wish, and cannot be required to join defendants that they do not wish to sue: see *eg Dollfuss Mieg v Bank of England* [1951] Ch 33, 38. But this is subject to special cases for which different provision has been made by law, including by the rules of procedure. In my judgment, claims of this kind for directions, under CPR Part 64, *are* different from the ordinary adversarial cases, and the rules in CPR rule 64.4 and PD 64B paragraph 4 about joinder to which I have referred, as interpreted by the judges, provide accordingly for exceptions to the general rule.

28. The whole point of an application by trustees of this kind is to bring certainty to the administration of the trust by directing the trustees whether or not to do whatever it is they have proposed to do. In my judgment, it does not normally bring certainty to say to them that, as against this or that beneficiary, you may do this without risk, but as against others you may not. I accept that there may be cases where the case for carrying out what is proposed is so strong that in reality the risk as against the other beneficiaries is negligible. I also accept that there may be cases where, even if the case is not so strong, still the interests of the beneficiary who is represented and those of the beneficiaries who are not are so perfectly aligned that, even if no order is made for the former to represent the latter, a decision against the represented beneficiary will make it practically impossible for the unrepresented beneficiary thereafter to complain, even if not formally bound.

29. But the present was neither of those two cases. As to the first of them, there were serious questions to be considered here, first as to how far the proposed appointment was for the benefit of John, second as to whether this appointment would fall foul of the doctrine of fraud on a power, and, third how far the trustees were able to make this decision free from any conflict of interest. As to the second, whatever the nature of the legal rights involved, the factual situations of John and his children and remoter issue were, as I have said, different. John was an undischarged bankrupt. His children and remoter issue were not. If the appointment were made to John before the deadline, the funds appointed would go to his creditors, and so could not benefit the others (as the claimants accepted). If they were appointed to John later, they would benefit John and possibly his wider family. If they were appointed to the others, it was they that would benefit. So there were not just two views of what the trustees might do, *ie* (i) immediately appoint to John or (ii) do nothing. There were at least four: (i) immediately appoint to John; (ii) appoint to John later; (iii) appoint to other objects, now or later; (iv) do nothing.

30. If there had been time, it might have been appropriate for the court to postpone the hearing until the other objects could be joined or properly represented. But, by leaving the matter so late, and issuing the claim when the deadline was only a week away, the claimants had in effect deprived the court of the possibility of adopting that course. Accordingly, I had to proceed on the basis of the claim as presented to me. In these circumstances, for the reasons given, I concluded that the claim was not properly constituted, in a way that mattered, and that I ought therefore to refuse to grant the relief sought.

31. I will only add that, given that the question before the court related to the propriety of the trustees' making an appointment out of the discretionary trust, it was very hard to see why the other residuary estate beneficiaries were joined. They were not beneficiaries of the discretionary trust, and their views on the question (if they had any) seemed to me not to be relevant. The *estate* was not proposing to do anything which required the approval of the court, and no such relief was sought against the estate beneficiaries. So their joinder too seemed to me to be an irregularity. That might impact on the question of costs as between the personal representative and the estate, but I need not consider it further now.

The disclaimer

32. In case I was wrong about the problems of constitution, however, I went on to consider the merits of the claim. In that connection I must refer to a singular occurrence. On the day before the hearing, John executed a deed of disclaimer of his interest under the discretionary trust. This came to my notice only on the morning of the hearing itself, and led to a considerable part of the hearing being devoted to the effect of the document in law and its implications for this application. I do not complain about this. It needed to be considered, and was simply another consequence of this application's having been made at the eleventh hour.

33. I heard detailed argument on the matter, which satisfied me that there was a point of some interest to be decided, and that if possible I would like some time to consider it. In view of the shortness of time however before John's discharge from bankruptcy would take effect, it was evident that a decision would need to be made that day. Therefore, I first went on to consider the procedural question and the rest of the merits of the application, on the basis that, if I decided for other reasons than the disclaimer that I should refuse relief, there was no urgency in considering the disclaimer point, as strictly it would not be necessary. In fact, that was what happened. My decision to refuse relief was not based on any possible effect of the disclaimer. Nevertheless, since the point was argued, and I have now had the opportunity to consider the matter more fully, I will state my views on it in due course.

The insolvency context

34. Before I turn to consider the merits of the application, it is necessary to refer to the insolvency context. At the time of the application, John was an undischarged bankrupt. The estate of the testatrix was the largest creditor of the bankrupt estate, being owed something over four times as much as all the other creditors put together. As I have said, the estate of the testatrix had essentially two assets, the first being the sum in cash in Kitsons' client account, the other being the claim in the bankruptcy.

The claim in bankruptcy was however unlikely to be recovered in full, so its value depended on what was recovered by the trustees in bankruptcy.

35. If an appointment were made out of the discretionary will trust in favour of John before his discharge from bankruptcy on 15 May 2021, the property or interest so appointed would constitute 'after acquired property' within the meaning of section 307 of the Insolvency Act 1986. That would mean that the trustees in bankruptcy would have 42 days in which to claim the property for the benefit of the bankrupt estate. (This is different from the mechanism under the Bankruptcy Act 1914, by which vesting was automatic.) If the property were to be so claimed (as I have no doubt it would be), it would then be applied for the benefit of the creditors of the bankrupt estate, including the estate of the testatrix. Hence that estate has an interest in the appointment's being made, because it would realise a sum which could and would be used to reduce the debt owed to the estate of the testatrix.

36. However, the amount proposed to be distributed to the trustees of the discretionary trust would be £55,000. This is just under 11% of the debt owed by the bankrupt estate to the estate of the testatrix. There may in addition be a small dividend from other recoveries made from the bankrupt estate, but overall it was clear that any distribution from the estate of the testatrix to the trustees of the discretionary trust, and from them to John, and thereby to his trustees in bankruptcy, would make only a very small dent in the overall debt owed by the bankrupt estate to the estate of the testatrix. There was no question, for example, that these distributions would repay any more than a fraction of all that John owed the estate of the testatrix at the time of his bankruptcy. That was the factual context in which this application fell to be considered.

The application

The law

37. This was an application under the second category of the well-known jurisdiction in *Public Trustee v Cooper* [2001] WTLR 901. In that case Hart J referred to an unreported decision in chambers of Robert Walker J (as he then was) in 1995, in which the judge divided cases concerned with trustees' courses of action into four different categories, three concerned with *proposed* actions, and one with *past*. These four categories were (i) where there was doubt as the power of the trustees to do what was proposed; (ii) where there was no doubt as to the trustees' *powers*, but there was doubt as to the *propriety* of the exercise of the power; (iii) where the trustees surrendered their discretion to the court; and (iv) where the trustees had taken action and that action was being attacked.

38. As to the second category, Robert Walker J had said this:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate

> or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

39. In relation to this category, Hart J said the following:

> "What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case. In the present case, before the court can give general liberty to the … trustees to carry into effect the decision made by them on 20th October to accept the bid, *ie* to grant the declaration sought, it must be satisfied, after a scrupulous consideration of the evidence before it, of at least three matters.
>
> First, that the … trustees have in fact formed the opinion that special circumstances exist which render it desirable that they accept the bid; first and foremost it is their opinion which counts. This is one of those cases where the governing instrument plainly constitutes the trustees as the forum to determine the precipitating event. […]
>
> Secondly, was the opinion which the … trustees formed one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived?
>
> Thirdly, was the opinion at which that body had arrived vitiated by any conflict of interest under which any of the trustees had been labouring, either because such conflict actually had, or because it might have had, an effect on the decision which they took?"

40. In the recent decision of *Schumacher v Clarke* [2020] EWHC 3381 (Ch), to which the claimants referred me, Chief Master Marsh took account of developments in, and indeed took stock of, this jurisdiction in this way:

> "44. I can summarise the relevant law quite briefly, because there is no dispute between the parties. The jurisprudence, as it relates to Category 2 *Public Trustee v Cooper* approvals is a well-developed area of law. It is helpful, however, to refer directly to paragraph 39-095 in *Lewin on Trusts* 20th ed. where the editors say this:
>
> > 'The approach of the court has been summarised both in England and overseas as requiring the court to be satisfied after proper consideration of the evidence that:
> >
> > (1) the trustees have, in fact, formed the opinion that they should act in the way for which they seek approval;

> (2) the opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at; and
>
> (3) the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.'

45. They go on:

> 'The second requirement involves two aspects. First: process. Has the trustee properly taken into account relevant matters and not taken into account irrelevant matters? Second: outcome. Is the decision one with a rational trustee could have come to?'

46. I am happy to adopt this helpful formulation. There are, however, several further matters that can usefully be highlighted and I take these from a number of observations made in *Lewin* at paragraphs 39-095 and 39-096.

(1) It bears emphasis that the giving of approval is a matter of discretion. Trustees have no entitlement to demand a blessing if the relevant criteria are met. The court is exercising a broad discretion as part of its supervisory powers. Of course, as a general rule, the court will wish to be supportive and helpful to trustees if it is indeed the case that the decision is momentous. That said, and I agree with the observation made in *Lewin*, that the court acts with caution because the result of giving approval is that the beneficiaries cannot later complain that there has been a breach of trust, provided full disclosure to the court has been given.

(2) The court is entitled to take into account the consequences of refusing to approve the trustees' decision. I observe, however, that this is not a case where the Trustees have faced conflict with the beneficiaries, and the approval will resolve a dispute not with the beneficiaries but between the trustees. The beneficiaries have only been brought in (other than Mr Schumacher, that is) at a very late stage.

(3) A failure to acknowledge a conflict of interest and to explain how it has been managed may be fatal. Reference is made to the decision in *Hawksford Jersey Ltd v A* [2018] JRC 171. *Hawksford* is, however, a very different case to this one because there the court was asked to approve the sale of the trust's only asset, which was a property in London. The trustee failed to acknowledge the very substantial amount of fees the trustee was owed which on a sale would be paid. However, I accept the general proposition which the court put forward at [51] in the judgment, that where there are conflicts, the court will give heightened scrutiny to the decision.

(4) There appears to have been little discussion in the authorities about how a conflict of interest may 'vitiate' the decision the trustees have reached. It seems to me that for these purposes, 'vitiate' is used in the sense of 'impair'. It is not used in the alternative sense of the decision being entirely set aside or destroyed."

41. As Chief Master Marsh observed, the consequence of the court 'blessing' the trustees' decision is that, assuming that the trustees have made full disclosure to the court, no beneficiary can thereafter complain that the exercise of power was a breach of duty: *Richard v McKay* (1987) 11 Tru LI 23, 25; *X v A* [2006] 1 WLR 741, [29]. This means that the court should be cautious before taking that step. At the least, as it seems to me, the court should give those affected the opportunity to make representations. That is one reason why the proper constitution of the claim matters.

42. Finally on the law, I need to refer to the decision of the Royal Court of Jersey in *Re Esteem Settlement* 2001 JLR 7, and the English cases referred to in that judgment. They deal with the question whether an appointment can be said to amount to a 'benefit' for the intended object. *Re Esteem Settlement* was a case where a settlor (Sheikh Fahad) had created a discretionary trust with assets worth about $18 million of which he, his wife and his son were objects. Subsequently he had embezzled funds from his employer to the extent of some $687 million, in respect of which his employer had obtained judgment. The employer was attempting to enforce this judgment. It is important to notice that there was no suggestion that the assets in the trust came from the embezzled funds, directly or indirectly. The trustee of the discretionary trust surrendered its discretion to the court, and applied for an order that the trust assets be applied to the part payment of the judgment debt against the settlor. The settlor, his wife and son all opposed the application. The court refused so to order, on the basis that the appointment would not be for the benefit of the settlor.

43. The court said that there were three issues to be decided, of which the first two were:

> "28. … (a) Can a trustee (and therefore the court) make a distribution for the benefit of a beneficiary against the objections of that beneficiary to the proposed distribution?
>
> (b) On the facts of this case, would a distribution by way of payment to GT in reduction of Sheikh Fahad's debt be a payment for the benefit of Sheikh Fahad?"

44. As to the first question, Sheikh Fahad had written a letter to the trustees' lawyers, informing them that he considered he owed no moral obligation to the judgment creditor and did not wish the trustees to make any distribution to him or for his benefit, either then or in the future. This was not a sufficient disclaimer of his interest under the trust, but it indicated that he did not recognise a moral obligation and did not want any payment to be made.

45. The court referred to a dictum of Lord Radcliffe in *Pilkington v IRC* [1964] AC 612, 637:

> "It is not as if anyone were contending for a principle that a power of advancement cannot be exercised 'over the head' of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the possibility of making any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an

> adult could not in any circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the commissioners did not contend before us that the power of advancement was inherently limited in this way: and I do not think that such a limitation would accord with the general understanding. Indeed its 'paternal' nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant."

46. The Royal Court went on to hold that, in such a case as that it was considering, there was a difference between a distribution directly to the beneficiary or object and a payment to another person for the benefit of that beneficiary or object:

> "38. In our judgment, there is a difference between a direct gift or distribution and an indirect one. We accept that, whether in the trust context or not, a man cannot be forced to accept a direct gift. However, we do not see that the same principle necessarily operates to prevent an indirect gift. In our judgment, the *dictum* of Lord Radcliffe envisaged such a course. He referred to a trustee "insisting" on paying the debts of a beneficiary. Mr. Sinel argued that Lord Radcliffe's *dictum* covered only a case of 'not consenting' but not one of 'positively objecting.' But we think that this is an unduly narrow interpretation of what Lord Radcliffe said. In our judgment, his wording is more apt to describe the position where a beneficiary is objecting. Furthermore, this would be consistent with the paternalistic nature of a power of advancement referred to by Lord Radcliffe. Suppose a case where a beneficiary owes a comparatively small amount of money but is refusing to pay it on wholly irrational grounds. The non-payment is causing considerable hardship to him and to his family. Is it really to be said that a trustee cannot, exercising the paternalistic power referred to, pay off the debt, which would so obviously be to the benefit of the beneficiary and his family? Is the trustee to be bound by the irrational conduct of the beneficiary? We accept that the *dictum* of Lord Radcliffe was *obiter* but any observation of Lord Radcliffe on trust matters, particularly when his speech is adopted by the other members of the House of Lords, is of the highest persuasive value.
>
> 39. Furthermore, there is logic to the distinction between a direct and indirect distribution. Direct payment clearly requires the concurrence of the donee and he therefore cannot be forced to accept the gift. But a payment to, say, a school to whom the donee owes school fees, requires no action by the donee. It can be effected simply by a payment by the donor directly to the school in settlement of the obligations of the donee. In order to refuse the gift, the donee would presumably have to force the school to give the money back to the donor. In our judgment, the principle which underlies the rule that no man can be forced to accept a gift does not preclude an indirect benefit being conferred against the objection of a donee of a power of advancement. The general approach of the House of Lords in *Pilkington* (13) was consistent with that and we would be surprised if Lord Radcliffe was seeking to draw a distinction between a situation where a beneficiary did not consent to an advance and where he positively objected to an advance. We do not consider that Plowman, J. had such a situation in mind in *Gulbenkian* (8), which was a very different case because the proposed donee was no longer a beneficiary. If he purported to go further, we respectfully disagree with him.

> 40. We accept of course that the cases where a trustee will exercise a power of advancement in favour of a beneficiary against the express wishes of that beneficiary will be very few. But we hold that there is power to do so and that Sheikh Fahad's objection to the proposed distribution in this case is not a bar to the trustee's (and therefore the court's) exercising the appropriate powers in the trust deeds."

47. The next question was whether it would be for the benefit of the Sheikh in this case to use the funds in the trust to pay off a small part of the judgment debt. The court considered a number of English cases, including *Pilkington, Re Clore's ST* [1966] 1 WLR 955, *Re Hampden ST* [1977] TR 177, *Lowther v Bentinck* (1974) LR 19 Eq 166, *Re Price* (1887) 34 Ch D 603, *Re Cameron deceased* [1999] Ch 386, and *Inglewood v IRC* [1983] 1 WLR 366, as well as the Jersey case of *Re N* 1999 JLR 86. Of these, the cases of *Lowther v Bentinck* and *Re Price* were particularly relevant, because both cases involved a proposed exercise of a power to pay or apply assets for the benefit of a beneficiary or object of the power, by paying his debts. In the first case it was a power under a settlement. In the second it was a statutory power.

48. In the first of those two cases, a life tenant with heavy debts (which consumed most of his income in interest) asked the trustees to pay half the capital to his creditors so as practically to wipe out those debts, and leave him with a (smaller) income on which he hand his family could live. The court considered that this was for his benefit. In the second, the mother of a detained mental patient sought the application of all his assets, together with some of her own, in paying her son's debts, so that if he were ever released he would be debt-free. The Court of Appeal considered that it was unlikely he would ever be released, and this therefore would not be for his benefit, but only for that of his creditors.

49. The Jersey court in *Esteem* said:

> "48. Taking account of the authorities referred to above … we agree that the word 'benefit' is to be construed widely and goes beyond mere financial benefit. It encompasses all sorts of ways in which a beneficiary's position can be made better. Nevertheless, it is not open-ended. There is an objective test, namely, that the way in which the trustee proposes to deal with the capital can fairly be regarded as being for the benefit of the beneficiary. There is also a subjective test, in that the trustee must genuinely believe that the appointment of capital will in fact be for the benefit of the beneficiary. A court is of course bound by exactly the same principles when, as here, the trustee has surrendered its discretion to the court. Most importantly, the question of benefit is to be considered in a realistic and commonsense manner rather than in a theoretical or academic way."

50. The court considered the detailed arguments of the parties and the particular facts of the case, and concluded:

> "61. When one stands back and looks at the reality of the effect of any payment, we are in no doubt that any such payment would only be for the benefit of GT. It would not be of benefit to Sheikh Fahad or any of the other beneficiaries. On the contrary, any funds paid out would never be available for the support of any of the beneficiaries in future. For these reasons, applying the objective part of the test referred to in para. 48 of this judgment, we are in no doubt that a payment of

these trust funds or part thereof to GT could not fairly be regarded as being for the benefit of Sheikh Fahad. Applying the subjective part of the test, we do not believe that any such payment would in fact be for the benefit of Sheikh Fahad."

51. The decision of the Royal Court on the second issue was subsequently affirmed by the Court of Appeal of Jersey, in a particularly high-powered constitution (Gloster, Sumption, Rokison JJA), reported at 2001 JLR 540. The Court of Appeal held that it was a decision which the Royal Court was entitled to reach on the material before it. In particular, Gloster JA, with whom Rokison JA agreed, said:

> "38. The Royal Court was entitled to come to the conclusion that, for the reasons stated in paragraph 59(a), there was, in the circumstances of the case, no material benefit to Sheikh Fahad in the proportionately very small reduction of his indebtedness to GT. GT's argument … that a payment would '*reduce the burden'* to which Sheikh Fahad is exposed, or that a payment would '*reduce the cause for complaint against Sheikh Fahad'* go nowhere in support of an argument that a distribution to GT would be a '*benefit'* to Sheikh Fahad. To say that a payment '*would reduce the burdens*' is simply unreal, given the size of the remaining debt to which Sheikh Fahad would remain exposed. Likewise it is impossible to see how the payment would '*reduce the cause of complaint against him'* in circumstances where, as the Royal Court records in paragraph 59(d) of the Judgment, the position was that there was no evidence whatsoever to suggest that a part payment might eventually lead to GT settling the matter and leaving Sheikh Fahad and his family alone. The fact is that it was clear on the evidence before the Royal Court that, immediately after any distribution, the position so far as Sheikh Fahad was concerned would remain exactly the same as it had been; Sheikh Fahad would still owe a huge amount to GT, which he could not repay and would continue to be considered by GT to be an inveterate liar and fraudster, whom GT would remain convinced had stashed away assets to defeat its claims. The Royal Court, on the evidence before it, was clearly entitled to come to the view it did.
>
> […]
>
> 40. The Royal Court was also entitled, in my view, to reject GT's contention that the so-called improvement in Sheikh Fahad's moral or ethical position, which, GT said, would be brought about by having the victim of his fraud at least pro tanto compensated and by Sheikh Fahad *'confronting his dishonesty'*, would be a real and discernible benefit to Sheikh Fahad. It may be that the law generally approves and reinforces what is generally accepted as good moral behaviour in the society in which it operates and disapproves and penalizes what is regarded as bad moral behaviour, such as dishonesty and unfair dealing … However, even accepting that the power to advance or apply capital is regarded as a paternal one, and that a trustee has power to make a payment to reduce the debts of a beneficiary's creditors without his consent, where the trustee considers it for the beneficiary's benefit to do so, nonetheless I agree with the Royal Court's conclusion that, *'in the circumstances of this case'*, the Trustee (and therefore the Court) cannot properly regard the so-called moral benefit of confronting his fraud as the type of benefit that will *'improve the material situation'* of Sheikh Fahad, to use Lord Radcliffe's words. As the Royal Court held (paragraph 59(b)), the fact that the debt arose out of fraud cannot characterise a reduction of that debt as a benefit to

> a debtor in circumstances where it would not be for the benefit of a non-fraudulent debtor. As the Royal Court correctly observed, GT's arguments would lead to the trustee's assessment of benefit being dependent upon the Trustee's view of the moral case for making a debtor repay part of his debt. … "

52. The third judge, Sumption JA, said that, even on the assumption that an appointment to pay Sheikh Fahad's debts would constitute a benefit to him, the trustees' arguments ignored both the status of the trusts, as funds independent of the settlor, and the rights of the other beneficiaries. Consequently, the Royal Court was entitled to exercise its discretion as it did. Indeed, he said that he could not see how

> "the Royal Court could have decided the issue any other way".

Submissions

53. The claimants submitted that the proposed appointment was within their formal powers under the discretionary will trust. But they said there was a question whether it would be a proper exercise of those powers to make that appointment. In particular, John objected to the appointment. It was a 'momentous' decision in the sense that whatever decision was made was likely to disappoint someone, and the claimants had to balance the competing obligations arising out of the will in the events that had happened. The first claimant had a duty to maximise the value of the estate for all of the beneficiaries. That included recovering as much as possible in respect of what was "notionally the main estate asset, the Judgment Debt", within John's bankruptcy. If the trustees were to exercise the power so as to benefit the creditors of John's bankruptcy, they would have to do so before the discharge date.

54. So far as concerned the requirements set out in the judgment of Robert Walker J, it was submitted that the court could be satisfied, first of all, that the trustees had formed the opinion that they should make the appointment proposed. It could also be satisfied that the trustees' decision was one which a reasonable body of trustees could properly have arrived at. The trustees had properly taken into account all and only relevant matters, and the decision was a rational one. Finally, the trustees' decision was not vitiated by any conflict of interest.

55. The fourth defendant submitted, on the authority of the decision in *Re Esteem Settlement* 2001 JLR 7, and the English cases referred to in that judgment, that the proposed appointment was not within the trustees' powers at all, because it was not for his benefit. Even if it were, it would be a fraud on the power. It would also be the product of a conflict of interest, arising from the fact that the first claimant was not only a trustee of the discretionary trust, but also (as executrix of the testatrix's estate) the largest creditor of the bankrupt estate.

Discussion

Benefit

56. In considering the propriety of the appointment, certain things were clear to me on the facts. First of all, whether or not he had effectively disclaimed his interest, John did not want the appointment to be made. Secondly, it was clear that, if it were made before John's discharge from bankruptcy, it would finance the payment of no more

than a small fraction of the bankruptcy debts, a little under 11%. It would confer no *direct* financial benefit on John at all. Instead, the direct benefit would flow to the estate of his mother (and thence to the beneficiaries of her estate), which was not an object of the power at all. If, on the other hand, the appointment were made to him the following day, *after* his discharge, when his provable debts had all gone, the appointment *would* benefit John directly. If no appointment were made, the funds would be available to benefit other objects.

57. So the appointment proposed by the trustees would not put more money into John's pocket, and would not enable more than a fraction of his bankruptcy debts to be paid. There is no suggestion that any other indirect benefit would accrue as a result to John, *eg* the ability to carry on a new trade, to become a member of a club he wished to join, or to live a new life of some kind. Yet, the very next day, he would be discharged from both his bankruptcy *and these debts*, and any *subsequent* appointment in his favour would flow *directly to him*. In my judgment, it was impossible to say that the proposed appointment was for John's benefit. It would not have objectively benefited him, and I have great difficulty in seeing how the trustees could subjectively have thought that it did, as opposed to benefiting the testatrix's estate, which the first claimant represented. So, in my judgment it was not within the scope of the power at all. Accordingly, the claim failed at the first hurdle.

Fraud on the power

58. There is next the question of fraud on the power. Even if I were wrong, and at a technical level it could have been said that the proposed exercise was for John's benefit and thus within the scope of the power, still in my judgment it was not really being used for the purpose intended, *ie* to benefit John or his children or remoter issue. The *real* beneficiary of this appointment would be the estate of the testatrix. In the (quite coincidentally named) case of *Re Crawshay (No 2)* [1948] Ch. 123, Cohen LJ, giving the judgment of the Court of Appeal, approved various propositions put forward by counsel, including the following (at 134-35):

> "(1.) One case of a fraud on a power is where the donee of a special power of appointment makes an appointment intended to benefit some person not an object of the power. (2.) To establish a fraud on a power it is not necessary to prove a bargain between the done of the power and the appointee. (3.) What the court looks to is the intention or purpose of the appointor in making the appointment. (4.) It is not necessary that (a) the appointee should be a party to or know of the corrupt intention or purpose or (b) that the purpose should in fact take effect. (5.) The relevant date as at which the intention of the appointor has to be ascertained is the date of the exercise of the power. (6.) Evidence is admissible as to the state of mind of the appointor, including statements by the appointor which go to show his or her state of mind at the material date. Such statements may be material though they are not contemporaneous with the date of exercise of the power.
>
> These propositions are based on observations of P. O. Lawrence J., as he then was, in *In re Wright*. We respectfully agree with those observations. We would add that the second proposition is founded on the observations of Lord Parker of Waddington in the Privy Council in *Vatcher v. Paull*, which were cited by Vaisey J. in the court below, namely:

> 'A bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power.'
>
> A difficulty, however, arises in determining what, short of a bargain, establishes such purpose and intention. On the one hand, if the appointor appoints to an object of the power, hoping that the appointee will so dispose of the appointed property as to benefit a non-object, but intending to benefit the object whatever disposition he may make of the appointed property, the appointment will be valid. But if he makes the appointment to an object with the belief that the object will be subject to strong moral suasion to benefit a non-object, which suasion the object would, in the appointor's opinion, be unable to resist, the appointment would, we think, be invalid as a fraud on the power. *In re Marsden's Trust*, where the testatrix, desiring to benefit her husband who was not an object of the power, appointed to her infant daughter, believing that her husband could bring effective pressure on the daughter to give effect to her mother's desire, is a case on this side of the line."

59. In the present case, there was no need for the appointor to believe that the appointee might or would use the appointed funds to benefit a non-object. That was already fixed by the insolvency law. The present case is therefore much stronger than that considered by the Court of Appeal in *Re Crawshay (No 2)*. In my judgment, this would be a clear case of a fraud on the power. It therefore ought not to be sanctioned by the court. The trustees' decision was not one which a reasonable body of trustees could properly have arrived at. It was irrational. The trustees had not properly taken into account all and only relevant matters. On the contrary, they had taken into account the interests of the estate, to which John (through his bankruptcy) owed a lot of money.

Conflict of interest

60. Thirdly, even if there were no fraud on the power, there was a stark and obvious conflict of interest here. The first claimant as personal representative of the estate was the chief creditor of John's bankruptcy. Yet she proposed (with her co-trustee) to make an appointment of funds from the discretionary trust effectively *in favour of the estate*. It is hard to think of a more blatant conflict. It is exposed in my summary of the argument of the claimants as set out above. This begins with the proposition that the first claimant had a duty to maximise the value of the estate for all of the beneficiaries of the estate (with which I agree). But, it continued, if the trustees were to exercise the power so as to benefit the creditors of John's bankruptcy, they would have to do so before the discharge date (also correct).

61. The problem was that the trustees of the discretionary trust owed duties to the objects of that trust, but *not* to the beneficiaries of the testatrix's estate. Unfortunately, the surviving personal representative was and is *also* one of the two trustees of the trust. This pulled her in different directions. It was no answer to say (as the first claimant did in the evidence) that she was aware of the conflict and had taken it into account. She could have retired, and appointed different trustees of the trust, or the trustees could have surrendered their discretion to the court. But she did not do the first of these things, and they did not do the second. Instead, conflicted as she was, the first claimant pushed ahead herself with the proposed appointment. The fact that her co-

trustee was not also a personal representative of the estate did not cure the problem. The power was exercisable by *both* trustees, and not merely by either of them. In my judgment, the third condition required by the test in *Public Trustee v Cooper* is not met. The decision of the trustees was substantially impaired by the conflict of interest under which the first claimant as trustee was labouring. That was an additional reason why the court should not give its approval to the proposed appointment.

The effect of the disclaimer

62. Finally, I deal with the question of the effect of the disclaimer executed by John on 13 May 2021, the day before the hearing of this claim. Strictly speaking, this is unnecessary, because I have already expressed the reasons why I decided at the conclusion of the hearing to refuse the claim. But the matter was argued between the parties at the hearing, and I have now had the opportunity to consider it and the authorities further. Because such cases are few and far between, and this one appears to raise a point not directly covered in the cases, I think that I should nevertheless express my views here.

63. The disclaimer document says this:

> "This Deed is made the 13th day of May 2021
>
> By this deed I, Arthur John Morris Crawshay of Barnfield, Vicarage Road, Marldon, Devon TQ3 1NN, disclaim all benefit under the gift that makes provision for me as a beneficiary of the discretionary trust contained in clause 6(d) of the will of Hope Crawshay dated 24 May 1999 late of Weekaborough Drive, Marldon, Paignton, Devon and also disclaim all estate and interest in the property the subject of that gift".

The document is expressed to be a deed, and is signed not only by the fourth defendant, but also by a witness, as required by the Law of Property (Miscellaneous Provisions) Act 1989, section 1. No suggestion was made at the hearing that it did not constitute a deed in English law.

64. At common law, the basic rule was that a person could not be compelled to accept the transfer of property, or, as it was quaintly put in an early case, a man "cannot have an estate put into him in spight of his teeth": *Thompson v Leach* (1690) 2 Vent 198, 206. This was subsequently treated as meaning that the purported transferee of a legal estate in land was *prima facie* presumed to accept it as beneficial, but was nevertheless entitled to falsify the presumption by disclaiming it by deed: *Townson v Tickell* (1819) 3 B & Ald 31. A similar presumption applied in relation to transfers of property in goods and chattels: *Siggers v Evans* (1855) 5 El & Bl 367. The consequences of disclaimer were extended from formal disclaimer by deed to informal disclaimer by mere conduct: *Re Birchall* (1889) 40 Ch D 436.

65. In relation to trusts, an intended trustee cannot disclaim the *trusts* attached to an estate without also disclaiming the *estate* itself: *Re Birchall* (1889) 40 Ch D 436. But an intended beneficiary can disclaim her interest under the trust: *Lady Naas v Westminster Bank Ltd* [1940] AC 366. This extends to the interest of a *discretionary* beneficiary, at least where the disclaimer is for value or by deed: *Re Gulbenkian's*

Settlements (No 2) [1970] Ch 408, 418G (though there the judge was considering a release rather than a disclaimer).

66. But there are limits to disclaimer. First, an expectancy under an intended gift of future property or a will cannot be disclaimed before the gift is made or while the testator is still alive. The donee has not yet acquired any property interest, and the donor may yet have a change of heart. Similarly, the intended legatee has not yet acquired any interest in the estate of the living testator, who may yet revoke or amend the will: *Smith v Smith* [2001] 1 WLR 1937, [9]-[10]. Or the donee or legatee may die first and the gift or legacy lapse. It may be said there is a question whether, just as the intended legatee during the testator's lifetime has only an expectancy, which (as *Smith v Smith* says) cannot be disclaimed, so too the beneficiary or object of a discretionary trust or power has, before the power is exercised, similarly only an expectancy. Therefore, it might be argued, such a beneficiary or object has as yet nothing to disclaim, and the purported disclaimer is of no effect.

67. Mr Wooding for the claimants was neutral on this question. But he nonetheless drew my attention to the judgment of Lewison LJ in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139. That was a case in which a freezing order had been made against the defendant, which *inter alia* required him to give disclosure of information about any trust in which he had an 'interest'. The defendant was a discretionary beneficiary under a trust. The question was whether he had an 'interest' within the meaning of the freezing order. Lewison LJ (with whom Arden and Christpher Clarke LJJ agreed) said:

> "13. A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. That is an interest which equity will protect. The trustees must apply some objective criterion in deciding whether or not to exercise their discretion in favour of a particular beneficiary; so that each beneficiary has more than a mere hope. But that right is not a proprietary interest in the assets held by the trustees, although it can be described as an interest of sorts: *Gartside v IRC* [1968] AC 553, 617-8. …"

68. This analysis was carried out in a different context from that arising in the present case, and for a rather different purpose. But even if I were not bound by it I would respectfully agree with it, at least as far as it goes. The beneficiary or object of a discretionary trust or power which has been created, in the sense that, for example, trustees now hold assets out which an appointment may be made, is in a fundamentally different position from that of the merely intended donee or legatee. As Lewison LJ says, even before the power is exercised, the trustees already owe the beneficiary or object the relevant duties of consideration (see *eg Re Gulbenkian's Settlements* [1970 AC 508, 518, and *McPhail v Doulton* [1971] AC 424, 456-57), and the beneficiary or object has various rights which may be vindicated by court action, not least that to restrain by injunction a threatened breach of trust by the trustees. That bundle of rights constitutes the beneficiary's or object's *interest*, and it already belongs to the beneficiary or object. Moreover, it persists against third parties into whose hands the assets may come (unless they are good faith purchasers for value of a legal estate without notice, when it persists against the exchange product). In that limited sense, the interest can be described as 'proprietary', even though it may never produce an absolute interest in capital or income ("a proprietary interest in [trust]

assets") in the hands of that beneficiary or object. As such an interest, in my judgment it can, therefore, properly be the subject of a disclaimer (or, as I say below, a release).

69. Second, once the testator has died or an *inter vivos* transfer has been made, and the legatee or transferee has accepted the property or interest, it cannot thereafter be disclaimed: *Lady Naas v Westminster Bank Ltd* [1940] AC 366. So a trust beneficiary who has once received income in right of his interest cannot thereafter disclaim that interest, but must instead *release* it (as in *Re Gulbenkian's Settlements (No 2)*: see [1970] Ch 408, 415F-G, 418B, 418G). A release is a giving up of the interest which the beneficiary had (*Re Guinness's Settlement* [1966] 1 WLR 1355), whereas a disclaimer is the avoidance of the interest in the first place: *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125, 1143B-C.

70. Third, the disclaimer of an *inter vivos* transfer cannot be revoked: *Re Paradise Motor Co Ltd*, 1143E-H. As the Court of Appeal there pointed out, there is first instance authority that the disclaimer of a gift *by will* can later be revoked, which was discussed more recently by the judge in *Smith v Smith* [2001] 1 WLR 1937, [15]-[16]. Personally, I find the distinction between the two kinds of disclaimer hard to square with the idea that a disclaimer *avoids* the gift (whether *inter vivos* or by will) in the first place. And, to my mind, a gift that never was can hardly be revived. But the point does not arise here.

71. The fourth aspect is that of delay in disclaiming. In my judgment, this is the important point in the present case. As I have said, there is a presumption of acceptance of a transfer. At the time of the hearing, I was not sure in my mind how that presumption sat with the case (which is this case) where a beneficiary did not disclaim for a long period after learning of his or her interest. That was why I was unhappy at deciding the point then and there unless it proved necessary. No case was cited to me at the hearing (and I have not found any since) where a trust beneficiary has been held to have validly disclaimed a trust interest after many years. In that sense this appears to be a new point.

72. But there *are* cases that show that an intended trustee who has never accepted the trusteeship or acted in the trust can refuse it, disclaiming both estate and trusts, even after the lapse of many years. In *Noble v Meymott* (1851) 14 Beav 471, for example, some 18 years after a trust came into existence, one of the two named original trustees formally disclaimed, never having acted in the trust or otherwise shown himself to have accepted it. Sir John Romilly MR held that the disclaimer was effective. And in *Jago v Jago* (1893) 68 LT 654, Wright J (sitting as an additional judge of the Chancery Division) held that one of two will trustees had validly disclaimed after 15 years, having done nothing sufficient to accept it in the meantime. By analogy with these cases, it seems that mere lapse of time without more should be no bar to a beneficiary's disclaiming his or her interest, and I so hold.

73. In the present case the testatrix died in 2010, and probate of her will was taken out in 2011. So, John has known of his interest for about a decade before attempting to disclaim it. Of course, the administration of the estate has been held up by the litigation, so nothing has yet been paid out to or accepted by John. It is quite possible that, if there had been no litigation, and the administration had taken place normally, John would by now have asked the trustees to exercise their power in his favour, and

they might well have done so, especially given the terms of the letter of wishes. But I must focus on what *has* happened in the matter of the trust, which is nothing.

74. There is no evidence before me to show that John has ever accepted his interest or relied on it in any way, sufficient to prevent his disclaiming now, and I must proceed on the basis that he has not accepted or relied on it. Hence, in my judgment, he was entitled to disclaim. Accordingly, I hold that John validly disclaimed his interest by the deed of 13 May 2021. Even if I were wrong about that, adopting a benevolent construction of the deed, it would operate as a *release* for the future of the trustees' obligations to consider John, in accordance with the decision in *Gulbenkian*. That provides an additional reason (though admittedly after the event) why this claim must fail.

Alleged unfairness to John's siblings

75. There is a final point. The first claimant said in her first witness statement that it seemed to her

> "wholly unfair that John's siblings and, where they are now sadly deceased, the beneficiaries of their shares, will be placed in a detrimental position if an appointment out of the discretionary trust is not made before the 15th May 2021 and they are the ones who will in effect bear the cost of John's pursuit of this matter and of his failure to account to the estate for his late Mother's share of the Partnership Account".

76. But the problem created in this case for the estate is, as it seems to me, the product of three quite disparate elements. The first was the decision *of the testatrix* not to give her son John an absolute interest in one quarter of her residuary estate, but instead to subject it to discretionary trusts for the benefit of him and his issue. This had the effect (as was intended) of protecting it against claims by John's former wife. But it *also* protected it against claims by other creditors, including, as it turned out, her own estate. It was her property to give away, and the testatrix could do this if she wanted to, to protect her son.

77. The second element was the deliberate choice of the personal representatives after obtaining judgments against John to make him bankrupt, thus limiting the recovery that they could make against his assets. I am in no position to and do not suggest that that was a wrong thing to do at the time. But it was not obligatory to do it. It was a *choice*, and it entailed *consequences*, including (i) putting the recovery of assets in the hands of the trustees in bankruptcy, rather than retaining them in their own hands, and (ii) the automatic discharge of provable debts once bankruptcy was over, normally at the end of one year.

78. Thirdly, it is only the fact that the same person (the first claimant) was both personal representative of the estate (and therefore creditor in John's bankruptcy) and trustee of the discretionary trust fund of which John was a possible object that made it practicable for the trustees in bankruptcy to suggest an appointment which would enure for the benefit of the estate rather than John. If the personal representatives had chosen to appoint different persons as trustees, and left it to them to decide what to do, there could not have been any conflict of interest. Of course, it may well be that they would not have considered that this appointment was appropriate anyway. In my

judgment, there could be no unfairness to John's siblings in not appointing for *the siblings'* benefit, because it was never intended that they should benefit from this trust. But if the same persons are involved both as personal representatives and trustees, there is an obvious conflict of interest which would by itself make it impossible for the court to give its blessing.

79. Accordingly I respectfully disagree with the suggestion that it would be "unfair" to John's siblings and their estates if an appointment were not made out of the discretionary trust before John's discharge from bankruptcy. By the choices which they made, the testatrix and the personal representatives of her estate have (perhaps unwittingly) produced a situation in which such an appointment cannot be made fairly, having regard to the rights of John, his children and remoter issue.

Conclusion

80. It was for all reasons given above (except in relation to disclaimer) that, at the conclusion of the arguments I announced that I would not give the court's approval to the proposed appointment, and dismissed the claim. My decision in relation to disclaimer provides a further route to the same conclusion. Since circulating my reasons in draft I have received a draft order to give effect to them, which I shall make. I am very grateful to counsel and solicitors for their contributions.