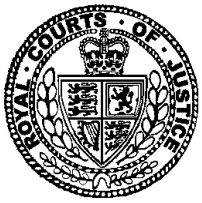

[2022] EWHC 81 (Ch)

Case No: PT- 2019- 000654

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

Rolls Building,
7 Rolls Building, Fetter Lane,
London. EC4A 1NL

Date: 21/01/2022

Before :

CHIEF MASTER SHUMAN

- -

Between :

(1) LEONARD GOODRICH **(2) CLARE JEFFRIES** **(as trustees of the Walker Books Employee Trust, the "WBET")** **(3) SARA COHEN** **(4) SIMON CATT** **(as trustees of the Walker Books Limited Employee Share Ownership Plan 2001, the "ESOP")**	**Claimants**
- and -	
(1) AB **(2) CD** **(3) EF** **(4) GH** **(5) IJ** **(6) KL** **(7) MN**	**Defendants**

- -
- -

Simon Atkinson (instructed by **Macfarlanes LLP**) for the **Claimants**
Elizabeth Weaver (instructed by **Charles Russell Speechlys LLP**) for the **1st to 6th Defendants**
Adam Cloherty (instructed by **Charles Russell Speechlys LLP**) for the **7th Defendant**

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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.

.....

CHIEF MASTER SHUMAN

CHIEF MASTER SHUMAN:

1. On 14 February 2020 the court approved and sanctioned the claimants to do all things necessary to complete a conditional share purchase agreement of their shares in Walker Books Limited (WBL) to a buyer. The sale completed on 7 May 2020. The application for approval had been brought under the jurisdiction in *Public Trustee v Cooper*. The claimants, who no longer hold any shares in WBL, wish to distribute the proceeds of sale but before doing so need to determine the scope of the beneficiaries (the construction application) and the extent to which the claimants may share information with each other in respect of the intended distributions and take that into account in their own decision as to distributions (the information application). It is anticipated that there will then be an application for the court to approve the final distribution policy, again under the jurisdiction in *Public Trustee v Cooper*.

2. The construction application concerns the construction of the trust deed dated 11 April 1990, which established the Walker Books Employee Trust (WBET), and comprises four issues:

   Issue 1: What does the term "retired officers or employees" mean?

   Sub-issue 1(1): does the term "retired" mean

   (a) only those who reach usual retirement age while working for Walker Books and on that date or after cease to be part of the workforce (narrow meaning);

   (b) those who, whether before at or after usual retirement age, cease working for Walker Books and cease to be part of the workforce (wider meaning); or

   (c) those who, whether before or at or after usual retirement age cease working for Walker Books irrespective of whether they continue in the workforce thereafter or not (widest meaning)?

   Sub-issue 1(2): if sub issue 1(1) is resolved in favour of the widest meaning, does the term

   (a) exclude a person who subsequently joins a competitor of Walker Books (narrow meaning); or

(b) include a person who subsequently joins a competitor of Walker Books (wider meaning)?

Sub-issue 1(3): does the term

(a) exclude officers or employees who die in service (narrow meaning); or

(b) include officers or employees who die in service (wider meaning)?

Sub-issue 1(4): does the term

(a) exclude 'bad leavers' (narrow meaning); or

(b) include 'bad leavers' (wider meaning)?

Sub-issue 1(5): if sub issue 1(4) is resolved in favour of the narrow meaning, does the term

(a) exclude a person who leaves one role as a 'good leaver' but subsequently leaves another as a 'bad leaver' (narrow meaning); or

(b) include a person who leaves one role as a 'good leaver' but subsequently leaves another role as a 'bad leaver' (wider meaning)?

Issue 2: what does "spouse" mean?

Sub-issue 2(1) does the term

(a) exclude civil partners (narrow meaning); or

(b) include civil partners (wider meaning)?

Sub-issue 2(2): does the term

(a) exclude same-sex spouses (narrow meaning); or

(b) include same-sex spouses (wider meaning)?

Issue 3: Does the term "children":

(a) exclude stepchildren (narrow meaning); or

(b) include stepchildren (wider meaning)?

Issue 4: Whether the terms "spouse", "children" and "remote issue"

(a) exclude surviving spouses, children and remoter issue of officers/employees who die in service (narrow meaning); or

(b) include surviving spouses, children and remoter issue of officers/employees who die in service (wider meaning)?

3. For the purposes of these issues the following definitions apply:

"Walker Books" means Walker Books Limited and its subsidiaries;

"employee" means an employee of Walker Books Limited or any of its subsidiaries;

"officer" means an officer of Walker Books Limited or any of its subsidiaries.

4. Mr Goodrich, the 1st claimant, has filed a witness statement dated 26 January 2021, his seventh, in support of the claimants' construction application. In addition, Mr Andrew Stone, one of the two living original trustees of WBET, has filed a witness statement dated 14 December 2020. Mr Harold Gould, the other living original trustee of WBET, has filed a witness statement dated 14 December 2020.

5. The information application, as I have indicated, concerns whether the 1st and 2nd claimants and the 3rd and 4th claimants can share information with each other in respect of the distribution of the proceeds of sale and how each set of trustees can take the others' distribution into account in respect of their own distribution. Ms Cohen, the 3rd claimant, has filed a witness statement dated 26 January 2021, her 4th, in support of the claimants' information application.

THE PARTIES

6. The claimants comprise the two trustees of the Walker Books Employee Trust (WBET) and the two trustees of the Walker Books Limited Employee Share Ownership Plan 2001 (ESOP).

7. For the purposes of the first *Public Trustee v Cooper* application the defendants represented various categories of people potentially affected by the proposed sale. However, the categorisation is problematic for the construction application. I was referred to *NBPF Pension Trustees Limited v Warnock-Smith* [2008] EWHC 455 and *Walker Morris Trustees Ltd v Masterson* [2009] EWHC 1955, cases concerning applications for directions by pension fund trustees, albeit the general tenor was that the court needed to form a view on whether to approve the distribution as sought and for that purpose it was necessary for the parties to present a critical analysis of the proposals. In both cases it was impractical to divide up the potential beneficiaries into classes with separate representation who could each argue in a consistent manner free from conflict. Both cases show the flexibility with which the court can approach this conundrum. In *PTNZ v AS* [2020] EWHC 3114 the court was faced with the defendants, bar one, contending for a particular construction, the trustee being neutral and the defendant opposing the construction not attending court. The trustee was

directed to assist the court by setting out the alternative argument so that the court had a fully argued construction case.

8. In relation to the current issues before me, the claimants were neutral on all issues and the first defendant had a conflict with potential distribution and neither the 1st nor 2nd defendants were willing to argue a narrow construction on issues 2 to 4. The parties' lawyers are to be commended for navigating a route in this case whereby in respect of each issue opposing views could be put before the court. The 1st to 6th defendants argued a narrow or wider but not widest construction on sub-issue 1(1) and a narrow construction on sub-issues 1(2) to 1(5). The 7th defendant was added to represent those who would benefit from the widest meaning on sub-issue 1(1) and the wider meaning on sub-issues 1(2) to (5), sub-issues 2(1) and 2(2), and issues 3 to 4. The 1st to 6th defendants were permitted not to advance any arguments in support of the narrow meaning for sub-issues 2(1) and 2(2) and for issues 3 to 4, notwithstanding the class of persons that they had been appointed to represent. Therefore, the claimants, notwithstanding their neutrality, were directed to advance arguments in support of the narrow meaning on those issues, as otherwise there would not be full argument before the court.

9. I am grateful to all counsel in this case who have each set out a comprehensive analysis both in writing and orally of the construction which they were tasked with supporting.

THE FACTUAL BACKGROUND

10. In 1978 Richard Sebastian Maynard Walker (Mr Walker) founded Walker Books, a United Kingdom based but internationally renowned publisher of high-quality children's books. Sebastian Walker Associates Limited was incorporated on 14 July 1978, the name was later changed to "Walker Books Limited". WBL is the parent company of a group of UK and overseas subsidiaries located in Australia, New Zealand and the United States of America.

11. In 1989 Mr Walker was diagnosed with a serious illness. It is likely that this caused Mr Walker to create the Walker Books Employee Trust (WBET). He instructed Lewis Silkin to prepare the necessary documents. The deed of settlement is dated 11 April 1990 and made between Mr Walker as settlor and Harold Gould, Andrew Howard Stone and Mr Walker as trustees (the WBET trust deed). 51% of WBL shares were transferred into the WBET. The remaining 49% shares in WBL were held across five family trusts, established by Mr Walker.

12. On 16 June 1991 Mr Walker died at the age of 48, only 12 years after he had founded WBL.

13. The shares held in the family trusts were acquired by Walker Books Limited Employee Share Ownership Trust 1997, as a qualifying employee share ownership trust (QUEST). Until 2003, QUEST transferred shares directly to qualifying current and former employees and officers.

14. On 31 March 2003 the Walker Books Limited Approved Share Incentive Plan 2003 (the SIP) was established for the benefit of qualifying employees. Thereafter shares held by QUEST were distributed via the SIP to qualifying employees. Eventually the SIP held 25.8% of the shares in WBL and individual employees the remaining 7.6%.

15. By an agreement dated 10 July 2001 the ESOP was established (the ESOP Trust Instrument). The parties to this were WBL, of the first part, and David Heatherwick, Michael Joseph McGrath and Stephen Vernon Woodhouse, of the second part, as the original ESOP trustees.

16. Employees who left WBL were required by legislation to withdraw their shares from the SIP. This was facilitated by the ESOP acquiring departing employees' shares at the fair market value for their shares and WBL providing the contribution. Eventually ESOP came to hold 15.4% of WBL's shares.

THE CONSTRUCTION APPLICATION

17. Clause 1 of the WBET Trust Deed contains the definition section. For the purposes of the construction application the relevant definition is found in clause 1(d),

> ""the Beneficiaries" shall mean the present and future officers or employees or retired officers or employees of WALKER BOOKS LIMITED or any subsidiary company within the meaning in Section 736(1) of the Companies Act 1985 or any company resulting from the amalgamation or reconstruction of WALKER BOOKS LIMITED and the spouses children and remoter issue of such present and future officers or employees or retired officers and employees and anybody whose objects are exclusively charitable under the law of England and Wales PROVIDED THAT neither the Settlor nor any person or persons who shall previously have added property to the Trust Fund nor the spouse for the time being of the Settlor or any such person or persons shall be one of the Beneficiaries."

THE LAW

18. There is no dispute between the parties as to the legal principles that the court is to apply.

19. In *Marley v Rawlings* [2014] UKSC 2 Lord Neuberger confirmed that the approach to construction in commercial contracts applies to wills. At paragraphs 19 to 21 he summarised the applicable principles,

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at

> the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. …
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".
>
> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts – see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H- 780F".

20. Lifetime settlements are no different and this approach was applied in *PTNZ v AS.* At paragraphs 39-42 the court said,

> "39. As Lord Hodge said in *Wood v Capita Insurance Services* [2017] UKSC 24 at paragraph 10,
>
> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching this view as to that objective meaning.
>
> 40. If it is being suggested that this canon is elevated in will cases, that is not the law. Lord Neuberger was quite clear, will construction follows the same approach as bilateral agreement construction. This is but one part of the iterative process. Lord Hodge in *Woods v Capita Insurance Services* said at paragraph 13,

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."
>
> 41. The principles of construction, as summarised by Lord Neuberger in *Marley v Rawlings*, which apply to wills similarly apply to lifetime settlements.
>
> 42. In a joint statement of the applicable legal principles counsel agree that the task for the court in construing the trust is ascertaining "the objective meaning of the words used, and the objective intentions of the parties to it (or in the case of a unilateral document such as a settlement or a will, the settlor or testator) by interpreting the whole of the words used against their documentary and factual context." To put that in another way the court needs to sit in the settlor's armchair and construe the objective meaning of the words in light of the relevant factual matrix. The relevant factual circumstances are those which existed or were in the reasonable contemplation of the settlor when the settlement was made and therefore do not include unforeseen circumstances."

21. As Ms Weaver, counsel for the 1st to 6th defendants, observed "The factual background or context means the factual background known to the parties to the document before or at the date it was made and includes the genesis of the document and its object or purpose."[1] Although that should not detract from the words actually used: *Arnold v Britton* [2015] AC 1619 at paragraph 17.

22. Mr Cloherty submitted that the WBET trust deed is a long living instrument, as Mr Walker intended. As such the court ought to take account of changing social mores and public policy as well as modern human rights obligations. He referred me to the Human Rights Act 1998 (HRA) and that under section 3, so far as possible, legislation must be read and given effect to in a way which is compatible with the rights guaranteed by the ECHR, (the Convention rights), and that, under section 6, the court as a public authority is obliged to act in a way which is compatible with Convention rights. In particular he drew my attention to article 8 and the right to "respect for … private and family life" and article 14 the right to non-discrimination.

23. In *Re Hand's Will Trust* [2017] Ch 449 the testator left the residue of his estate to his three children in equal shares for life with the remainder in each case to "their child or children who attain the age of 21 years". The testator died in 1948. The claimants

[1] 1st-6th defendants' skeleton argument, paragraph 21.

were the adopted children of the testator's second son, K, who died in 2008. The defendants were the natural children of the testator's daughter. When the will was made section 5(2) of the Adoption Act 1926 was in force, which provided that in any disposition "children" was construed as not including adopted children. This position was reversed by section 9 of the Adoption of Children Act 1949 and section 39 of the Adoption Act 1976, but paragraph 6(1) of Schedule 2 of the 1976 Act provided that the reversal did not apply to existing instruments. The claimants argued that section 3(1) of the HRA required the court to construe paragraph 6(1) of Schedule 2 to make it compliant with their Convention rights under article 14, read with article 8. Rose J held that by retaining the discriminatory interpretative provision in section 5(2) of the 1926 Act, paragraph 6(1) conferred more limited inheritance rights on adopted children than natural children. Such an interpretation infringed article 14 in conjunction with article 8. It was possible to read paragraph 6(1) pursuant to section 3 of the HRA to make it compliant with the claimants' Convention rights so that the reference to "children" included biological and adopted children. This was not giving retrospective effect to the HRA, which is generally impermissible, since the question only fell to be determined in 2008 on the death of K. Although the defendants had "vested interests", in the sense that this phrase is used in the law of inheritance, it was not unfair to apply the HRA as a result of a post-HRA event which reduced the value of those interests.

24. This analysis has been followed in *Re JC Druce Settlement* [2019] EWHC 3701 (Ch) where a literal reading of "beneficiaries" in clause 3 in the settlement made on 10 December 1959, as defined in clause 1(c), would exclude certain potential members of the class because they or their parents were illegitimate or adopted. The Judge accepted that whilst the HRA could not bring about a retroactive alteration of the identity of the beneficiaries at a past point in time, the HRA could be applied when a power or duty falls to be exercised or performed post the implementation of the HRA.

25. Lewin on Trusts, paragraphs 7-004 to 7-018, provides a useful summary of what evidence may be admitted by the court to interpret settlements. What cannot be admitted, save in the exceptional case of latent ambiguities, is evidence of the subjective intention of the settlor. Although as Mr Cloherty, counsel for the 7th defendant, rightly in my view says, material may be admitted for the purpose of establishing objective facts, this may include, where relevant, the settlor's religious beliefs, sexual orientation and family situation. The court has to remain vigilant though that the evidence sought to be adduced is properly part of the factual background and not subjective intention by a back door.

RELEVANT EVIDENCE

26. The WBET Trust Deed itself.

27. In terms of contemporaneous documents there is a four-page document dated 10 April 1990 headed "LETTER TO ALL EMPLOYEES" from Mr Walker (the Letter to Employees). This was made one day before the WBET was established. The material part says,

> "Ever since starting Walker Books, ten years ago, it has been my intention that authors, illustrators and employees should share in its success…"

> "Those entitled to benefit under the Trust will be all employees of the Company and all authors and illustrators who agree to become employees of a new subsidiary of the Company by the name of Walker Books (Editorial) Limited."
>
> "All these Beneficiaries in the Trust are capable of benefiting under the Trust. I will be giving guidance to the Trustees as to how I feel any payments, which they wish to make under the Trust, should be made. I do stress, however, that this guidance is purely that and is not binding upon the Trustees…"
>
> "The primary purpose of the Trust is to ensure that the Beneficiaries share in the long-term future success of the Company…"
>
> "The Trustees have absolute discretion as to whether or not they pay out cash received to any employee or in what proportions they do so. No employee is entitled to any payment. Payment may be made to some employees and not others…"
>
> "I must make it clear that I am not tying Employees or Authors/Illustrators to the Company in any way. I do obviously very much enjoy your loyalty, otherwise I would not hand over something so valuable to the Trust. However, any Employee is free to leave the Company whenever he or she wishes, although in fairness you should know that to do so would be likely to take you outside the scope of those I feel should benefit from the Trust. Any Author or Illustrator is free to do books for other publishers (although of course I would prefer them not to!) without affecting his or her right to come under the Trust.
>
> The guidance I will give to my Co Trustees (and do bear in mind that I am, myself, a Trustee and will remain so) will encourage them to look at the performance of each Employee (including Authors and Illustrators) both historic and future. The relative importance to the profitable wellbeing of the Company will reflect in the extent to which you share in any payment the Trustees decide to make. This has the immense advantage that Authors, Illustrators and Employees will automatically enjoy a share of the success in their publishing house which could never be expressed in the course of a normal royalty contract or salary."

28. This document is dated the day before the WBET trust deed and addressed to all employees. It was intended to be read by the beneficiaries of the prospective WBET and sets out in lay terms what would be intended by the WBET Trust Deed. The position is analogous to the "explanatory note" that was taken into account by the House of Lords in *ICS Ltd v West Bromwich BS* [1978] 1 WLR 896 (HL), specifically Lord Hoffman at page 913G. I consider that it is admissible as an aid to construction.

29. In addition, there is a Memorandum of Wishes which is unsigned and only bears the year 1990 at the top. It is the understanding of the 1st and 2nd claimants that it was drafted by Lewis Silkin at around the same time as the WBET Trust Deed, and that it was being considered by Mr Walker but was not signed. It is thought that Mr Walker may have thought the document too prescriptive or complicated. Mr Stone, who was a trustee from 1990 until 28 September 1998, was a partner at Lewis Silkin LLP and was Mr Walker's personal lawyer and WBL's lawyer from 1980, says that paragraph 1 of the Memorandum of Wishes and the paragraph beginning "I suggest…" reflect Mr Walker's subjective intentions and wishes. The material parts of the Memorandum of Wishes are,

> "1. My primary aims in setting up the Settlement are to reward Employees of Walker Books Limited (including authors and illustrators who have worked for Walker Books Limited) for their past loyalty and commitment to the Company and, by enabling them to share in its long-term future success, to provide an incentive for their continued efforts."
>
> "I would also request you to bear in mind the following:-
>
> (a) Where an employee has died prior to a distribution, his or her dependants (by which I mean spouse and minor children) should benefit in substitution.
>
> (b) Where at the relevant date [i.e. the date of distribution] an employee has retired, the fact of his or her retirement should be disregarded…
>
> (c) Where an employee has been dismissed or left the employment of the Company, then, unless there are special circumstances, he or she should not be included in any distribution as above.
>
> (d) Where an employee has, whilst working for Walker Books Limited, also worked for any other company, then you should adjust his or her share of any distribution to take into account of such other work, as you consider appropriate.
>
> (e) In the usual course of events, the financial circumstances of a beneficiary, should not be one of the factors which you take into account."

30. This is more problematic as a document. On one analysis it is a statement of Mr Walker's subjective intentions and by its nature it is intended to be non-binding and confidential. However, it does seem to me that a letter of wishes may in principle be admissible where it contains background facts. The Memorandum of Wishes does appear to be consistent with the Letter to Employees. On the limited evidence before me I am satisfied that it was prepared on Mr Walker's instructions and was drafted contemporaneously with the WBET Trust Deed. However, I also bear in mind that it

was not finalised and not formally approved by Mr Walker. On balance I consider that the Memorandum of Wishes is admissible as part of the factual background, but that limited weight should be placed upon it.

31. There is also a "Note to the Trustees of the Walker Books Employees Trust" from Mr Walker dated 20 June 1990, which postdates the WBET Trust Deed. Mr Atkinson, counsel for the claimants, submits that this document is not admissible as an aid to construction. Whilst as a general proposition I do not accept that a document which postdates the document is never admissible; there are very limited circumstances in which it might be. In *Chartbook Ltd v Persimmon Homes Ltd [*2009] 1 AC 1101 at paragraph 42 Lord Hoffman said,

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel."

As Mr Cloherty observed the biography of Mr Walker, which is in the bundle, is admissible for the purpose of establishing the factual matrix existing at the time of WBET, even though it was published 5 years later. Whilst that is correct the Note to Trustees does not assist with the factual background and is not relevant to the construction of the WBET: it is not admissible.

32. The witness statements from Mr Stone and Mr Gould set out their understanding of matters in 1990. However, what they seek to do is place before the court evidence about Mr Walker's subjective wishes and views. They are not admissible.

THE ISSUES

33. The background facts are agreed between the parties. In broad terms this includes a dictionary definition of the relevant term, the legislative regime, the wording of the trust deed itself, contemporaneous documents (save for the contents that declare a subjective intention), and the commercial purpose of the WBET as discerned from the WBET trust deed and the matrix of fact.

34. There are two overarching points about the WBET trust deed which are pertinent to the issues of construction before me. First, it is right to note that this is a discretionary trust, affording the WBET trustees a wide measure of discretion in implementing its purposes from time to time. This structure was understood in the Letter to Employees, in which Mr Walker tells them that,

> "I will be giving guidance to the Trustees as to how I feel any payments, which they wish to make under the Trust, should be made. I do stress, however, that this guidance is purely that and is not binding upon the Trustees. Indeed the discretionary element of the Trust will enable the Trustees to view the input

> of all the potential Beneficiaries, to the Company, at any given time…."[2]

WBET is by its nature a long-term trust with a large and fluctuating class of beneficiaries and is unlike a private family settlement. The class of beneficiaries is defined by reference to the relationship they have with Walker Books, whether existing or previous. Whilst Mr Walker was resistant to a sale of WBL he did appreciate that it might cease to exist; see Letter to Employees.

35. Secondly, WBET had a commercial purpose. It is clear from the documents before me that Mr Walker valued loyalty but that is a Janus-faced concept in the WBET trust deed. The purpose was to reward those who worked hard and contributed to Walker Books. This includes both a reward dimension for past loyalty and contribution to Walker Books and an incentive dimension to encourage future loyalty and contribution. The Letter to Employees specifically refers to encouraging the trustees to "look at the performance of each Employee (including Authors and Illustrators) both historic and future.[3]" In the Memorandum of Wishes, point 1, this is reiterated,

> "My primary aims in setting up the Settlement are to reward Employees of Walker Books Limited (including authors and illustrators who have worked for Walker Books Limited) for their past loyalty and commitment to the Company and, by enabling them to share in its long-term future success, to provide an incentive for their continued efforts."

Both of these elements form part of the commercial purpose of WBET.

Issue 1: What does the term "retired officers or employees" mean?

Sub-issue 1(1): does the term "retired" mean

(a) only those who reach usual retirement age while working for Walker Books and on that date or after cease to be part of the workforce (narrow meaning);

(b) those who, whether before at or after usual retirement age, cease working for Walker Books and cease to be part of the workforce (wider meaning); or

(c) those who, whether before or at or after usual retirement age cease working for Walker Books irrespective of whether they continue in the workforce thereafter or not (widest meaning)?

[2] No formal guidance was given by Mr Walker; all that is before the court is the Memorandum of Wishes, an unsigned document bearing only the year 1990 and apparently drafted by a solicitor at Lewis Silkin, albeit on instruction.

[3] Letter to Employees, penultimate paragraph.

36. It is my decision that the widest meaning, (c), is the correct construction of "retired".

37. Ms Weaver seeks to emphasise the natural language of the clause but that is to elevate textualism, which I am not convinced is as entirely clear cut as submitted, at the expense of contextualism.

38. There is no definition of the term "retired" in the WBET trust deed. The Oxford English Dictionary defines the term in respect of a person as,

> "That has left office, employment, or service permanently, now esp. on reaching pensionable age; that stopped working."

39. I accept that "retired" is commonly used in the sense of someone who has stopped working in their chosen career or activity because they have reached the age of retirement or for other reasons have been forced to stop working. However, it is also used in the sense of someone leaving the office which they hold or ceasing their activity. For example, a partner 'retiring' from a partnership or a director 'retiring' from office, a cricketer retiring hurt from a match. A professional footballer who is no longer able to play competitive football due to injury but may go on to coach. As Mr Cloherty submitted linguistically the word can be used in the sense of someone retiring from an employment relationship but not retiring from the workforce generally.

40. A "retired" officer may be able to put themselves forward for re-election, whereas a contract of employment is not necessarily time limited. It is not usual to speak of an employee putting themselves forward for employment again. There is a disjunctive reference to "officers or employees", "retired" is not repeated before "employee" and "retired" should be construed in the same way for both. The meaning of "retired" is wider in respect of "officers" but it should be given the same construction in respect of "employees".

41. Ms Weaver submits that the drafter used "former" trustee in paragraph 8(a) of the First Schedule to the WBET trust deed. That was in the context of the power of the trustees to enter into an indemnity in favour of former trustees. I accept that the word was open to the drafter to use in respect of officers and employees, as was the prefix "ex", but "beneficiaries" are in a qualitatively different position to trustees.

42. The opinion from claimants' counsel sets out the legislative framework under which the WBET was established, specifically employee benefit trusts under section 186 of the Inheritance Tax Act, employees' share schemes under section 743 of the Companies Act 1985. As indicated in that opinion, they do not take matters any further in terms of assisting with construction.

43. In *Venables v Hornby (Inspector of Taxes)* [2003] UKHL 65 a pension scheme provided for the payment of an immediate pension at the discretion of the trustees to a member who had retired in normal health at or after age 50. The taxpayer was an executive director who decided at age 54 to retire but to continue as an unpaid non-executive director. He was paid some £580,000 by the trustees but was assessed for schedule E income tax under the Income and Corporation Tax Act 1988 on the basis

that he had not retired, and the payments were not authorised by the rules. The House of Lords, allowing an appeal from the Court of Appeal, determined that "retire" means "retire from the service of the company whether as employee or director"[4]. More significantly for present purposes it was emphasised that the commercial objectives of the arrangement in question are important crosschecks to the construction preferred. Lord Millett at paragraph 39 set out the consequences of the construction of the trustee placed upon it by the Court of Appeal, which would have led to absurdities, such as with the position of the taxpayer.

44. Here, a narrow construction would lead to a capricious result for a long serving employee who may have made a substantial contribution to Walker Books' success but may have left Walker Books before the usual retirement age. Mr Cloherty also poses the question: what if WBL ceased to exist? A narrow construction would mean that a loyal employee who worked hard for WBL prior to it ceasing to exist would fall outside of the scope of the WBET trustees' dispositive powers due to reasons beyond their control so that they could not work for WBL until normal retirement age. The class fixed at that point in time may well be a fairly small number of persons. The widest construction is consistent with the commercial purpose of WBET and would not lead to the absurdities that would arise on a narrow construction and potentially under the wider construction. Past valuable contributions are as important as incentives for future contributions to Walker Books and support the widest construction.

45. The widest construction is also supported by the Letter to Employees. Whilst the WBET is not a pension scheme there is an element of benefit under it as employees are encouraged to contribute to Walker Books' success, both in the sense of reward and incentive. It sets out in straightforward language the essence of the intended WBET. In relation to ceasing to work at Walker Books, the employees are told that they are not being tied to Walker Books but that if they leave "it is likely to take you outside the scope of those I feel should benefit from the Trust". This does not say that leaving employees could not benefit under the WBET and does not seek to attach any conditions to those leaving Walker Books. Indeed, the second paragraph of the Letter provides, in the context of refusing to sell WBL, "it would be irresponsible if my lack of personal financial ambition prejudiced the careers and good fortune of the people who create what does excite me …"

46. In so far as I can place any weight on the Memorandum of Wishes it is consistent with the Letter to Employees. I note that reference is made to an employee who has been dismissed or left the employment of Walker Books and that they may not be included in the distribution "unless there are special circumstances". Again, this does not exclude such a person from the category of beneficiaries but simply suggests that they are unlikely to benefit, although that will be a matter for the claimants.

<u>Sub-issue 1(2): if sub issue 1(1) is resolved in favour of the widest meaning, does the term</u>

(a) exclude a person who subsequently joins a competitor of Walker Books (narrow meaning); or

[4] Lord Millett, paragraph 29.

(b) include a person who subsequently joins a competitor of Walker Books (wider meaning)?

47. The term includes the wider meaning, (b).

48. It follows from my decision on sub-issue 1(1) that a person who leaves Walker Books, for whatever reason, is within the scope of beneficiaries. There is nothing within the WBET trust deed that seeks to delimit what an officer or employee does after leaving Walker Books.

49. Although part of the context is that the WBET intended to incentivise those who remained at Walker Books it also rewarded past contributions. There is nothing in the evidence before me that would support construing the term in a narrow way so that past contributions, no matter how valuable they have been to the success of Walker Books, would effectively be extinguished by leaving Walker Books to work for a competitor. This is supported in the Letter to Employees which speaks in terms of employees being free to leave Walker Books and that if they did so they would "likely" be outside of the persons that Mr Walker considered should benefit. Whilst that may mean they would be unlikely to receive anything it does not follow that they would receive nothing; they remain within the class of potential beneficiaries. This position is also supported in the Memorandum of Wishes, as set out in paragraph 46 above.

Sub-issue 1(3): does the term

(a) exclude officers or employees who die in service (narrow meaning); or

(b) include officers or employees who die in service (wider meaning)?

50. The term includes the wide meaning, (b).

51. This follows from my decision on sub-issue 1(1). In some ways this is more consistent with the OED definition of "retirement" in that it describes someone who has left employment permanently.

52. I have not accepted that leaving employment to join a competitor negates an officer or employee's past contribution to Walker Books. It would be perverse to then construe those who die in service as falling outside the class of beneficiaries. It would also leave spouses, children and remoter issues of "retired officers or employees" outside the scope of the beneficial class. This defeats the obvious and usual purpose of including such people, so that they are within the scope of beneficiaries under an employee benefit trusts and employee share schemes when the employee dies.

53. The Memorandum of Wishes also makes specific mention of dependants of the employee, where they have died prior to a distribution[5].

[5] Page 2, (a).

Sub-issue 1(4): does the term

(a) exclude 'bad leavers' (narrow meaning); or

(b) include 'bad leavers' (wider meaning)?

54. The term includes the wider meaning, (b).

55. A 'bad leaver' is simply someone who has ceased to be an officer or an employee of Walker Books. There is nothing within the WBET trust deed that seeks to differentiate this class of people.

56. Legislation also supports the wider construction. Under the Companies Act 1985 section 743 an employees' share scheme is "a scheme for encouraging or facilitating the holding of shares or debentures in a company by or for the benefit of … (a) the bona fide employees or former employees of the company." The statute does not seek to differentiate the class of beneficiaries under an employment share scheme by how they left their employment.

57. The wider construction is again consistent with the purpose of the WBET as a discretionary trust. It may be that the trustees in exercising their wide discretion will decide that a 'bad leaver' should not receive a distribution under the WBET. That is a very different position to the 'bad leaver' not being included within the potential class of beneficiaries. In counsel for the claimants' opinion an example illustrates this point. If an employee has been instrumental in developing a new title or increasing the profitability of Walker Books but has been dismissed because they are persistently tardy due to personal or health issues the trustees may consider that that person should receive a distribution.

58. The Memorandum of Wishes, page 3 paragraph (c), refers to an employee who has been dismissed and "unless there are special circumstances" they should not be included in the distribution. That does not exclude such a person from the class of beneficiaries.

59. The manner in which a person leaves Walker Books is something that the trustees will consider in the exercise of their discretion but in my view that does not exclude that person from the scope of beneficiaries per se.

Sub-issue 1(5): if sub issue 1(4) is resolved in favour of the narrow meaning, does the term

(a) exclude a person who leaves one role as a 'good leaver' but subsequently leaves another as a 'bad leaver' (narrow meaning); or

(b) include a person who leaves one role as a 'good leaver' but subsequently leaves another role as a 'bad leaver' (wider meaning)?

60. The term includes the wider meaning, (b) and necessarily follows from my determination of sub-issue 1(4).

Issue 2: what does "spouse" mean?

Sub-issue 2(1) does the term

(a) exclude civil partners (narrow meaning); or

(b) include civil partners (wider meaning)?

61. The term includes civil partners, wider meaning (b).

62. At the date of the WBET trust deed the legal concept of civil partners did not exist in this jurisdiction. In G*haidan v Godin-Mendoza* [2004] 2 AC 557 the defendant had lived in a stable and permanent same sex relationship with the protected tenant of the flat of which the claimant was the freehold owner. On the tenant's death the claimant brought possession proceedings and the defendant sought a declaration that he could succeed to his partner's tenancy. The House of Lords, upholding the decision of the Court of Appeal, decided that it is possible to read paragraph 2(2) of Schedule 1 to the Rent Act 1977 in a Convention-compliant way by extending "spouse" to persons living with the original tenant as if they were his or her wife or husband. The defendant was entitled to succeed to his late partner's tenancy. Lord Millett said, at paragraph 78, that at common law the term "spouse" means "a party to a lawful marriage between two persons of the opposite sex".

63. The Civil Partnerships Act 2004 (the CPA) permitted same-sex couples, as of 5 December 2005, to enter into a civil partnership as an alternative to marriage. It has been further amended, as from 2 December 2019, to allow opposite-sex couples to also enter into a civil partnership.

64. The CPA did make important changes to the legal status of a couple who had entered into a civil partnership, for example, under section 71 in respect of wills, the administration of estates and family provision.

65. In *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2020] AC 1 (HL) an opposite-sex couple wished to enter into a civil partnership but were prevented from doing so by the provisions of the CPA. They sought a declaration of incompatibility under section 4 of the HRA on the ground that as a result of the Marriage (Same Sex Couples) Act 2013 (the MSSCA), the CPA had become incompatible with article 14 of the Convention. At paragraph 3 their Lordships in a joint judgment said that,

> "CPA was not repealed when MSSCA was enacted. Consequently, same sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not and is not available to heterosexual couples. Under the law as it currently stands, they can only gain access to the rights, responsibilities, benefits and entitlements that marriage brings by getting married."

At paragraph 21, their Lordships said,

> "Between 2005 (on the coming into force of CPA) and 2014 (when MSSCA came into force) there was no question of discrimination between same sex and different sex couples. Both had access to all the rights, entitlements and responsibilities that marriage entailed. The only difference was that the gateways to those entitlements etc were differently labelled …"

66. Mr Atkinson submits that the law has retained a distinction between civil partnerships and marriage, and it is important that the two are not conflated. Mr Cloherty submits that both marriage and civil partnership can be said to confer the same set of spousal rights. Whilst I think this might be better described as a similar set of "spousal" rights, I accept the broad tenor of Mr Cloherty's submission and it accords with the analysis of the House of Lords in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*.

67. Mr Cloherty submits that it is open to the court to construe the relevant provision of the WBET trust deed by reference to the background facts and in particular the known characteristics about Mr Walker. In the alternative that the court should adopt a Convention compliant reading of the term "spouse" to include civil partners.

68. Strictly the court is searching for the objective intention of the settlor, the guiding principles of which I have already set out in paragraphs 18 to 20 above. The words to be interpreted are placed in their documentary, factual and commercial context.

69. Counsel referred me to the common law definition of "spouse". I wonder whether they could equally have referred me to the eligibility of a person to enter into a valid marriage in accordance with the requirements of the Marriage Act 1949, as amended. What troubles me is whether Mr Walker objectively intended to define a "spouse" in such a restrictive way or to encompass someone who has entered into a legally recognised relationship with another person?

70. There is nothing in the Letter to Employees that assists. In the Memorandum of Wishes there is reference to the death of an employee prior to distribution and that "his or her dependants (by which I mean spouse and minor children) should benefit in substitution"; page 2, paragraph (a).

71. Mr Cloherty has referred to the fact that Mr Walker was gay and that it was a relevant background fact. This was not developed in argument.

72. Textually "spouse" can be narrowly defined in accordance with the legislation at the time. However, if one puts it into the commercial context in which WBET was created, Mr Walker wished to reward the contributions of employees both past, in terms of reward, and future in terms of incentivising them. By extension he intended that the dependants of the officer or employee should be within the scope of beneficiaries so that they benefited from the contribution made by the deceased officer or employee. Analysed in that way it seems to me to be open to construe "spouse" as including a civil partner, which is a legal relationship between two people carrying with it similar rights to those enjoyed under marriage. I accept that the term connotes some form of status, a legal recognition of a committed relationship between

two people. In this case that the term includes civil partners within the meaning of the CPA.

73. In counsel for the claimants' opinion reference is made to the Variation of Trusts Act 1958 and that in older private trusts, trustees and beneficiaries may seek a variation to expand the scope of beneficiaries to include civil partners, or since the MSSCA, same sex spouses. A private family trust is a far cry from the employee trust that I am grappling with. Furthermore, as indicated in counsel's opinion, this route is not feasibly open to the claimants to pursue, given the size of the adult beneficial class who would need to give their consent, and the uncertainties with the scope of that class. The VTA is a mechanism that can be used to approve variations on behalf of minor, unborn and unascertained beneficiaries: it does not assist the claimants here.

74. My construction is fact sensitive to the background facts in this case including the fact that WBET is not a family trust but a more flexible 'living and breathing' long term employee trust; a key feature of which is to reward officers or employees for past contributions.

75. I have also considered Mr Cloherty's alternative argument that in reaching a Convention compatible interpretation of spouse the court can by analogy follow the approach taken by Rose J in *Re Hand's Will Trust.* Having accepted that the claimants' Convention rights had been infringed because paragraph 6 of Schedule 2 to the 1976 Act was discriminatory, she went on to consider whether the domestic legislation infringed article 14 and article 8. At paragraphs 76 to 77, Rose J said,

> "76. The next question is whether the domestic legislation as it applies to Henry Hand's will infringes the Convention. In my judgment it is clear from the Strasbourg case law that I have cited above that it does. The ECtHR has consistently held that article 14 in conjunction with article 8 precludes legislation which confers more limited rights on adopted children to their adoptive parents' estate, than are conferred on natural children. The ECtHR has also consistently rejected arguments put forward by respondent governments that the discriminatory law should remain applicable to instruments that pre-date the change in social attitudes which now requires equal treatment for adopted children. The ECtHR addressed the problem of retrospectivity of the Convention in this regard in Marckx 2EHRR 330. It held that arguments based on legal certainty or the need to protect the expectations of the deceased and their families must be subordinate to the imperative of equal treatment. Discrimination cannot be regarded as a proportionate response to such concerns: see Brauer's case, 51 EHRR 23, para 43 and the treatment of transitional provisions retaining the effect of discriminatory legislation for earlier instruments in Fabris's case 57 EHRR 19, para 68.
>
> 77. I therefore hold that the claimants would succeed in a claim before the ECtHR that the United Kingdom Government has infringed their rights under article 14 in combination with article 8 by failing to legislate to ensure that the interpretative

> provision in section 5(2) of the 1926 Act had no continuing effect where a will falls to be construed after the Convention came into force."

76. Rose J accepted the wording proposed by counsel so that paragraph 6 could be read to be Convention compliant, the effect of which would mean that the reference in Henry Hand's will to the child or children of his children includes any adopted grandchildren and therefore the claimants[6].

77. She had already satisfied herself that reading down the 1976 Act in this way did not offend against the principle that the HRA could not be applied retrospectively. At paragraph 86 Rose J said,

> "86. He submits that Henry Hand's will should be treated like the long lease in Lord Rodger's example citing West v Gwynne [1911] 2 Ch 1: see para 50 above. The lease at its inception confers certain rights on the parties if certain things happen. If that thing happens before the revising legislation comes into effect, the die is cast and the changes brought about by the new legislation cannot apply retrospectively to change the result. But if the event happens after the revising legislation comes into effect then in order to determine the scope of the parties rights under the lease, one must look not just at the wording of the lease but also at the wording of the subsequent legislation. As Lord Rodger said, there is no general presumption that legislation does not alter the existing legal situation or existing legal rights prospectively in respect of events that happen after the HRA comes into force."

The question of whether Kenneth has any children within the meaning of the Henry Hand will only fell to be determined after his death in 2008, after the HRA had come into force.

78. Mr Atkinson specifically referred to Lewin on Trusts, paragraph 7-033(2) where the editors consider that the reasoning in *Re Hand's Will Trust* should be treated with caution. It is said that the post-act relied upon was only relevant because it marked the time of termination of a trust, which itself had been constituted by a disposition made at a much earlier time. I also note that at paragraph 7-033(3) the editors accept that a connection with the past does not necessarily mean that section 3 of the HRA does not apply, particularly where the operation of section 3 is to enlarge the class of discretionary objects.

79. The latter approach was followed in *Re JC Druce Settlement*. At paragraph 25 HHJ Keyser QC sitting as a Judge of the High Court said,

> "In my judgment, the Human Rights Act 1988 could not bring about a retroactive alteration of the identity of the beneficiaries at a past point in time. However, I agree with Mr Legge's

[6] See Rose J, paragraphs 105 to 106.

> opinion, and with his submissions to me, that the effect of the Act is capable of changing the contents of the class of beneficiary during the period in which duties fall to be performed or powers fall to be exercised under the Settlement. The fact that someone was not a beneficiary when a power fell to be exercised or a duty to be performed at such-and-such a past date does not mean that that person cannot be, by reason of the Human Rights Act, a beneficiary when a power or duty falls to be exercised or performed now. Thus, whereas on the facts in Wilson the Act could not operate retrospectively so as to alter the rights and obligations under a consumer credit agreement that had come to an end before the Act came into force, Lord Rodger observed that the coming into force of the Act might affect the relationship between existing parties under a long lease, the term of which extended both before and after the date of the coming into force. The present case is in my view analogous. Distributions under the Settlement before the Act came into force would be unaffected by the Act, but after the Act has come into force it will potentially apply to further distributions. I do not consider that retrospectivity presents a problem in this case."

80. The question of spousal rights clearly engages article 8 of the Convention; the right to respect for private and family life. I also accept Mr Cloherty's submission that a decision not to construe "spouse" so as to include civil partners so that the gateway to benefits is through marriage, not civil partnership, infringes article 14. Setting out his reasoning more fully, the common law was discriminatory in continuing to make a distinction between couples in a long term different-sex relationship (spouses) and couples in a long term same-sex relationship. The courts continued to effect this discrimination by applying the common law distinction after the HRA came into effect. The introduction of the CPA failed to cure this discrimination but continues to discriminate between spouses and civil partners.

81. By parity of reasoning with both *Re Hand's Will Trust* and *Re JC Druce Settlement* I do not consider that the issue in this case offends the principle of retrospectivity.

82. However, I do have difficulty in how to read down the CPA in a Convention compliant way. Parliament has introduced a new legal relationship, initially between same-sex couples, now including different-sex couples as well. If I read down the CPA inevitably, I am eliding spouses and civil partners and I consider going beyond what the court should do. As Lord Nicholls said in *In Re S (minors)(Care Order: Implementation of Care plan)* [2002] 2 AC 291 at paragraph 40,

> "a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention-compliant by legitimate use of the process of interpretation."

83. To paraphrase Lord Rodger in G*haidan v Godin-Mendoza* it would fall the wrong side of the line into judicial vandalism rather than judicial interpretation. I therefore do not consider it is open to me to read the CPA in the way contended for Mr Cloherty. Although as I have already accepted, by applying construction principles the term "spouse" in the WBET trust deed does include "civil partner."

Sub-issue 2(2): does the term

(a) exclude same-sex spouses (narrow meaning); or

(b) include same-sex spouses (wider meaning)?

84. The term includes same-sex spouses, wide meaning (b).

85. The MSSCA extended the institution of marriage to same-sex couples: sections 1 and 11.

86. The points made in paragraphs 67 to 74 apply equally here. Similarly, by parity of reasoning, textually "spouse" can be narrowly defined in accordance with the legislation at the time to mean an opposite-sex couple who are therefore eligible to marry in accordance with the Marriage Act 1949, subject to compliance with certain processes such as notices. Again, if one puts it into the commercial context, Mr Walker wished to reward the contributions of employees both past, in terms of reward, and future in terms of incentivising them. By extension he intended that the dependants of the officer or employee should be within the scope of beneficiaries so that they benefited from the contribution made by the deceased officer or employee. The WBET trust deed is a living instrument, more analogous to a commercial arrangement such as a pension scheme than a private family trust. Mr Cloherty argues that Mr Walker's sexual orientation and apparent commitment to equal rights is relevant here. It is open to construe "spouse" as including a marriage between a same-sex couple, as permitted under the MSSCA, which even uses the same language as that used in the WBET trust deed, "spouse".

87. If I am not correct in my reasoning, I have gone on to consider Mr Cloherty's alternative argument that he can rely on the approach taken by Rose J in *Re Hand's Will Trust*.

88. The rights of same-sex spouses are plainly engaged under article 8 of the Convention, and for the reasons that I will go on to consider article 14 is engaged.

89. Section 11(1) of the MSSCA provides that in the law of England and Wales marriage has the same effect in relation to same-sex couples as it has in relation to opposite-sex couples. It goes on at section 11(2) to state that the law of England and Wales, including legislation whenever passed or made, has effect in accordance with section 11(1). The problem arises in respect of Part 1 Schedule 4 which expressly provides at paragraph 1,

> "(1) Section 11 does not alter the effect of any private legal instrument made before that section comes into force."

The WBET trust deed is an instrument that falls within paragraph 1 of Schedule 4.

90. The effect of this Schedule is discriminatory in that, post the HRA, it seeks to continue to make a distinction between same-sex couples and opposite-sex spouses in instruments. If there was any doubt as to the MSSCA's purpose, the explanatory notes to paragraph 1 of Schedule 4 state that "marriage-related references in documents …. drawn up prior to section 11 coming into force …. will be understood only in terms of marriage of opposite sex couples." Unlike the CPA no new legal relationship is created but rather the MSSCA removes one of the eligibility criteria, that the parties are to be of the opposite-sex, to the formation of a valid marriage contract.

91. In counsel for the claimants' opinion reference is made to whether there is ambiguity in the wording of paragraph 1, which simply limits "the effect" of an existing private instrument. I do not accept this analysis and am satisfied that the MSSCA by preserving this distinction creates new discriminatory effects.

92. The summary in Lewin on Trusts, paragraph 7-033(3), covers the situation here. The creation of a same-sex spousal relationship is a post-HRA event and extends the category of beneficiaries: retrospectivity does not arise here.

93. Mr Cloherty submits that the wording from *Re Hand's Will Trust* can be adapted so that paragraph 1(2)(b) of Schedule 4 to the MSSCA can be read down to be Convention compliant as follows,

> ""(1) Section 11 does not alter the effect of any private legal instrument made before that section comes into force. …
>
> (2) In this paragraph "private legal instrument" includes - …
>
> …
>
> (b) an instrument (including a private Act) which settles property in so far as (i) it contains a disposition of property, and (ii) the beneficiary of the disposition has done something to avail himself or herself of the property right in question before the coming into force of the Human Rights Act 1998."

94. Whilst this is rather a 'clunky' way of reading down paragraph 2(b) it does have the effect of limiting the discriminatory effect of the MSSCA post-HRA. I do not consider that it goes against the grain, even though the explanatory note would have to be similarly read. I accept that Schedule 4 to MSSCA should be so read to be Convention compliant.

Issue 3: Does the term "children"

(a) exclude stepchildren (narrow meaning); or

(b) include stepchildren (wider meaning)?

95. The term excludes stepchildren, narrow meaning (a).

96. At common law "children" were originally construed to mean legitimate children. As summarised in Lewin on Trusts, at paragraph 7-020, a child was legitimate if:

> "(1) the child is born or conceived in wedlock;
>
> (2) the child, if not born or conceived in wedlock, is legitimate by the law of the domicile of each of his parents at the time of his birth; or
>
> (3) the child's parents marry after the birth of the child and under the law of the father's domicile at the time of his birth and at the time of the subsequent marriage of his parents, the child is legitimated by that marriage."

In order to displace this rule, it was necessary to show either that it was apparent from the words used by the settlor that a gift in favour of children was not intended to be confined to legitimate children only or that it was impossible from the surrounding circumstances for a legitimate child to take.

97. This position has been modified by statute, so that "child" now includes legitimate, illegitimate, legitimated and adopted children. It does not include "step-child". At common law "child" also does not include "step-child", absent an express provision including step-children or an extended meaning from the context: Lewin on Trusts, paragraph 7-023.

98. "Step-children" are not expressly provided for in the WBET trust deed.

99. Looking at the factual context there is nothing in the Letter to Employees that supports a wider definition of children to include "step-children". At best it might be said that the reference to "dependants" in the Memorandum of Wishes could include an extended category of children. However, there is nothing in the factual background that would support this analysis and I am satisfied that the WBET trust deed should be construed in accordance with the common law meaning of child, as varied under statute.

100. At the time of the WBET trust deed the background facts include the state of the law. The parties to the WBET trust deed, and the solicitor at Lewis Silkin drafting it, would have been aware that the term "children" did not include "stepchildren". Indeed, that remains the position. It would have been open to the drafter to specifically include step-children, but they did not. It was also open to Mr Walker to make provision for step-children. In relation to employees' share schemes, section 743 of the Companies Act 1986 expressly provides for children and stepchildren to be the object of the trust.

101. Mr Cloherty realistically accepts the common law position but again seeks to argue that the court should follow the approach taken by Rose J in *Re Hand's Will Trust*. Mr Cloherty acknowledges that the ECHR jurisprudence in this area is less developed.

102. I cannot obviously see why a distinction drawn by the courts between a natural or adopted child on the one hand and a stepchild on the other hand is in and of itself discriminatory. This simply reflects the relational difference between the two. The stepchild simply being related by law through the step-parent's legal relationship with their natural or adopted parent. As Lord Nicholls observed in G*haidan v Godin-Mondoza*, paragraph 9, there is a difference between discriminatory law and the law drawing distinctions.

Issue 4: Whether the terms "spouse", "children" and "remote issue"

(a) exclude surviving spouses, children and remoter issue of officers/employees who die in service (narrow meaning); or

(b) include surviving spouses, children and remoter issue of officers/employees who die in service (wider meaning)?

103. The term includes the wider meaning, (b).

104. Given my analysis in respect of sub-issue 1(1), the widest meaning, and in respect of sub-issue 1(3), the wider meaning, I consider that (b) follows.

105. Mr Atkinson submits that a marriage relationship terminates on death so that the condition of being a spouse similarly terminates. Whilst it is legally correct that a marriage relationship can terminate on death of either party or order of the court the concept of "surviving spouse" is a common term in law. Section 46(1)(i) of the Administration of Estates Act 1925, as originally enacted, provided "If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely…" The Intestates' Estate Act 1952 made reference to "leav[ing] a husband or wife in section 46. Headings to section 1 and 2 include the term "surviving spouse". The Inheritance (Provision for Family and Dependants) Act 1975 section 1 provides where "a person died domiciled in England and Wales and is survived by any of the following person: - (a) the spouse…"

106. In the context of succession law, the law refers to the concept of a "spouse" who has been left behind, notwithstanding the strict legal position on death. In light of how the domestic legislation refers to a "surviving spouse" I consider that "spouse" in clause 1(3) of the WBET trust deed should be construed to include "surviving spouse".

107. In the Memorandum of Wishes reference is made to the dependants of an employee who dies before a distribution and "spouse" is specifically referred to. The state of the law at that time, as Lewis Silkin would have known, was that "surviving spouse" would have been within the class of beneficiaries and "spouse" was simply a

shorthand reference for that term, which in turn can be a shorthand for "widow or widower".

108. The position in respect of children can be said to be stronger as upon the death of their parent they do not cease to be a child of that parent. Although the Memorandum of Wishes refers to minor children benefiting, there is no such limitation in the WBET trust deed.

INFORMATION APPLICATION

109. The court is asked to determine as a matter of principle whether the 1st and 2nd claimants as trustees of the WBET can share information with the 3rd and 4th claimants as trustees of the ESOP, and vice versa. It follows that if the court accepts that there should be information sharing both sets of claimants should take account of the other's distribution policy when determining their own distribution policy.

110. The reason for seeking this determination is set out in Mr Goodrich's 7th witness statement at paragraphs 17 and 18. In broad terms both sets of claimants intend to make distributions on the basis of an individual's past contribution to the success of Walker Books. It will therefore be important for the claimants to share information. Both intend to measure individual distributions by reference to a series of metrics to assess that individuals' contribution to Walker Books, for example, years of service, salary level, and royalty data for authors and illustrators. They are keen to ensure that the approaches are aligned so that the metrics and measure of distributions are as consistent as possible. Without sharing information there might be uneven outcomes leading to discontent or perceptions of unfairness by beneficiaries. This position is heightened because the beneficiaries substantially, but not entirely overlap, so that certain employees under the WBET and the ESOP might disproportionately benefit against a beneficiary under only one of the trusts, no matter their past contributions. With two separate trusts and two separate funds but not fully overlapping beneficial classes it is easy to see why the claimants are keen to calibrate their respective distribution policies in order to promote fairness of treatment between beneficiaries.

111. Counsel tells me there is a dearth of authority on the issue of sharing information and so the court needs to go back to first principles.

112. In Underhill and Hayton on Law of Trusts and Trustees, 19th Ed, paragraph 42A.1, the duties of confidentiality owed by the trustees are described as follows,

> "Trustees owe a general duty to keep the affairs of their trust confidential and not disclose them to the outside world. This duty derives from the general law of breach of confidence… But the duty of confidentiality is not absolute, and will give way to (a) exceptions, express or implied, in the terms of the trust, (b) the consent of the beneficiaries, (c) the authority of the court, and (d) the general law… An implied exception arises from the conferring of powers on trustees to carry out transactions (eg sale) with third parties. Thus, in order to maximise the benefit for the trust, the trustees will have to

> disclose trust information to potential purchasers. The general law will provide exceptions not only for obvious disclosures (eg making tax returns for the trust, anti-money laundering rules) but also for cases where the proper protection of the trustee himself requires such disclosure."

113. This duty is engaged in the information application.

114. In *Re B* (35/2012) the Guernsey Court of Appeal at paragraph 39 described the duty as akin, but not identical to, the duty of confidence owed by a bank to the affairs of its customer. Although it did not arise as a matter of contract and the trustees may need to disclose information for the purpose of administering the trust. It cited with approval the analysis of Bankes LJ in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 471 classifying the qualifications of the duty under four heads: (a) where disclosure is under compulsion of law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where disclosure is made by the express or implied consent of the customer.

115. In *Breakspear v Ackland* [2008] EWHC 220 the claimants, three beneficiaries, sought disclosure of a non-binding wish letter, which was contemporaneous with the settlement and which the settlor requested that the trustees take into account when exercising their dispositive powers. The trustees refused on the ground that they wished to keep the letter confidential and that its disclosure would cause family division. Briggs J held that the exercise by the trustees of their dispositive discretionary powers was a confidential process, such confidentiality existing for the benefit of the beneficiaries. The wish letter sought by the claimants was part of the confidential process. However, it was a matter for the trustees to preserve, judiciously relax or abandon that confidence. In an appropriate case the court would exercise that discretion having regard to the best interests of the beneficiaries and the due administration of the trust.

116. Whilst Ms Weaver acknowledges that there are exceptions to the duty of confidentiality, she argues that the categories of exception do not apply here where the disclosure is being sought for the purposes of the claimants exercising their dispositive powers. She refers to two other fundamental principles which underpin consideration of the information application: trustees must not put themselves in a position of conflict of interest; and trustees must act in the best interests of the beneficiaries of the trust.

117. Ms Weaver also submits that the recipient claimants may use the information in a way that would adversely affect the interest of the beneficiaries, to reduce the benefit that a beneficiary may receive, or enhance the share of a beneficiary to the detriment of that trust fund. It cannot therefore be said that the claimants are acting in the best interests of their own beneficiaries. Although the corollary to this is that the claimants by having regard to the distribution policy of the other may well be said to be acting in the best interests of the beneficiaries as a whole.

118. When exercising discretionary dispositive powers, the trustees must act in good faith and not irrationally, powers are not to be exercised for improper purposes. The trustees must take into account matters that are relevant and ignore irrelevant matters. As Lewin on Trusts at paragraph 29-041 says,

> "The duty requires them to inform themselves, before taking a decision, of matters material to it, including where necessary advice from appropriate experts such as lawyers, accountants, actuaries, surveyors or scientists. The obligation may be onerous, given the general rule that they cannot delegate their discretions, but they must assess the expert advice themselves as best they can."

119. I agree with the proposition in Lewin on Trusts at paragraph 29-042 that, "The duty to take relevant matters into consideration is in our view best regarded as an element in the duty to act responsibly, so that the trustees must have a rational basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take into account would be irrational".

120. It seems to me that the existence of another trust is a relevant matter for the claimants. I also accept that it may well be practical and proportionate for the claimants to consider the distribution policy before determining their own. Some of the issues raised by Ms Weaver arise if the trustees treat the trust funds as a pooled or composite fund. There is no evidence before me that they have done so, or intend to do so, quite the contrary. There are two separate trusts, the WBET and the ESOP, with different trustees and separate trust funds. In the context of family settlements Lewin on Trusts at paragraphs 29-057 to 29-058 says,

> "It often happens that members of a single family are beneficiaries of several settlements, perhaps many. The settlements may have the same or much the same trustees. Where the classes of beneficiaries overlap but are not identical it is a frequent error to treat the assets of all the settlements as a common pool for the family as a whole. When considering whether or how to benefit a given beneficiary out of one settlement, it is, of course, proper to take into account his entitlement or expectation under another. But it is not proper to exercise the powers conferred by one settlement so as to benefit someone who is not a beneficiary of that settlement.
>
> On occasion settlements are created with a view to holding a balance between different branches of a family, as where shares in a family company are held by two branches as to 45 per cent each and by two settlements, one for each branch, as to five per cent each, the settlements having common trustees with the intention that they will hold the balance by use of the combined holding. Such arrangements will fail, because the trustees of each settlement, whether or not they are the same persons, owe duties solely to the beneficiaries of that settlement. Hence if the interests of the two branches of the family diverge, the trustees cannot use the combined holding to impose any form of compromise."

121. A distribution policy forms part of the confidential process of the trustees exercising their dispositive power. As Briggs J said in *Breakspear* it will be a matter for the trustees (and the court, where an application is made to the court) for them to

determine whether disclosure of confidential documents best serves the interest of the beneficiaries and the due administration of the trust.

122. In family settlements, where there are two or more settlements with similar objects and similar purposes, trustees can and do have regard to the beneficiaries' entitlements under other trust arrangements. The WBET and the ESOP are not family settlements, but they have a similar congruence of objects and purposes. Both trusts aim to reward officers or employees for their contribution and service to Walker Books. There is such an overlap between the two trusts that I consider that the treatment of confidential information between family settlements is analogous to the position before the court.

123. In my view the claimants are seeking a limited incursion into the duty of confidentiality and the sharing of the distribution policy may mitigate the risk of recipients considering their distribution to be arbitrary and unexplained. I consider that permitting limited disclosure, with any necessary protections put in place to preserve the confidentiality, will be in the best interests of the beneficiaries and the due administration of the trusts. I therefore accept that the claimants should share information in respect of their distribution policy.