



Civil Appeal No. 4 of 2024

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. CHIEF JUSTICE NARINDER HARGUN
CASE NUMBER 2021: No. 261**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 07/10/2025

Before:

**THE HON. CHRISTOPHER CLARKE
THE HON. GEOFFREY BELL
THE HON. DAME ELIZABETH GLOSTER**

Between:

**P LTD
(AS TRUSTEE OF THE M TRUST)**

Appellant/Defendant

-and -

K

Respondent/Claimant

-and-

F

G

E
R
A
T
M
D
AM

(AS TRUSTEE OF THE A TRUST)
CHRISTOPHER SWAN
(AS TRUSTEE OF THE A TRUST)

Interested Parties

Appearances: Steven White, John McSweeney and Izabella Arnold of Walkers
(Bermuda) Limited for the Appellant/Defendant
Ryan Hawthorne of Trott & Duncan Limited for the
Plaintiff/Respondent
Sam Riihiluoma and Jordan Knight of Appleby (Bermuda) Limited
Attorneys for D, Interested Party

Date of Hearing: 4 November 2024

Date of Judgment: 7 October 2025

JUDGMENT

GLOSTER JA

Introduction

1. This is an appeal by the defendant in the action, P Ltd (“the Trustee” or “the Appellant”), as the current trustee of the M Trust (“the Trust”), against the order of Hargun CJ (“the Chief Justice”) purportedly dated 22 August 2022 (“the Order”), but not in fact made or signed by the Chief Justice until sometime between 9 to 16 November 2022. The Order was expressed to be a consent order and recited that it was made “*UPON the Plaintiff and Defending consenting to the terms of this Order*”. The Order included declarations, at paragraphs 3 and 4 thereof, in the following terms in relation to the construction of the trust deed dated 12 February 1993 (“the Trust Deed”) which constituted the Trust:

“3. The Plaintiff is granted a declaration that on the date of the Bermuda Debt (as defined by paragraph 1 of the [M] Trust Deed) (the “Relevant Date”), the Plaintiff became entitled to 15% of the income of the Trust Fund (as defined by the [M] Trust Deed) (the “Trust Fund”) and continues to be so entitled.

4. The plaintiff is granted a declaration that on twenty-one (21) years of the Relevant Date the Plaintiff is entitled to 20% of the income and capital of the Trust Fund.”

2. The Order was made by the Chief Justice without a hearing in the circumstances more fully described below.
3. The Notice of Appeal by the Trustee was filed on 16 April 2024, the time for filing and service of such notice having been extended to 17 April 2024 pursuant to an order of Bell JA, sitting as a single Justice of this Court, dated 16 April 2024.
4. In addition to the Trustee, D, the second wife and widow of the Settlor, and a beneficiary under the Trust, who was added to the action as an interested party after the date of the Order, submits that:
 - (1) the Order, and the declarations contained within it, should be set aside;
 - (2) this Court should properly construe the Trust Deed in accordance with D’s argued construction and grant such declaratory relief as it considers necessary in order to record the proper construction of the Trust and to avoid uncertainty or disputes going forward.
5. The claimant in the action, and the respondent to the Appeal, K (“the Respondent”), is the daughter of the Settlor and a stepdaughter of D. K contends that the declarations made by the Chief Justice in the Order should be maintained.

Factual background

6. The Trust was settled by MR (“the Settlor”) under the laws of Bermuda by means of a deed of settlement dated 12 February 1993 (already defined above as the Trust Deed). At that time he was already married to D, their marriage having taken place on 23 June 1986.
7. The original trustees of the Trust were O, R, one of the Settlor’s sons and the Settlor’s friend, J.
8. Clause 4 of the Trust Deed in effect provided that the trustees for the time being of the Trust (“the Trustees”) should stand possessed of the trust fund, as defined therein (“the Trust Fund”) and the income thereof, upon wide discretionary trusts as follows:

*“UPON TRUST for all or such one or more exclusively of the others **or other of the Specified Class** at such age or time or respective ages or times and to such uses for such estate (whether absolutely or otherwise) and if more than one in such shares and with and subject to such terms limitations and charges and with and subject to such provisions for maintenance education or*

advancement or accumulation of income for any period and for any purpose authorised by law or for forfeiture in the event of bankruptcy or otherwise and with such trusts and powers (including if thought fit discretionary trusts and powers of appointment over capital and income and powers to apply both capital and income capable of being exercised in favour of all or any of the Specified Class) exercisable at the discretion of the Trustees or of any other person and generally in such manner as the Trustees shall without transgressing the rule against perpetuities by any deed revocable or irrevocable executed before the Vesting Day appoint PROVIDED ALWAYS that:-

- (1) *no such appointment shall invalidate any payment or application of capital or income previously made under the trusts or powers herein elsewhere contained; and*
- (2) *every appointment shall be made and every interest limited thereunder shall vest in interest (if at all) not later than the Vesting Day and no appointment shall be revoked later than the Vesting Day; and*
- (3) *subject to any irrevocable appointment theretofore made by the Trustees the Trustees shall have power wholly or in part to release the Trust Fund from the power hereby conferred upon them as though such power were not conferred in a fiduciary capacity.” [My emphasis.]*

9. Clause 1 of the Trust Deed contained the following relevant definitions:

“ “the Perpetuity Day” means the day on which shall expire the period of one hundred years after the execution of this Settlement which period (and no other) shall be the perpetuity period applicable hereto;

“the Vesting Day” means the Perpetuity Day or such earlier day as the Trustees shall unanimously by writing under their hand declare to be the Vesting Day;

“the Specified Class” has the meaning attributed to it in the Second Schedule hereto;

“the Trust Fund” means:

(a) the said sum of money specified in the First Schedule hereto;

(b) all property hereafter paid or transferred to or otherwise vested in and accepted by the Trustees as additions to the Trust Fund and of which a memorandum signed by the Trustees shall be conclusive evidence;

(c) all income which shall in accordance with the provisions of this Settlement be accumulated by the Trustees and added to the capital thereof; and

(d) all money investments and other property from time to time representing the said sum of money specified in the First Schedule hereto the said additions and accumulations or any part thereof respectively;

“Bermuda Debt” which for the avoidance of doubt, shall be determined at the date of the Settlor’s death and defined as any charge lien encumbrance or overdraft facility pledged by the Settlor over the Settlor’s Bermuda property;”

10. Clause 2 provided:

“DECISION MAKING OF THE TRUSTEES

2. Any reference to the decisions and/or discretion of the Trustees shall be a reference to a simple majority of the Trustees save and except for the declaration of the Vesting Day supra.”

11. Clauses 5, 6 and 7 provided as follows:

“POWERS REGARDING CAPITAL AND INCOME AND TRUST TO ACCUMULATE SURPLUS INCOME

5. IN default of and subject to any such appointment as aforesaid the Trustees may until the Vesting Day pay transfer appropriate or apply the whole or any part of the capital or annual income of the Trust Fund to or for the maintenance advancement education or otherwise for the benefit of all or such one or more exclusively of the others of the Specified Class for the time being in existence in such proportions and manner as the Trustees shall in their absolute discretion and without being liable to account for the same think fit and the Trustees shall until the Vesting Day accumulate the whole or such part of the annual income of the Trust Fund as shall not have been paid or applied as aforesaid by investing the same in or upon any of the investments hereby authorised for the investment of trust monies and hold the same as an accretion to the capital of the Trust Fund for all purposes.

ULTIMATE TRUST

*6. SUBJECT as aforesaid the Trustees **shall on the Vesting Day** stand possessed of the Trust Fund and the income thereof **upon the trusts set forth in the Third Schedule** hereto. [My emphasis.]*

7. IN the event of the failure or determination of all or any of the trusts hereinbefore contained or if the whole or any part of the capital or income of the Trust Fund shall be otherwise undisposed of by such trusts then such undisposed of capital and income shall subject to .the powers by this Settlement or by law vested in the Trustees and to each and every exercise thereof be held UPON TRUST for such charitable purposes or charities as the Trustees shall think fit failing which for charity generally.”

12. Clause 10 provided:

“POWER TO ADD TO AND EXCLUDE FROM SPECIFIED CLASS

10. THE Trustees shall have power exercisable at their absolute discretion by deed to declare that: any person or class or description of persons shall (as from either the date of such deed or such later date as is therein specified permanently or for such period as is therein mentioned) be included as a member of the Specified Class for the purposes of this Settlement (and any such

declaration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly); and
(2) any person or class or description of persons then included in the Specified Class shall (as from either date of such deed or such later date as is therein specified and either permanently or for such period as is therein mentioned) be excluded from and cease to be a member of the Specified Class for the purposes of this Settlement {and any such declaration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly);

AND the powers hereinbefore contained shall be exercisable from time to time and at any time before the Vesting Day unless and except so far as such powers as expressly released or restricted by the Trustees or expressly overridden by some appointment made by the Trustees under Clause 3 hereof."

13. The Second Schedule to the Trust Deed defined the Specified Class as follows:

"(i) The Settlor;
(ii) The Settlor's son, [R];
(iii) The Settlor's son, [F];
(iv) The Settlor's daughter, [K];
(v) The Settlor's natural grandchildren;
(vi) The Settlor's friend [J]
(v) [sic] Such other person persons or class of persons or body corporate or unincorporated or otherwise as the Trustees shall declare to be members of the Specified Class pursuant to the power contained in Clause 10(1) of the within written Settlement."

The clause was subject to an additional proviso, which imposed additional restrictions, in relation to certain assets owned by non-Bermudians, but these are not relevant for present purposes.

14. The Third Schedule provided as follows:

"THE THIRD SCHEDULE REFERRED TO

(i) Such income as is necessary from the Trust Fund shall be applied against the Bermuda Debt and/or Trust Fund;
(ii) (A) WHEN AND ONLY WHEN such debt is repaid in full in Bermuda TO PAY the income derived from the said Trust Fund as follows:
(a) Thirty per cent (30%) per annum to the Settlor's son, [R];
(b) Fifteen per cent (15%) per annum to the Settlor's son, [F];
(c) Fifteen per cent (15%) per annum to the Settlor's daughter, [K];
(d) One per cent (1%) per annum to the Settlor's friend, [J];
(e) Fifteen per cent (15%) per annum to be accumulated and held for such of the Settlor's natural grandchildren who shall be living at the date of Vesting at which time such sum shall be distributed in accordance with sub-clause (B) (d) infra;

AND TO HOLD the balance of my Trust Fund as to both income and capital for a further period of Twenty-one (21) years from the date the Bermuda debt is repaid in full at which time the Trust Fund shall be distributed as follows:

- (B) (a) Forty per cent (40%) to the Settlor's son, [R] absolutely;*
- (b) Twenty per cent (20%) to the Settlor's son, [F] absolutely;*
- (c) Twenty per cent (20%) to the Settlor's daughter, [K] absolutely;*
- (d) Twenty per cent (20%) [sic] such of the Settlor's natural grandchildren who shall be living at the date of Vesting in equal shares absolutely."*

15. The Fourth Schedule provided as follows:

*"THE FOURTH SCHEDULE ABOVE REFERRED TO
IN DEFAULT of and subject to the trust and powers contained in Clauses 3 and 4 respectively of the above written Settlement the Trustees shall on the Vesting Day stand possessed of the Trust Fund and the income thereof upon trust for such of the Settlor's issue (their respective executors administrators and assigns) as shall be living on the Vesting Day and if more than one in equal shares per stirpes."*

16. Thus the Trust Deed fixed the life of the Trust at 100 years and provided for a suite of standard trustee discretionary powers (of investment, appointment, and settlement, including the power to add and exclude beneficiaries), all of which were to be exercised at the Trustees' absolute discretion. The Fourth Schedule provided that, at the conclusion of the Trust, the fund would be distributed to the Settlor's still living issue, to be divided by family branch. But it is the provisions of the Third Schedule which have given rise to the problems of construction and which have led to this litigation – as addressed in greater detail below.
17. By a Deed of Exclusion of Beneficiary dated 20 June 1996, the Original Trustees exercised their powers under clause 10 (2) of the Trust Deed to exclude R from being a member of the Specified Class.
18. By a Deed of Addition of Beneficiaries dated 21 June 1996, the Original Trustees exercised their powers under clause 10 of the Trust Deed to declare that, with effect from the date thereof, D and the trustees of the A Trust (being R's own trust) were to *"be included as members of the Specified Class as defined in the Settlement for all purposes thereof"*.
19. By Notice of Resignation dated 14 August 1996, Olive Joyce Monro resigned as a trustee of the Trust.
20. By a Deed of Retirement and Appointment of New Trustee dated 24 July 1998, the then trustees of the Trust, namely R and J, retired as trustees of the Trust and the Settlor

(who had the power of appointing a new trustee under the Trust Deed) appointed the Trustee as the new trustee of the Trust in place of the existing Trustees. R is a director of the Trustee as is Christopher Swan, who is also a barrister and attorney at Christopher E Swan & Co (“C&S”), the attorneys which acted for the Appellant in the Supreme Court but not on the appeal.

21. By a Deed of Exclusion of Beneficiary dated 30 December 2010 the Trustee exercised its power pursuant to clause 10 (2) of the Trust Deed to exclude J from the date thereof as a member of the Specified Class.
22. According to paragraph 25 of Mr Swan’s affidavit dated 9 February 2024 (“Mr Swan’s first affidavit”) sworn for the purposes of this appeal, during his lifetime the Settlor treated the Trust as a fully discretionary trust; he wrote letters of wishes dated respectively 14 June 1996, 8 December 1998, 15 December 1998, 16 September 1999, 16 March 2020 and 23 July 2000. Each apparently started with the standard rubric that:

“The wishes set out in this letter are by way of guidance only to you as Trustees and are in no way intended to bind or fetter you in the exercise of the powers and discretions granted to you by the said Settlement.”

According to Mr Swan (see paragraph 26 of his first affidavit):

“One such letter concerned the addition of [D]. As I understand it, this was in a context where the Settlor's last will and testament dated 18 June 1996 made very little provision for his wife and deposited the residue of his estate into the Trust. His wish was that his wife could benefit from the Trust and she was duly added to the Specified Class. However, she is of course not named in the Third Schedule, as it was drafted three years before. Another letter, dealing directly with the Respondent, requested that "much thought" be given by the Trustees to future distributions to [K] in view of the Settlor's concerns about her conduct. The letter further advises that only "modest" amounts be paid, and nothing of capital. This is obviously at odds with the purportedly mandatory fixed share approach in (B) of the Third Schedule.”

This letter, dated 16 September 1999, contained the following paragraphs:

“In my letter of wishes of the 8th December 1998 I asked that you do your utmost to make monthly distributions of \$1,500.00 to my daughter [K] until she starts receiving regular distributions in accordance with the terms of the Settlement. I would ask that henceforth these funds be placed in a separate account to facilitate the payment by [K] of monies due from her to her mother.

Furthermore, [K's] conduct regarding the issue of the funds due to her mother has given me much cause for concern. I would ask that you give much thought to any future distributions to [K] under the terms of the Trust.

I would urge that no capital distributions be made to [K] and that any future distributions be of modest amounts on a monthly basis.”

23. The Settlor died on 2 February 2002. As set out in a letter dated 18 April 2023 from Walkers (Bermuda) Limited (“Walkers”), attorneys acting for the Trustee subsequent to the hearing in the Supreme Court, as at the date of the Settlor’s death there was no Bermuda Debt as defined outstanding. The position was stated to be as follows:

“The [M] Trust Balance Sheet as of 1 October 1998 records a loan from [Bank] to the [M] Trust in the amount of \$1,207,244.74 (the “Loan”). Subsequent ledgers confirm that the Loan was extinguished and paid in full on 7 June 1999. In the circumstances, the Trustee can confirm that at the date of the Settlor’s death there we [sic] no charges, liens, encumbrances or overdraft facilities pledged by the Settlor over the Settlor’s Bermuda property.”

24. The position of D in relation to her and the Settlor’s family was (so far as material) set out in her affidavit dated 28 October 2024 as follows:

“4. I am 76 years old. My husband passed away in February of 2002. I have not re-married. My late husband was born and lived much of his early life in Bermuda. In the early 1980s, he learned of [T], a community in [C] with an established equestrian community. He purchased a home there and set about building a farm. I owned and operated a store in the town which is where we met. We married on 23 June 1986. I brought with me my two children from a previous marriage, [X and Y]. I eventually sold my home and business, and moved to the farm where we resided.

5. My step-son [F] also moved to the area, married, and started a family.

6. During our 16-year marriage, my husband travelled to Bermuda to oversee his business dealings as needed which included real estate, private lending and a gas station. But, during his last ten years, I became his sole care-giver. He was hospitalised for many months after a severe medical episode in 1992; after that, his health did not allow much travel.

7. Two of his children, [R] and [K], and three grandchildren remained in Bermuda. [R] oversaw the daily business operations. I see from the Record of Appeal that [R] served as one of the original trustees before retiring in 1998 Nevertheless, I believe that he has remained involved in managing the Trust following his retirement, through his involvement with the current trustee.

.....

12. As a beneficiary of the Trust, I receive monthly distributions of \$17,000 which is consistent with the Letter of Wishes dated 16 March 2000 [DT-1/3-4]. In addition, I receive a separate travel allowance of \$10,000 which is disbursed yearly upon request. I also have use of the [B] Hotel when I visit Bermuda, although I have not made use of it. Earlier on, I received distributions for home renovation and for the purchase of a truck. I have no capital entitlement under the Trust.

13. In 1996, I was added as a beneficiary of the Trust because my husband wanted to ensure that I would be provided for financially by the trustees/Trustee of the Trust until my death or re-marriage. Accordingly, the Letter of Wishes dated 14 June 1996 [DT- 1/5-7] refers to my husband's wish that I receive \$12,000 per month "for or during the term of [D's] natural life or until she-remarries." The amount of my monthly distribution was subsequently increased to assist [Y and X]. Furthermore, I received very little benefit under my husband's Will (dated 18 June 1996) - I received my husband's tie pin. His residuary estate was left to the Trust. However, I received certain US real properties before he died."

25. The Court was informed that, as at the date of the hearing of the Appeal, there were three adult children, five adult grandchildren and five minor great-grandchildren of the Settlor, all of whom have, or potentially have, interests under the Trust.

The Procedural History

26. In 2011, K's former attorneys, Conyers, had expressed their views as to the construction of the Trust in the following terms:

"One such matter is the terms applying to the ultimate vesting of the Trust assets. Prior to us having the opportunity to review the Trust Deed, [K] had advised us of her understanding that the Trust must continue for a period of 21 years from her father's death before any capital distributions can be made. Our reading of the Deed is that this is not the case. We note that there is a provision relating to a 21 year period contained in the 3rd schedule to the deed. This schedule is referenced in clause 6 of the Trust Deed "Ultimate Trust". We, believe, however, that this reference in clause 6 to the 3rd schedule must be an error and should instead be a reference to the provisions of the 4th schedule. The provisions of the 4th schedule seem much more likely to fit with the "Ultimate Trust" provisions and it seems that the 4th schedule is not referenced at all in the body of the Trust Deed leading us to believe an error has occurred in the drafting. This leaves us confused as to how the provisions of schedule 3 can operate during the trust period."

In other words, Conyers had correctly appreciated that difficulties of construction arose in connection with the Trust Deed.

27. On 14 September 2021 K issued an originating summons ("the Originating Summons") against the Trustee in the Supreme Court seeking the following relief:

"(1) A declaration that the Plaintiff is entitled to disclosure of the documents and information listed in the Schedule attached hereto and an audit of the accounts of the [M] Trust;

(2) An order that the Defendant shall provide to the Plaintiff the documents and information listed in the Schedule attached hereto;

(3) A declaration that on the date of payment of the Bermuda Debt (as defined by paragraph 1 of the [M] Trust Deed) (the "Relevant Date"), the Plaintiff became entitled to 15 per cent of the income of the Trust Fund and continues to be so entitled;

(4) A declaration that on twenty-one (21) years of the Relevant Date, the Plaintiff is entitled to 20 per cent of the income and capital of the Trust Fund;

(5) Such further and other directions as relief as may be appropriate; and

(6) Costs. ”

None of the Interested Parties, as identified in the heading to the appeal, were originally joined as defendants or respondents to the Originating Summons.

28. The issue of the Originating Summons had been preceded by increasingly acrimonious correspondence as between K’s subsequent attorneys, Trott & Duncan Ltd (“T&D”) and the Trustee’s then attorneys, C&S, dating from 15 July 2020, in which K had repeatedly demanded the documents and information listed in the schedule to the Originating Summons and an audit of the Trust accounts. These included: (1) information about the financial position of the Trust such as profit and loss statements and balance sheets for the Trust; (2) information about the Trustee; (3) information about repayment of the Bermuda Debt; and (4) information about the calculation of the income distributions to the Specified Class.

29. It is relevant to set out the procedural chronology of the Originating Summons in some detail:

(1) On 12 August 2021 K swore her first affidavit in support of the Originating Summons; apart from her complaint that she had not been provided with the financial and other information which T&D had demanded on her behalf, she deposed as follows:

“30. The [M] Trust has substantial assets and has operated for twenty-eight (28) years. The [M] Trust accounts have never been audited. No explanation has been provided as to why. Put simply, the Trustee has provided absolutely nothing for over a year and even prior to that the Trustees never provided anything of substance.

31. I have a fixed right to 15 per cent of the income from the Trust Fund as a beneficiary named in the Specified Class, which crystallised at the date the Bermuda Debt was paid. It has been confirmed by the Trustee that the [M] Trust is debt free. At present, there is no way of

knowing whether I have in fact received the 15 per cent I am entitled to under the Third Scheduled to the [M] Trust Deed.

32. *I also have a fixed right to 20 per cent of the income and capital on twenty-one (21) years of payment of the Bermuda Debt. At present, I have no way of knowing when that right will crystallise under the Third Schedule to the [M] Trust Deed.”*

- (2) On 30 September 2021 T&D and C&S signed a consent order for directions for evidence leading to an envisaged one day hearing (“the Directions Order”). The Directions order provided for the Trustee to file any evidence in response to K’s first affidavit within 28 days. In the event, no evidence was filed by the Trustee.
- (3) The Directions Order provided that the parties were to provide available dates for a one day hearing. According to evidence contained in K’s second affidavit dated 7 February 2023, Mr. Froomkin KC of C&S did not respond to T&D’s request for dates of availability, but on behalf of the Trustee indicated that the Trust’s accounts were to be audited. K contended, however, that “*the deadline [was] continually being pushed back*”.
- (4) On 13 June 2022, C&S emailed T&D attaching “Consolidated Financial Statements and Independent Auditor’s Report” for 30 September 2020 and 2019 in respect of the Trust (“the Trust Audit”). The Trust Audit was dated 24 January 2022 and the letter enclosing the Trust Audit was dated 17 February 2022. The email concluded:

“We believe that the document should satisfy your requests but if there are any other documents needed please feel free to advise these chambers. We are of the hopes [sic] that this will address all issues which will enable this matter to proceed without further litigation.”
- (5) The Registry then provided the parties with a Notice of Hearing which was fixed to take place on 9 August 2022.
- (6) On 25 July 2022, Mr. Froomkin of C & S emailed T&D inquiring about the necessity of a hearing in the light of the provision of the Trust Audit. He stated that he had understood that the matter had finally been resolved as a result of the previous correspondence and the fact that C&S had heard nothing further. He asked T&D to indicate whether there were other documents that were required which had not been provided.
- (7) On 2 August 2022, Mr Ryan Hawthorne of T&D responded to Mr Froomkin, stating that the matter had not been resolved because the relief which K sought was in the Originating Summons and that there had been no response to that document or K’s first affidavit. Mr Hawthorne stated that, unless the Trustees

signed a consent order agreeing to the relief sought in the Originating Summons, the hearing would proceed on 9 August.

- (8) On 4 August 2022, Mr. Froomkin confirmed to Mr Hawthorne:

"We have finally be [sic] able to receive instructions from our client and are instructed to execute a Consent Order as you requested."

He requested that Mr Hawthorne should forward a draft consent order to Mr Froomkin for his comments.

- (9) The Registry then administratively delisted the hearing and relisted it for 22 August 2022.

- (10) On 17 August 2022, Mr Hawthorne of T&D emailed a draft consent order to Mr. Froomkin at C&S. Mr Hawthorne wrote:

"as you will recall we see declarations that are uncontroversial as they are proper construction of the Trust Deed. As we seek declarations, we will need to attend on Monday. However it should not take longer than 20 minutes."

- (11) On the same day the consent order was signed and returned by email by Mr. Froomkin on behalf of the Trustee. Mr Froomkin wrote as follows:

"I do not understand what is necessary for a court appearance in view of our consent, or why you suggest that it might take 20 minutes. Please explain. If an appearance is required on Monday, at what time? Perhaps you might write to the Registrar forwarding the Consent order, ask that accordingly the matter be delisted. See what she says. Hopefully we won't have to waste time by robing and appearing."

- (12) On 18 August 2022, Mr Hawthorne of T&D emailed the Registry informing that a consent order had been signed. Significantly he wrote as follows:

"... As you are aware [the substantive hearing] is listed for a day on Monday 22 August 2022 (the "Hearing") before the Chief Justice.

We write to confirm that the parties have agreed to the terms of a consent order (attached) and therefore the whole day will not be necessary. However, part of the consent order is declaratory, which is a discretionary remedy and therefore requires consideration by the Chief Justice even when the parties consent.

We are very much aware of the Chief Justice's busy schedule and so write to ask what the Chief Justice's preference is in light of the above. The options as we see it are:

1. The evidence of the Plaintiff is uncontested and the declarations are matters of construction. As such, the Chief Justice could consider the

evidence and determine on the papers whether or not he wishes to sign the consent order. We filed a hearing bundle in the matter (containing the uncontested evidence of the Plaintiff) which will assist the Chief Justice.

2. The Defendant could provide a brief written submission if there is any issue on which the Chief Justice would like further information.

3. The parties could attend on Monday and make submissions.

Our preference (along with attorneys for the Defendant - copied into this email) would be 1a [sic] and/or 2, but this is of course a matter entirely for the Chief Justice.”

- (13) The Registry accordingly delisted the hearing which had been relisted for 22 August 2022.
- (14) On 11 October 2022, the Registry emailed T&D informing that the Chief Justice required “*a brief written submission in aid of the case that it is appropriate for the court to make the declarations sought*”.
- (15) On 9 November 2022 T&D emailed its brief written submissions to the Registry with a copy to Mr. Froomkin on behalf of the Trustee. Those submissions pointed out that:

“13. As part of exercising that discretion, it is an important factor that the Defendant has consented to the order being made. The construction of the [M] Trust Deed is therefore not in dispute and so the Court is asked to consider that deed and confirm the parties’ construction.

.....

17. Relief 3 and 4 are based on the construction of the [M] Trust deed, which is before the Court. This is a purely legal analysis with no factual assertions outside of the [M] Trust Deed. We therefore invited the Court to consider the [M] Trust Deed and consider the provisions (which are summarised in the Originating Summons and the [...] Affidavit). The Plaintiff and Defendant are agreed as to the true meaning of the [M] Trust Deed, which is evidenced by the Consent Order.

18. The declarations are purely to assist both parties in organising their affairs in relation to the [M] Trust. The documents in Relief 1 and 2 are of little value unless the Plaintiff is able to assess her right to the income and capital of the [M] Trust. it [sic] is therefore plainly in the interests of justice to grant the declarations.

.....

20. In relation to paragraphs 1, 3, and 4, the Court is asked to consider the [...] Affidavit and the Originating Summons. The declarations are not based on admission, consent or default, but on the principles in

Schmidt v Rosewood and Wingate and the proper construction of the [M] Trust Deed. It is a relevant factor that the Defendant consents but the Plaintiff's case is made out by the evidence before the Court. In the circumstances, it would be an injustice to the Plaintiff not to grant those declarations sought."

- (16) No submissions were filed on behalf of the Trustee, either in support, or in opposition, to the declarations sought.
- (17) By email dated 16 November 2022, the Registrar confirmed that the consent order had been signed by the Chief Justice, sealed as an order of the court and that signed copies could be collected from the Registry. As already stated above, although the Order purportedly bore the date of 22 August, in fact it must have been signed by the Chief Justice and sealed sometime between 9 and 16 November 2022. It was served on the Trustee on 16 November 2022.
- 30. According to K, as set out in her second affidavit dated 7 February 2023, the Trustee did not comply with its obligations to provide the documents and information under the Schedule to the Order.
- 31. At some stage, in about April 2023, Walkers replaced C&S as attorneys to the Trustee. Walkers provided further documents which it said were in satisfaction of paragraph 2 of the Schedule to the Order.
- 32. It is not necessary to recite the detailed subsequent chronology of the proceedings. It is sufficient to state that, by notice of application for an enlargement of time filed with the Court of Appeal on 13 February 2024, the Trustee, now represented by Walkers, sought an enlargement of time in which to appeal paragraphs 3 and 4 of the Order. That application was supported by the first affidavit of Mr Swan dated 9 February 2024.
- 33. In that affidavit Mr Swan, *inter alia*, deposed as follows:

"The Respondent's Case

*19. The Respondent relies upon the Third Schedule. This sets out that the Trustees should use any income from the Trust Fund to first pay down any "Bermuda Debt", which is determinable at the date of the Settlor's death. The Trust Fund is then said to be held for a further 21 years after payment of the Bermuda Debt (the **21 Year Period**). During this time, (A) provides that the income will be paid in fixed shares per annum to the members of the Specified Class listed in the Second Schedule at the date of settlement. At the expiry of the 21 Year Period, (B) purportedly provides that the Trust Fund in its entirety "shall" be distributed in fixed percentages to [R] (40%), [F] (20%), [K] (20%), and the Settlor's natural grandchildren (20%) absolutely. If correct, this would end the Trust prematurely some seventy years ahead of the Perpetuity Day.*

20. The above provisions form the basis of the Declarations in the Disclosure Proceedings; paragraph 3 of the Final Order reflects (A) and paragraph (4) reflects (B) of the Third Schedule.

21. The Settlor died on 2 February 2002. As there was no Bermuda Debt at that date, and 21 years having now passed, the Respondent alleges that (B) in the Third Schedule has become operative. On this basis, [K] relies upon paragraph 4 of the Final Order to justify her application in the Enforcement Proceedings, filed on 23 August 2023, for an order that "... 20 per cent of the income and capital of the [M] Trust be distributed [to [K]]".

The Trustee's Case

22. The difficulty with the Respondent's approach is that the Third Schedule is clearly very problematic in its drafting when viewed in the context of the Trust Deed as a whole.

23. As I set out earlier, clause 6 of the Trust Deed refers to "the trusts" set out in the Third Schedule, which are said to take effect on the Vesting Day (i.e. defined as the Perpetuity Day, which is 12 February 2093). Clearly, this makes no sense. Moreover, there is no scope within these defined terms for much earlier Perpetuity and Vesting Days. In fact, clause 1 expressly states that there shall be "no other" Perpetuity Day than that set out in the clause. The Third Schedule is also nonsensical. Clause (A) suggests the Trustee has no discretion over the timing and amount of payments to beneficiaries, whereas the Trust Deed at clauses 4, 5 and 11 expressly states that the trustees have broad powers of distribution, advancement and appointment (all to be exercised in the Trustee's "absolute and unfettered" discretion). In essence, the Trustee retains full discretion to make payments to any one of the beneficiaries, and in whatever amounts the Trustee sees fit. There are no fixed distributions, although the Trustee may use (as indeed it has done) the Third Schedule as guidance when making distributions. Further, clause (B), in addition to conflicting with clause 6 and the definitions of Vesting Day and Perpetuity Day, makes no allowance whatsoever for the Trustee's powers of exclusion and addition. This is important as since the date of settlement, [J] and [R] have both been (voluntarily) excluded as beneficiaries ([R] was replaced by the trustees of his own private family trust), and [D] was added as a beneficiary in 1996 at her late husband's request. I note that neither (A) nor (B) contain any mechanism to deal with these changes (for instance [D] would be deprived of all continuing and future benefit under the Trust), nor indeed any mechanism to cope with the deaths of either [R], [F] or [K]. For instance, clauses (B)(a) to (c) make no reference to their natural children or grandchildren; simply names the three siblings and their respective shares.

24. Clause (B) of the Third Schedule, if interpreted in the way the Respondent contends, also renders the Fourth Schedule of the Trust Deed wholly redundant, i.e. the interpretation dictates mandatory distributions in fixed shares to specified beneficiaries, excluding wider issue, at a time other than the Vesting Day (as the 21 Year Period is adopted), and with no room for a broader provision requiring distribution of the entirety of the Trust fund to the Settlor's

"issue" still living on the Vesting Day. In this way, the two schedules are completely irreconcilable with one another. Nonetheless, as should be immediately obvious, the Fourth Schedule provides an entirely logical and sensible provision for final distributions for a Trust lasting 100 years. It captures future generations in a way that the Third Schedule does not. To put this into context, the Settlor has five adult grandchildren, and currently five great grandchildren (all aged under 18). The Third Schedule excludes the latter from obtaining any benefit under the Trust. This may have been a drafting error in that clause 6 should have referred to the Fourth Schedule and not to the Third. I explore this possibility in more detail below, as that was also the view of the Respondent's former counsel, Conyers.

.....

27. The Respondent was also very much aware of the problems with the Third Schedule, as her former attorneys, Conyers, had previously made these same points in correspondence. On 5 July 2011, Conyers wrote to the Trustee on her behalf pointing out that, in their view, the Third Schedule made little sense and rejecting the 21 Year Period. Their thought was that clause 6 of the Trust Deed should instead refer to the Fourth Schedule, and not to the Third, and this was most likely a drafting error. It was even suggested the Trustee should apply to court seeking to correct these "irregularities". Contrary again to the Third Schedule, and reflective instead of the Trustee's broad discretionary powers, the letter invites the Trustee to exercise those powers to make a lump sum payment her.

28. Despite the Respondent clearly appreciating the interpretation difficulties caused by the Third Schedule, I note that no mention of this made its way into either her evidence or the written submissions filed by her attorneys in both the proceedings.

Reasons for delay

29. The Trustee did not object to the Declarations in the Final Order. At the time, I believe the Trustee was focussed on the disclosure aspects of the summons and arranging the independent audit sought by the Respondent. As these issues were eventually agreed between the parties, a consent order seemed sensible. I cannot recall what was said about the declaratory relief in paragraphs 3 and 4. It may be the case that because, at first blush, the Declarations dealing with the Third Schedule simply reflected its language, they seemed uncontroversial. It was not disputed that the Respondent was a beneficiary of the Trust or that she had (and continues to receive) regular distributions from the Trust fund. In any event, the Trustee did not seek specific legal advice on the Declarations at the time, nor on the interpretation of the Third Schedule within the wider context of the Trust Deed. With hindsight, this was clearly a mistake. However, this was not appreciated until the following year. By this time, the Trustee had instructed new counsel, Walkers, in place of Saul Froomkin KC who had acted on the Trustee's behalf in the Disclosure Proceedings. Following a review by Walkers of the Trust Deed and the documents filed in the Enforcement Proceedings in August 2023, the Trustee promptly filed a summons on 6 September 2023 challenging the Declarations

and seeking that the proper interpretation of the Trust Deed be dealt with as a preliminary issue (the **PI Summons**). The Trustee has consistently disputed the Declarations since that date. The Court ordered directions for the filing of evidence and to ensure the confidentiality of the proceedings on 12 October 2023. A copy of that order is at (CS-1/60-62). The hearing of the **PI Summons** is listed for 11 March 2024.

30. Without prejudice to the **PI Summons**, and without waiving privilege, after Walkers had obtained a copy of the Brief Submissions, I had an opportunity to review the correspondence surrounding the Final Order, and become aware of the extent of the absence of other relevant parties to the proceedings, the Trustee was advised that in the context of its fiduciary duties, the better course of action was to appeal the Final Order and invite this Honourable Court to either remit the issues for further consideration by the Supreme Court or (preferably for time and efficiency reasons) to consider the issues afresh in this Court.

Supervisory Jurisdiction of the Court

31. The Trustee accepts that the overall period of delay is some 15 months. However, the Respondent's interpretation, as reflected in the Declarations, is likely to have a considerable impact upon the administration of the Trust and more importantly on the other beneficiaries. The Declarations arguably bring the Trust to an end, requiring the liquidation of the Trust fund (which comprises mostly real property) and distribution of the proceeds of sale. The Respondent's interpretation of the Third Schedule removes the Settlor's spouse entirely and immediately from any future benefit from the Trust. The minor great grandchildren are also disentitled from addition as beneficiaries in their own right or any chance of benefit as the Settlor's 'issue' under the Fourth Schedule. A number of the adult beneficiaries, who are subject to US tax requirements, will incur an unforeseen (and unplanned for) punitive tax liability (which may be up to 100%) if fixed share vesting has already occurred.

32. With regard to these beneficiaries, the Respondent did not join them as parties to either proceedings, and nor were they on notice of the Declarations in paragraphs 3 and 4 of the Order. They had no chance to be heard in November 2022 prior to the making of the Final Order. As a result, the Trustee believes the beneficiaries would suffer a grave injustice, in circumstances where they are blameless, should the Court refuse to grant this application for an enlargement of time."

34. By order dated 16 April 2024, Bell JA extended the time by which the Trustee should file and serve notice of appeal to 17 April 2024. In giving his judgment on the application, Bell JA said as follows:

"4. Counsel on both sides provided detailed and helpful skeleton submissions, for which the court is grateful. But cutting to the chase, the problem that I was most concerned with related to the absence from the proceedings before the Chief Justice of both [F] and [D]. [D's] position is the more extreme, insofar

as she would effectively lose the income distributions which she had been receiving, if effect were to be given to the Chief Justice's order, without her having any entitlement to share in the Trust capital. The Consent Order provided for [K] to receive her capital entitlement, for which enforcement proceedings are apparently under way, although stayed pending the determination of this appeal. But on any interpretation, it is not possible for [K] to receive her capital entitlement without all the other beneficiaries being similarly entitled. That would effectively wind up the Trust. Mr. Hawthorne, appearing for [K], sought to suggest that those parties who were not before the court on the making of the Consent Order could apply to join in the enforcement proceedings, which have been joined with the appeal proceedings. But that ignores, first, the fact that there would then be an order in place which would be binding on all concerned, yet it would not resolve the underlying conflict between the different provisions of the Trust deed. The second point is to acknowledge the reality that if I were to refuse this application, the appeal proceedings would be at an end, albeit with the right to a renewed application before the full court. But the Consent Order would be binding. And the consequence of that happening would be that the Trustee could feel obliged to proceed in accordance with the Chief Justice's order, something which Mr. White, for the Appellant, said was likely.

*5. It does seem to me that such a possibility is to be avoided at all costs. It would be a recipe for disaster and confusion. During the course of argument, I was referred to this Court's judgment in *Crisson v Marshall Diel & Myers Limited* [2021] Bda LR 52, where Gloster JA made it clear in relation to applications to extend time that if there are grounds which show good cause why the appeal should be heard, then the fact that the reasons for the delay are less than good (as they are in this case) is not inevitably fatal. And it does seem to me vital that this appeal should go forward to a full hearing, not least to protect the positions of [F] and [D]. So the fact that the reasons given by Mr. Swan for the delay (that the Trustee was focused on the disclosure aspects of the summons, and arranging the independent audit sought by [K]) are, to say the least, unsatisfactory, does not preclude leave to enlarge time being ordered. Mr. Swan also said that the Trustee did not seek "specific legal advice", but the fact is that the Trustee was represented by senior counsel, who expressly consented to the order, and who could have been expected to have read the terms of the Consent Order and the Trust deed carefully before doing so.*

6. But while the reasons for the delay are decidedly at the bottom end of the scale, the danger of injustice to the beneficiaries who were not before the court when the Consent Order was signed leads me to the view that the application for an enlargement of time should be granted, so that the appeal can proceed with the stay of the enforcement proceedings in place."

35. I wholeheartedly endorse those comments. The reasons put forward by the Trustee for the delay and for the Trustee's, and its previous attorneys', apparent lack of appreciation of what the declarations sought by K involved, were woeful, to say the least. I return to revisit these issues later in this judgment.

The Notice and Grounds of Appeal

36. On 16 April 2024 the Trustee served its Notice of Appeal against the declarations contained in paragraphs 3 and 4 of the Order. The Notice of Appeal set out the grounds upon which the Trustee relied. These were as follows:

“Grounds of Appeal

2. *The Appellant appeals on the following grounds, namely that:*

Ground 1

3. *The Learned Chief Justice was wrong in law and/or manifestly wrong in the exercise of his discretion to grant the Declarations. In particular, but without prejudice to the generality of the foregoing and without prejudice to the Appellant's further written and oral submissions, the Appellant relies on the following errors of law or legal reasoning which amount to a serious procedural irregularity:*
- a. *The Learned Chief Justice failed to have any or any proper regard to the fact that the Respondent failed to join as parties or give notice to the individuals named as beneficiaries in either or all of the Second and Third Schedules to the Trust Deed and the Deed of Addition of Beneficiaries dated 21 June 1996 (the Interested Parties), such that, as a consequence, all necessary parties were not properly before the Court and/or given an opportunity to make submissions on the Construction Issue;*
 - b. *In the absence of the Interested Parties, and in any event, the Learned Chief Justice failed to satisfy himself that all sides of the argument were properly before the Court. This error arose in circumstances where the Respondent had failed adequately or at all to put into its evidence or submissions alternative arguments as to the true construction of the Trust Deed in circumstances where:*
 - (i) *There was on a plain reading of the Trust Deed as a whole a clear and prima facie irreconcilable conflict between the provisions of the main text of that instrument and its Fourth Schedule and the provisions of the Third Schedule (Third Schedule) relied upon by the Respondent; and*
 - (ii) *This clear and prima facie irreconcilable conflict had already been identified by the Respondent, most notably in Conyers' (her former attorneys) letter of 5 July 2011 which set out a construction of the Trust Deed which was wholly contrary to the Respondent's case before the Court but nonetheless was not referred to in any way in the Respondent's evidence or written submissions; and*

- c. *The Learned Chief Justice wrongly directed himself as to the relevant factors for the grant of declaratory relief (namely those factors identified in 3a. and 3b. above)². Had he been so properly directed, and in the clear absence of all Interested Parties before the Court and because of the scant and wholly inadequate written submissions filed by the Respondent, he would have proceeded with caution and concluded there was no proper basis upon which to grant the relief sought and/or that such relief was not appropriate.*

Ground 2

4. *Even if contrary to the foregoing, the Learned Chief Justice could properly have concluded that the grant of declaratory relief was in 'principle' appropriate, he nonetheless erred in law in determining the Construction Issue as he did for the following reasons:*
 - a. *The grant of the Declarations, merely reflecting the literal wording of the Third Schedule when read in isolation, was contrary to the well-established canon of construction³ that in order to determine the intentions of the settlor at the time of execution, words in a trust instrument must be construed inter alia by ascertaining the natural and ordinary meaning of the words within the overall context of the instrument viewed as a whole. In failing to apply this principle, the Learned Chief Justice wrongly concluded that the Third Schedule represented a valid and binding trust which overrode multiple other express provisions of Trust Deed including inter alia the definitions of "Vesting Day" and "Perpetuity Day", the provisions of clauses 2 and 6 and the Fourth Schedule, and which was inconsistent with clauses 10 and 18; and*
 - b. *Had the Learned Chief Justice been properly directed, he would have inevitably concluded that the Third Schedule was inconsistent with, and irreconcilable to, the main body of the Trust Deed and its Fourth Schedule, and thereby that it should either be struck through for repugnancy, or alternatively, as determined in analogous circumstances by the Eastern Caribbean Court of Appeal in *Serena & Ors v Equity Trustee Limited & Ors* [2014] ECSC Jo929-5, treated as being merely indicative of the settlor's wishes at the time of settlement and therefore incapable of being, and not declaratory of, any trusts enforceable at law.*

Ground 3

5. *The Learned Chief Justice failed to give any or any adequate reasons for his decision to grant the Declarations, and in failing to do so, made it impossible for the parties, including the Interested Parties, to ascertain the basis for that decision, which was, in all circumstances, wrong.*

Relief Sought From The Court Of Appeal

6. To set aside in the Chief Justice's grant of the Declarations in paragraphs 3 and 4 of the Order and for the proper construction of the Trust Deed (and in particular the meaning and effect of the Third Schedule) to be considered afresh by the Court of Appeal."

37. In addition, the Trustee joined the parties interested as described in the heading to the appeal.
38. D issued a summons on 28 October 2024 for permission to rely upon her first affidavit sworn on 28 October 2024 and her Skeleton Argument. That affidavit principally explains her participation in the Trust and the circumstances in which she first became aware of the Chief Justice's declaration and these proceedings. According to her evidence, that was on 19 August 2024. In light of the matters contained within that affidavit, the Court of Appeal was invited to grant the relief sought in order to enable D, for the first time, to take part in the proceedings which directly affected her entitlement under the Trust and her economic well-being. At the hearing of the appeal, Mr Hawthorne on behalf of the Respondent, properly did not object to that approach. The Court permitted D to rely on her affidavit and participate in the appeal.

The Appeal

39. I accept the trenchant criticisms put forward by Mr Hawthorne, on behalf of K, to the effect that the Trustee can hardly complain about the approach taken by the Chief Justice to the granting of the Order, in circumstances where, not only C & S, as the Trustee's then attorneys, consented to the making of the Order but also chose not to oppose the making of the order, nor to file any submissions to the contrary nor to require a formal in-person hearing. The principal responsibility for the fact that the Chief Justice did not address his mind to the issues, which obviously arose on the construction of the Trust Deed, nor gave any reasons for his decision, clearly lies with the Trustee, and its then attorneys, C & S, who, apparently, without any proper consideration of the issues to which relief gave rise, consented to the proposed Order and provided no submissions to the contrary. In the circumstances, they clearly should not have consented to the making of the consent Order without addressing their minds to the complex issues of construction which arose and the implications for the other beneficiaries or potential beneficiaries under the Trust. It was a clear dereliction of the duties of the Trustee, and its then attorneys, in failing to do so and they are to blame, to large extent, for the consequences. However, albeit to a lesser extent, the responsibility also lies with the legal representatives acting on behalf of K; they likewise should have appreciated that the interests of other beneficiaries under the Trust were materially affected by the claims which K was making and that, accordingly, those beneficiaries should have been joined as parties to the Originating Summons. They also bear a proportion of the blame for the fact that the relevant issues were not properly argued in front of the Chief Justice.

40. Having said that, I have no doubt that, in circumstances, where:

- (1) the Chief Justice, understandably, did not address, or determine, the substantive issues of construction that arose in relation to the Trust Deed; and
- (2) the other beneficiaries or potential beneficiaries under the Trust were not joined as interested parties to the Originating Summons to argue the issues of construction which so clearly affected them;

this Court must nonetheless entertain the appeal and approach *de novo* the relevant issues of construction on a substantive basis. As Bell JA stated on the extension application, it is indeed vital that this appeal should go forward to protect the interests of F and D and the ultimate beneficiaries. There has to be an informed decision on the complex issues of construction which arise.

41. Sensibly, at the start of the hearing of the appeal, Mr Hawthorne, on behalf of K, correctly accepted that this Court should indeed address, and determine, those issues of construction afresh. Accordingly, I now turn to do so. In the circumstances there is no need to address the submissions of the parties in relation to the absence of any detailed consideration by the Chief Justice or his failure to give reasons. In the circumstances set out above, that was understandable. The responsibility for the fact that he did not do so lies with the legal representatives then acting on behalf of the Trustee, and, to a lesser extent, with the legal representatives acting for K.

The submissions of the parties on the construction of the Trust Deed
The Trustee's submissions

42. Mr Steven White, of Walkers, on behalf of the Trustee, submitted as follows in relation to the construction of the Trust Deed:

- (1) It is readily apparent from reading the Trust Deed in full that something has gone wrong. The Third Schedule is in clear conflict with the Fourth Schedule and the two cannot be reconciled. The Third Schedule mandates distributions in fixed shares to certain beneficiaries only during (i) the life of the Trust, and (ii) in fixed shares at its conclusion, which is to be determined not by the 100 year perpetuity period but by a 21 year period accruing from payment of the Bermuda Debt (as defined in clause 1 of the Trust Deed). In essence, the Third Schedule stands in complete conflict to the rest of the Trust Deed, and dispossesses those beneficiaries added since 1993, as well as the great-grandchildren, and creates a significant but unforeseen (and unplanned) tax liability for the US based beneficiaries. In order to make sense of these provisions, one part must be taken to give way to the other.

- (2) Taking into account the above principles, it is apparent on the face of the Trust Deed that the Third Schedule and clauses 4, 5, 10, 11, 18 and the Fourth Schedule cannot stand together. As a matter of construction, the consequences of the Respondent's interpretation of the Third Schedule effectively ends the Trust and is wholly inconsistent with almost every other part of the Trust Deed.
- (3) This is because the period of the Trust is clearly defined in clause 1 of the Trust. It continues from the date of execution until the Vesting Day (being either 12 February 2093 or any earlier date the Trustee unilaterally decides). These clauses made no reference to the earlier termination contended for by the Respondent or the purported use of 21 years from the payment of the Bermuda Debt as a timing mechanism (reflected in paragraph 4 of the Order), and indeed the Trust Deed expressly excludes the possibility of their being any other Perpetuity Day.
- (4) Further, the Respondent's construction cannot be supported on the basis of clause 6 of the Trust Deed which provides for the distributions to be made on the Vesting Day of the Trust (headed "Ultimate Trust"). This fits far more closely with it being a reference to the Fourth Schedule.
- (5) Conversely, the Appellant's position is that on a proper construction of the relevant sections of the Trust Deed, on the Vesting Day, the Fourth Schedule provides, in an entirely standard form, that the income and capital of the Trust shall be distributed to the Settlor's surviving children by family branch. This Fourth Schedule is rendered nugatory if the Third Schedule is treated as predominant in that the Third Schedule requires mandatory distributions in fixed shares to specified beneficiaries at a time other than the Vesting Day (thus in the process overriding and ignoring multiple broad discretionary powers held by the Trustee and exercisable prior to that date, and which are contrary to the fixed share approach contended for by the Respondent, such as powers to appoint, advance, distribute, and add and exclude beneficiaries, etc.).
- (6) Accordingly, it is submitted that this court cannot rely on the Chief Justice's construction of the Third Schedule which is inconsistent with, and irreconcilable to, the Trust Deed as a whole, such that the Order should be set aside.
- (7) As part of the process of construction, the court has three main tools in its arsenal to resolve the inconsistencies which are apparent on the face of the Trust Deed.
- (8) First, there is the ability to correct mistakes. This is the more modern approach. Correction of mistakes by construction is not a separate branch of the law or a summary version of an action for rectification in equity. In *KPMG LLP v*

Network Rail Infrastructure Ltd [2007] Bus LR 1336 at [50] Carnwath LJ observed:

“Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph ‘as it stands’, as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.”

- (9) Accordingly, this court may correct obvious errors in expression, but only when the mistake is clear on the face of the document, and it is clear what correction is needed to cure the mistake. It is submitted that this test is plainly satisfied here, and this court is therefore entitled to correct the mistake as a matter of construction for the reasons expanded on below.
- (10) It is, or ought to be, common ground that, on the face of the document, there is a drafting error or mistake in the Trust Deed, being the reference to the Third Schedule in clause 6 “Ultimate Trust”. The Third Schedule provides for fixed distributions to be made to a Specified Class of beneficiaries prior to the Vesting Day or any earlier time unilaterally determined by the Trustee. In contrast, the Fourth Schedule provides for distributions to be made on the Vesting Day. Common sense tells a reasonable reader that something has gone wrong by the reference to the Third Schedule in clause 6. Indeed, this was the view taken by the Respondent's own lawyers, Conyers, in 2011.
- (11) The second part of this test is also satisfied because it is clear what correction is needed to cure the mistake. The provisions of the Fourth Schedule are entirely consistent with the purpose of clause 6, and therefore this mistake can be readily corrected by replacing the reference in clause 6 to the Third Schedule with a reference to the Fourth Schedule.
- (12) Secondly, the court may strike out the Third Schedule on the basis of repugnancy. This is the historical approach and, for instance, was one route considered by the judge at first instance, and by the Eastern Caribbean Court of Appeal (ECCA) on appeal, in *Serena & Ors v Equity Trustee & Ors* 17 ITELR 890.
- (13) Alternatively, this court could, like the ECCA in *Serena*, adopt the arguably more elegant path of directing the Trustee simply to treat the Third Schedule as non-binding and instead indicative of the Settlor's wishes at the time of settlement (much like a letter of wishes which will often accompany a new trust at inception).
- (14) In *Serena*, the trustee sought the court's assistance with the construction of certain provisions of the trust deed which affected six beneficiaries' entitlement

to the assets of the trust. The first instance judge (Bannister J) acceded to the trustee's application and rejected the defendants' argument that the '*words of entitlement*' contained in the annexure to the main trust instrument trumped all other provisions of the trust deed (which were otherwise inconsistent with them and discretionary) to otherwise create absolute and indefeasible fixed interests. On appeal the judgment was upheld.

- (15) Bannister J's findings below that '*words of entitlement*' in the annexure, when read in the context of the trust instrument as a whole, and against the relevant background, amounted to no more than '*an indication of the settlor's wishes at the time of the settlement of the trust*'. In his judgment, Farara, JA held at [88] to [89]:

"88. To accept the interpretation and legal effect contended for by the appellants would be to do violence to or render 'barren' most, if not all, of the other provisions of the Trust Deed. In that regard, I agree with the learned judge's conclusion that 'words of entitlement' were not intended by the parties, and did not result, in the grant of a fixed, absolute and indefeasible interest in all the assets of the Trust, in favour of the then class of Specified Beneficiaries. In fact, no such trusts were declared by the 'words of entitlement' and that was not the intention of the parties.

89. I come to this conclusion, notwithstanding the use of the word 'entitlement'. In my opinion, this, in and of itself, in the context of the overall scheme of this Trust, to be taken as declaratory of any trusts or intended to convey to the persons named a fixed absolute entitlement and indefeasible interest in any asset of the Trust, even where 'words of entitlement; are to be accorded some precedence. I am satisfied that the word 'entitlement' was used, not to confer an absolute interest in the Trust Property, but merely to preface the statement of percentages in item (26) as being reflective of the then thinking and wishes of the de facto settlor Dr Mong."

- (16) It is submitted, as was the case in *Serena*, that the construction contended for by the Respondent would render "*barren*" most, if not, all the other provisions of the Trust Deed. When the Trust Deed is construed within the context of the scheme of the Trust Deed as a whole, it becomes clear that it was not intended by the Settlor to grant a fixed interest in the assets of the Trust prior to the Perpetuity Day of the Trust. Accordingly, by a process of construction, that part of the Third Schedule should be disregarded as a drafting anomaly or alternatively treated as being merely indicative of the Settlor's wishes at the time of settlement (although the Appellant is agnostic on the particular path taken by this court to resolve the inconsistencies, as it submitted that they all ultimately lead to the same destination; that is the Third Schedule being disregarded).

- (17) In all the circumstances, the Chief Justice should not have granted the declaratory relief sought by the Respondent in the Originating Summons.
- (18) Accordingly, the Court of Appeal is invited to allow the appeal, consider the issue of construction afresh and substitute an appropriate order.

D's submissions

- 43. Mr Sam Riihiluoma, of Appleby, on behalf of D, submitted that the proceedings instituted by K had a direct economic bearing on D because those proceedings included, *inter alia*, applications for declaratory relief that, if granted, would have the effect of bringing the discretionary element of the Trust to an end, thereby terminating D's entitlement to her then existing benefits of: \$17,000, paid to her per month; a yearly travel allowance of \$10,000; and to stay at the B Hotel (one of the Trust's assets) free of charge if she ever visits Bermuda. Historically, D had also received funds from the Trust towards the renovation of her home in the US and for the purchase of a truck. He submitted that the Order (and/or the declarations therein) should be set aside because of serious procedural irregularities and agreed that the Court of Appeal should consider the proper interpretation of the Trust Deed.
- 44. So far as the construction of the Trust Deed was concerned, Mr Riihiluoma, on behalf of D, submitted that, in summary, the Trust Deed, properly construed, operates as follows:
 - (1) The Trust is a fully discretionary trust for the Specified Class, with full powers of appointment by deeds revocable or irrevocable (per clause 4).
 - (2) Until the Vesting Day and in default of any such appointment, the Trust is a fully discretionary trust for the Specified Class, with powers of maintenance, advancement, accumulation etc. (clause 5).
 - (3) On the Vesting Day, the Trustee holds the Trust Fund and any income on the trusts contained in the Third Schedule (clause 6); and
 - (4) In the event that any of the trusts in the Third Schedule for income and capital fail or if (for example) they do not dispose of the totality of the Trust Fund, then the Trustee holds the Trust Fund and any income upon the terms of the Fourth Schedule.
 - (5) The Third Schedule is only engaged on the Vesting Day; the principal protagonists' focus on the date upon which the Bermuda Debt is repaid is to miss the point; the timing of the payment of the Bermuda Debt is irrelevant for the purposes of construing the Trust Deed and the point in time on which Third Schedule is operative.

- (6) There is no need to substitute “Third Schedule” with “Fourth Schedule” for the purposes of clause 6 (as proposed by the Trustee) or to ignore it.
- (7) It appears to be common ground that the Trust is not particularly well drafted. If any correction is required, it is respectfully submitted that the following correction of the Fourth Schedule be applied:

“IN DEFAULT of and subject to the trusts and powers contained in Clauses 3, [4], [5] and [6] respectively of the above written settlement...”

The Respondent's submissions

45. On behalf of the Respondent, Mr Ryan Hawthorne, submitted in summary as follows:

- (1) There are well-established principles of construction under which the court should attempt to give a document such as the Trust Deed an interpretation that will validate rather than destroy its provisions, and under which the court will look to find an interpretation whereby all the provisions of the trust are given effect in harmony with one another.
- (2) In fact, read in context, the Third Schedule is neither inconsistent nor irreconcilable with the main body of the Trust Deed.
- (3) In such circumstances, there is simply no justification for striking out as repugnant a significant part of the Trust Deed in the form of the Third Schedule; this would involve defeating the objective intention of the Settlor on a grand scale. Nor is there any justification for reading the Third Schedule as being indicative only of the Settlor's wishes, when it clearly expresses the Settlor's intention to create mandatory trusts in favour of the beneficiaries.
- (4) As such, Ground 2 of the Notice of Appeal should be dismissed.

46. He amplified these submissions as follows:

- (1) As set out above, it is a well-established principle that the court will attempt to give effect to all of the provisions of a trust and will be slow to conclude that provisions which have been included by the Settlor should not be given effect.
- (2) Whilst there are issues with the drafting of the Trust Deed, it is possible to construe the Trust Deed as a whole so that all of its provisions have effect, and the Appellant's submissions to the contrary are misconceived.
- (3) The Appellant's position appears to be that the power of appointment contained in clause 3 of the Trust Deed should apply wholly in preference to the provisions

contained in the Third Schedule, as otherwise the trustee's broad discretionary powers would be overridden. However, the proviso in clause 3 (1) makes clear that this contention is unsustainable. It states that no appointment made under that clause should '*invalidate any payment or application of capital or income previously made under the trusts or powers herein elsewhere contained*' - i.e. the power is subject to the application of the other trusts contained in the deed, which must logically include the Third Schedule. Clause 3 is therefore saying that to the extent that the trusts in the Third Schedule result in an absolute vesting of income or capital, the power of appointment cannot any longer be exercised.

- (4) The suggestion that the application of the Third Schedule would render the rest of the Trust Deed '*barren*' is equally misplaced. The Third Schedule is explicit in stating that it only comes into effect in certain circumstances, failing which the Trustee's discretionary powers continue to apply:
- (a) Only income from the trust fund which is 'necessary' to meet the Bermuda Debt should be applied for that purpose (see sub-clause (i) of the Third Schedule).
 - (b) It is only if, and when, the Bermuda Debt is paid off that the fixed trusts of income contained in sub-clause (ii) (A) come into effect in favour of R, F, the Respondent and J. Of course, at the inception of the Settlement there can have been no guarantee that the Bermuda Debt would have been paid at all.
 - (c) The fixed trusts of income contained in sub-clause (ii) (A) only deal in total, as set out above, with 76% of the income arising from the Settlement.
 - (d) The Third Schedule then makes clear that it is only in respect of '*the balance of my Trust Fund*' that the fixed trusts of income and capital in sub-clause (B) apply, and only after 21 years have elapsed following the repayment of the Bermuda Debt. The use of the word '*balance*' is consistent with only income (i.e. the 24% not covered by the fixed trusts contained in sub-clause (ii) (A)) and capital which has not already been distributed via the trustee's discretionary powers being subject to these trusts, as is the use of the defined term Trust Fund, which denotes the remaining trust fund in existence from time to time.
 - (e) The trusts in favour of the grandchildren, both as to income and capital, only take effect on the Vesting Day. It is entirely reasonable to construe the trustee's discretionary powers as continuing to apply until the Vesting Day occurs.

- (5) In these circumstances, where the application of the Third Schedule is clearly consistent with the discretionary powers given to the trustee, striking out the words of the Third Schedule as being of no effect would do violence to a significant part of the Trust Deed - and without any logical justification.
- (6) The Appellant's alternative contention that the words of the Third Schedule are merely intended to express the wishes of the Settlor does not work:
 - (a) In *Serena*, it was in reality only one word ('*entitlement*') that was being relied on by the appellant in that case as denoting an effective trust, and Item 26 did not refer to any specific trust property. By contrast, clause 6 (which gives effect to the Third Schedule) and the Third Schedule itself contain multiple examples of imperative language which can only be consistent with the application of fixed trusts, using language such as '*trusts*', '*shall*', '*shall be distributed*' and '*absolutely*', and refer to specific trust property in the form of both income and capital. Furthermore, unlike with Item 26 in *Serena*, there is nothing in the Third Schedule to show that the Trustees' discretionary powers continue to apply once the conditions for absolute vesting in the beneficiaries have occurred, and the application of the Third Schedule in the manner contended for by the Respondent is perfectly consistent with the remainder of the Trust Deed. Cutting down the effect of the Third Schedule in the way contended for by the Appellant would involve departing very significantly indeed from the ordinary and natural meaning of the words used.
 - (b) If the Third Schedule had been intended to act as the Settlor's wishes, then one would expect this to be referenced in clause 8, which states that the Trustees shall be entitled to have regard to such wishes, but this is not the case.
- (7) Furthermore, there is no inconsistency between the contents of the Third Schedule and the other provisions referred to by the Appellant:
 - (a) As to the definitions of '*Perpetuity Day*' and '*Vesting Day*' in clause 1 and the application of the Third Schedule, just because a trust deed such as that under consideration in the present case lays down a perpetuity period of one hundred years for the Settlement, that does not mean that distributions cannot be made to the beneficiaries prior to the end of that period. This is evident from clause 1 itself, which allows the trustees to shorten the period during which the entire Settlement subsists by bringing forward the Vesting Day. Furthermore, where they still apply, the Trustee has discretionary powers under the Trust Deed to make absolute distributions to beneficiaries before the Vesting Day.

Therefore, there cannot be any contradiction between the establishment of a 100-year perpetuity period and the trusts coming to an end (in part only) in the event of the Bermuda Debt being paid. That there is no contradiction is also underlined by the fact that the Third Schedule itself expressly incorporates the concept of the Vesting Day as set out in Clause 1- for example by stipulating that only the grandchildren of the Settlor who are living at the Vesting Day take the 20% of capital referred to in sub-clause (ii)(B)(d).

- (b) The Appellant suggests that there is a contradiction between clause 2 of the Trust Deed and the Third Schedule. Clause 2 provides that decisions made by the trustees should be made by a simple majority, save where the trustees declare that the Vesting Day should occur earlier than the end of the perpetuity period. The alleged contradiction here is not understood.
- (c) As to clause 6, this provides: *'Subject as aforesaid the Trustees shall on the Vesting Day stand possessed of the Trust Fund and the income thereof upon the trusts set forth in the Third Schedule hereto'*. There is no contradiction between this clause and the application of the Third Schedule - the clause is mandating that the Third Schedule should apply. Equally, the words *'subject as aforesaid'* again make clear that the trustees' discretionary powers have effect until the Third Schedule comes into operation. The only real question arises from the use of the words *'on the Vesting Day'*. It is clear from the Third Schedule that part of it was intended only to come into effect on the Vesting Day - i.e. the gift of capital in favour of the grandchildren living on that date. The other trusts in the Third Schedule, however, were intended to come into effect at a time which either was prior to the Vesting Day (in the case of the provision allowing the application of *'necessary'* income towards the Bermuda Debt) or which could have been prior to the Vesting Day - depending on whether the Bermuda Debt was repaid and whether 21 years had elapsed since it had been (in the case of the remainder of the capital trusts). The Respondent therefore submits that, construing the Trust Deed as a whole, the words *'on the Vesting Day'* were intended to mean the following:
 - (a) In relation to the trusts in favour of the grandchildren, that these trusts should only vest absolutely on the Vesting Day as set out expressly in the Third Schedule;
 - (b) That the trusts of the Third Schedule could not vest absolutely outside of the trust period of 100 years if, for example, 21 years had not elapsed since the repayment of the Bermuda Debt by that

time. Given the clear words in the Third Schedule stating that absolute trusts of income and capital should apply at certain defined points following the payment of the Bermuda Debt, there is no sense, however, in holding that those absolute interests should vest in the beneficiaries concerned on the Vesting Day occurring, if the repayment of the Bermuda Debt and the passage of 21 years since that event occurs before then.

- (8) As to the Fourth Schedule, it is again perfectly possible to construe this as having effect alongside the Trustees' discretionary powers of appointment and the Third Schedule. Although, contrary to the heading above it, the Fourth Schedule is not referred to earlier in the Trust Deed, the text of the Fourth Schedule itself makes clear that it was intended to be the default trusts applying to the Settlement. It provides for the Trust Fund to be held for the Settlor's 'issue' living on the Vesting Day, a term which of course captures all of the Settlor's descendants and therefore spreads the widest possible net. Therefore, the hierarchy of the Settlement can be analysed as follows:
- (a) The Trustees' discretionary powers apply unless and until the Bermuda Debt is repaid, subject to such income as is necessary being applied to the Bermuda Debt.
 - (b) If the Bermuda Debt is repaid, the income trusts contained in the Third Schedule in relation to 76% of the income come into effect, with the trustee's discretionary powers continuing to apply in relation to the remaining 24% of income and in relation to capital.
 - (c) Once 21 years have elapsed from the payment of the Bermuda Debt, the absolute trusts of the remaining income and capital in the trust fund come into effect in favour of R, F and the Respondent (i.e. in relation to a total of 80% of the remaining trust fund).
 - (d) The remaining 20% of capital (together with the accumulated income held under clause (2) (A) (e)) is held for the Settlor's natural grandchildren living on the Vesting Day, with the Trustees retaining their discretionary powers in the meantime - including to bring forward the Vesting Day so that the grandchildren take the capital absolutely.
 - (e) In the event that the trusts of income and capital in favour of the beneficiaries in the Third Schedule do not come into operation because the Bermuda Debt is not paid back, or they fail in some way (e.g. because there are no living grandchildren on the Vesting Day), then the Fourth Schedule has effect on the Vesting Day.

- (f) In the event that the trusts of the Fourth Schedule fail (because there are no issue of the Settlor living on the Vesting Day), clause 7 then provides for the Trust Fund to be held for such charitable purposes or charities as the Trustees shall determine, failing which for charity generally.
- (9) As to clause 10, this clause allows the Trustees to add or exclude members of the Specified Class as set out above. There is no contradiction between a clause which allows the Trustees discretion over who the potential objects of its discretionary powers are and the Third Schedule, given that the correct construction of the Trust Deed as a whole is that those discretionary powers only apply until the Third Schedule comes into effect.
- (10) Finally, as to Clause 18, this provides that every discretion or power conferred on the Trustees '*shall be an absolute and unfettered discretion*', but this says nothing about the circumstances in which the Trustees have such discretion or power. As set out above, it is clear from the Trust Deed that the trustee's discretionary powers are limited in a number of ways, including by the application of the Third Schedule.
- (11) As the Respondent has set out previously, the Appellant itself has administered the Settlement in a way which is consistent with the Third Schedule having effect, by making distributions of income in accordance with it, including to the Respondent. It is not in dispute that the Respondent's brother, R, who is a director of the Appellant, has discussed the Settlement with the Respondent on the basis that the Third Schedule and the Settlement as a whole operates in accordance with the declarations given by the court below, including during the proceedings in the court below.
- (12) The Appellant's current preferred construction of the Trust Deed involves rejecting the application of a very significant part of it, thereby defeating the clear intentions of the Settlor, and in violation of the principle that the entirety of the Trust Deed should be given effect, if at all possible. There is simply no reason for the court to conclude that the provisions of clause 6 and the Third Schedule should be discarded entirely when, as set out above, they can be construed to work in a way which is consistent with the remainder of the Trust Deed.
- (13) Accordingly, Ground 2 of the Notice of Appeal ought to be dismissed, and the appeal in its entirety ought to be dismissed, on the basis that the true construction of the Trust Deed is in accordance with the Chief Justice's order. That renders the remaining grounds of appeal otiose.

Discussion and determination

47. The relevant law as to the principles of construction of a trust instrument as set out in detail in this Court's decision in *Re X Trusts* [2023] CA (Bda) 4 Civ21 from paragraphs [33] to (42), were not in dispute. It is not necessary to repeat them here. In addition, as Mr Hawthorne, on behalf of the Respondent, submitted, it is relevant in the present context to have regard to the well-established principle of construction under which the court should attempt to give an instrument an interpretation that will validate rather than destroy its provisions: see for example *Chopra v Bindra* [2009] EWCA Civ 20327 in the trust context. The court will be slow to favour interpretations which involve rejecting the application of clauses which have been deliberately included and will look to find an interpretation whereby all the provisions of the trust are given effect in harmony with one another: see Lewis on, *The Interpretation of Contracts* at Chapter 9, Section 8, and at Chapter 9, Section 1328.
48. The application of the parol evidence rule means that evidence of the Settlor's subjective intention is inadmissible in construing the Trust Deed. Thus, in my judgment, the contents of the subsequent letters of wishes provided by the Settlor are inadmissible in so far as they relate to the Settlor's intention at the time of execution of the Trust Deed. Although such subsequent letters of wishes might be admissible if they were to provide evidence of *surrounding circumstances* which existed or were in the reasonable contemplation of the Settlor when the settlement was made (see *Lewin on Trusts* (20th Edition), paragraph 7-006.29), the reality here is that the letters of wishes add nothing legitimate to the known factual matrix namely that, as at the date of execution of the Trust Deed, the Settlor had married D and that his family members were his own children and her stepchildren. The fact that the letter of wishes dated 16 September 1999 shows that, subsequent to the execution of the Trust Deed, the Settlor appears to have become dissatisfied with the conduct of K, is of no relevance to the construction of the Trust Deed. For similar reasons, evidence relating to events subsequent to the execution of the Trust Deed is also inadmissible.
49. All three parties agree that the problem lies with the tension between the provisions of the Third Schedule and the Fourth Schedule. The Third Schedule is only mentioned once in the body of the Trust Deed in clause 6. The Fourth Schedule is not mentioned at all. In summary, as set out above, the respective and, in terms of outcome, very different, contentions of the parties are as follows:
 - (1) The Trustee contends, in effect, that the inclusion of the Third Schedule is a mistake as a result of a drafting error; that it is irreconcilable with the provisions of clauses 4, 5, 10, 11, 18 and the Fourth Schedule and that the provisions cannot stand together. Accordingly, the Trustee submits that, since it is clear that the provisions of the Fourth Schedule are entirely consistent with the purpose of clause 6, the mistake can be readily corrected as a matter of construction by replacing the reference in clause 6 to the Third Schedule with a reference to the

Fourth Schedule. Thus, Mr White submitted that this Court should strike out the Third Schedule on the basis of repugnancy. Alternatively, he contended that this Court could, like the Eastern Caribbean Court of Appeal (“ECCA”) on appeal, in *Serena & Ors v Equity Trustee & Ors* 17 ITELR 890, direct the Trustee simply to treat the Third Schedule as non-binding and instead indicative of the Settlor's wishes at the time of settlement.

- (2) The Respondent, on the other hand, submits that the Chief Justice’s declaration was correct; that 21 years having passed since the repayment of the Bermuda Debt, the provisions of the Third Schedule came into effect thereby bringing to an end the Trustee’s discretionary powers to appoint or apply income and capital pursuant to the discretionary powers contained in clauses 4 and 5 of the Trust Deed in relation to 80% of the Trust Fund; Mr Hawthorne contended that the remaining 20% of the income and capital remained subject to the overriding discretionary powers of the Trustee contained in clauses 4 and 5 of the Trust Deed, since the capital trusts in paragraph (B) (d) of the Third Schedule related to the Settlor’s grandchildren living at the Vesting Day.
- (3) D, on the other hand, submits that the Trust Deed can and should be construed as giving effect both to the Third Schedule and the Fourth Schedule; and that the critical point is that clause 6, which brings the Third Schedule into operation, only operates from the Vesting Day. Accordingly, Mr Riihiluoma, on D’s behalf, submits that the trusts contained in the Third Schedule have not yet come into effect and that accordingly the Trustee retains its discretionary power under clauses 4 and 5 over the entirety of the Trust Fund to appoint income and capital to members of the Specified Class, including, *inter alios*, D.

50. I conclude that D’s arguments in relation to the interpretation of the Trust Deed are broadly correct and should be accepted. My reasons may be summarised as follows.

51. I bear in mind the following well-established principles of construction. First, as Mr Hawthorne submitted, in construing a trust instrument, a court should attempt to give the document an interpretation that will validate, rather than destroy, its provisions, and to find an interpretation whereby all the provisions of the trust are given effect consistently with one another. Second, as Carnwath LJ observed in *KPMG LLP v Network Rail Infrastructure Ltd supra* at [44 -50], the more modern approach is to treat the correction of mistakes in a deed as part of the process of construction. He said:

“B Construction of mistakes by correction

44. *There is no dispute that as part of the process of construing a contract the court can correct obvious errors. Lewis on the Interpretation of Contracts (2004), in a section headed “correction of mistakes by construction” (cap 9 para 9.01) states:*

“As part of the process of construction the court has power to correct obvious mistakes in the written expression of the intention of the parties. Once corrected, the contract is interpreted in its corrected form.”

45. In support there are citations from *Wilson v Wilson* (1854) 5 HL Cas 40, 66 (per Lord St Leonards) and, more recently, *East v Pantiles Plant Hire Ltd* [1982] 2 EGLR 111. In the latter (at p 112), Brightman LJ summarised the requirements:

“Two conditions must be satisfied: first there must be a clear mistake on the face of the instrument; secondly it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express the manner in which the parties decided to express their intention.”

46. So much is uncontentious, in so far as one is dealing with errors “on the face of the instrument”. However, as Lewison observes, the cases are not confined to such errors:

“... in order to decide whether there is such a mistake, the court may take into account such evidence of background facts as is admissible in order to interpret the contract.”

The principal cases cited in support of that proposition are Holding & Barnes plc v Hill House Hammond Ltd [2002] L&TR 7; [2001] EWCA Civ 1334, where the Court of Appeal looked at six other leases executed contemporaneously as part of the same overall transaction; and The Starsin, where an obvious gap was filled by words imported from a standard model clause.

47. I will need to look at the latter case in more detail, since, as the judge acknowledged, it provided the closest analogy to the present case. At this stage I would make one general comment. In the passage cited above Brightman LJ might be read as distinguishing “correction as a matter of construction”, as he called it, from on the one hand “rectification”, and on the other construing the uncorrected wording. However, as I am sure he would have recognised, correction of mistakes under this head is not a separate process, but is simply one facet of the task of “the court of construction”.

48. This point was emphasised by Sir Martin Nourse in *Holding & Barnes* (above). He referred to the principle stated by Brightman LJ, and concluded that in the instant case not only was there a clear clerical error, but it was also clear what the correction should be. He added:

“I arrive at this conclusion by seeking to ascertain the common intention of the parties from the words they have used in the Barking lease in the light of the material provisions of the other six leases. This is the classical process of construction [...] It enables the court to correct an obvious clerical error in a document that it may conform with the obvious intention of the parties. Although in a loose sense the document is rectified, indeed the process is sometimes referred to as common law rectification, it is not rectification in the correct sense. It remains an exercise in construction.” (para 47)

I agree respectfully with that passage. I confess, however, to having omitted his comment that the process “owed nothing” to the wider approach adopted in recent cases such as ICS (which had been cited in the preceding judgment of Clarke LJ). It is true that the principle stated by Brightman LJ pre-dated the more flexible approach to interpretation adopted in the recent authorities. It was in effect confirmed in the fifth of the ICS principles:

“The “rule” that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”

49. *However, without the wider approach allowed by cases such as ICS, the legitimacy of having regard to the other lease might have been in doubt. As Clarke LJ observed,*

“Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that that reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix...” (para 18)

It was in reliance on the new approach that he felt able to look beyond the particular lease to others in the same group.

50. *The relevance of this point in the present case is that, having decided that the 1974 draft lease is a legitimate aid to construction, it is wrong to compartmentalise the process of interpretation. Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph “as it stands”, as though they were distinct exercises. In my view they are simply aspects of the single task of interpreting the agreement in its*

context, in order to get as close as possible to the meaning which the parties intended.”

52. I turn now to the construction of the Trust Deed itself. It is important to understand the structure of the Trust Deed. The first point to make in this context is that Recital (A) makes it clear that the primary purpose of the Trust Deed is to make provision for members of the Specified Class. Recital (A) recites:

*“The Settlor wishes to make provision **for the members of the Specified Class** as herein defined in manner hereinafter appearing....”* [My emphasis]

53. As already set out above, the Specified Class is defined as all:

“(i) The Settlor;
(ii) The Settlor's son, [R];
(iii) The Settlor's son, [F];
(iv) The Settlor's daughter, [K];
(v) The Settlor's natural grandchildren;
(vi) The Settlor's friend [J]
(v) [sic] Such other person persons or class of persons or body corporate or unincorporated or otherwise as the Trustees shall declare to be members of the Specified Class pursuant to the power contained in Clause 10(1) of the within written Settlement.”

54. Clause 10 (1) of the Trust Deed gives the Trustees power in their absolute discretion to add beneficiaries as members of the Specified Class; clause 10 (2) of the Trust Deed gives the Trustees Power in their absolute discretion to exclude existing beneficiaries as members of the Specified Class. As stated above, [R] was excluded from, and D was added to, the Specified Class.
55. The primary, in the sense of overriding, trusts, are those contained in clauses 4 and 5 of the Trust Deed. Prior to the Vesting Day and subject to the rule against perpetuities (and the proviso to clause 4), the Trust is a fully discretionary trust.
56. As I have already quoted above, clause 4 (under the heading “Power of Appointment”) confers on the Trustees a discretionary power of appointment in favour of members of the Specified Class. The clause directs the Trustees to stand possessed of the Trust Fund and the income thereof until the Vesting Day:

*“UPON TRUST **for all or such one or more exclusively of the others or other of the Specified Class** at such age or time or respective ages or times and to such uses for such estate (whether absolutely or otherwise) and if more than one in such shares and with and subject to such terms limitations and charges and with and subject to such provisions for maintenance education or advancement or accumulation of income for any period and for any purpose authorised by law or for forfeiture in the event of bankruptcy or otherwise and*

with such trusts and powers (including if thought fit discretionary trusts and powers of appointment over capital and income and powers to apply both capital and income capable of being exercised in favour of all or any of the Specified Class) **exercisable at the discretion of the Trustees or of any other person and generally in such manner as the Trustees shall without transgressing the rule against perpetuities by any deed revocable or irrevocable executed before the Vesting Day appoint** PROVIDED ALWAYS that:-

- (1) no such appointment shall invalidate any payment or application of capital or income previously made under the trusts or powers herein elsewhere contained; and
- (2) every appointment shall be made and every interest limited thereunder shall vest in interest (if at all) not later than the Vesting Day and no appointment shall be revoked later than the Vesting Day; and
- (3) subject to any irrevocable appointment theretofore made by the Trustees the Trustees shall have power wholly or in part to release the Trust Fund from the power hereby conferred upon them as though such power were not conferred in a fiduciary capacity." [My emphasis]

Thus, any exercise of the Trustees' power of appointment under this clause has to be by deed and any such deed has to be executed prior to the Vesting Day.

57. Likewise, clause 5 confers a discretionary power upon the Trustees, until the Vesting Day, to pay or apply income or capital, without the formal execution of a deed of appointment, for the benefit of members of the Specified Class. Thus (as already quoted above) the clause provides:

"POWERS REGARDING CAPITAL AND INCOME AND TRUST TO ACCUMULATE SURPLUS INCOME

5. IN default of and subject to any such appointment as aforesaid the Trustees may **until the Vesting Day** pay transfer appropriate or apply the whole or any part of the capital or annual income of the Trust Fund to or for the maintenance advancement education or otherwise for the benefit **of all or such one or more exclusively of the others of the Specified Class** for the time being in existence in such proportions and manner as the Trustees shall in their absolute discretion and without being liable to account for the same think fit and the Trustees shall until the Vesting Day accumulate the whole or such part of the annual income of the Trust Fund as shall not have been paid or applied as aforesaid by investing the same in or upon any of the investments hereby authorised for the investment of trust monies and hold the same as an accretion to the capital of the Trust Fund for all purposes." [My emphasis]

58. In other words, until the Vesting Day, as defined, the Trustees have clear discretionary powers to execute deeds of appointment of income and/or capital in favour of members of the Specified Class (clause 4), or, in the absence of the execution of formal deeds of

appointment, simply to make payments of capital or income in favour of such beneficiaries or to apply the same for their maintenance, advancement or education or otherwise for their benefit (clause 5). It is pursuant to the exercise by the Trustee of these clause 5 discretionary powers that D has been granted the benefits referred to in her affidavit. It does not appear that any formal deeds of appointment have been executed pursuant to clause 4.

59. The term “Vesting Day” is defined in clause 1 of the Trust Deed. In the Trust Deed it can only be construed as one of the following days:

- (1) the Perpetuity Day (i.e. 12 February 2093, being the day 100 years from the date of the Trust Deed); or
- (2) an earlier day than the Perpetuity Day, namely one which has been declared by the Trustees in writing as the Vesting Day in accordance with clause 1:

(4) IN this Settlement the following expressions have the following meanings respectively (that is to say):

“the Perpetuity Day” means the day on which shall expire the period of One hundred years after the execution of this Settlement which period (and no other) shall be the perpetuity period applicable hereto”

“the Vesting Day” means the Perpetuity Day or such earlier day as the Trustees shall unanimously by writing under their hand declare to be the Vesting Day”.

The Trustees have not executed any deed pursuant to this clause declaring that the Vesting Day should take place earlier than the Perpetuity Day. However, what this power demonstrates is that the Trustees have the power to bring to an end their discretionary powers under clauses 4 and 5 to appoint or apply income and capital to members of the Specified Class and declare the Vesting Day.

60. I next turn to consider the critical provisions of clause 6. As I have already quoted above, it provides as follows:

“ULTIMATE TRUST

***SUBJECT as aforesaid** the Trustees shall on **the Vesting Day** stand possessed of the Trust Fund and the income thereof upon the trusts set forth in the Third Schedule hereto.” [My emphasis]*

61. For present purposes there are two critical features about this clause. The first is that it is clearly expressed to be *subject to* the previous provisions of the Trust Deed - in other words the discretionary powers of the Trustees to appoint or apply income or capital to members of the Specified Class at any time *prior to the Vesting Day* take priority.

Second, and most importantly, it expressly provides that it is *on the Vesting Day* (and no earlier) that the Trustees are to stand possessed of the Trust Fund upon the trusts set forth in the Third Schedule - which will necessarily be subject to any prior appointments of income or capital or applications of income or capital to members of the Specified Class made prior to the Vesting Day. In other words, it is only on the Vesting Day that the Third Schedule is engaged at all.

62. Although the drafting of the Third Schedule is somewhat opaque, as it appears to direct under subparagraph (i) that the income of the Trust Fund shall be applied to repay the Bermuda Debt – which might suggest an immediate application of such income – there is no doubt in my mind that, because of the express wording in clause 6, the trusts expressed in the Third Schedule can only take effect, or put another way, only come into operation, on the Vesting Day. That is not so surprising. The Settlor might well have envisaged the possibility that the Trustees might have considered it appropriate to have terminated the trusts set out in the Trust Deed much earlier than the Perpetuity Day, by declaring an earlier Vesting Day, and without having made any appointments under clause 4. The trusts set out in the Third Schedule provide for, and reflect the Settlor's intention as to, what was to happen in the event of there being an early declaration of the Vesting Day and no previous deeds of appointment.
63. That being so, given that the Vesting Day has not occurred, since (i) the Perpetuity Day has not arrived, since a period of 100 years has not expired from the date of the Trust Deed; and (ii) there has been no earlier day declared by the Trustee in writing to be the Vesting Day, the Third Schedule has no application. It follows that the Trustee does not hold the Trust Fund and the income thereof upon the trusts set forth in the Third Schedule. In other words, the entitlement of a beneficiary under the trusts declared in the Third Schedule is triggered *only* in the event of the occurrence of the Vesting Day; it is not triggered by the repayment of the Bermuda Debt or the expiry of 21 years from the date of the repayment of the Bermuda Debt.
64. The Respondent's acceptance in argument that the Trustees' powers of appointment and application of income and capital, in favour of members of the Specified Class under clauses 4 and 5, continue to apply until the Vesting Day in relation to the 20% of the Trust Fund that, under the Third Schedule, is held on trust for such of the Settlor's natural grandchildren as shall be living at the Vesting Day, demonstrates the flaw in the Respondent's argument. The true construction is that no beneficiaries under the trusts set out in the Third Schedule have any vested interest in the Trust Fund until the occurrence of the Vesting Day. That is the effect of clause 6. If the Respondent's argument were correct, and the trusts set out in the Third Schedule came into effect on a date 21 years from the date of repayment of Bermuda Debt, as she contends, then the grandchildren of the Settlor would have a vested, albeit contingent, interest as at that date which would prevent the Trustees from exercising any powers of appointment or application under clauses 4 and 5 over, or in relation to, their contingent 20% interest in the Trust Fund.

65. The fact that the Third Schedule might, in certain circumstances, only be engaged on the Perpetuity Day, which might, of itself, render the trusts contained in the Third Schedule void for perpetuity, depending on when the Bermuda Debt was repaid (it is only on repayment of the Bermuda Debt that the individuals named in the Third Schedule, paragraph (ii)(A) become entitled to the income), is not a reason for rejecting the above construction of the Trust Deed. As Mr Riihiluoma submitted:

- (1) To the extent that this possibility is more than purely theoretical (as a matter of fact), it makes no difference since the draftsman of the Trust Deed (dated 12 February 1993) would have been perfectly familiar with section 5 of the Perpetuities and Accumulations Act 1989 (“the PA Act”), which has the following effect:
 - (a) where it is possible that property could vest outside the perpetuity period (which would be void at common law), section 5 of the PA Act makes it permissible for trustees to ‘wait and see’ whether the property will in fact vest within the perpetuity period; and
 - (b) only when it becomes clear that the gift cannot so vest will the gift be void.
- (2) Accordingly, the ‘*wait and see*’ provision of the PA Act assists and supports the construction of clause 6 and the Third Schedule set out above because the Trustee can ‘*wait and see*’ whether there will be a perpetuity issue and, if necessary, move the Vesting Day back to an earlier date to eliminate any potential perpetuity issue.
- (3) Moreover,
 - (a) ‘*wait and see*’ would clearly have demonstrated the risk to be unlikely (as a matter of fact) to arise; the “*Bermuda Debt*” falls to be determined at the date of the Settlor’s death (2 February 2022); the prospect of any of that existing in 2093 must have been considered to have been remote;
 - (b) secondly, in trusts of this nature one might expect the Trustee to declare the Vesting Day on the death of D, thereby completing a circle of devolution clearly anticipated by the overall Trust terms and structure well before the approach of the Perpetuity Day.

66. I turn next to consider the terms of the Fourth Schedule. As already mentioned, it is not referred to in the body of the Trust Deed at all. However, nonetheless, as part of the exercise of construction, the Court should attempt to construe it as part of, and consistently with, the Trust Deed. I see no problem with this. By its express terms it is

clearly a default provision that only takes effect in the event of failure of the preceding trusts. The Fourth Schedule is clearly intended to operate in the event that all preceding trusts, which might have been established under clauses 4 and 5, or come into existence under the Third Schedule, fail. Although it is not mentioned in the body of the Trust Deed, that is clearly its intention.

67. The Third Schedule itself does not dispose of the entirety of the capital and income of the Trust Fund. It provides for fixed percentages both in relation to income and income and capital following the expiry of the 21-year period specified. However, paragraph (ii) (A) of the Third Schedule only disposes of 76% of the income. Moreover, there is no provision within the Third Schedule determining the destination of any income or capital in the event of the death of the named beneficiary or of his/her stirpes. In my judgment, the Court should construe the Fourth Schedule as taking effect to the extent that the preceding trusts or payments, namely those established by the exercise of the Trustees' discretionary powers under 4 and 5, or those taking effect under the Third Schedule fail.
68. Although the Fourth Schedule only expressly refers to being subject to the trust and powers contained in clause 3 (the Trust for Sale provision) and clause 4 (the Power of Appointment provision), it is clear that the Fourth Schedule should also have referred to clauses 5 and 6. In my judgment the Court should have no difficulty in construing the wording of the Fourth Schedule as though it also referred to clauses 5 and 6 of the Trust Deed.
69. The Trust Deed is an exemplar of sloppy drafting. Apart from the difficulties to which the Third Schedule and the Fourth Schedule give rise, the Trust Deed has other anomalies. Thus, for example, internal paragraph cross-references within the Trust Deed are, on their face and insofar as they go, haphazard; see, for example, clause 10, referring to "Clause 3" (which clearly should be a reference to clause 4); clause 22 referring to "Clause 19 (7)" (which clearly should be a reference clause 20 (7)). This clearly extends to the Fourth Schedule, as K appears to accept: see paragraph 20.7 of her Skeleton Argument dated 17 September 2024.
70. In such circumstances and in accordance with the principles of construction already referred to above, in my judgment this Court should have no difficulty in reading the Fourth Schedule as additionally referring to clauses 5 and 6 of the Trust Deed.
71. The above construction provides a logical and coherent solution to the apparent – but not actual – tension between the provisions of the Third Schedule and the provisions of the preceding trusts and powers contained in clauses 4 and 5 of the Trust Deed. It also provides a role for the Fourth Schedule.
72. It is only in the event that there is no beneficiary to take under the trusts of the Fourth Schedule that clause 7 of the Trust (namely the trust for charitable purposes) applies.

There is a slight difficulty with the wording of clause 7 as it refers “*to the failure or determination of all or any of the trusts hereinbefore contained or if the whole or any part of the capital or income of the Trust Fund shall be otherwise undisposed of by such trusts*”, and does not expressly include, or refer to, the default trusts set out in the Fourth Schedule. However, if the Trust Deed is construed holistically, it is clear that the trust for charitable purposes is only intended to take effect if there is a total failure of all trusts for the family members of the Settlor, not merely those set out in the preceding clauses.

73. Accordingly, it follows that I would allow the appeal; I would set aside the Chief Justice’s declaration as set out in paragraphs 3 and 4 of the Order; and I would declare that, on the proper construction of the Trust Deed:

- (1) the trusts contained in the Third Schedule to the Trust Deed have not come into effect and will not come into effect until the Vesting Day as defined in the Trust Deed;
- (2) that such trusts (if they take effect at all) will only take effect subject to any prior exercise of the Trustees’ discretionary powers of appointment or application under clauses 4 and 5 of the Trust Deed;
- (3) that, since the date of the Trust Deed, the Trustees have had, and continue to be entitled to exercise, the discretionary powers of appointment and application in relation to income and capital of the Trust Fund in favour of members of the Specified Class as contained in clauses 4 and 5 of the Trust Deed, without regard to the provisions of the Third Schedule;
- (4) that the Fourth Schedule on its proper construction should be read as follows:

“IN DEFAULT of and subject to the trusts and powers contained in clauses 3, 4, 5 and 6 respectively of the above written settlement...”;

- (5) that clause 7 of the Trust Deed should, on its proper construction, be read as follows:

“In the event of the failure or determination of all or any of the trusts hereinbefore contained and of the trust referred to in the Fourth Schedule hereof ...”.

Disposition

74. It follows that I would allow the Appeal by the Trustee and by D. I would direct that the Appellant, the Respondent and D should submit written submissions in relation to

costs within 21 days of the date of this judgment, including headline schedules as to the amount of costs incurred.

BELL JA

75. I agree.

CLARKE P

76. I, also, agree.