[2023] SC (Bda) 31 Civ. 20 April 2023

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018: No. 389

IN THE MATTER OF THE P TRUSTS
AND IN THE MATTER OF SECTION 47 OF THE TRUSTEE ACT 1975 AND IN THE MATTER OF ORDER 85 OF THE RULES OF THE SUPREME COURT 1985

Before: **The Hon. Chief Justice Hargun**

Representation: **Brian Green KC, Jeffrey Elkinson and Britt Smith of Conyers Dill & Pearman Limited for the Plaintiffs**

Michael Furness KC and Reid Orchard of MJM Limited for the First, Fourth and Eighth Defendants

Francis Tregear KC and Keith Robinson of Carey Olsen Bermuda Limited for the 1st named Second Defendant, Third Defendant, Fifth Defendants and the 1st, 3rd and 4th named Sixth Defendants

Andrew Mold KC and Laura Williamson of Kennedys Chudleigh Limited for the 2nd named Second Defendant, 2nd and 5th named Sixth Defendants, and the Ninth Defendant

Nicholas Le Poidevin KC and Warren Bank of Cox Hallett Wilkinson Limited for the Seventh Defendant

Fozeia Rana-Fahy of MJM Limited for the Eighth Defendant

Date of Hearing: **25-26 January 2023**

Date of Judgment: **20 April 2023**

JUDGMENT

HARGUN CJ

Introduction

1. By Originating Summons dated 22 November 2018, the Plaintiffs seek an order approving the actions of the First Plaintiff, Company A, in its capacity as the trustee of the three Settlements (the **"Trustee"**) and the Second Plaintiff in his capacity as the protector of those Settlements (the **"Protector"**) established by:

   (1) The deed dated 27 December 2006 and made between PRP as settlor and the Trustee and known as the P Family Settlement (2006) ("**the Family Settlement**");

   (2) The deed dated 27 December 2006 between PRP as settlor and the Trustee and known as the JP Family Settlement ("**JP Settlement**");

   (3) The deed dated 27 December 2006 between PRP as settlor and the Trustee and known as the JE Family Settlement ("**JE Settlement**") (collectively referred to as the "**the Settlements**" or the "**Three Settlements**"), which

actions were to give effect to the agreement entered into between the primary beneficiaries of the Settlements (PDP, JP and JE) on 13 July 2018 ("**the Settlement Agreement**") such that the collective assets of the Settlements may be redistributed to the Settlements in accordance with the Settlement Agreement and the wishes of the respective adult beneficiaries.

2. The application made by the Trustee is in the nature of a *Public Trustee v Cooper* category (2) application. The Trustee contends that its decision to accept and implement the terms of the Settlement Agreement is a momentous decision and, in the circumstances, it is appropriate that the Trustees should seek the sanction of the Court.

3. In his first affidavit sworn on 7 August 2019 Mr Peter Pearman, who is a director of the Trustee along with Mr Christopher Lloyd, explains the background to the present application.

4. The settlor ("**PRP**" or the "**Settlor**") was a successful businessman and created and built up a UK company. Its business was providing management and janitorial services, including cleaning of office buildings. It was a successful company and PRP's son, PDP also worked in the company. The company was taken over in a hostile bid. After the takeover of the UK company, PDP with the help and support of PRP set up a company, II**,** in the United States.

5. With a view to trying to pass on the wealth generated in an efficient manner, PRP established the Settlements. PRP had three children: PDP, JP and JE. Mr Pearman believes that the three trusts were established so as to provide for PRP's three children and their issue. Under the Family Settlement, each of PDP, JP, JE, together with their spouses and any children are named as beneficiaries. Under the JP Settlement, JP and his spouse and any children are named as beneficiaries. Under the JE Settlement, JE and her spouse and any children are named as beneficiaries.

6. PRP died on 6 March 2014 and disputes arose between the three siblings, in particular as regards the division of assets, the value of the II shares held by a company called KIL and if, when and at what price the land in England should be sold.

7. Mr Pearman states that the settlement of any disputes amongst the family was made more complicated as a result of the family being aware of the meeting that PRP had with Mr Pearman and Mr Lloyd, the Protector, on or about October 2013. PRP had come to appreciate how much PDP had achieved at II and he was also very conscious of the complicated inter-company loans amongst the various corporate entities in the structure of the Settlements. He wished to try and tidy these matters up but unfortunately passed away before the directors of the Trustee were made aware of how he wished to proceed and the ability to complete such transactions became significantly more complicated after his death.

8. When the Settlements were established KIL was the owner of approximately 17.6% of II ("**the KIL II Shares**") (representing family funds used to initially provide financial support for II), and KIL was owned 3/7th by the JP Settlement and 4/7th by the JE Settlement. Mr Pearman believes that (a) JP owned, in his own right, approximately 11% of the issued share capital of II; and (b) PDP owned or controlled a vast majority of the remaining issued share capital in II.

9. It appears that PDP was keen to obtain the II shares held by KIL but obtaining the valuation of the shares proved difficult given that there was no open market for the shares and KIL held a minority position (albeit a significant minority). An attempt was made to agree a valuation using the services of KPMG but this led to more disputes with disagreements arising as to whether the valuation should be twice what PDP thought it was. The

parties attempted a family mediation to try and find a mechanism and price where the combined assets of the Settlements could be fairly divided. At one stage there was a suggestion of dividing the assets 30/30/40, with JE obtaining the 40%. However, this did not succeed and finally the younger generation, namely the children of the three primary beneficiaries, commenced discussions and in due course the primary beneficiaries and the younger generation sought the assistance of Mr SLR, an accomplished solicitor. Mr SLR had been a long-term friend of PRP as well as a director of M Services Ltd, the UK family company, for many years. He was asked to see if he could implement a global settlement that appeared to have been promulgated by members of the JE family.

The Settlement Agreement

10. Mr SLR did eventually achieve the signing of the family Settlement Agreement dated 13 July 2018 which was duly executed by the family members. The signatories to the Settlement Agreement are all the adult members of the families (the "**Signatories**"). The Signatories are (i) PDP, deceased, his daughter and his son; (ii) JP, and his two sons; (iii) JE, her two sons, and her daughter.

11 . The preamble to the Settlement Agreement records that the Signatories intend that the terms of the Settlement Agreement will form the basis on which the Trustee will be invited to exercise its powers to procure the distribution of the assets of the Settlements. It further records that it is proposed that the transactions described in the Settlement Agreement will be implemented in accordance with a detailed timetable to be agreed with the Trustee and approved by an order made by the Supreme Court of Bermuda.

12. Under the Settlement Agreement, the Family Settlement becomes a settlement for PDP's family branch (the "**PDP Settlement**"), and the JE Settlement and

the JP Settlement continue to be held for JE's and JP's family branches. Subject to excluded transactions, the practical effect of which is to cause certain assets to be held exclusively for the JE Settlement and the JP Settlement, the balance of the net assets of the Settlements are under the Settlement Agreement to be divided equally three ways.

13. One of the excluded transactions, the proceeds of which are under the Settlement Agreement excluded from the three-way split, concerned the KIL II Shares. Under the Settlement Agreement, the KIL II Shares were to be bought back and cancelled by II at an effective price of US$54.34 per II share, and the proceeds of that buy-back were to belong equally to the JE Settlement and the JP Settlement to the exclusion of the PDP Settlement. PDP's family were excluded from the proceeds of the buy-back because the consideration paid by II was set on the basis that the 1/3rd of the KIL II Shares that might otherwise have been allocated to PDP's family's branch by way of three-way split under the Settlement Agreement was acquired for nil consideration. PDP's family branch obtained their side of the bargain on the other side of the transaction as majority shareholders in II, since II benefitted from the fact that in effect nothing was paid by it in the II buy-back and cancellation for PDP's family branch's otherwise notional 1/3rd of the KIL II Shares.

14. Although the Settlement Agreement provided for its implementation generally to be pursuant to an order of this Court, it was specifically agreed that the KIL II Share buy-back and cancellation would be completed in advance of any such application (clauses 3.6 and 21). In clause 21 of the Settlement Agreement, dealing with "*Order of transactions*", the Signatories acknowledged that the order of and timing of the appointment and transactions which they have agreed to request the Trustee to implement, will be a matter for agreement with the Trustee, in light of the need for Court approval, save and except that the II transaction as detailed in clauses 3 and 19 must be completed on or before 16 July 2018.

15. By clause 20 of the Settlement Agreement, dealing with "*Future Steps*" the Signatories agreed that:

(1) The implementation of the proposals contained in the Settlement Agreement, if accepted by the Trustee, will require the approval of this Court.

(2) In any Court proceedings brought to secure the approval the Signatories will support the implementation of the proposal described in the Settlement Agreement.

(3) To the extent that the implementation of the proposals contained in the Settlement Agreement requires the agreement of the Signatories to further documentation, they will negotiate in good faith to secure the necessary agreement.

16. As noted in the earlier Ruling of the Court dated 30 September 2022, JE and JP, in their affidavits sworn 9 January and 15 January 2020 supported the present application by the Trustee and stated that: "*Having considered the matter and having taken Leading Counsel's advice, without in any way waving privilege over that advice, I can confirm that I support the trustee's application for implementation of the Settlement Agreement*."

17. JE and JP continued to take the position that they supported the Trustee's application for implementation of the Settlement Agreement until the letter from Carey Olsen dated 16 August 2022. In that letter, they took the position that the Settlement Agreement is legally invalid because it is voidable given that they were induced to enter into it by implied representation (which was false) that no sale of II was in the offing. They further advised the Court that to the extent that the Settlement Agreement and misrepresentation in relation to it needs to be addressed, it could be included in the evidence filed in response to the Trustee's

Originating Summons and the Trustee and Protector could have an opportunity to adduce responsive evidence and make legal submissions during the hearing. In that letter Carey Olsen stated that their clients can see no reason to determine separately the validity of the Settlement Agreement, which would serve no useful purpose and can only create further delay.

18. At the hearing on 1 September 2022 the Court considered whether the issue of validity of the Settlement Agreement could properly be determined in these proceedings and determined that the issue of validity of the Settlement Agreement, if challenged, must be determined in separate proceedings by way of a writ action. Following the hearing by Order dated 30 September 2022 the Court ordered that:

(1) Any party, including those who are not signatories to the Settlement Agreement, who contends that the Settlement Agreement is liable to be rescinded and wishes to pursue that claim, must do so in separate proceedings by way of a writ action dealing with that claim and the Court will assist the parties by ensuring that such an action can be concluded on an expedited basis.

…

(4) In the event that the relevant parties elect not to pursue a claim for rescission in separate proceedings within the time stipulated, the Court will proceed with the Trustee's *Public Trustee v Cooper* application but will do so on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms, and any Defendant is entitled to make any other relevant submission to the Court bearing upon the issue whether the Court should approve the decision of the Trustee.

19. None of the parties who oppose the present application (the "**Opposing Parties**") have elected to pursue a claim for rescission of the Settlement Agreement in separate proceedings by way of a writ action in accordance with

paragraph 1 of the Order dated 30 September 2022. Accordingly, this application must be considered on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms.

Outline of the positions taken by the parties

20. Before this Court all members of PDP's family branch, being the surviving signatory parties to the Settlement Agreement in the family branch (plus spouses and the representatives of minors, unborn and unascertained persons in that family) support the Plaintiffs' application. However, members of JE's and JP's family branches including the signatory parties to the Settlement Agreement in those family branches (plus spouses and the representatives of minors, unborn and unascertained persons in those families) oppose the Plaintiffs' application.

21. Mr Pearman states in his seventh affidavit that the objection voiced by the Opposing Parties to the relief sought by the Trustee and the Protector is focused on a single issue: namely whether in allocating the assets of the Three Settlements between each of PDP's, JE's and JP's family branches, the Trustee should as regards assets under the Settlement Agreement which are to be split equally three ways, instead allocate part exclusively to the JE Settlement and to the JP Settlement (and equally between them). It is said that the Trustee and the Protector should be doing this because PDP's family benefitted from the onward sale of shares in II which occurred in September 2018 (the "**September Sale**"), in a manner which the JE Settlement and the JP Settlement did not do. This is in circumstances where (it is said) the JE's family signatories and the JP's family signatories to the Settlement Agreement were not aware of the possibility of such onward sale when they entered into the Settlement Agreement under which they agreed a lesser price per share for their minority interest in II than the price per II share realised by PDP's family on the onward sale of their interest in II. This, according to the Opposing Parties, being in circumstances where (it is said) PDP (and others)

withheld relevant information as to the potentiality of the onward sale from them.

22. Mr A, the Seventh Defendant, in his sixth affidavit dated 23 August 2022, states that what matters in practical terms is the difference between (i) the value which the Trustee received for the KIL II Shares and which was available to redistribute as part of the division of the trust funds and (ii) the value which PDP received outside of the division of the trust funds. The additional enrichment which PDP received entailed, in Mr A's view, the corresponding loss of an opportunity for the JE and JP Settlements to participate in the sale negotiated by him. Had they done so, KIL II Shares would have been sold for a higher price than they were on the repurchase by II.

23. For these reasons Mr A confirms that he cannot support the Trustee's application. He reiterates that he is supportive of the separation of the family wealth across the three lines as he agrees that a parting of the ways generally in order to achieve family harmony is in the interests of all the beneficiaries. Mr A suggests that the Court should not approve the settlement in its current form and that the parties, including the minor and unborns represented by Mr A, should sit down and seek to adjust the Settlement Agreement with the benefit of proper disclosure.

24. The Trustee's final and considered position is set out in Mr Pearman's comprehensive seventh affidavit. Mr Pearman states that the Trustee and the Protector have undertaken such reconsideration of the matter having regard to all points raised by the parties, fully conscious of what is required of them as fiduciaries taking account of all relevant considerations, and with the benefit of legal advice from Bermuda counsel and from English leading counsel. That decision is that the right course is for the Trustee and the Protector to continue to seek this Court's authorisation to implement the Settlement Agreement under the *Public Trustee v Cooper* category 2 application.

***Public Trustee v Cooper* category 2: relevant legal principles**

25. The general principles governing the approach of the Court to an application for approval by the Court of a momentous decision by the trustees are not in dispute and are set out in *Public Trustee v Cooper* [2001] WTLR 901, *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312 and the Bermuda decisions in *In the matter of the A Trusts* [2018] SC (Bda) 42 (Civ) (17 May 2018) (Kawaley CJ); *In Re XYZ Trusts* [2002] SC (Bda) 10 Civ (16 February 2022) (Subair-Williams J); and *In Re R Trusts* [2019] SC (Bda) 36 Civ (3 June 2019) (Hargun CJ). In *Re R Trusts* the Court adopted the approach set out in the judgment of Vos LJ in *Cotton:*

> *23.. In* Cotton *Vos LJ summarised the requirements which have to be satisfied in a case where the trustee had the power to make the decision but seek the approval of the Court because the decision is particularly momentous:*
>
> > *"12. In Public Trustee v. Cooper [2001] WTLR 901, Hart J repeated Robert Walker J's now well-known categorisation of cases in which trustees may seek the approval of the court. These proceedings fell into the second of Robert Walker J's categories (see page 923 in Cooper), namely where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them "but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action". In Cooper, Hart J said at page 925 that the duties of the court in a category 2 case depended on the circumstances of each case, but that in that case, it had to be satisfied, after a scrupulous consideration of the evidence, of three matters as follows:-*
> >
> > *i) That the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;*
> >
> > *ii) That the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the*

relevant clause could properly have arrived at;

iii) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring."

24. In the formulation of the general principle, Vos LJ referred to the need for caution given that one consequence of authorising the trustees to exercise the power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. However, the need for caution has to be placed in context: "The court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason" (Vos LJ at [12])."

26. The central question under this jurisdiction for the court to consider and determine is whether the decision made by the trustee is within the range of possible decisions which a reasonable and prudent trustee could have made. The court is considering the question whether the decision of the trustee passes the test of rationality. The court is not concerned with the separate issue of what decision the court itself would have made if it was required to make that decision. As noted by this Court in *Re R Trust* "*[the Court] does not withhold approval merely because it would not itself exercise the power in the way proposed*."

27. As further noted by Vos LJ in *Cotton* at [78] the procedure for seeking the approval of the court to a momentous transaction is intended to be quick and accessible and is not suitable for the determination of contested facts and/or expert evidence. The Court is concerned with determining whether the trustees have "*presented sufficient evidence to satisfy [the court] that [they had] fulfilled their duties to the beneficiaries in deciding upon the transaction in question and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation after the event, where a beneficiary is seeking to prove that the trustees have failed in*

their duties by selling, for example, at an undervalue."

28. The Court confirms that *Public Trustee v Cooper* category 2 procedure for seeking the approval of the court of a momentous transaction is available to other donees of fiduciary power including the Protector in this case (see *Lewin on Trusts* (20th ed) at 39-107: "*there seems no reason in principle why a donee should not… seek the approval of the court to a proposed exercise, though such an application might be a novelty*").

Basis of the opposition to the application by the Trustee

29. Mr Tregear KC, appearing for JP and JE and their adult children who are signatories to the Settlement Agreement, complains that at the time the Settlement Agreement was concluded, neither JP nor JE had access to current financial information relating to II. Although KIL had the right to appoint a director of II the Trustee had never sought to appoint a director. Therefore, argues Mr Tregear KC, all the up-to-date knowledge relating to the company's finances was controlled by PDP.

30. At the time of the repurchase of the KIL II Shares being negotiated, it is now common ground, contends Mr Tregear KC, that PDP was in the course of negotiating the sale of all the issued shares in II to a third-party. Mr Tregear KC submits that for PDP to profit from the difference for his benefit and to the disadvantage of JP and JE subverted and undermined the principle of equality underpinning the Settlement Agreement. He argues that PDP could have disclosed his intention to sell but he did not and it would have been possible to structure the onward sale in September 2018 in such a way that JP and JE were enabled to benefit from the September 2018 price rather than the July 2018 price per share.

31. Mr Tregear KC submits that a reasonable trustee would pause before implementing the Settlement Agreement. He argues that this is because in the face of the facts which are now known, implementation would have the effect of subverting the guiding principle of the Settlement Agreement which was equality. Implementation of the Settlement Agreement would produce an unfair result in which one branch of the P family would benefit at the expense of the other two branches in a manner which: (i) was not intended; (ii) is inequitable; and (iii) flies in the face of the Letter of Wishes. Implementation would have a lasting sense of injustice and unfairness. Although it would achieve the desired separation into three separate trusts with separate trustees which would avoid the possibility of future disharmony, it would, submits Mr Tregear KC, do so at the expense of two branches of the family and with one branch of the family having taken and kept for itself an unfair benefit.

32. Mr Mold KC, appearing for DP, wife of JP, in her capacity as representative for the unborn and unascertained beneficiaries in the JP line and for DP in her personal capacity, EE (wife of a son of JE), and SE (wife of the second son of JE), submits that in reaching a decision put forward to the Court for approval, the Trustee's decision-making has been flawed. Mr Mold KC argues that whilst DP supports there being a redistribution of the Settlements' assets so as to enable the three separate branches of the family to go their separate ways, that redistribution should take into account the substantial excess benefit that PDP's branch has already obtained from the Settlements' assets by the onward sale of the II shares in September 2018 and adjust the value to be allocated to each of the Settlements. Mr Mold KC submits that the Court should not approve the Trustee's decision to implement the Settlement Agreement since:

(1) The decision is opposed by the vast majority of the beneficial class of the Family Settlement, and the entire beneficial class of each of the JP and JE Settlements.

(2) The decision is contrary to Settlor's clear and detailed Letter of Wishes.

(3) The decision dismisses the relevance of the substantial additional gain made by PDP/PDP's branch from the September Sale even though on the figures the Plaintiffs have relied on, it leads to PDP/PDP's branch benefiting from the II shares by up to US $9.54 million more than each of JP's and JE's branches and would potentially result in an aggregate adjustment of US $6.4 million to the JP Settlement and JE Settlement if corrected.

(4) The decision is profoundly unfair towards non-signatories to the Settlement Agreement, in particular future generations of these dynastic settlements who are the ones most likely to feel the consequences of an unequal division of value and whose interests have wrongly been regarded as equivalent to, and protected by, the signatory beneficiaries, and as the Plaintiffs would have it, results in the future generations in JP's (and JE's) line being significantly disadvantaged when compared with those in PDP's branch.

(5) The decision fails to take account of the circumstances in which the Settlement Agreement was reached including the plain inequality of information between PDP (on the one hand) and JP, JE and the Plaintiffs (on the other) in relation to the prospect of an imminent onward sale, such that PDP was negotiating the Settlement Agreement at the same time negotiating a sale of II.

33. Mr Nicholas Le Poidevin KC, appearing for Mr A in his capacity as guardian *ad litem* for the minor beneficiaries of the JE Settlement and any future issue of JE, also argues that a very substantial gain was made by one branch of the Settlor's family out of what immediately beforehand had been trust assets belonging to the other two branches. Those represented by Mr A, argues Mr Le Poidevin KC, had no say in the decision to sell the KIL II Shares or on the terms on which this was done. The present question for the Trustee is how to distribute the remaining

assets of the Three Settlements. Mr Le Poidevin KC submits that it is obvious that an adjustment should be made to that distribution to reflect the gain. Accordingly, it is submitted on behalf of Mr A that the Court should refuse the approval sought by the Trustee.

34. Mr Le Poidevin KC accepts that in the event the Court refuses to approve the Trustee's decision it will be for this Trustee, or another trustee, to reconsider the division, if necessary, imposing a division. However, Mr Le Poidevin KC suggests that it would be helpful if the Court were both to indicate the appropriate lines of division and to make it clear that the beneficiaries should make proper disclosure of material relevant to the decision.

Basis of the Trustee's decision to implement the Settlement Agreement

35. The Trustee's position in relation to its decision and this application is set out in Mr Pearman's seventh affidavit dated 9 January 2023. Mr Pearman states that the Trustee's decision to implement the Settlement Agreement is made in the factual context that the Settlement Agreement has already to a significant extent been implemented (as to the repurchase of shares in L Holdings Limited **("Holdings")** (KIL being the owner of 686,609 shares of common stock in Holdings) as well as the KIL II Shares, the sale of the land in England, the repayment of borrowing out of its proceeds including the PL Loan owed by TH Limited (owned by the Family Settlement) to JP and PDP, and the elimination of the PRP Loans, and there is no suggestion that those past steps taken or procured by the Trustee did not meet the *Public Trustee v Cooper* category 2 standard.

36. Second, all parties agree with Mr A (the Seventh Defendant) that it is for the benefit of the three family branches to go their separate ways in light of considerable family infighting, and nobody suggests (subject to the one issue) that a three-way split of the assets in the Three Settlements as contemplated by the Settlement Agreement, on the basis that the Family Settlement becomes the settlement for PDP's family's branch, and the JE Settlement and the JP

Settlement are the settlements holding assets for each of JE's and JP's family branches, is not a proper way to go.

37. Third, the objection voiced by the Opposing Parties to the relief sought by the Trustee and the Protector relates to a single issue: namely whether there should be an adjustment in the distribution as a result of the onward sale of KIL II Shares in September 2018. In all it is not understood by the Trustee or the Protector to be suggested that a decision by them to proceed to take the further implementation steps provided for in the Settlement Agreement would not meet the *Public Trustee v Cooper* category 2 standard.

38. Fourth, whilst the Opposing Parties have advised the Court that the adult beneficiaries consider the Settlement Agreement to be legally invalid because it is voidable since they were induced to enter into it by an implied representation (which they say was false) that no sale of II was in the offing, they have elected not to pursue this issue in accordance with paragraph 1 of the Order dated 30 September 2022.

39. Mr Pearman confirms that in light of the final round of evidence from the beneficiaries, the Trustee has carefully considered again everything that has been said by the Opposing Parties in their affidavits in setting out their reasons why they say they do not support the grant to the Trustee and the Protector of *Public Trustee v Cooper* category 2 authorisation to carry through the Settlement Agreement in this case. In particular, Mr Pearman and Mr Lloyd have considered afresh whether they should be making the adjustments contended for by the Opposing Parties; or lesser adjustments which might be said to be entailed by an identification of the distinction between PDP's family's benefit and the JE Settlement's and the JP Settlement's *"loss of opportunity"* and in that connection whether they should be seeking further information to enable yet further calculations to be undertaken along such lines.

40. Mr Pearman notes that it is clear from the evidence of the Opposing Parties that by far the main point in issue in relation *to* the application is the Opposing Parties' contention in relation to the onward sale of the II shares in September 2018, and the adjustment of asset allocation between the three branches of the family that the Opposing Parties say should be made in light of it. Mr Pearman states that he and Mr Lloyd have given careful consideration as to whether the fact of the onward sale for a higher sum per share shortly after the purchase of the KIL II Shares causes them to change their decision to implement the Settlement Agreement in its agreed form. Mr Pearman and Mr Lloyd have concluded that in their view continued implementation of the Settlement Agreement according to its terms remains the right course. Their reasons for taking the view are as follows.

Settlement Agreement is made by all the adult beneficiaries

41. First, the Trustee refers to the reasons which led to the Settlement Agreement being made by all adult descendants of PRP and the fact that the Settlement Agreement has not been set aside. Mr Pearman notes that all of PDP, JE and JP and their adult children (all ten of whom then constituted and - save for PDP's passing - continue to constitute all of the adult descendants of PRP) were signatories to the Settlement Agreement. They all had access to legal advice when the Settlement Agreement was being negotiated and made.

42. Mr Pearman states that the Trustee originally made the decision to implement the terms of the Settlement Agreement - as the signatories to such agreement specifically wished it to - because the Trustee considered that, as an agreement negotiated over a lengthy period between the adult descendants of PRP from all three branches following years of disharmony, it was the best course of action to adopt in relation to the Three Settlements. Absent it being set aside or there being some other reason which the Trustee finds sufficiently compelling to change course the Trustee still considers that implementing the balance of the Settlement Agreement (so far as not already implemented) is the

right course.

43. Mr Pearman notes that the Three Settlements are discretionary settlements, dispositive powers under which are exercisable for the benefit of any one or some or more of (as the case may be) PDP, JE and JP, their children and more remote issue, and spouses. In as much as implementation of the Settlement Agreement would involve the exercise of such powers, the Trustee and the Protector saw it as of benefit to PDP, JE and JP as the principal protagonists and senior beneficiaries so to do, and that was (having regard to their dispositive powers) sufficient in itself - but similarly as regards the next generation beneficiaries (being commonly advantaged by the end of hostilities and separation of interests, and signatories to the Settlement Agreement), the Trustee saw it of equivalent benefit to them.

44. To the Trustee's mind, there was and is no tension between this and the interests of the (young and very young) minor and unborn discretionary objects under the Three Settlements, or the spouses of the senior beneficiaries and the next generation beneficiaries (or for that matter of minors and unborns and unascertained persons). They are, in the Trustee's judgment, equivalently benefitted.

45. In the Trustee's view, the continuing inter-family disharmony and dissension that has characterised the present application further reinforces the importance of the achievement of the closure and clean break under the Settlement Agreement as agreed between the parties actively involved at that time. The legal process has now provided a forum for such disharmony and dissension to expand to minors, unborns, unascertained persons and spouses. This is the sort of thing, in the Trustee's view, that the Settlement Agreement was designed to avoid. Mr Pearman states that the family needs finality, not a re-opening of matters with a re-negotiation and subject to that a Trustee imposed solution departing from what was agreed in the Settlement Agreement as contended for by Mr A.

46. The Trustee does not consider that the fact that, in the event, II shares were later sold for a higher value per share than that agreed for the KIL II Shares, is sufficient reason for it to refuse to implement the Settlement Agreement when it had otherwise decided that this was the correct course. The Trustee still considers that respecting the agreement reached by the adult descendants of PRP, in a form legally binding on each of them and made with the benefit of legal advice and after lengthy negotiations is the best course of action in the circumstances.

47. The Trustee notes that should the parties consider that the circumstances in which the Settlement Agreement was entered into were such that it should now be set aside (for example, by reason of alleged misrepresentation on the part of PDP, or for any other of the reasons now complained of by certain of the beneficiaries in the JP and JE branches) they have had ample opportunity to seek to do so. However, no beneficiary has chosen to do so. The Trustee has therefore decided to proceed on the basis - specifically confirmed in paragraph 4 of the Order dated 30 September 2022 - that the Settlement Agreement remains valid and binding upon on the signatories to it and that it was therefore validly entered into with no vitiating factors.

48. Mr Pearman states that it is recognised that the Trustee itself is not legally bound by the terms of the Settlement Agreement, and that is not the basis on which the Trustee has made its decision. The Trustee does, however, recognise and take into account that it was well aware of the terms of the Settlement Agreement, and that the inclusion of the clauses in the Settlement Agreement acknowledging that the Trustee would make a Court application for approval of its implementation (and providing for the signatory beneficiaries to support the same), reflect an understanding conveyed to the Trustee's beneficiaries that the Trustee would do so. In the circumstances, the Trustee has concluded that unless there is good and sufficient reason not to do so, it is appropriate for it

to continue with that course.

49. In all the circumstances, Mr Pearman further confirms, the Trustee does not consider it appropriate to further investigate, let alone to attempt to adjudicate upon, the various factual allegations made by some of the beneficiaries directed at undermining the Settlement Agreement.

50. Nor does the Trustee consider it right to re-open the asset allocation under the Settlement Agreement irrespective of whether there are grounds for it to be set aside. Mr Pearman advises that it is in the Trustee's view important that the Settlement Agreement - which has already been part performed - be adhered to, and it would not (in its discretion) be right to depart from the asset allocation pursuant to one ingredient of it because (it is said) that one branch of the family did better than others did, or might otherwise have done, or for any other reason. In this regard Mr Pearman states that the Settlement Agreement represented a holistic settlement in relation to the family tensions and disputes relating to the Trust assets. The negotiation of one term may well have had a bearing on what a party was willing to agree in relation to another, and for the Trustee to pick and choose now in relation to one particular feature would risk doing injustice between the parties. In the Trustee's view, the foregoing are good and sufficient reasons for its decision to continue to proceed with implementation of the Settlement Agreement.

The issue of price adjustment due to an onward sale was specifically canvassed by the parties

51. Secondly, the Trustee took into account the possibility of II shares being sold on for a higher price or lower price than that agreed under the Settlement Agreement was specifically canvassed between the parties in negotiations for the Settlement Agreement and for the II Share Repurchase Agreement, and a price adjustment mechanism that might have covered what occurred was

rejected by JE's and JP's family branches.

52. Mr Pearman states that the Trustee has also considered it relevant to their considerations in respect of the implementation of the Settlement Agreement that the very thing which is now complained of (the sale of II shares for a value greater than that obtained by KIL) was the subject of specific negotiation and a provision which would have addressed it was not included by agreement.

53. Mr Pearman records the Trustee's understanding that upward and downward price adjustment provisions in cases of onward sale are commonly encountered in practice and that PDP was willing to agree to the same for a 9-month period following the sale of the KIL II Shares. However, JE and JP would not accept that but were pressing for an upwards only price adjustment provision for such period failing which it was their preference that there be no price adjustment mechanism at all (which was what the II Share Repurchase Agreement actually provided for).

54. Mr Pearman's understanding is confirmed by the emails dated 21 May and 22 May 2018 from JE to Lucy Gibson. In the first email JE states that "*My family and I have decided to abandon the clause because they clearly don't want to do it, and* ***we definitely do not want to do this up/down clause. We would like to get on with the original offer.***" In the second email JE states that "*I would like to reiterate that I* ***do not want to go ahead with the up/down clause and never agreed to it.*** *I was only in favour of the upwards only clause, which I now believe to be a waste of time and money trying to negotiate. I have talked with (my children) about this and* ***they are in agreement that we should sell our shares for the price negotiated***." (emphasis added)

55. In the circumstances, Mr Pearman notes that no adjustment either way was included in the Settlement Agreement or the II Share Repurchase Agreement

made pursuant to it, such that JP and JE (and their children) accepted the certainty of retaining the value of the price agreed upon under the Settlement Agreement, rather than take on the potential benefit coupled with the potential risk as to adjustment for a subsequent sale in the near future.

56. Mr Pearman states that the Trustee views this as a commercial decision taken having considered the possibility that the KIL II Shares might within a short (9 month) timeframe be sold for more or less than agreed in the Settlement Agreement and that having regard to all the factors pointing in favour of giving recognition to the Settlement Agreement - it is not something that the Trustee should be going behind.

The impact of the onward sale on value between the three family branches

57. Thirdly, Mr Pearman states that the Trustee took into account the potential effect of the price obtained for the KIL II Shares and the subsequent September Sale in terms of value between the three family branches. The Trustee considers that the Settlement Agreement should be implemented notwithstanding the information which has come to light in relation to the September Sale primarily for the reasons set out in paragraphs 35 to 56 above. However, the Trustee has nonetheless considered the information which the various parties have put forward in relation to this issue, and the proper approach to take to it, in order to consider whether the magnitude of such values is such as to cause it to change its view that the remaining terms of the Settlement Agreement should continue to be implemented as agreed.

58. Mr A relies on a Memorandum which he has obtained from Grant Thornton, having instructed them to place a value on a *"loss of opportunity*" to the JE Settlement and the JP Settlement, based on a comparison of *"JE's and JP's lines.. . selling the shares in II when they did, rather than selling them to X as part of the II onward sale"*. The Trustee does not consider this is the correct approach

to adopt, when considering whether there might be any reason to make an adjustment to the allocation of the remaining assets in the Three Settlements as opposed to implementing the remaining terms of the Settlement Agreement.

59. Rather, having obtained advice from the global consultancy and financial advisory firm Teneo's valuations team in London in conjunction with its Bermuda office, the Trustee's view is that the right way to look at this issue is to consider what PDP (and/or his family, or trusts for their benefit) obtained directly or indirectly in terms of value from the KIL II Share buy-back (those shares being ex-Trust assets), which JE's and JP's branches did not - and that it is that which would then fall to be brought into hotchpot, to be split three-ways between PDP's family and the JE Settlement and the JP Settlement if an adjustment were to be made.

60. Mr Pearman notes that in calculating a notional benefit the parties have based their calculations on different factual assumptions. In calculating any notional benefit to PDP's family branch the Opposing Parties contend that the September Sale is assumed to have occurred at US$91.85 per share, with 2,290,235 II shares in issue post-buy- back and cancellation of the KIL II Shares - based on 3,087,568 shares in issue but for the buy-back after executive share options were exercised - with 1,970,269 II shares (63.8%) initially held by PDP/PDP's family. On the other hand, PDP's family branch contend the September Sale occurred at US$82.87 per share, with 2,457,652 II shares in issue post-buy-back and cancellation of the KIL II Shares - based on 3,087,568 shares in issue but for the buy-back after executive share options were exercised, but with a further 167,417 shares issued, so based on a total of 3,254,985 II shares - but with no particularisation in the evidence as to who held the extra 167,417 II shares which were issued - it being additionally asserted that some US$5m additional value accrued to II between July 2018 and September 2018 which should be taken into account when comparing the July 2018 position.

61. Mr Pearman states that the methodology to be applied to such calculations, and the calculations using the above information/assumptions, have been confirmed by Teneo. Based on this, the Trustee has therefore caused there to be calculated the notional benefit to PDP's family branch on each of the following bases in order to chart the scale of the issue:

(1) Applying the Opposing Parties' information in the previous paragraph results in US$3,024,833 adjustment figure for each of the JE Settlement and the JP Settlement.

(2) Applying PDP's family branch's information in the previous paragraph on an assumption that 100% of the extra 167,417 shares had been allocated to PDP's family results in US$2,037,862 adjustment figure for each of the JE Settlement and the JP Settlement.

(3) Applying PDP's family branch's information in the previous paragraph on an assumption that 0% of the extra 167,417 shares had been allocated to PDP's family results in US$1,652,410 adjustment figure for each of the JE Settlement and the JP Settlement.

(4) To give the Opposing Parties the benefit of all doubts in their favour (i) by applying an onward share sale price of US$91.85 per share; (ii) by assuming that 100% of the extra 167,417 shares were allocated to PDP/PDP's family; and (iii) by the US$5 million credit contended for by PDP's family not being applied, results in US$3,179,164 adjustment figure for each of the JE Settlement and the JP Settlement.

62. In the Trustee's view, apart from all other factors which militate against the same, none of these sums, which as is seen range from a minimum of US$1,652,410 to an outer level US$3,179,164, is of such a game-changing magnitude as to justify departure from the allocations in the Settlement

Agreement. Based on current assets, the JE Settlement has allocated to it overall of the order of US$20,807,954 under the Settlement Agreement, and the JP Settlement has allocated to it overall of the order of US$17, 749,204 under the Settlement Agreement.

63. Given the Trustee's conclusion in this respect, the Trustee does not consider it necessary to attempt to reach a view on the numerous other matters raised in the evidence which might be said to be likely to produce lower figures than those set out above.

Interests of beneficiaries who are not Signatories

64. Fourthly the Trustee has taken into account the position of those beneficiaries who are not signatories to the Settlement Agreement. Mr Pearman states that the Trustee sees implementation of the Settlement Agreement in the first instance as being for the benefit of the first generation and subject thereto second generation beneficiary descendants of PRP who signed the Settlement Agreement with a view to achievement of closure against a backdrop of family disharmony, and its facilitation of the same as an exercise of its discretionary powers under which it may at its discretion benefit one, some or all of the discretionary objects of the Three Settlements (the first and next generations each being some of such persons). But further, there is no tension so far as the Trustee is concerned between that and the conferment of benefit on minor, unborn and unascertained beneficiaries in each family branch, since they are likewise benefitted from such closure, and no distinction is drawn between them and the members of the first and next generations, in that they all remain discretionary objects of their respective family settlements alongside the other members of their family branch.

65. In the Trustee's view the implementation of the Settlement Agreement does not affect how the segregated trust funds should be divided as between the

generations within each branch. The Trustee takes the view that the adult descendants of PRP in each of the three branches, being in receipt of legal advice and following lengthy negotiations, in determining upon a settlement in their own interests as first generation and next generation family members in achieving a clean break including exit from II at a fixed price, were by parity concluding an agreement which *prima facie* was for the benefit of minors, unborns and unascertained beneficiaries in their respective family branches also. No conflict of interest as regards the achievement of a family settlement is apparent. Given that the before and after trust provision for minors, unborns and unascertained beneficiaries in the branches was under discretionary trusts taking the same before and after form, and given that the Trustee has conscientiously concluded that implementation of the Settlement Agreement is of benefit to the first and next generation signatories, the Trustee is of the view that such implementation is on the same basis to be viewed as of benefit to beneficiaries known and unknown tracing their interest through such persons.

66. In the circumstances, the Trustee does not consider, therefore, that the fact that the minor, unborn and unascertained beneficiaries were not signatories to the Settlement Agreement, or separately formally represented in connection with the negotiations leading up to it, is a justification for not implementing what was agreed between the first generation and next generation descendants of PRP under it.

67. Similarly, the Trustee has indeed considered the interests of spouses of the Signatories to the Settlement Agreement in all three family branches. However, as with the minor, unborn and unascertained beneficiaries, the spouses of the adult descendants of the settlor who signed the Settlement Agreement can, in the Trustee's view, be taken to have the same interest in such Settlement Agreement as their spouse who was a signatory, and the fact therefore that they were not themselves signatories does not cause the Trustee to consider that it is unfair and no longer the right course of action for the Settlement Agreement to be implemented in light of the September Sale.

68. In addition to the above reasons, Mr Pearman's seventh affidavit (at paragraphs 164 to 251) also deals with points raised in the parties' last round of affidavits and with the allegation that the Trustee failed to use KIL 's right to appoint JP as a director of II. Mr Pearman states that historically PDP had always been opposed to JP joining the board of II, because he did not consider him to be of the requisite competence, and that his presence on the board would not be constructive given his and JP's personal relationship.

69. In light of that history Mr Pearman states that the Trustee did not consider it would be conducive to the resolution of the settlement, which was being negotiated between the family branches, for it to impose JP on PDP on the board of II, or otherwise to interfere with the composition of the II board. Mr Pearman also notes that KIL had not previously exercised a right to appoint a director of II, and for it suddenly to have done so - including against a backdrop of PDP, JE and JP having already signed up in March 2018 to the key terms of what became the Settlement Agreement - risked destabilising everything.

Discussion and conclusion

70. The Court reminds itself that it is concerned to see the proposed exercise of the Trustee's powers is lawful and within the power and that it does not infringe the Trustee's duty to act as an ordinary, reasonable and prudent trustee might act, ignoring irrelevant, improper or irrational factors. The Court is asked to determine whether the decision made by the Trustee is within the range of possible decisions which a reasonable and prudent trustee could have made. The Court is not concerned with the separate issue of what decision the Court itself would have made if it was required to make that decision.

71. As noted earlier, the objection of the Opposing Parties is confined to a single issue, namely, the alleged unfair advantage obtained by PDP/PDP's branch as a result of the onward sale of the II Shares in September 2018. Mr Tregear

KC argues that this is so because in the face of the facts which are now known, implementation would have the effect of subverting the guiding principle of the Settlement Agreement which was equality. He says the implementation of the Settlement Agreement would produce an unfair result in which one branch of the P family would benefit at the expense of the other two branches in a manner which (i) was unintended, (ii) is inequitable, and (iii) flies in the face of the Letter of Wishes.

72. This issue arises in the context where all the parties before the Court are agreed that it is for the benefit of the three family branches to go their separate ways in light of the considerable family infighting and nobody suggests (subject to the issue arising from the September Sale) that a three-way split of the assets in the Three Settlements as contemplated by the Settlement Agreement, is not a proper way to go.

73. The Court is considering this application for approval of the Trustee's decision to implement the Settlement Agreement in circumstances where, in relation to the sale of the KIL II Shares, the Settlement Agreement has been substantially performed. Pursuant to clause 21 the sale of the KIL II shares "*must be completed on or before 16th July 2018*." In accordance with these contractual provisions the KIL II Shares have been transferred to II for cancellation and it is no longer possible to reverse this aspect of the transaction. In return, the JE Settlement and the JP Settlement have been credited with the cash consideration due to these Settlements in accordance with the provisions of the Settlement Agreement.

74. It is clear from Mr Pearman's seventh affidavit that the Trustee has not reached its decision on the basis that the adult beneficiaries are contractually bound to perform the obligations assumed in this Settlement Agreement. As noted earlier, Mr Pearman confirms that in light of the final round of evidence from the beneficiaries, the Trustee has carefully considered again everything that has been said by the Opposing Parties in their affidavits in setting out their reasons why

they say they do not support the grant to the Trustee and the Protector of *Public Trustee v Cooper* category 2 authorisation to carry through the Settlement Agreement in this case. In particular, Mr Pearman and Mr Lloyd have considered afresh whether they should be making the adjustments contended for by the Opposing Parties; or lesser adjustments which might be said to be entailed by an identification of the distinction between PDP's family's benefit and the JE Settlement's and the JP Settlement's *"loss of opportunity"* and in that connection whether they should be seeking further information to enable yet further calculations to be undertaken along such lines. Mr Pearman states that he and Mr Lloyd have given careful consideration as to whether the fact of the onward sale for a higher sum per share shortly after the purchase of the KIL II Shares causes them to change their decision to implement the Settlement Agreement in its agreed form.

75. The Trustee originally made the decision to implement the terms of the Settlement Agreement because the Trustee considered that, as an agreement negotiated over a lengthy period between the adult descendants of PRP from all three branches following years of disharmony, it was the best course of action to adopt in relation to the Three Settlements. The Trustee has approached its decision on the basis that absent the Settlement Agreement being set aside or there being some other reason which the Trustee finds sufficiently compelling to change course the Trustee still considers that implementing the balance of the Settlement Agreement (so far as not already implemented) is the right course.

76. The Trustee has noted that the parties have had ample opportunity to seek to set aside the Settlement Agreement (for example, by reason of alleged misrepresentation on the part of PDP) in accordance with paragraph 1 of the Order dated 30 September 2022 but they have elected not to do so.

77. As noted earlier, the Trustee does not consider that the fact that, in the event, II

shares were later sold for a higher value per share than that agreed for the KIL II Shares, is sufficient reason for it to refuse to implement the Settlement Agreement when it had otherwise decided that this was the correct course. The Trustee still considers that respecting the agreement reached by the adult descendants of PRP, in a form legally binding on each of them and made with the benefit of legal advice and after lengthy negotiations, is the best course of action in the circumstances.

78. In this regard it is to be noted that the Trustee took into account the possibility of II shares being sold on for a higher price or lower price than that agreed under the Settlement Agreement was specifically canvassed between the parties in negotiations for the Settlement Agreement and for the II Share Repurchase Agreement, and a price adjustment mechanism that might have covered what occurred was rejected by JE's and JP's family branches. The negotiations in relation to the price adjustment mechanism clearly indicate that it was in the contemplation of the parties that there may be an onward sale of the II Shares. As noted earlier, PDP was willing to agree to an up/down price adjustment mechanism for a 9-month period following the sale of the KIL II Shares. However, JE and JP were not prepared to accept that but were pressing for an upwards only price adjustment provision for such period. In the event the parties agreed not to provide any price adjustment mechanism at all.

79. The Trustee has also obtained advice from the global consultancy and financial advisory firm Teneo which shows that the potential adjustment to the JE and JP Settlements is in the range from a minimum of US$1,652,410 to an outer level US$3,179,164. In the Trustee's view such an adjustment is not of such a game-changing magnitude as to justify departure from the allocations in the Settlement Agreement. Based on current assets, the JE Settlement has allocated to it overall of the order of US$20,807,954 under the Settlement Agreement, and the JP Settlement has allocated to it overall of the order of US$17,749,204 under the Settlement Agreement.

80. In coming to its decision, the Trustee has emphasised it does not consider it right to re-open the asset allocation under the Settlement Agreement irrespective of whether there are grounds for it to be set-aside. In Mr Pearman's view the Settlement Agreement represented a holistic settlement in relation to the family tensions and disputes relating to the Trust assets. The negotiation of one term may well have had a bearing on what a party was willing to agree in relation to another, and for the Trustee to pick and choose now in relation to one particular feature would risk doing injustice between the parties.

81. Mr Pearman has also confirmed that the Trustee has taken into account the position of those beneficiaries who are not signatories to the Settlement Agreement. Similarly, the Trustee has considered the interests of spouses of the signatories to the Settlement Agreement in all three family branches. As with the minor, unborn and unascertained beneficiaries, the spouses of the adult descendants of the settlor who signed the Settlement Agreement can, in the Trustee's view, be taken to have the same interest in such Settlement Agreement as their spouse who was a signatory, and the fact therefore that they were not themselves signatories does not cause the Trustee to consider that it is unfair and no longer the right course of action for the Settlement Agreement to be implemented in light of the September Sale.

82. Having regard to the evidence in the seventh affidavit of Mr Pearman it is clear to the Court that the Trustee came to its decision by having appropriate regard to the relevant considerations. The Trustee originally took the reasonable view that the Settlement Agreement should be implemented since: (i) it was an agreement negotiated over a lengthy period with the benefit of legal advice between the adult descendants of PRP from all branches following years of disharmony; (ii) all the parties are agreed that it is for the benefit of the three family branches to go their separate ways in light of the considerable family infighting; (iii) the sale of the KIL II Shares provided for by the Settlement Agreement had been substantially carried out; (iv) the Settlement Agreement envisaged that the Trustee would

implement its provisions: "*The Signatories intend that the terms of this agreement will form the basis on which the Trustee will be invited to exercise its powers to procure the distribution of the assets of the Settlements*" (Recital (E)); and (v) it is now almost 9 years since PRP died and the disharmony between the three family branches developed, and it is now 4½ years since the signatory beneficiaries signed the Settlement Agreement.

83. The Trustee has taken a reasonable view that it should continue with the present application unless the Settlement Agreement is rescinded by the court or alternatively there is some other substantial reason why it should not do so.

84. As noted earlier, following the Trustee's original decision to make the present application seeking to implement the Settlement Agreement, some of the beneficiaries in JE's and JP's branches asserted that the Settlement Agreement was voidable due to non-disclosure of the onward sale on the part of PDP. By its Ruling dated 30 September 2022 the Court determined that these proceedings were not an appropriate vehicle for the determination of the validity of the Settlement Agreement based upon highly contested factual allegations. The Court ordered that the validity of the Settlement Agreement must be determined in separate proceedings by way of a writ action and unless such proceedings were commenced within the time stipulated, the Court would proceed with this application on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms. The Trustee has noted that no party has sought to rescind the Settlement Agreement on the grounds asserted in correspondence and in affidavit evidence. Accordingly, in considering this application by the Trustee the Court must proceed on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms.

85. The Trustee has taken the view that the fact that an onward sale of the KIL II Shares took place in September 2018 is not by itself a sufficient reason not to implement the Settlement Agreement. The Court considers that to be a reasonable view on

the part of the Trustee given that (i) the negotiations leading up to the Settlement Agreement clearly envisaged that there was a realistic possibility of an onward sale; and (ii) PDP was willing to agree to an up/down adjustment mechanism which was rejected by JE and JP as they were unwilling to accept the risk of a downward adjustment.

86. The Trustee has nevertheless considered whether the potential adjustment as a result of the onward sale of the KIL II Shares is of such magnitude that it warrants an adjustment. As noted earlier, the advice from the financial advisory firm Teneo shows that the potential adjustment to the JE and JP Settlements is in the range from a minimum of US$1,652,410 to an outer level US$3,179,164. In the Trustee's view such an adjustment is not of such a game-changing magnitude as to justify departure from the allocations in the Settlement Agreement. Based on current assets, the JE Settlement has allocated to it overall of the order of US$20,807,954 under the Settlement Agreement, and the JP Settlement has allocated to it overall of the order of US$17, 749,204 under the Settlement Agreement. It is clear to the Court that this decision by the Trustee, made in the context of facts outlined above, is within the range of decisions which a reasonable and prudent trustee could have made.

87. The Court accepts Mr Green KC's submission that it is unreasonable to criticise the Trustee's decision to implement the Settlement Agreement on the ground that the Settlement Agreement departs from the Letter of Wishes. The entire Settlement Agreement is a substantial departure from the Letter of Wishes but the Opposing Parties have chosen to criticise only one aspect of it as being at variance with the Letter of Wishes. In any event, as Mr Green KC points out and the Court accepts, the Settlement Agreement was executed 11 years after the Settlor's Letter of Wishes was signed, in the difficult landscape of the 4 years following the Settlor's death. Having been signed by all ten adult senior and other principal beneficiaries, it is clearly something that the Trustee, acting rationally in the exercise of its fiduciary discretion, is entitled to give precedence to.

88. The Trustee and the Protector's position is that they indeed took the view that the implementation of the Settlement Agreement was in the interests of both the signatory beneficiaries and the non-signatory beneficiaries. The Settlement Agreement, following lengthy negotiations, reflected the agreed position of all 10 descendant beneficiary signatories who were independently advised. The Court accepts Mr Green KC's submission that the before and after position of the then 4 spouses and any minor great-grandchildren as discretionary objects of discretionary settlements was not detrimentally impacted by comparison with that of the 10 descendant beneficiary signatories. In the circumstances it was reasonable for the Plaintiffs to proceed on the basis that what was right for the Settlor's children and grandchildren, as reflected in the Settlement Agreement, would equivalently be so for the great-grandchildren and more remote issue (born and unborn) and spouses (ascertained and unascertained).

89. In the circumstances the Court has no hesitation in concluding that the Trustee's decision in relation to the implementation of the Settlement Agreement (without the adjustments sought by the Opposing Parties) is one which the Trustee was entitled to make, and it is, in the Court's view, implausible to categorise that decision as irrational or one which no reasonable trustee could make.

90. The above discussion has proceeded on the assumption that the Opposing Parties are signatories to the Settlement Agreement and entitled to come along to the Court and formally oppose the relief sought by the Plaintiffs. However, Mr Furness KC, on behalf of PDP's branch, contends that the Opposing Parties who have signed the Settlement Agreement are contractually constrained from opposing the present application and indeed are contractually obliged to support it. The Trustee supports this position.

91. In relation to this argument, it is to be noted that Clause 20 of the Settlement

Agreement provides, *inter-alia,* that the Signatories agree that in any court proceedings brought to secure the approval they will support the implementation of the proposals described in the deed. Mr Furness KC argues that the clear effect of this clause is that the Signatories, as between themselves, have agreed contractually that they should receive no more or less than the level of the provision set out in the Settlement Agreement and have agreed to support the implementation of those wishes and proposals in the event that the Trustee and Protector decide to accept them.

92. It is also to be noted that by Order dated 30 September 2022 the Court ordered that any party, including those who are not signatories to the Settlement Agreement, who contends that the Settlement Agreement is liable to be rescinded and wishes to pursue the claim, must do so in separate proceedings by way of a writ action. The Court further provided that in the event the relevant parties elected not to pursue a claim for rescission in separate proceedings within the time stipulated the Court will proceed with this application on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms. As noted earlier, no party has elected to pursue a writ action to rescind the Settlement Agreement, and this hearing has proceeded on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms.

93. Mr Furness KC, relying upon *Snelling v John G Snelling Ltd* [1973] 1 QB 87, *Hirachand Punamchand v Temple* [1911] 2 KB 330, *Southwest Trains v Wightman* [1998] PLR 113 and *Re Gulbenkian (No. 2)* [1970] 1 Ch 409, submits that the Opposing Parties who are Signatories have given a promise to support the Trustee's application for permission to implement the Settlement Agreement. They are bound to accept, for the purposes of this hearing, that that promise is part of "*a valid and binding agreement in accordance with its terms*". Any Signatory is entitled to enforce that promise. The members of PDP's family are Signatories and they wish to enforce it. That being so, those Opposing Parties are obliged to support the Trustee's decision to implement the Settlement Agreement. Mr Furness KC submits that the Trustee is therefore entitled to

proceed, if it so decides, on the basis that it has no obligation to provide the Signatories with any greater provision than what is provided for in the Settlement Agreement.

94. The Court accepts that in the ordinary case Mr Furness KC's submission is compelling. However, the position is made more complicated by what the parties and the Court indicated to be the position to the Opposing Parties at the hearing on 1 September 2022. It may well be that the position was not properly analysed by the parties and the Court but the impression left with the Opposing Parties was that (i) unless the Settlement Agreement was set aside in separate proceedings the Court would proceed on the basis that the Settlement Agreement is valid and binding in accordance with its terms; and (ii) even if the Settlement Agreement has not been set aside the Opposing Parties could still submit to the Court that the Court should not, in the exercise of its discretion, approve the Trustee's decision because its implementation results in unfair distribution. In the circumstances the Court does not consider that it would be appropriate to shut out the Opposing Parties from making submissions based upon the assertion that the resulting distribution is unfair.

95. However, the weight to be attached to any such submission is a matter for the Court and has to be considered in the context that the Opposing Parties have not sought to set aside the Settlement Agreement in accordance with the Order dated 30 September 2022 and accordingly the Settlement Agreement is to be considered as a valid and binding agreement in accordance with its terms. In that regard the Court concludes that having regard to the fact that the adult Opposing Parties have voluntarily signed, after lengthy negotiations and receipt of independent legal advice, the Settlement Agreement, it is, in the Court's view, impossible to contend that the Trustee's decision to implement the very same Settlement Agreement is unreasonable or irrational. Likewise, the Opposing Parties who have not signed the Settlement Agreement cannot, in the Court's view, succeed in their contention that the application is irrational merely because it does not give enough to the non-Signatories within their families.

96. Finally, Mr Green KC addressed the issue of the express indemnities in relation to outgoing protectors. He suggested that just as it is in the interests of the trusts and their beneficiaries for express indemnities to replace equitable liens in relation to the trustees, that is also the case in relation to outgoing protectors. In this connection, it is noted that whereas Schedule 2 paragraph 22.3 of each of the Three Settlements enables a trustee to exercise powers notwithstanding a personal interest, there is no such provision in relation to the protector as the person having the power of appointing new trustees under the Three Settlements.

97. In the circumstances, Mr Green KC submits that it is in the interest of the trust as a whole and hence "expedient" for section 47 of the Trustee Act 1975 purposes, that the amendments in paragraph 2(3)(d) of the draft Order be made to facilitate what is provided in paragraph 2(3)(c) to the advantage of all. The Court accepts that it is appropriate to grant the relief under section 47 of the Trustee Act 1975 and orders that if and to the extent necessary, paragraph 15 of Schedule 2 and paragraph 22.3 of Schedule 2 shall be amended pursuant to section 47 of the Trustee Act 1975 so as to enable the appointments referred to in (c) - that is (i) the reference in paragraph 15 to a former trustee shall extend to a former protector, and (ii) paragraph 22.3 shall extend to the Protector in the exercise of his power to appoint a new or new trustees on terms which included an indemnity for him.

98. In conclusion, subject as mentioned in paragraph 2 of the draft order provided to the Court by the Plaintiffs, the Plaintiffs are authorised to implement the terms of the Settlement Deed dated 13 July 2018 made between the parties to it.

99. The Court directs that in the event that there are any points arising in relation to the draft order presented to the Court by the Plaintiffs, any outstanding point will be resolved by the Court on written submissions, without requiring further attendance by Counsel.

100. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 20th day of April 2023

NARINDER K HARGUN

CHIEF JUSTICE