REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012-02873

Between

EMILE PETER ELIAS

INEZ MATOUK Claimants

AND

JOSEPH ELIAS Defendant

CV. 2012-04286

IN THE MATTER OF THE DISCRETIONARY TRUST ESTABLISHED BY THE RESIDUARY CLAUSE IN THE LAST WILL AND TESTAMENT OF LINDA ELIAS, DECEASED, DATED APRIL 8, 1982

And

IN THE MATTER OF THE APPLICATION OF THE TRUSTEE, JOSEPH ELIAS FOR DIRECTIONS AND THE DETERMINATION OF QUESTIONS RELATING TO THE ADMINISTRATION OF THE SAID TRUST

Between

JOSEPH ELIAS

Claimant

And

EMILE PETER ELIAS

INEZ MATOUK

GEORGE ELIAS

LILY ABOUD

ROBERT ELIAS

Defendants

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Alvin.K. Fitzpatrick S.C. and leads Mr. Jason K. Mootoo instructed by Mr. Adrian Byrne *for Emile Peter Alias and Inez Matouk*

Ms. Debra Peake S.C. and Mr. Kerwyn Garcia instructed by Mr. Samuel Harrison *for Joseph Elias*

Mr. Elton Prescott S.C. instructed by Mr. Russell Hugging *for Robert Elias*

JUDGMENT

History

1. The parties to these two actions are the children of Linda Elias (hereinafter referred to as "the Deceased"). The Deceased died on the 4th May 1984, having made her last Will and Testament dated 8th April 1982.
2. By terms of the said Will, the Deceased appointed her son, Joseph Elias, and her son-in-law, Robert Matouk, executors of her last Will and Testament and on the 25th September 1984, probate of the said Will was granted to the executors.
3. The said Will contained a residuary clause in the following terms:

   "*I direct that all the rest remainder or residue of my estate real and personal whatsoever and wheresoever be handed over to my son, JOSEPH ELIAS, who will use the same at his own discretion to assist those who are in need and for the sole purpose of family use as has been discussed us"*
4. In 1990, High Court Action No. 2045 of 1990 (hereinafter referred to as "the 1990 Action") was instituted by Emile Elias against the executors seeking, *inter alia,* to

determine whether upon a true construction of the residuary clause of the Deceased's Will a valid trust of the residuary estate of the Deceased was created with Joseph Elias as the trustee thereof.

5. On 2nd February 1993, Razack J. delivered judgment in the 1990 Action and held that the residuary clause created a valid trust of the residue of the Deceased's real and personal estate and that Joseph Elias was the trustee of the trust to whom the Trust Fund was to be handed over. The Trustee was required to use the trust fund at his discretion to assist those children of the Deceased who are in need.
6. On 3rd March 1993, Emile Elias filed an appeal against the judgment of Razack J. in the 1990 Action. However, up to the date of the filing of these actions in 2012, that appeal had not been heard and determined by the Court of Appeal. During the course of these proceeding, I have been advised by Counsel for Emile Elias that this appeal is not being pursued. To date, however, I have not had sight of a Notice of withdrawal of the appeal.
7. The only surviving children of the Deceased are George Elias, Lily Aboud, Inez Matouk, Emile Elias, Joseph Elias and Robert Elias.
8. By two Pre-Action protocol letters dated 2nd May 2011 and 26th June 2012, Attorneys-at-Law for Emile Elias and Inez Matouk respectively wrote to the Joseph Elias requesting, inter alia, that he forthwith produce accounts relating to the Trust, a list of all investments comprising the Trust and all relevant documentation relating to the Trust.

The Proceedings

9. On the 17th July 2012, by a Fixed Date Claim and Statement of Case, Emile Elias and Inez Matouk instituted CV 2012-02873 against Joseph Elias (hereinafter referred to as "the Trustee") claiming the following reliefs:

    (a) an inquiry as to:

        (i) what property subject to the Trusts was received or possessed by or vested in the Trustee and whether any property so received or possessed or vested as aforesaid was paid or transferred to or in the name of any other person, and if so of whom, at what time or times and under what circumstances and what changes of investment of the property were made and when and under what circumstances and what has become of the property;

        (ii) whether any and what money subject to the Trusts have been invested and of what the investments consisted and of all dealings therewith by the Trustee and what rents and profits and income thereof has been received and by whom and under what circumstances;

    (b) an account of the property subject to the Trusts possessed and received by the Trustee or by any other persons or person by the order or for the use of the Trustee distinguishing between capital and income and of the dealings of the Trustee therewith;

    (c) an order that the Trustee disclose to the Claimants all bank documents which relate to any money subject to the Trust;

(d) such further or other Accounts, Inquiries and directions as shall be just; and

(e) costs.

10. On 11th December 2012, the Trustees filed a Defence in this action.

11. On 18th October 2012, the Trustee instituted CV 2012-04286 against Emile Elias and Inez Matouk claiming certain reliefs pursuant to Part 71.1 and/or Part 71.4 of the Civil Proceedings Rules 1998 as amended. On 14th November 2012, an Amended Claim Form was filed whereby George Elias, Lily Aboud and Robert Elias were joined as Defendants to the action.

12. By this Amended Claim, the Trustee sought the following reliefs:

    a) an order that the Trustee be at liberty to maintain this action for the determination of questions concerning the administration of the Trust;

    b) an order that the costs of the Trustee and the costs of the Defendants be met and paid out of Trust;

    c) that the Court do determine the following questions relating to the administration and/or execution of the Trust:

        i. What does the expression "in need" mean?

        ii. What are the factors which the Trustee should consider in determining which children of the deceased are in need?

        iii. To what factors should the Trustee have regard in determining the amount of financial assistance to be provided to the children of the deceased who are in need?

iv. Is the Trustee required to provide accounts to all the children of the deceased who are potential beneficiaries of the Trust and if so, what is the extent of this duty?

v. Is the Trustee required to disclose documents relating to the Trust to the children of the deceased who are the potential beneficiaries of the Trust and, if so, what documents?

vi. What is to become of the Trust if no children of the deceased are determined by the Trustee to be in need?

13. On 11th December 2012 I made an order that CV2012-02873 and CV 2012-04286 be heard together. I also gave directions for the filing of Agreed and Un-Agreed Statements of Facts on or before the 31st January 2013 and Agreed and Un-Agreed Statements of Issues on or before the 22nd February 2013.

14. On 22nd February 2013, separate Statements of Issues were filed on behalf of the Claimants and the Trustee in CV2012-2873 and on behalf of the Trustee and the First and Second Defendants in CV2012-04286. On 8th March 2013, a Statement of Issues was filed on behalf of the Fifth Defendant in CV2012-04286.

15. On15th March 2013 an Amended Agreed Statement of Facts was filed in each matter.

16. On 22nd April 2013, written submissions were filed on behalf of the Claimants and the Trustee in CV 2012-02873 and on behalf of the Trustee, the First and Second Defendants and the Fifth Defendant in CV 2012-04286. The other Defendants in CV2012-04286, George Elias and Lily Aboud, did not enter appearances or participate in these proceedings.

17. On 17th May 2013, I extended the time to 29th May 2013 for the service of Reply Submissions by the Claimants and the Trustee in CV2012-02873 and by the Trustee and the First, Second and Fifth Defendants in CV 2012-04286.

18. On 27th May 2013, in CV2012-02873, the Claimants filed Reply Submissions and on 29th May 2013 the Trustee filed Submissions in Reply. On 27th May 2013, in CV 2012-04286, the First and Second Defendants filed Reply Submissions, on 29th May 2013 the Trustee filed Submissions in Reply and on 6th May 2013 the Fifth Defendant filed submissions in Reply.

19. On the 27th June 2013, I heard oral submissions by Counsel for Emile Elias and Inez Matouk, Counsel for the Trustee and Counsel for Robert Elias and reserved judgment.

The Issues

20. Having considered the Statements of issues and submissions filed by the parties in both actions and taking into account my decision to hear both matters together, the following issues arise for determination in these matters:

CV 2012-02873, Emile Elias and Inez Matouk v. Joseph Elias

I. What is the Claimants' status vis-a-vis the Trust, that is to say, is each or any of the Claimants:

   a) a discretionary beneficiary of the Trust; and/or

   b) entitled to the Trust, together with the other surviving children of the deceased (other than the Trustee), in default of any appointment being made by the Trustee;

c) entitled to the Trust, together with all of the other surviving children of the deceased, in default of any appointment being made by the Trustee; or

d) only potentially a discretionary object of the Trust; or

e) only a person with no more than a theoretical possibility of benefit under the Trust?

II. Has the Trustee failed and/or refused to provide the Claimants with accounts relating to the Trust?

III. Do any of the Claimants have an absolute right to be provided with the accounts and/or the information sought in relation to the Trust?

IV. Does the Court have an inherent jurisdiction to order the Trustee as trustee to provide the Claimants with the accounts and/or the information sought in relation to the Trust?

V. If so, ought the Court, in the circumstances of the case, exercise its inherent jurisdiction to order the Trustee to provide the Claimants with the accounts and/or the information sought in relation to the Trust?

VI. Are the Claimants or any of them entitled to the reliefs claimed or any of them?

<u>CV 2012-04286, Joseph Elias v. Emile Elias, Inez Matouk, George Elias, Lily Aboud, Robert Elias</u>

A. What are the answers to the questions raised by the Trustee, namely:

(i) What does the expression "in need" mean?

(ii) What are the factors which the Trustee should consider in determining which children of the deceased are in need?

(iii) To what factors should the Trustee have regard in determining the amount of financial assistance to be provided to the children of the deceased who are in need?

(iv) Is the Trustee required to provide accounts to all the children of the deceased who are the potential beneficiaries of the Trust and if so, what is the extent of that duty?

(v) Is the Trustee required to disclose documents relating to the Trust to all the children of the deceased who are the potential beneficiaries of the Trust and, if so, what documents?

(vi) What is to become of the Trust if no children of the deceased are determined by the Trustee to be in need?

B. What order for costs should be made in this action?

The Submissions

CV 2012-02873, Emile Elias and Inez Matouk v. Joseph Elias

The Claimants' Submissions

21. The Claimants' primary contention is that the residuary clause gives to the Trustee the power to appoint among the children of the deceased without providing for a gift over in default of appointment. In those circumstances the terms of the power implies a direct gift to all the children of the deceased, other than the Trustee.[1]

22. Further, the power of appointment does not prevent the vesting of the property in the members of the class pending the execution of the power by the Trustee. Thus, the members have vested, but defeasible, interests in the subject matter of the Trust,

[1] Thomas on Powers, paras. 3.58 to 3.60

independently of the power. If the power is exercised, the interests of the members are defeated (or varied), either completely or pro tanto. If, however, the power to select is not exercised, the gift in favour of the members of the class becomes indefeasible. Therefore, if the Trustee dies, or is removed, without exercising the power, the share of each member of the class becomes indefeasible at the time of the Trustee's death or removal and the personal representatives of a member who has predeceased the Trustee's death or removal will become entitled to his share.[2]

23. The Deceased intended to benefit a narrow class of persons, namely her children and not to relieve poverty in the objective and charitable sense. Therefore, the Trustee was given a power to appoint among this class with the result that there was an implied gift over in default of appointment and the trust property was immediately vested in those who were to take in default of such appointment subject to divestment in the event that the power was exercised. Accordingly, as at the date of this action, the Claimants have a vested interest in the Trust property. [3]

24. Alternatively, if the residuary clause does not have that effect, then it creates a discretionary trust under which the Trustee is under a duty to exercise the primary discretion conferred upon him by the mandatory language used in the clause. Therefore, even in that alternative, the Claimants have a sufficient interest in the assets of the Trust to support an order for disclosure of accounts and other trust documentation.[4]

25. By reason of their status as beneficiaries of the Trust and the clear intention of the Deceased to benefit them, the discretion of the Court should be exercised to direct the

[2] Re: Llewellyn's Settlement, Official Receiver v. Evans (1921) 2 Ch. 281; Lambert v. Thwaites LR 2 Eq. 151; In Re White's Trusts (2) John 656.
[3] Re: Scarisbrick's Will Trusts, Cockshott v. Public Trustee and Others (1951) 1 All ER 822 at 828
[4] Schmidt v. Rosewood Trust Ltd [2003] 2 AC 709 at paras. 51,66; Lewin on Trusts (18th Ed.) paras. 23-24; Underhill and Hayton, Law of Trusts and Trustees (18th Ed. 2010) at para. 56.2.

Trustee to forthwith provide the Claimants with the accounts and documentation sought in their claim for the period from the inception of the Trust in 1984 to the present date.

The Trustee's submissions

26. The Trustee submitted that the effect of the judgment in the 1990 Action was to declare the existence of a discretionary trust empowering the Trustee to decide in his discretion (i) which children of the Deceased, including the Trustee, are in need and when; and (ii) what sums from the said residue of the Deceased's real and personal estate should be used to assist any such children of the Deceased.
27. Accordingly, the children of the Deceased are not entitled to benefit from the Trust unless they are found, in the Trustee's discretion, to be in need. They are potential objects of the exercise of a discretionary power or persons potentially entitled to benefit from the Trust. As at the date hereof, they do not have a vested interest in the Trust property.
28. Since the Trustee, in his discretion, has not yet found any particular child of the Deceased to be in need, all of the Deceased's children, including the Trustee, are potential beneficiaries under a discretionary trust. Further, because it cannot be known if any child of the Deceased will ever be in need, all of the Deceased's children, including the Trustee, are currently persons with a theoretical possibility of benefit under the Trust. In default of any appointment by the Trustee, none of the Deceased's children, including the Claimants, is entitled to the Trust.
29. In the event that the Trustee, in good faith, does not deem any of the Deceased's children to be in need, the Deceased's residuary estate remains in his hands until the death of the

last of the surviving children, at which time it reverts back to the Deceased's estate and falls into intestacy, to be distributed in accordance therewith.

30. The Trustee also submitted that there was no allegation in the Statement of Case and no evidence in the affidavits filed on behalf of the Claimants that the Trustee ever refused to provide the Claimants with accounts relating to the Trust. As such, the Court is not entitled to make any finding that the Trustee failed and/or refused to provide the Claimants with accounts relating to the Trust.

31. The Trustee also submitted that the Claimants do not have an automatic, unqualified right to disclosure of accounts and/or information in relation to the Trust. They can ask the Court to exercise its inherent jurisdiction to supervise the administration of the Trust. It is then a matter of discretion of the Court whether a beneficiary should be granted disclosure at all, what classes of documents should be disclosed and what safeguards should be imposed regarding such disclosure and the use which may be made of the material disclosed.[5]

32. On the facts of this case, the Trustee submitted that the Claimants failed to set out factors upon which the discretionary judgment of the Trustee could be exercised whether to disclose, what to disclose and what safeguards to impose regarding disclosure. The Claimants have not provided any justification for needing to be provided with the accounts and/or the information sought and have not stated how that information is to be treated if it comes into their hands. The terms of the Deceased's Will make it clear that the Trust was to be administered on terms discussed between the Deceased and the Trustee and this suggests strongly that, as a matter of probability, it was the intention of the Deceased that the administration of the Trust be conducted on a confidential basis.

[5] Schmidt v. Rosewood Trust Limited [2003] 2 AC 709 at paras. 51, 66

Further, it is in the interest of beneficiaries of family discretionary trusts and advantageous to the due administration of such trusts that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as an essentially confidential process.

33. Therefore, in the absence of any material or factors set out by the Claimants to enable the Trustee to assess what if any limitations and/or safeguards may have to be put in place in relation to any disclosure to the Claimants, the Trustee could not legitimately be expected to give such disclosure.

34. The Trustee also submitted that the issue of whether the Court ought to exercise its inherent jurisdiction to order the Trustee to provide the Claimants with the accounts and/or information sought in relation to the Trust should be determined in CV 2012-04286 where this issue had been included in the questions to be answered by the Court. Further, since all the potential beneficiaries are parties to that action, they would be entitled to be heard on the issue and would be bound by the Court's determination.

CV 2012-04286, Joseph Elias v. Emile Elias, Inez Matouk, George Elias, Lily Aboud, Robert Elias

The Claimant's Submissions

35. In response to the questions posed in this Action, the Trustee submitted as follows:

    i. As a matter of ordinary language, in order for a child of the Deceased to be considered "in need" his or her current circumstances must be such as to require, as a matter of practicality, humanity and common sense, the provision of assistance beyond that which he or she is merely desirous of

having, but that it is not necessary, in order to qualify for such assistance, that it be shown that he or she is unable to survive without assistance;[6]

ii. It is difficult to list factors to which the Trustee should have regard in determining which children are in need, beyond advancing the general proposition that each situation has to be assessed in the context of its own facts and circumstances, as a matter of practicality, humanity and common sense, and having regard to matters such as the person's age, infirmity, physical or mental illness or other disability, usual or ordinary standard of living and the availability of or access to sources of income other than the Trust;

iii. In determining the amount of financial assistance to be provided to the children of the Deceased, the factors outlined in (ii) above would be relevant, with particular emphasis being given perhaps to the question of availability of or access to sources of income other than the Trust;

iv. The children of the Deceased do not have any entitlement as of right to be provided with accounts. Accordingly, the Trustee is not required to provide them with accounts. However, it is a matter of discretion of the Court whether a beneficiary should be granted disclosure at all, what classes of documents should be disclosed and what safeguards should be imposed regarding such disclosure and the use which may be made of the

[6] Re Scarisbrick's Will Trusts [1951] 1 All ER 822; Re Cohen (Deceased) [1973] 1 All ER 889; R (on the application of M) v. Slough BC [2008] 4 All ER 831

material disclosed.[7] For this purpose, the Court may wish to inspect such documents as are in the possession of the Trustee;

v. In respect of the disclosure of documents relating to the Trust to all the children of the Deceased, the Trustee also submitted that it is a matter for the Court to decide, in the exercise of its discretion, whether the Trustee is required to disclose documents and, if so, what documents;

vi. If the Trustee, acting reasonably and faithfully, determines in his discretion that none of the children of the Deceased are in need, the question as to what would become of Trust will only arise if and when all of the children of the deceased have died. In that eventuality, all of the children having died, the Trust will terminate and, there being no express or implied gift of the residue to anyone including the class, the residue would fall into intestacy as undisposed of property to be distributed to her next of kin under the intestacy rules[8].

36. On the issue of costs, the Claimant submitted that the costs of all parties, in the absence of any exceptional reason requiring any different treatment, should be treated as incurred for the benefit of the Trust and paid out of the Trust Fund.

The First and Second Defendants' Submissions

37. The First and Second Defendants submitted that the expression "in need" must, in the context of the Deceased's will and the decided cases relate to those of the deceased's

[7] Schmidt .v Rosewood Trust Limited [2003] 2 AC 709 at para. 54

[8] Underhill & Hayton, Law of Trusts & Trustees, paras. 26.1, 21.1,21.5; Twinsectra Limited v. Yardley & Ors. [2002] 2 AC 164 at 193.

children (other than the Trustee) who are, in the fair and honest opinion of the Trustee, in need of financial assistance to alleviate their poverty.

38. In the absence of a clear and express direction to the contrary in the Deceased's will, the Trustee, as the donee of the fiduciary power, should not be included among the objects of that power for the reason that such inclusion gives rise to the possibility of the donee reducing the subject matter of the power into his own possession in disregard of his fiduciary obligations[9].

39. With respect to the factors which the Trustee should consider in determining which children of the Deceased are in need, the First and Second Defendants submitted that the only factor to be considered by the Trustee is whether, in his fair and honest opinion, that child is poor.

40. With respect to the factors to which the Trustee should have regard in determining the amount of financial assistance to be provided to the children of the Deceased who are in need, the First and Second Defendants submitted that should the Trustee be of the opinion that one or more of the Deceased's children are in need, he could provide relief from the Trust to the extent necessary to relieve them from want[10].

41. On the question of provision of accounts and disclosure of documents by the Trustee to all the children of the Deceased, the First and Second Defendants submitted that a beneficiary has a right to seek disclosure of trust documents and that such right is one aspect of the Court's inherent jurisdiction to supervise and, if necessary, intervene in, the administration of trusts. There was no need to draw any bright dividing line between transmissible and non-transmissible (discretionary) interests or between the rights of an

[9] Thomas on Powers (2nd Ed) paras. 12.11 to 12.17; Wright v. Morgan (1926) AC 788; In re Beatty (deceased), Hinves and Ors. v. Brooks and Ors. (1990) 1 WLR 1503

[10] Re Scarisbrick's Will Trusts, Cockshott v. Public Trustee and Others (1951) 1 All ER 822 at 837

object of a discretionary trust and those of the object of a mere power (of a fiduciary character). No beneficiary has any entitlement as of right to disclosure of anything that could be described as a trust document. Accordingly, the Court has a discretion to exercise and that discretion should be exercised so as to allow disclosure of trust accounts on demand by a beneficiary[11].

42. The First and Second Defendants also submitted that by reason of their status as beneficiaries of the Trust and the fact that the Deceased had a general intention to benefit them, the Court should direct the Trustee forthwith to provide them with the following accounts, information and documentation spanning the period 1984 to date:

    (i) what property subject to the trust was received or possessed by or vested in the Trustee and whether any property so received or possessed or vested was paid or transferred to or in the name of the any other person, and if so, to whom, at what time or times and under what circumstances and what changes of investment of the property were made and when and under what circumstances and what has become of the property; and

    (ii) whether any or what money subject to the Trust have been invested and of what the investments consisted and of all dealings therewith by the Trustee and what rents and profits and income thereof has been received and by whom and under what circumstances;

    (iii) an account of the property subject to the Trust possessed and received by the Trustee as the trustee thereof or by any other persons or person by the order or for the use of the Trustee distinguishing between capital and income and of the dealings of the Trustee therewith.

[11] Lewin on Trusts, 18th Ed. at para. 23-24; Underhill & Hayton, Law of Trusts and Trustees, 18th Ed., para. 56.2

43. The Deceased intended to benefit a narrow class of persons, namely her children and not to relieve poverty in the objective and charitable sense. The Trustee was given a power to appoint among this class with the result that there was an implied gift over in default of appointment and the trust property was immediately vested in those who were to take in default of such appointment subject to divestment in the event the power was exercised. In default of appointment, the residue of the deceased's estate passes (on the death of the Trustee or on his removal or on the death of the all the children) to all of the children of the Deceased (except the Trustee) alive at the date of death of the Deceased and to the personal representatives of such children (except the Trustee) who die prior to the gift over in equal shares.

44. Alternatively, if the residuary clause did not have that effect, it created a discretionary trust under which the Trustee is under duty to exercise the primary discretion conferred upon him by the mandatory language used in the residuary clause. Where the Trust comes to an end without the need for the disposition of property, the property passes on intestacy and will be available for distribution among the children of the Deceased and the personal representatives of any child who died prior to the Trust coming to an end[12].

The Fifth Defendant's Submissions

45. The Fifth Defendant submitted that the natural and ordinary meaning of the expression "in need" is requiring assistance or support (financial, social, cultural or intellectual) in order to address/correct a related imbalance/gap in the access to provisions which are necessary and appropriate to the condition in life of the recipient. It is a question of fact

[12]In Re Llewellyn's Settlement, Official Receiver v. Evans (1921) 2 Ch. 281; Re Caplin's Will 2 DR & SM 527 at 720; Re Scarisbrick's Will Trusts (ibid)

what standard of living or condition in life would be the threshold for determining who is in need and the station in life of the potential beneficiaries of the Trust can readily be determined by their own evidence of their respective circumstances.

46. The factors to be considered by the Trustee in determining which children of the Deceased are in need are:
    a) the age and station in life of the child of the deceased;
    b) whether the need may be categorised as financial or social (inclusive of health and educational needs);
    c) whether the assistance sought/being considered is in the best interests of the beneficiary.
47. The factors to be considered by the Trustee in determining the amount of financial assistance to be provided to the children of the Deceased who are in need are:
    a) The objective or market value which may be placed on the goods or services which are essential to the provision of assistance;
    b) The frequency (relative) of the requests for assistance made by the child of the Deceased;
    c) The state (value) of the fund
48. To avoid uncertainty in the administration of the Trust, it should be the obligation of the Trustee to provide to all the potential beneficiaries a statement of those factors which he will take into consideration when dealing with claims for assistance.
49. The Trustee's fiduciary duties include the duty to render accounts to the beneficiaries and the Trustee is under a duty to disclose information to the beneficiaries but he may act in his own discretion (with a proper care for transparency and fairness).

50. If no children of the Deceased are determined by the Trustee to be in need, the Court should consider ordering an equal division amongst all the objects, including the Trustee, to avoid issues of conflict of interest or apparent bias. In the exercise of its inherent jurisdiction to supervise the administration of the Trust, the Court may direct the Trustee to present for the consideration of the Court, a method of evaluation of the individual needs of the beneficiaries who make claim for assistance.

Analysis of submissions

CV 2012-02873, Emile Elias and Inez Matouk v. Joseph Elias

51. At its core, this action is a claim by the Claimants against the Trustee for disclosure of information about the Trust property vested in him, his dealings with such property as well as accounts in relation thereto since the creation of the Trust. The Claimant say they are entitled to these orders because the terms of the residuary clause implied a direct gift to all the children of the Deceased, other than the Trustee. By virtue of their vested, but defeasible, interests in the Trust property, they claim to be entitled to the orders for inquiries and disclosure of accounts, documents and other information.
52. The Claimants also argued, in the alternative, that even if the residuary clause created a discretionary trust, the Trustee was under a duty to exercise the discretion conferred on him. Therefore, the Claimants have a sufficient interest in the Trust property to support the reliefs sought and the Court should exercise its discretion to direct the Trustee to provide the Claimants with the accounts and documentation sought.
53. In response, the Trustee argued that the Claimants do not have an automatic, unqualified right to disclosure of accounts and information relating to the Trust. They say that the

disclosure of the accounts is a matter for the discretion of the Court whether a beneficiary should be granted disclosure at all, what documents should be disclosed and what safeguards should be imposed regarding such disclosure.

54. In **Schmidt v. Rosewood Trust Limited**, the Privy Council provided useful guidance as to the correct approach to be adopted when faced with a claim for disclosure of trust documents:

> *"51. Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection of a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."*
>
> *66. .....There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in In Re Baden [1971] AC 424, 448-449) a good deal less significant than the similarities. The tide of Commonwealth authorities appears to be flowing in that direction.*

> *67. However, the recent cases also confirm (as has been stated as long ago as In Re Cowin 33 Ch. D 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything that can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the courts may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."*

55. Applying this approach to the claim herein, I am of the opinion that, for the purposes of deciding whether or not the Claimants are entitled to disclosure of accounts, documents and other information in relation to the Trust, it not necessary or imperative for me to determine the status of the Claimants vis-a-vis the Trust. It is clear from the authorities that this court, as a court of equity, has an inherent jurisdiction to supervise and, where appropriate, intervene in the administration of a trust. In the exercise of that discretion, I am required to weigh in the balance the interests of the beneficiaries and the Trustee as well as the issue of confidentiality in determining whether or not to order the Trustee to make disclosure to the Claimants. In the event that I am prepared to make an order for disclosure against the Trustee, I must also decide what classes of documents should be

disclosed, either completely or in a redacted form, and what safeguards, if any, should be imposed to limit the use to which such documents or information may be put.

56. Therefore, insofar as the Claimants by Pre-action protocol letters dated 2nd May 2011 and 26th June 2012 called upon the Trustee to produce forthwith accounts, a list of investments and all relevant documentation based on an entitlement thereto, the Privy Council has made it clear that they do not have any such right or entitlement. While they are entitled to invoke the court's inherent jurisdiction to order disclosure, they were not and are not entitled to demand that the Trustee provide them with accounts and documentation as to his dealings with the Trust since 1984.

57. In the circumstances, the fundamental question to be decided is whether the Court should exercise its discretion to order the Trustee to provide the Claimants with the accounts and/or information sought in relation to the Trust.

58. The Claimants relied on the following passage in Lewin on Trusts (18th ed.), at paragraph 23-24 where the learned authors expressed their view on how the court's discretion should be exercised:

> *"But that does not mean that in any ordinary case there can be any doubt that the discretion should be exercised so as to allow disclosure of trust accounts on demand by a beneficiary. That is because Schmidt v. Rosewood Trust Ltd builds on the foundations set by previous case law, which remain applicable in determining how the discretion is to be exercised. The Privy Council expressed general agreement with the proposition that beneficiaries' rights are founded, not upon an equitable proprietary right, but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts. And so prima facie the trust*

accounts must be disclosed to all beneficiaries on demand, since the court's discretion should be exercised so as to give effect to the trustees' fundamental duty of accountability and not to thwart it. A settlor's desire for confidentiality cannot compromise that duty"

59. In response, the Trustee, in reliance on **Avanes v. Marshall**[13], accepted that the decision in **Schmidt** did not abrogate the Trustee's duty to keep accounts and his obligation to grant a beneficiary access to trust accounts but when it comes to inspection of other documents the beneficiary would not be entitled as of right to disclosure of any documents and it should be for the court to determine to what extent information should be disclosed.

60. However, the Trustee contended that this question should be determined more appropriately in CV 2012-04286 where all the children of the Deceased were named as Defendants and all parties would be bound by the Court's determination of questions (iv) and (v) in that action.

61. In my opinion, the issue of whether the Court should exercise its discretion to order the Trustee to disclose accounts and other relevant information to the beneficiaries of the Trust should be determined in CV 2012-04286 where I have had the benefit of extensive submissions made on behalf of the Trustee and three beneficiaries and in which the other children of the Deceased, George Elias and Lily Aboud, have had the opportunity to be heard. A determination of this issue in that action would bind the Trustee and all the beneficiaries and the Claimants would not suffer any prejudice by such a course of action.

[13] [2007] NSWSC 191 at para. 15.

62. Accordingly, I will defer the determination of the issue of whether or not the Claimants are entitled to orders for disclosure of accounts, documents and other information until I address issues (iv) and (v) raised in CV2012-04286.

63. CV 2012-04286, Joseph Elias v. Emile Elias, Inez Matouk, George Elias, Lily Aboud, Robert Elias

Question 1: What does the expression "in need" mean?

64. The first question posed by the Trustee in this action requires the court to construe the meaning of the expression "in need" used by the Deceased in the residuary clause of her Will. The full terms of the said residuary clause bear repetition:

> "*I direct that all the rest remainder or residue of my estate real and personal whatsoever and wheresoever be handed over to my son, JOSEPH ELIAS, who will use the same at his own discretion to assist those who are in need and for the sole purpose of family use as has been discussed between us."*

65. By the terms of her Will, the Deceased made certain specific bequests in relation to her house at 21 Alexandra Street, St. Clair and her shares in Nagib Elias & Sons Limited. She also made several pecuniary bequests to some of her children and her grandchildren. In the 1990 Action, Razack J. took into account the evidence of the Trustee contained in an affidavit sworn in previous proceedings where he deposed to discussions he held with the Deceased in which the Deceased told him that she had faith in him and would rely on him to look after and act as a "second father" to those members of the family who might need assistance financially or otherwise. Thereafter, the learned Judge concluded that "*the only rational construction to be given it (the residuary clause) is that the deceased intended*

thereby that the residue of her real and personal estate was to be handed over to the Trustee who is required to use the same at his discretion to assist the members of the family who are in need." He also concluded that the Deceased was not contemplating her family other than in the primary sense which should be given to the word "family", namely her children.

66. Both the Trustee and the First and Second Defendants, in their written submissions, relied on **Re Scarisbrick's Will Trusts**[14] and **Re Cohen (deceased)**[15] and submitted that no sensible or logical distinction could be drawn between the "persons in needy circumstances " and "persons in special need".

67. In reliance on these cases, the First and Second Defendants submitted that the expression "in need" must in the context of the Deceased's Will and the decided cases relate to those of the Deceased's children (other than the Trustee) who are, in the fair and honest opinion of the Trustee, in need of financial assistance to alleviate their poverty.

68. In his Submissions in Reply, the Trustee agreed with this submission, save the assertion that the Trustee should be excluded from the class of potential objects under the Will.

69. However, the Fifth Defendant disagreed with these submissions on the basis that the cases cited by the First and Second Defendants were posited on trusts for "poor relations" or "relief of poverty" or "charitable purposes" and were therefore unhelpful. According to the Fifth Defendant, the Court should give to the expression "in need" its natural and ordinary meaning and compared the expression with the term "necessaries" as contemplated at common law in relation to minors/infants.

[14] (1951) 1 All ER 822
[15] (1973) 1 All ER 889

70. In **Re Scarisbrick's Will Trusts**, Dame Scarisbrick, by her will dated July 27, 1911, disposed of the residue of her estate on trusts to pay the income thereof first to her two daughter during their joint lives, then to the survivor of her daughters during the rest of her life and then to her son for his life. The will then provided that:

> "*And after the death of the survivor of my said daughters and son the trustees for the time being of this my will shall hold (the capital and income of the residue) upon trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Catholic Church and faith) for such interests and in such proportions and manner in every respect as the survivor of my said son and daughters shall by deed or will appoint."*

71. Dame Scarisbrick died on April 28, 1915 and her will was proved by her son. Her son then died in 1933 and was survived by both his sisters and they in turn died in 1940 and 1948 respectively. The survivor never purported to exercise any of the powers of appointment or designation in favour of relations as provided for in the mother's will.
72. Upon the death of the last of the three children, the question arose as to what effect (if any) could be given to the terms of the will. The Court of Appeal held that on a true construction of the will and having regard especially to the context of the relevant words, the testatrix intended by the gift to relieve property in the charitable sense.
73. In **Re Cohen**, Rachel Cohen died in 1966. By her will, she gave her residuary estate to her trustees on the usual trusts for conversion, investment and payment of debts, funeral

and testamentary expenses, and directed her trustees to hold the balance as to four-tenths for one of her sons, and as to three-tenths for another son. Clause 6 (b) (iii) provided: 'As to the remaining Three-tenths of my Residuary Estate (herein referred to as "the final residue") as to both capital and income thereof...(c) Upon trust as to the balance of the final residue to pay and apply the whole or any part or parts thereof in such manner and at such time or times as my Trustees shall in their absolute and uncontrolled discretion think fit for or towards the maintenance and benefit of any relatives of mine whom my Trustees shall consider to be in special need Provided that my Trustees shall be under no legal obligation whatsoever nor accountable to any other person or persons in relation to the carrying out of this bequest nor shall any beneficiary under this my Will or any relative of mine or any of my next of kin be entitled to particulars from my Trustees as to the mode in which they have carried out this bequest'. The testatrix was survived by three sons, her next-of-kin, and about 50 relations, i.e. her grandchildren and remoter issue and her nephews and nieces and their issue, all of whom shared with her a common ancestor. Since her death, the number of relations had increased to about 60. Her net estate, valued at about 1,500l. at her death, had subsequently increased in value to between 10,000l. and 15,000l. The question arose whether the will created a charitable trust of the final residue for the relief of poverty among her relations, or a special power of appointment exercisable in favour of such of her relations as were 'in special need'.

74. Templeman J. applied the decision in Re Scarisbrick and held that paragraph (c) created a charitable trust for the relief of poverty among the relations of the testatrix born before or after her death whom the trustees considered to be in special need.

75. In my opinion, the question to be answered here is whether on a proper construction of the Will and, in particular, the residuary clause, the Deceased intended to create a charitable trust for the relief of poverty among her children. In **Re Scarisbrick**, Jenkins L.J. set out several general propositions that I consider helpful. He said:

> *"(1)It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public....(ii) An aggregate of individuals ascertained by reference to some personal tie (e.g. of blood or contract) such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof for the purposes of the general rule.....(iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined to some aggregate of individuals ascertained as above is not legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof.....(iv) there is, however, an exception to the general rule in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are, therefore , not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal ties is one of blood (as in the numerous so-called "poor relations" cases....) or of contract. (v) This exception cannot be accounted for by reference to any principle, but is established by a series of authorities of long standing, and*

must at the present date be accepted though doubtless open to review in the House of Lords."

76. Applying these general propositions to the facts of this case, I consider that the decisions in **Re Scarisbrick** and **Re Cohen** are inapplicable to the facts of this case. It is clear from the language of the clause that the Deceased did not intend to provide a benefit for the general public or some section of the public but for her children. She expressly directed her executors to hand over her residuary estate to the Trustee and he was given a discretion to use same to assist those of her children who are in need as had been discussed between them. To my mind, therefore, this clause should not be construed to mean that the Deceased intended to provide relief for her children from poverty but rather to mean that she intended to give to the Trustee a discretion, to be exercised fairly and honestly, to provide assistance, financial or otherwise, to any child whose circumstances were such as to require assistance, as opposed to a mere desire or wish for assistance. However, in order to qualify for such assistance, it would not be necessary for the child to show that he or she is poor or unable to survive without such assistance.

77. Before moving on, however, I must address the issue raised by the First and Second Defendants as to whether or not the Trustee should be included among the potential objects of the Trust.

78. According to the First and Second Defendants, in the absence of a clear indication that a settlor intended to make the donee of a fiduciary power an object of that power, as where the donee is expressly named both as a trustee and an object, the courts will not find that a person upon whom a trust power has been conferred can exercise that power in his favour. To hold otherwise, they submit, would be to conclude that, by implication, the

donee is authorised to fill a dual role of trustee and object and to dispose of property in his own favour.

79. However, this submission was not supported by the authorities cited. In Thomas in Powers, at paragraph 12.12, the authors stated:

> "*It is clear that there is nothing illegal per se in an appointment by a donee of a power in favour of a limited class of person in favour of himself if, on a true construction of the instrument creating the power, the donee is himself a member of the class and not excluded from it."*

80. Further, at paragraph 12.14 and 12.18, the authors state the following in relation to beneficial powers:

> "12. 14. *Thus in Taylor v. Allhusen and Re Penrose the power in question was a beneficial power. The rule against conflict of interests does not apply to a beneficial power and the donee of such a power can exercise the power in favour of himself. In such a case, the primary questions are simply whether the donee is a proper object of the power (and that any purported exercise is not therefore excessive) and whether the power was exercised in good faith (and that no fraud on the power was committed). As far as fiduciary powers are concerned, however, it seems to have been assumed in both Taylor v. Allhusen and Re Penrose that a power simply could not be a fiduciary power if the donee thereof was himself one of its objects. As Jenkins J. stated in Re Edward's Will Trusts:*
>
> > *Where a person is appointed by a will or trust instrument to some fiduciary position and he is given a power of disposition over the trust property, it must be a question of construction in each particular case*

whether the power was given to him as an individual or whether it was given to him virtute officii. If, as a matter of construction, one can find that the power is given to him as an individual, then, provided the terms of the power itself are sufficiently widely expressed, the power may be held to be a beneficial power giving him the same power of disposition as an absolute owner would have. If, on the other hand, one finds as a matter of construction that the power, in truth, is given, not to the individual as such, but virtute officii, the power is not a beneficial power, but is a power of disposition to be exercised in a fiduciary capacity and, therefore, is not one which the person exercising it can exercise for his own benefit.

12.18 There is no general rule of law prohibiting someone in a fiduciary position (including a trustee) from also being a beneficiary of his trust or benefiting from that position. Nor, it is suggested, (and despite Jenkins J's observations) is there any prohibition on the donee of a fiduciary power from being an object of that power; and the rule against conflict of interests may be excluded in relation to a fiduciary power, as in other contexts, by an express declaration to that effect or by necessary implication."

81. On the facts of this case, I am of the opinion that the power conferred on the Claimant was a beneficial power and not a fiduciary power because of the faith which the Deceased had in him to carry out the responsibility of handling her residuary estate in the manner "discussed between us". Further, according to the evidence of the Claimant, (accepted by Razack J. in the 1990 action) the Deceased requested him to look after and act as a 'second father' to those members of her family who might need assistance,

financial and otherwise and she reposed confidence in him as a person who knew how to handle money. This was a power which the Deceased conferred upon the Claimant as an individual and not *virtute officii*.

82. Further, as a matter of construction of the Will, it is significant that the residuary clause does not specifically name any of the objects of the Trust and Razack J., in his judgment, concluded that "family" in the clause meant the children of the Deceased.

83. Accordingly, I am of the view that the rule against conflicts of interest does not apply here and the Trustee is entitled to exercise the power conferred by the residuary clause in favour of the children of the Deceased, including himself. In exercising his power, the Trustee must, just as he must in relation to any other child of the Deceased, form a fair and honest opinion that he requires financial assistance and must take into account the factors hereinafter set out in answer to questions 2 and 3.

Question 2: What are the factors which the Trustee should consider in determining which children of the deceased are in need?

84. All the parties in their submissions agreed that it is difficult and perhaps inadvisable for the court to attempt to provide an exhaustive list of factors to be taken into account by the Trustee is assessing and determining which of the children of the Deceased are in need. However, bearing in mind that the intention of the Deceased was to confer on the Trustee a discretion to assist those of her children who required assistance, financial or otherwise, the Trustee will be required to take a practical and common sense approach to the discharge of his responsibility. By way of example and without in any way intending to provide an exhaustive list of factors to be considered or to fetter or circumscribe the

exercise of the Trustee's discretion, I would say that the Trustee would be entitled to take into account the following:

(i) the available resources of the child, including sources of income and assets of the child, other than the Trust;

(ii) the age of the child;

(iii) whether the need of the child is financial, educational, health (physical or mental) or otherwise;

(iv) whether the child is capable of meeting his/her need from his/her own resources, without resort to the Trust;

(v) whether the assistance sought or being considered is consistent with the intentions of the Deceased that she communicated to the Trustee when she conveyed to him her expectation that he would look after and act as a second father to her children.

Question 3: To what factors should the Trustee have regard in determining the amount of financial assistance to be provided to the children of the deceased who are in need?

85. In determining the amount of financial assistance to be provided to the children who are in need, the Trustee will be required to maintain a fine balance between the value of the Trust Fund available to provide financial assistance and the needs as identified by any one or more of the children. Therefore, in addition to the factors set out in the previous paragraph, the Trustee would also be entitled to take into account the following:

(i) The value of the Trust fund;

(ii) The frequency of requests for assistance made by the child or children of the Deceased;

(iii) Whether the quantum of financial assistance being requested is currently required in some manner or in some measure.

Question 4: Is the Trustee required to provide accounts to all the children of the deceased who are the potential beneficiaries of the Trust, and if so, what is the extent of that duty?

Question 5: Is the Trustee required to disclose documents relating to the Trust to all the children of the deceased who are the potential beneficiaries of the Trust and if so, what documents?

86. As earlier stated, based on the decision of the Privy Council in **Schmidt**, I am of the opinion that the beneficiaries do not have an entitlement as of right to the disclosure of accounts and information in relation to the Trust. However, the Court has an inherent jurisdiction to supervise, and if necessary, intervene in the administration of trusts and a Trustee or a beneficiary is entitled to invoke the court's jurisdiction to call upon the court to decide whether a Trustee should provide accounts to the beneficiaries and, if so, the extent of that duty.

87. The undisputed facts of this case demonstrate that since the death of the Deceased on the 4th May 1984 and since the decision of the Honourable Justice Razack on the 2nd February 1993, the Trustee has not provided any accounts to any of the children of the Deceased. The First Defendant filed an appeal against that judgment on the 4th March 1993 and, only after the filing of CV2012-02873, did he indicate to the Trustee's Attorneys that he did not intend to pursue this appeal. Therefore, it is now almost thirty

(30) years since the death of the Deceased and over twenty (20) years since the Court's decision that the trust created by the residuary clause was valid.

88. In the exercise of the court's inherent jurisdiction, there are three matters which I believe I should take into account: (a) whether the children of the Deceased, as beneficiaries of the trust**,** should be provided with accounts by the Trustee; (b) what classes of documents should be disclosed, either completely or in a redacted form; and (c) what safeguards should be imposed to limit the use which may be made of the documents or information disclosed pursuant to any order I may make.

89. On the first matter, I am of the opinion that the Trustee has a duty to keep accounts of the Trust and that a beneficiary is entitled to invoke the Court's jurisdiction to call upon the Trustee to provide such accounts. Although prior to the institution of these actions, the children of the Deceased have not invoked the Court's inherent jurisdiction to supervise and/or intervene in the administration of the Trust, the fact remains that the Trustee has not provided any accounts since the death of the Deceased and the First and Second Defendants have been requesting accounts since 2011 and 2012, albeit on the erroneous basis that they had a vested interest in the Trust Fund which gave them a right to demand same. I have already found, based on the decision in **Schmidt,** that beneficiaries, (whether vested or potential), are not entitled to such accounts as of right but that is not the end of the matter. This court, in the exercise of its equitable jurisdiction, is empowered to supervise the Trust and order the Trustee to provide accounts. In all the circumstances of this case and especially having regard to the passage of time since the death of the Deceased, I consider it timely and appropriate for the Trustee to provide accounts to the Defendants. Accordingly, I hereby direct and order the Trustee to render

accounts to all the Defendants in relation to the Trust from the date of the grant of probate on the 25th September 1984 to date, such accounts to be provided within sixty (60) days from the date of this Order.

90. In respect of the second and third matters, based on the evidence before me, I do not consider that I am in a position to determine what classes of documents should be disclosed to the Defendants, either completely or in a redacted form and/or to determine what safeguards, if any, I should impose with respect to the use to which any of documents disclosed pursuant to any order that I may make may be put. The Trustee's Attorneys have suggested that the Court may wish to inspect such documents as are in the possession of the Trustee. In their Reply submissions, the First and Second Defendants indicated that they are seeking trust accounts and not disclosure of trust documents and/or confidential information relating to the manner in which the Trust property is to be distributed. This submission is certainly a significant modification of its original submission in which they had argued, at paragraph 36, that "*by reason of their status as beneficiaries of the Trust... and the fact that it is clear that the Deceased had a general intention to benefit them, the discretion of the court should be exercised to direct the Trustee to forthwith provide them with the following accounts, information and documentation (reliefs (a) to (d) of the claim in CV2012-02873) and that such accounts, information and documentation should span the period from inception of the Trust in 1984 to the date hereof."* Taking into account the Claimant's suggestion and the First and Second Defendants' modified submission, I consider it most sensible and practical in all the circumstances of this case to direct the Claimant to disclose to the Court for its inspection all the Trust documents in his possession in relation to the Trust, such

disclosure to be made within sixty (60) days of the date of this Order. Upon a review of these documents, I will then be in a more informed position to decide whether these documents ought to be disclosed to the Defendants, either completely or in a redacted form and whether any safeguards should be imposed with regard to the use of same.

Question 6: What is to become of the Trust if no children of the deceased are determined by the Trustee to be in need?

91. The fundamental questions raised on this issue is whether or not on a proper construction of the Deceased's Will and, in particular, the residuary clause, there was an implied gift over to the children of the Deceased in default of appointment which immediately vested the Trust property in them. The First and Second Defendants argued forcefully that, on a proper construction of the Will and the residuary clause, the Deceased intended to benefit a narrow class of persons, namely her children, and not to relieve poverty in the objective and charitable sense. Therefore, in construing the residuary clause, the Court should find that there was an implied gift over to the Deceased's children which immediately vested the Trust property in those children who were to take in default of appointment. Although the vested interest of the children in the Trust property is defeasible in the event that the Trustee exercises the power given to him by the Deceased to assist one or more of the children in need, if the Trustee does not exercise his power to select, the gift to the children would become indefeasible and the residue of the Deceased's estate would pass, on the death of the Trustee or on his removal or on the death of all the children, to all the children of the Deceased (except the Trustee) alive as at the death of the deceased and to

the personal representatives of such children (except the Trustee) who die prior to the gift over in equal shares.

92. In support of this submission, Counsel for the First and Second Defendant relied on **Re Llewellyn's Settlement,** [16]**Official Receiver v. Evans**, **Lambert v. Thwaites,**[17] **Re White's Trusts**[18]**, Wilson v. Duguid**[19]**, Re Caplin's Will**[20] and **Re Scarisbrick's Will Trusts**[21].

93. In **Re Llewellyn's Settlement**, Russell J. was called upon to construe a settlement dated April 20, 1878 made on the marriage of William Llewellyn and Alice White. By the settlement, certain real and personal property belonging to the wife was vested in trustees on trust to receive or permit the wife to receive the income for her life for her sole use and after her death, in the event of the husband surviving, on trust to pay the income to him for life. The husband predeceased the wife. Further, the settlement provided that upon the death of the survivor of the husband and wife, if there shall be any child or children, the issue of the said intended marriage upon trust to grant convey pay transfer and set over all the real and personal estate and all monies rents interest dividends and proceeds arising therefrom to such child or children or their issue in such shares and proportions and subject to such restrictions and conditions and generally in such manner as the said Alice White by any deed or instrument in writing with or without power of revocation and new appointment or by her last will and testament shall from to time direct limit or appoint such shares and proportions to be payable to such child or children as he she or they respectively shall attain the age of twenty-one years or if a daughter

[16] (1921) 2 Ch 281
[17] LR 2 Eq. 151
[18] (2) John 656
[19] 24 Ch. D. 244
[20] 2 DR & SM 527
[21] (1951) 1 All ER 822

marrying within that age with the consent of her parent or guardian and in case there shall be no more than one such child then subject as aforesaid upon trust for such only child his heirs executors and assigns. (emphasis mine) The deed did not contain any clause providing for default of appointment, nor any hotchpot, or maintenance, or advancement clause. William Llewellyn died in 1916 and his wife died in 1918. There were seven children of the marriage of whom two had died in infancy and five attained the age of twenty-one and were surviving. There were also three grandchildren living at Mrs. Llewellyn's death.

94. Russell J. declared that upon the true construction of the settlement and in the events which had happened, the funds subject to the trusts of the settlement were divisible equally between such of the children of the marriage as attained twenty-one years and the grandchildren living at her death.

95. In my opinion, as is made clear from his judgment, the learned Judge was willing to find that there was a gift to the children and grandchildren by implication based on his construction of the terms of the settlement in the context of the events which had occurred.

96. In **Lambert v. Thwaites**, there was a post-nuptial settlement in which certain freehold property was conveyed to trustees upon trust to pay the rents to W. and his wife during their lives, and after the decease of the survivor upon trust to sell and divide the proceeds amongst all and every the children of W., in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without exercising the appointment. The Court held that the property was vested in all the children liable to be divested by the execution of the power

and, the power not having been executed, the representatives of the deceased child were entitled to his share.

97. In his judgment in that case, Kindersley V.-C. said:

> *"In order to determine [the question of entitlement in default of appointment] it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers....that the existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate but until the power is exercised, it remains vested in those who are to take in default of appointment..... But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of this class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under the exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it."*
>
> *(emphasis mine)*

98. To my mind, the rationale for the decision in this case is the Court's conclusion that, on a proper construction of the terms of the settlement, there was a clear intention to give the

property to the children of W., who were liable to be divested thereof if W. exercised the power of appointment by will. Since W. died without exercising the power of appointment by will, all the children, including the child who had predeceased W., were held to be entitled to share in the property.

99. In **Re White's Trusts**, a testator bequeathed 2500l. to trustees upon trust for his son R.H. White for life, and to "*divide the capital among his children....but should my said son die childless, I confide in the said trustees for applying the said last-mentioned sum of 2500l. capital stock to the benefit of such other of my children, or their issue, as they may think fit, for the interest and good of my family*"(emphasis mine). The trustees never acted in the trust and died before R.H. White so there was no possibility of the trust being executed. There was also no gift in default of appointment. R.H. White died childless but the testator had two other daughters, both of whom had children, and one of them had grandchildren, living. Wood V.-C said:

> "*It is settled by Brown v. Higgs and Burrough v. Philcox that, where there is a power to appoint among certain objects, and no gifts in default of appointment, the Court will imply a gift to the objects of the power equally.....The implied gift is equally to all the objects of the power..... The words of this will clearly point to a personal enjoyment by the objects of the power at the death of the tenant for life; there is, therefore, strong reason for holding on the tenor of this particular will, if not on general principle, that none of those who predeceased the tenant for life could share in the benefits of an appointment under this power.... here the benefit is bestowed upon a class, and the question is, at what time that class ought to be ascertained. I think the right period is the death of the tenant for life; and*

the fund must, therefore, be divided among such of the children and grandchildren as were living at the death of the tenant for life, in equal shares per capita." (emphasis mine)

100. In my opinion, the decision in this case turned on the language of the will which clearly pointed to the personal enjoyment of the sum bequested by the other children and grandchildren of the testator if the testator's son died childless.

101. In **Wilson v Duguid**, the Court was called upon to construe a settlement by which a leasehold property was assigned to trustees upon trust to A. for life, and after her death for B. (her husband) for life, and after the death of the survivor upon trust to assign the premises unto and amongst such of A. and B.'s children then living in such manner, shares, times and proportions as A. and B. jointly or the survivor separately should by any writing appoint, and in case there should be no such child or children then upon trust for C. for life, and after his death upon trust to assign the premises unto and amongst such of his children and in such manner, shares, times and proportions as he should by any writing appoint. A. died without leaving issue. Then B. died. C. had died before A. without having exercised the power of appointment, having had ten children of whom three died before him, two after him and before the death of A., and one after the death of A. and before that of B. Chitty J. decided that all of C's children took as tenants in common in equal shares. He said:

"*On the true construction of this settlement, so far as it relates to the children of Robert Keeling the younger (that is, C) I hold that there is a trust for all the children of Robert in equal shares, subject to a power of selection and distribution exercisable by him either by deed inter vivos or a testamentary*

instrument. That appears to me to be the plain meaning of the words I have read. The whole of the property is vested in trustees, there is contained a trust in the words 'upon trust to assign' distinguishable from the power which is conferred upon Robert Keeling the younger. The objects of the power are not any of the children, though there is a power of selection and a power to exclude, not particular children of Robert, but all of his children. There is no time limited for the execution of the power, and it was not more or less his duty to exercise the power just before his death than it was to exercise it at any other time. If it is necessary to resort to technical reasoning, I hold that there is a plan implication from the words I have read of a trust in default of appointment for all the children of Robert."

102. In my opinion, the learned Judge made it clear that his decision turned on the plain meaning of the language employed in the settlement which expressly provided that, insofar as Robert Keeling was concerned, the trustees would hold the property upon trust for him for life and, after his death, upon trust to assign the premises unto and amongst such of his children and in such manner, shares, times and proportions as he should by any writing appoint.

103. In **Re Caplin's Will**, Richard Caplin, by his will, bequeathed all the rest, residue and remainder of his real and personal estate, chattels and effects whatsoever and wheresoever of which he might be seised, or possessed, or entitled to at the time of his decease, to trustees upon trust for sale and investment; and after payment of his debts, funeral and testamentary expenses and legacies, to pay and apply the interest, dividends and annual produce to arise and be produced from all the rest of, residue and remainder

of his said real and personal estate, chattels and effects, when and as the same shall become payable to, unto his wife Sarah Caplin, for life for her separate use; and after her decease, as to all the rest, residue and remainder (after certain bequests contained in the will) the testator directed that the same shall be apportioned as follows: "one third to thereof shall be paid unto such and so many of the relations or friends of her my said dear wife, Sarah Caplin, as she, whether in my lifetime or afterwards, and notwithstanding such coverture, and as if she were a feme sole, shall by her last will and testament in writing, or by any codicil thereto, or any writing in the nature of or purporting to be her last will legally executed, direct, limit, or appoint, give or bequeath the same". The testator appointed his trustees executors of his will and he died in 1855. The income of his residue was paid to his widow (he not being possessed on any real estate at the time of his death) until she died in 1864. Sarah Caplin left a will in which she made several general bequests from her residuary estate. Questions arose whether her will operated as a good execution of the power given her by the will of Richard Caplin to appoint the third part of the residue derived from his will. The Court held that Mrs. Caplin took only a life estate with a power of appointing one-third of the residue by will and that the word "friends" used in the will of Richard Caplin should be construed as synonymous with "relations". There being no gift over in default of appointment, the Court held that the general bequests contained in her will could not be an execution of the power given to her and that there was an implied trust in favour of the objects of the power, namely, the next of kin of Sarah Caplin at her death.

104. In my opinion, this decision can best be explained on the basis that by the terms of the testator's will, he evinced an intention to give to his wife a life estate only in one-

third of his residuary estate and to benefit so many of his wife's relations or friends as she may appoint. On that basis, therefore, Vice-Chancellor Kindersley was prepared to find that there was an implied trust in favour of the objects of the power, namely the wife's next of kin.

105. In **Re Scarisbrick's Will Trusts**, (the facts of which have been previously set out at paragraphs 70-72 hereof), the Court of Appeal held that on a true construction of the will and having regard especially to the context of the relevant words, the testatrix intended by the gift to relieve property in the charitable sense.

106. However, in support of his arguments in this matter, Counsel for the First and Second Defendants relied on the following passage from the judgment of Sir Raymond Evershed M.R. where he expressed his opinion as to the position if he was wrong in his view of the gift as a charitable trust:

> "*In my opinion, if I am wrong in the view I take of the construction of the gift, there should be implied a gift over in equal shares to the statutory next of kin of the three children respectively, to be ascertained at the date of determination of the last life interest, i.e. as if each of the children had died on that date. The matter is no doubt one of intention or presumed intention to be derived from the language of the instrument. But it is, I think also clear that, where there is a default of appointment to all the members of the class in equal shares. For the testatrix has manifested an intention to benefit that class: See Lambert v. Thwaites..."*

107. In my opinion, this passage makes it clear that before the court implies a gift over in default of appointment to members of a class, the court must, in construing the

language of the instrument, be satisfied that there was an intention or a presumed intention to benefit the class with a power given to the Trustee to appoint or select among that class.

108. In this matter, therefore, the question to be answered is whether, on a proper construction of the Deceased's Will, the Deceased intended, or should the court presume an intention on her part, to give the residue of her estate, real and personal, to her children, with power in the Trustee to merely to select from among them those whom he considered to be in need of financial assistance?

109. As I consider this question, I have found useful the following passage from the judgment of Tomlin J. in **Re Combe**[22]:

> *"The matter really stands this way. Am I approach this will governed by an inflexible and artificial rule of construction to the effect that where I find a power of appointment to a class not followed by any gift in default of appointment, I am bound to imply a gift to that class in default of the exercise of the power? Or ought I to approach this will for the purposes of construction in the same spirit as I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied?"*

110. In my opinion, the correct approach to the construction of the Deceased's Will is for this Court to endeavour to arrive at the meaning thereof by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied. When I do so, it is clear from the terms of the Will that the Deceased was quite specific in naming the beneficiaries of her gifts and bequests of her house at 21

[22] [1925] Ch 210 at 216

Alexandra Street, Port of Spain, including the rents therefrom, her shares in Nagib Elias & Sons Limited and the twenty-three pecuniary bequests, which included some of her children and grandchildren. However, when dealing with her residuary estate, she directed that the same "*be handed over to my son, JOSEPH ELIAS, who will use the same at his own discretion to assist those who are in need and for the sole purpose of family use as has been discussed between us*."

111. I consider this difference in language to be quite significant since it contradicts the contention of the First and Second Defendants that the Deceased intended that her children should have an immediate vested interest in her residuary estate, subject to divestment if the Trustee exercised his discretion to assist one or more of the children in need. Further, I am of the opinion that the Deceased intended that her residuary estate would remain in the hands of and under the control of the Trustee who would be entitled to exercise his discretion to use same as he saw fit to assist those of her children who are in need. In my view, there is nothing stated in the Will to support the contention that the Deceased intended to make a gift of her residuary estate to her children if the Claimant did not exercise the power given to him and I do not consider it necessary or reasonable to imply such a gift.

112. By way of alternative submission, Counsel for the First and Second Defendants submitted that where the trust comes to an end without the Trustee determining that any of the Deceased's children are in need, the property comprising the residuary estate would pass on intestacy and would be available for distribution among the children of the Deceased and the personal representatives of any child who died prior to the Trust coming to an end.

113. In her oral submissions, Counsel for the Claimant agreed with this submission but added that while there is any surviving child, the Trustee remained under a continuing duty to exercise his discretion to consider whether any of them is in need and to disburse such part of the Trust fund to relieve that need. Accordingly, she argued that the question of what will become of the Trust if no children of the Deceased are determined by the Trustee to be in need would only arise if and when all of the children of the deceased have died. In that eventuality, she said, all of the children having died and there being no express or implied gift of the residue to anyone including the class, then the residue of the Deceased's estate would fall into intestacy to be dealt with in accordance with the intestacy rules.

114. While I agree that the Trust may come to an end upon the death of all the children of the Deceased before the death of the Trustee, I am also of the opinion that it may come to an end if the Trustee predeceases the other children of the Deceased or is removed as the Trustee. I say so based on the language of the residuary clause which conferred the wide and unrestricted discretionary power upon the Trustee as well as on the Trustee's evidence, (which was accepted by Razack J. in the 1990 Action), that the Deceased had held conversations with him in which she expressed her faith and confidence in him personally and informed him that she would rely on him to look after and act as a "second father" to those members of the family who might need assistance, financially or otherwise. In those circumstances, as I have already found, the power granted to the Trustee was as an individual and not *virtute officii* and, should he predecease his siblings, the trust created by the residuary clause would come to an end and the Trust property would result to the estate of the Deceased as un-disposed of property to be distributed

among all of the children of the deceased, including the personal representatives of any child who died prior to the Trust coming to an end.

115. In coming to this conclusion, I do not consider that, as a matter of law, I can accept the suggestion made on behalf of the Fifth Defendant that I should order an equal division of the residuary estate amongst all the objects to avoid issues of conflict of interest or apparent bias.

Costs

116. Having regard to the approach which I have adopted in hearing these matters together and exercising my inherent jurisdiction to supervise and intervene in the administration of the Trust by providing answers to the questions posed by the Trustee in CV2012-04286, I am of the view that the appropriate order for costs should be that the costs of all the parties be paid out of the Trust Fund, to be assessed in default of agreement.

Dated this 17th day February 2014.

André des Vignes
Judge