[2017 Gib LR 310]

LINE TRUST CORPORATION LIMITED (as trustee of the AC TRUST) v. W and FIVE OTHERS

SUPREME COURT (Dudley, C.J.): November 10th, 2017

Trusts—jurisdiction of court—exclusive jurisdiction—Gibraltar courts have exclusive jurisdiction under Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 25(3) if (i) trust instrument confers jurisdiction; (ii) proceedings brought against beneficiaries; and (iii) involves relations between trustee and beneficiaries

A trustee sought directions from the court in the administration of a trust.

The claimant had been appointed trustee of the trust in 2012. The trust had been settled by the third defendant ("H") in 1995 in the Isle of Man, but its place of administration and law was later changed to Gibraltar. It was a discretionary trust and the original beneficiaries were H and his legitimate issue, H's mother ("A") and H's brother and his legitimate issue. Subsequently, H's wife ("W"), his son ("O") and his adopted son ("I") were added, as were H and W's younger children, "X" and "Y." In 2008, H's brother and his legitimate issue were excluded.

In September 2012, a deed of exclusion was executed by the former trustees which purported to exclude H, W and A as beneficiaries. H had requested the exclusion for tax purposes. The trust deed gave the trustees power to exclude beneficiaries.

A further deed of exclusion was executed in March 2015, which was said to exclude W and H from benefit under the trust as well as "any child or grandchild of the Settlor who is under the age of 18 . . ." This deed of exclusion was also said to have resulted from tax advice H had received.

There were divorce proceedings in the English High Court between H and W. W, who took no part in the present proceedings and did not submit to the jurisdiction of the court, had pleaded in the English proceedings that the 2012 and 2015 deeds of exclusion were invalid or voidable because of various alleged breaches of duty by the trustees and protector of the trust. The English court had made an order joining the present trustee to W's application for financial relief but, given an order of the Gibraltar Supreme Court directing it not to submit to the English proceedings, the trustee had not appeared or taken any part in those proceedings.

The trustee considered that W's challenge in the English proceedings had created doubt as to who was presently within the class of beneficiaries. It therefore sought directions from the court as to whether the 2012 deed of exclusion had validly and irrevocably excluded H, W and A from benefit under the trust; and whether the 2015 deed of exclusion had validly and irrevocably excluded W and H. It also sought directions as to whether the effect of the 2015 deed of exclusion had been irrevocably to exclude for all time any child or grandchild of H who was under the age of 18, or whether such exclusion was only temporary whilst they remained under 18.

Article 25(3) of Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) provided that—

> "the court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved."

Held, ordering as follows:

(1) The Gibraltar courts had exclusive jurisdiction over the claim as it fell within art. 25(3) of the Regulation. Article 25(3) applied where (i) the trust instrument conferred jurisdiction; (ii) the proceedings were to be brought (amongst others) against beneficiaries; and (iii) the relations between trustee and beneficiaries, and the rights or obligations as between them, were involved. As the trust deed provided that the forum for the administration of the trust would be the courts of Gibraltar, it was clear that the first element was satisfied. In respect of the second element, the claim was brought against the one undoubted beneficiary of the trust, O, and other persons who, depending on the status of the deeds of exclusion, might also be beneficiaries. Thirdly, the claim plainly dealt with relations between the trustee and beneficiaries, the trustee's obligations under the trust or the rights of beneficiaries. The claim to determine the validity of the exclusion clause was an internal dispute and a beneficiary was to be given a purposive interpretation to include possible beneficiaries (paras. 33–39).

(2) The 2012 deed of exclusion had validly and irrevocably excluded H, W and A as beneficiaries. The trustees had had power under the original trust deed to execute the deed of exclusion and the exercise of that power had not been improper. The court could only have determined that the 2012 deed of exclusion was invalid if the evidence showed that the trustees had (a) failed to act responsibly and in good faith; (b) failed to take only relevant matters into account; (c) failed to act impartially; or (d) acted for an ulterior purpose. The evidence did not disclose any breaches of those duties by the trustees other than the duty to act impartially but that duty was rendered meaningless in the circumstances as the power of

exclusion allowed the trustees to discriminate as between the beneficiaries, and the trust also allowed them to ignore the interests of beneficiaries. The court accepted the evidence of the then trustees and the protector, which was consistent with that of H, that H, W and A had been excluded as beneficiaries for tax purposes (para. 42; paras. 53–57).

(3) As H and W had been validly and irrevocably excluded by the 2012 deed of exclusion, whether they had been excluded by the 2015 deed of exclusion did not fall for consideration. There remained, however, the narrow point of interpretation as to whether X and Y (and others in their class) had been only temporarily excluded while they were under the age of 18 and would regain their status as beneficiaries upon reaching that age, or whether they had been irrevocably excluded. When interpreting a written instrument, the court's task was to ascertain the objective meaning of the language used, considering the instrument as a whole. If there were more than one possible meaning, the court could determine which was more consistent with business common sense. As the 2015 deed of exclusion had been professionally drafted, particular weight had to be given to the language used. The deed had been drafted as a consequence of tax advice received by H. It was apparent that it was not intended to exclude X and Y and others in their class for all time. On the evidence before the court, the purpose of the trust was dynastic. It would defeat that purpose if the court were to adopt a meaning that excluded H's children and grandchildren from benefitting. Objectively, that could not have been intended by the trustee. On a proper construction, therefore, the 2015 deed of exclusion would be interpreted to mean that X and Y (and others in their class) would only be temporarily excluded, and would automatically regain their status as beneficiaries upon attaining 18 years of age (paras. 58–64).

Cases cited:

(1) *Crociani* v. *Crociani*, [2014] UKPC 40; 2014 (2) JLR 508; [2015] W.T.L.R. 975; (2014), 17 ITELR 624, followed.

(2) *Gomez* v. *Gomez-Monche Vives*, [2008] EWCA Civ 1065; [2009] Ch. 245; [2009] 2 W.L.R. 950; [2009] 1 All E.R. (Comm) 127; [2008] 2 C.L.C. 494; [2009] I.L.Pr. 32; [2008] W.T.L.R. 1623; (2008), 11 ITELR 422; [2008] N.P.C. 105; [2009] 1 P. & C.R. DG1, distinguished.

(3) *Public Trustee* v. *Cooper*, [2001] W.T.L.R. 901, followed.

(4) *Wood* v. *Capita Ins. Servs. Ltd*., [2017] UKSC 24; [2017] A.C. 1173; [2017] 2 W.L.R. 1095; [2017] 4 All E.R. 615; [2018] 1 All E.R. (Comm) 51, applied.

Legislation construed:

Trustees Act 1895, s.61: The relevant terms of this section are set out at para. 15.

Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), art. 1(2): The relevant terms of this paragraph are set out at para. 32.
art. 4(1): The relevant terms of this paragraph are set out at para. 32.
art. 7(6): The relevant terms of this paragraph are set out at para. 32.
art. 25(3): The relevant terms of this paragraph are set out at para. 32.
art. 28: The relevant terms of this article are set out at para. 30.
art. 29: The relevant terms of this article are set out at para. 32.
art. 30: The relevant terms of this article are set out at para. 32.

E. Talbot Rice, *Q.C.*, *L. Baglietto*, *Q.C.* and *M. Levy* for the claimant;
E. Phillips and *S. De Lara* for the first defendant;
R. Wilson, *Q.C.* and *R. Sharma* for the second and third defendants;
C. Newman, *Q.C.*, *B. Shah*, *S. Catania* and *S. Chandiramani* for the fourth defendant;
A. Cloherty and *I. Watts* for the fifth and sixth defendants (by their litigation friend, I.C. Massias).

1 **DUDLEY, C.J.:** This is a Part 8 Claim in which the claimant ("Line Trust") seeks directions from the court in the administration of a trust pursuant to CPR, r.64 and/or the inherent supervisory jurisdiction of the court over trusts.

2 At the hearing of the claim I was persuaded that, given the age of the fifth and sixth defendants, it would be detrimental to them if their interest in the trust, the subject matter of this claim, were to be made public. Given that determination, the hearing took place in private but I indicated that an anonymized judgment would be handed down in public. As regards the trust, there is sufficient anonymization by referring to it as the AC Trust. The defendants are all related. The AC Trust was settled by the third defendant ("H"). The first defendant ("W") is H's divorcing wife and the second defendant "A" is H's mother. The fourth defendant "O" is H and W's (just) adult son and the fifth and sixth defendants "X" and "Y" are their minor children (aged 17 and 15 respectively).

3 Line Trust seeks directions in relation to the identity of the current beneficiaries of the AC Trust and in particular:

(i) Whether a deed of exclusion dated September 18th, 2012 ("the 2012 deed of exclusion") validly and irrevocably excluded W, H and A from benefit under the AC Trust; and

(ii) Whether a deed of exclusion dated March 20th, 2015 ("the 2015 deed of exclusion") validly and irrevocably excluded, *inter alia*, W and H from benefit under the AC Trust.

Together, "the deeds of exclusion."

4 A subsidiary question of interpretation arises in respect of the 2015 deed of exclusion as to whether the effect of its terms is to irrevocably exclude from future benefit under the AC Trust, for all time, any child or grandchild of the settlor who is under the age of 18, or whether such exclusion is only temporary while they remain under the age of 18.

5 Although I have in the entitlement to this judgment set out the representation in full, this is a composite judgment in which I deal with applications listed for July 25th, 2017 and issues that arose on that day, when there was no appearance by counsel on behalf of X and Y. As regards the substantive hearing of the claim on July 26th–27th, 2017, that proceeded without W appearing or being represented.

Other extant proceedings

6 This is one of four related proceedings in Gibraltar, which arise against the backdrop of divorce proceedings before the High Court in England between W and H. The three other actions in Gibraltar are:

(1) *Beddoe* proceedings which I am told I need not concern myself with;

(2) A claim brought by W (2016–Ord–99) by which she sought and obtained the assistance of this court in the form of injunctive relief restraining Line Trust from taking certain actions and disposing of certain assets as trustee of the AC Trust; and

(3) A Part 7 claim (2017–Ord–013) brought by Line Trust seeking declaratory relief including a declaration that orders sought by W in the English matrimonial proceedings would not be enforceable in Gibraltar.

7 In the English proceedings, W has pleaded, in a statement of case dated December 22nd, 2016 ("the English statement of case"), *inter alia*, that the 2012 deed of exclusion is invalid or voidable because of various alleged breaches of duty by the trustees and the protector of the AC Trust. Subsequently, the validity of the 2015 deed of exclusion has also been challenged. The English court made an order joining Line Trust to W's application for financial relief on divorce but, given an order of Jack, J. of July 7th, 2016 directing it not to submit to the jurisdiction of the English court, Line Trust has not entered an appearance and therefore taken no part in those proceedings.

The AC Trust

8 All of the evidence before me is in the nature of witness statements and exhibits thereto, none of which has been challenged in this action.

9 Line Trust is the sole trustee of the AC Trust. It is now governed by Gibraltar law but was settled on June 25th, 1995 ("the original trust deed")

under a different name as a trust governed and administered in the Isle of Man. As aforesaid, the AC Trust was settled by H. The original trustees were Edward Bowers and Laurence Keenan with William Bennett appointed an additional trustee on February 5th, 2001. Laurence Keenan retired as a trustee on September 15th, 2003 and was replaced by John Murphy. John Murphy retired on October 7th, 2005, leaving Edward Bowers and William Bennett as the continuing trustees. On September 21st, 2012, Line Trust was appointed trustee in place of Edward Bowers and William Bennett.

10 By deed dated January 23rd, 2013 ("the 2013 trust deed") (but upon which the date December 20th, 2012 also appears, although nothing turns on this), in exercise of the powers conferred upon the trustees by cl. 12 of the original trust deed, the place of administration and law of the trust was changed by way of a declaration found at cl. 2 which provides:

> ". . . the Trustees HEREBY DECLARE that the Trust shall from the date hereof take effect in accordance with the laws of Gibraltar and that the forum for the administration thereof shall be the courts of Gibraltar."

In similar vein, cl. 26(a) provides:

> "26. PROPER LAW
>
> (a) This Settlement is established under the laws of Gibraltar and subject and without prejudice to any transfer of the administration of the Trusts hereof to any change in the proper law of this Settlement and to any change of the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the proper law of this Settlement will be the law of Gibraltar and Gibraltar will be the forum for the administration thereof."

11 Mahomed Joosab was appointed as protector of the trust on July 3rd, 1997 and he continues to so act. According to his evidence, he is a successful businessman in South Africa, and his involvement in the AC Trust came about as a result of his family's very longstanding connection and friendship with H's family dating back to the 1960s.

12 The AC Trust has throughout been a discretionary trust. The original discretionary beneficiaries were set out in the Second Schedule to the original trust deed and were H and his legitimate issue, A and H's brother and his legitimate issue. On March 9th, 1999, W, H's adopted son ("I") and O were added as discretionary beneficiaries. On June 13th, 2000 and August 14th, 2002, X and Y, respectively, were added as discretionary beneficiaries. Given that H's legitimate issue were within the class of discretionary beneficiaries, O, X and Y's addition would appear superfluous, but nothing turns on this. On July 17th, 2008, H's brother and his legitimate issue were excluded as discretionary beneficiaries.

13 That was then followed by the 2012 deed of exclusion, which purports to exclude as beneficiaries H, W and A. The 2013 trust deed went on to reflect the then current beneficiaries as being H's legitimate issue and (by name) X, Y, I and O although shortly thereafter, on January 31st, 2013, I was excluded as a beneficiary.

14 Finally, the 2015 deed of exclusion excluded the following classes of persons as beneficiaries:

> "1. Any child or grandchild of the Settlor who is under the age of 18.
>
> 2. Any company which is a close company as defined in the Corporation Tax Act 2010 and in relation to which the Settlor or any other Excluded Person is a party within the meaning of the Corporation Tax Act 2010.
>
> 3. A company in which an Excluded Person is a participator and which would be a close company if it were resident in the United Kingdom.
>
> 4. The Trustees of a Trust of which an Excluded Person is a beneficiary or may be added as beneficiary.
>
> 5. A body connected with such a Trust set out in 4. above.
>
> 6. Any other persons, or persons or class of persons falling within the definition of 'relevant' person for the purposes of section 809M of the Income Tax Act 2007 as amended from time to time."

15 Line Trust's position is that W's challenge in the English divorce proceedings of the deeds of exclusion creates a doubt as to who is presently within the class of beneficiaries and has led to this application. It is cogently submitted that this arises not just because of the trustee's obligation to administer the AC Trust properly but also because it is a criminal offence for a Gibraltar trustee, under s.61 of the Trustees Act 1895 (as amended by the Trustees Act (Amendment) Regulations 2017), not to "record in writing information as to the identity of . . . the beneficiaries or class of beneficiaries of . . . the trust . . ." The 2017 Regulations implemented the 4th EU Anti-Money Laundering Directive (2015/849), which came into force on June 27th, 2017.

Procedural background and W's participation in this claim

16 I set out the procedural background in some detail because it provides the backdrop to the circumstances leading to my making a determination in relation to jurisdiction.

17 On March 29th, 2017, Line Trust's Gibraltar lawyers provided W's London solicitors, DWFM Beckman, with a copy of the issued claim form. The position adopted on W's behalf was that she did not submit to

the jurisdiction of this court and her solicitors were not instructed to accept service. In the event, the claim form was served on W at her home address in England on April 25th, 2017, although an acknowledgment of service in which an intention to dispute the court's jurisdiction was not filed until June 26th, 2017.

18 Before W filed the acknowledgment, on June 14th, 2017, a case management conference took place immediately after one in the Part 7 claim (2017–Ord–013), in which action W had entered an appearance. Counsel for W left the courtroom in circumstances in which it was apparent that he knew that a case management conference in this claim was about to be heard. The inference to be drawn from that, and it is not meant as a criticism, is that those acting for W wanted to ensure that she was not submitting to the jurisdiction of the court in this claim. Following that case management conference, this claim was listed for hearing for July 26th–28th, 2017, given that I had upon an application by W previously vacated the hearing of the Part 7 claim (2017–Ord–013) listed for those days.

19 Thereafter, on June 26th, 2017, upon the filing of the acknowledgment of service contesting the court's jurisdiction to hear this claim, W issued an application notice in which she sought, *inter alia*, an order seeking to set aside an earlier order of Jack, J. in relation to permission to serve out of the jurisdiction, although as I understand it Jack, J. had merely adjourned that application.

20 W also sought to set aside my order of June 14th, 2017, presumably the setting down of the claim for hearing, on the grounds that—

> "a. The Court was/is bound of its own motion to determine finally and conclusively its own jurisdiction in respect of these proceedings in accordance with the Brussels Convention and/or Regulation (EU) 1215/2012 (together, 'the European Legislation').
>
> b. Had the Court considered and made such a determination, it would have concluded that:
>
> i. It was bound to decline jurisdiction of its own motion upon the application of the European Legislation; and/or
>
> ii. It had no jurisdiction under the European Legislation and was bound to decline jurisdiction of its own motion; and/or
>
> iii. The proceedings should be stayed on the basis, inter alia, that proceedings with the same or similar subject matter are pending in England and/or a jurisdiction challenge is pending in Claim No 2017/ORD/13, which is due to be heard at a hearing commencing on 18 September 2017."

21 It also sought an order declaring that the time for filing the acknowledgment of service had not been triggered and, in the alternative, an application for an extension of time for filing an acknowledgment of service and/or an application contesting jurisdiction on the same grounds as set out above, whether on the court's own motion or upon W's application. The application for these orders was listed for hearing on July 25th, 2017, that is, the day before the substantive action was to be heard.

22 In parallel to the application, W's English solicitors sent a 10-page letter to the court dated June 26th, 2017, in which it highlighted the contention that this court should decline jurisdiction of its own motion, independently of any steps taken by W, and set out its arguments in that regard over 14 paragraphs.

23 That was then followed by an application dated July 3rd, 2017 requesting that the substantive hearing be vacated on the grounds that, if it were to proceed, W's right to a fair trial would be denied; that service of the claim was flawed because the English court was seised of the dispute; and that the court should decline jurisdiction of its own motion. That application was heard on July 10th, by Jack, J. who, without determining the substantive issues, dismissed the application for the adjournment.

24 On July 17th, 2017 (although the letter is incorrectly dated August 24th, 2017), whilst I was away from the jurisdiction, W's Gibraltar solicitors, Signature Litigation, wrote to me directly, seeking to revisit the application that had been heard by Jack, J. Conducting litigation in that fashion is to be deprecated and the parties were informed by the Registry that I would not deal with an application to vary an order or consider an appeal from an existing order (*qua ex officio* judge of the Court of Appeal) by way of correspondence.

25 On July 19th, 2017, W issued a notice of motion for leave to appeal the decision of Jack, J., and seeking a stay of the trial listed to take place on July 26th–28th, 2017. Butler, J., who was acting Chief Justice and sitting as *ex officio* judge of the Court of Appeal, handed down a ruling on July 21st, 2017, and said this (at para. 6):

> "On the basis of the material placed before me I am not prepared to deal with this application on papers. I have considered whether it should be dealt with by Jack J but, since it is obvious that no application for leave to appeal was made to him when he made his ruling and order, and since the case is listed in any event before the Chief Justice next week, it should be listed in any event before the Chief Justice next week, it should be listed for him to determine at the commencement of that hearing on 25th July 2017. Effectively, this will be a renewal of the application for the matter to be adjourned and relisted but the parties must not assume that that application will be granted and must be ready to proceed if it is not.

> If the application were to succeed, no doubt there will be costs issues but those are not for me to consider at this stage."

26 That ruling was followed by what Butler, J. accurately categorized in a subsequent ruling dated July 22nd, 2017 as "a surprising application (by letter) for [him] to overrule [his] decision on grounds set out in a letter." That ruling made the position clear beyond peradventure (at para. 8):

> "I have not dismissed the application but have given the Applicant the advantage of making her application before the Chief Justice next week, thus ensuring continuity of judicial consideration of the case."

27 By letter dated July 21st, 2017, Signature informed the other parties that, consistent with W's position that her counsel was not available from July 25th–28th, 2017, and not having the means to instruct suitable alternative counsel, they were withdrawing the application for leave to appeal the order of Jack, J. and stay of the trial and were also discontinuing W's application of June 26th, 2017. The letter stressed that this was being done without submitting to this court's jurisdiction and continued to maintain that this court has no jurisdiction over her.

28 On July 25th, 2017, the parties convened in court by counsel, with W being represented by Mr. Phillips and Mr. de Lara with the only issue remaining on W's applications being that of costs. However, Ms. Talbot Rice submitted that given W's position that the court should, of its own motion, decline jurisdiction over the matter, it was appropriate for Line Trust to satisfy the court that it did have jurisdiction, and that it should not be declining that jurisdiction under the relevant Regulations. For his part, Mr. Phillips made it clear that he had instructions only in relation to the issue of costs and that he was not participating in relation to the question of jurisdiction. Although something of a volte face, given the repeated requests by those acting for W that the court should enquire of its own motion whether it had jurisdiction, the position adopted by Mr. Phillips was that I should decline Ms. Talbot Rice's invitation on the basis that W's leading counsel were absent and it was well known that they would not be available on the days of the hearing.

29 Notwithstanding the withdrawal and discontinuance of the various applications by W, given her historic repeated invitations for the court to consider the question of jurisdiction of its own motion, and it being apparent that it is a central contentious issue between the parties requiring determination, I accepted Ms. Talbot Rice's invitation to determine it.

Jurisdiction

30 Although W has not participated in the proceedings, her position in relation to jurisdiction is articulated in some detail in the letter of June 26th, 2017 from her English solicitors, DWFM Beckman, to the court (in

paras. 10–23). Although in summarizing them I no doubt do those submissions a disservice, as I understand them they essentially come to this:

(1) That by virtue of the Civil Jurisdiction and Judgments Act 1993, Gibraltar and the United Kingdom are treated as separate Regulation States, and that as between Gibraltar and the United Kingdom, the Council Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Recast Judgments Regulation") applies.

(2) That the trustees had previously been joined to proceedings before the English High Court in which the very issue that this Part 8 claim seeks to have determined is pending, and that the effect of the *lis pendens* was, and is, that this court must declare of its own motion, irrespective of any steps taken by W, that it has no jurisdiction.

(3) Reliance is placed upon art. 28 of the Recast Judgments Regulation. It provides:

> "1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation."

(4) That the effect of that provision is that the court must determine finally and conclusively whether it is bound of its own motion to decline jurisdiction. What is not explained for W is whether art. 28 continued to be engaged once she entered an appearance (which happened on the date of the letter), albeit one in which she indicated an intention to contest jurisdiction.

(5) Reliance is also placed upon art. 29 and it is said that the English court is the court first seised and also said that there is no valid exclusive jurisdiction clause in the present case since art. 25(3) of the Recast Judgments Regulation only applies to claims against a beneficiary, and the premise of the trustees' claim is that she is not a beneficiary.

(6) It is also said that there is no jurisdiction clause in the 2013 trust deed covering contentious disputes, and that a forum for administration clause, as found at cl. 26(a), does not afford the Gibraltar courts exclusive jurisdiction. In support of this proposition, reliance is placed upon the Privy Council decision in *Crociani* v. *Crociani* (1).

31 For her part, Ms. Talbot Rice's fundamental proposition is that the Gibraltar courts have exclusive jurisdiction to determine this Part 8 claim, and that this is a straightforward CPR Part 64 claim by a Gibraltar incorporated trustee of a Gibraltar law trust seeking the assistance of the

court under its CPR Part 64 jurisdiction and/or the inherent supervisory jurisdiction a court has over its trustees.

32 Ms. Talbot Rice undertook a detailed review of the relevant provisions in the Recast Judgments Regulation. I set these out for the sake of completeness and context.

(1) Article 1(1) establishes the scope of the Regulation, namely that it applies to civil and commercial matters. Of some significance is that art. 1(2) establishes exceptions to the application of the Regulation which includes, at sub-para. (a) "rights in property arising out of a matrimonial relationship," and at sub-para. (e) "maintenance obligations arising from a family relationship, parentage, marriage or affinity."

(2) Chapter II of the Regulation deals with jurisdiction, with the default position found in art. 4(1), which provides that "subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

(3) Article 7 provides for exceptions to the general rule, and of relevance is art. 7(6), which provides that a person domiciled in a Member State may be sued in another Member State: "[A]s regards a dispute brought against a settlor, trustee or beneficiary of a trust created . . . by a written instrument . . . in the courts of the Member State in which the trust is domiciled."

(4) Section 7 of the Regulation deals with prorogation of jurisdiction, in which art. 25(3) deals with trusts and provides:

> "The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved."

(5) The next provision which falls for consideration, and upon which W relies, is art. 29(1), which provides:

> "Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

(6) In contrast to that mandatory obligation, art. 30(1) affords the court a discretion in respect of related actions by providing: "Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings."

33 Ms. Talbot Rice's principal submission is that art. 25(3) is engaged, and that, by virtue of it, the Gibraltar courts have exclusive jurisdiction. She properly identifies the three elements that have to be satisfied, namely:

(i) the trust instrument must confer jurisdiction;

(ii) proceedings are to be brought (amongst others) against beneficiaries; and

(iii) relations between trustee and beneficiaries and rights or obligations as between them are involved.

34 It cannot be in issue that the third element is satisfied. As Ms. Talbot Rice puts it in her skeleton argument, this claim plainly deals with relations between the trustee and beneficiary/ies, or the trustee's obligations under the trust, or the beneficiary rights under the trust.

35 As regards the first element, Ms. Talbot Rice submits that, given the terms of cll. 2(a) and 26 of the 2013 trust deed, the Gibraltar courts have exclusive jurisdiction. In *Crociani* v. *Crociani* (1), the Privy Council, on appeal from a decision of the Court of Appeal of Jersey, considered a provision in a trust, on the following terms (2014 (2) JLR 508, at para. 7):

> "[T]hereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder . . ."

and held it did not confer exclusive jurisdiction. The basis for the decision is to be found in the judgment delivered by Lord Neuberger (*ibid.*, at para. 17):

> "In the context of a trust, the Board accepts that the expression 'forum of administration' can refer to the court which is to enforce the trust . . . However, the Board sees no grounds for holding that the expression has such a well-established technical significance that it cannot have the meaning for which the respondents contend, namely the place where the trust is administered in the sense of its affairs being organized."

And later, he went on to say (*ibid.*, at para. 20):

> ". . . [I]f the stipulation was intended to indicate the country whose courts were to determine disputes, rather than the country in which the trust was to be managed, one would have expected the draftsman to refer to the courts of the country, as opposed to the country *simpliciter*, as being the forum."

Ms. Talbot Rice cogently submits that the provision found in cl. 2(a), which provides "that the forum for the administration [of the trust] shall be the courts of Gibraltar," is a decisive distinguishing feature from *Crociani* (1). I accept her submission, not least because it accords with what Lord Neuberger says (at para. 20). It follows that the first element is satisfied.

36 The second element also requires some analysis in light of the stance taken by W. Her English solicitors, in their June 26th, 2017 letter, state (at para. 18):

> ". . . the Trusts jurisdiction provisions in the Regulation can only apply to claims against beneficiaries (the entire premise of the Trustee's claim is that [W] is not a beneficiary and so they obviously cannot blow hot and cold on this point)."

The obverse to that proposition is advanced by Ms. Talbot Rice. She submits that W's position is that she is a beneficiary, and therefore she cannot be heard to say that she does not fall within art. 25(3) because she is not a beneficiary.

37 Ms. Talbot Rice also relies upon the decision of the English Court of Appeal in *Gomez* v. *Gomez-Monche Vives* (2), in support of the proposition that for the purposes of art. 25(3) "beneficiary" includes a former beneficiary. As appears from the headnote in *Gomez*, the first defendant challenged the jurisdiction of the English courts on the grounds that the trust was not domiciled in England and that she was not being sued *qua* trustee or beneficiary for the purposes of art. 5(6) of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (which is in substantially in the same terms as art. 7(6) of the Recast Judgments Regulation). At first instance, Morgan, J. held that she was not being sued in the capacity of either beneficiary or trustee for the purposes of art. 5(6). The English Court of Appeal, allowing the appeal in part, held that since the dispute was about the extent of the first defendant's entitlement under the trust, not its existence, she was being sued as a beneficiary for the purposes of art. 5(6) of the 2001 Regulation. Although a parallel is capable of being drawn with the facts of the present case, in that determination of the validity of the deed of exclusion is in the nature of a determination as to W's entitlement under the trust, there is a material factual difference. In *Gomez*, it was not in dispute that the first defendant remained a beneficiary; that is clear from the judgment of Lawrence Collins, L.J. ([2009] Ch. 245, at para. 89):

> "I do not consider that this part of the appeal raises a question of the construction of article 5(6). It involves a question of the application of article 5(6) to the nature of the claim in the light of the particulars of claim and the evidential material before the court. The claimants

> are not asserting that the first defendant was not a beneficiary at all, and so the appeal does not raise an issue analogous to the problem, discussed in relation to article 5(1) (contract jurisdiction), which arises where the claimant denies the existence of a contractual relationship . . ."

I am of the view that *Gomez* provides no substantive support to Ms. Talbot Rice's argument.

38 In my judgment in the present case, determining the validity of an exclusion clause made pursuant to the provisions of a deed establishing a trust is an internal dispute, and a beneficiary is to be given a purposive interpretation to include possible or potential beneficiaries caught within any such internal dispute. Moreover, as Ms. Talbot Rice sets out in her skeleton argument, the claim is brought against the one undoubted beneficiary of the trust, O, and other persons who, depending on the status of the deeds of exclusion, may or may not be beneficiaries of the trust.

39 The instrument confers jurisdiction, the proceedings are brought against beneficiaries, and the claim deals with relations between the trustee and the beneficiary/ies and their rights. It follows that the claim is within the scope of art. 25(3) and this court has exclusive jurisdiction over it. Having made that determination, it is neither necessary nor desirable that I consider whether, for the purposes of the English matrimonial proceedings, the claims in relation to the deeds of exclusion constitute a freestanding civil claim so as not to fall foul of the exclusion in respect of "rights in property arising out of a matrimonial relationship"; or whether the English court is the court first seised of the same cause of action between the same parties for the purposes of art. 29. It is also unnecessary for me to consider whether there has been a submission to the jurisdiction either through a possible failure to make the requisite application or through conduct.

The 2012 deed of exclusion

40 The power relied upon by the then trustees to execute the 2012 deed of exclusion, and purportedly exclude H, W and A, is to be found at cl. 9(a) of the original trust deed. It provides under the entitlement "Powers of Exclusion":

> "The Trustees may by declaration in writing made at any time or times during the Trust Period declare that the person or persons or members of a class name or specified (whether or not ascertained) in such declaration who are would or might but for this Clause be or become a Beneficiary or Beneficiaries or be otherwise able to benefit hereunder as the case may be:

(i) shall be wholly or partially excluded from future benefit hereunder; or

(ii) shall cease to be a Beneficiary or Beneficiaries; or

(iii) shall be an Excluded Person or Persons."

By virtue of cl. 10, the effect of being "excluded" as opposed to ceasing to be a beneficiary is that the trustees cannot subsequently add an excluded person to the class of beneficiaries.

41 Clause 11, which provides for the ignoring of interests of beneficiaries, reads:

> "The Trustees in exercising any of the powers hereby conferred in favour of any particular person are hereby expressly authorised to ignore entirely the interests of any other person interested or who may become interested under these presents."

More generally, cl. 41, which deals with the trustees' exercise of powers, provides (at sub-cll. (a) and (b)):

> "(a) The Trustees shall exercise the powers and discretion vested in them as they shall think most expedient for the benefit of all or any of the persons actually or prospectively interested under this Settlement and may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more of them without being obliged to consider the interests of the others or other;
>
> (b) Subject to the previous sub-clause every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion and the Trustees shall have the same discretion in deciding whether or not to exercise any such power."

42 In my judgment, it is clear that excluding H, W and A from benefitting under the AC Trust is within the letter of the powers afforded to the trustees and a challenge, if any, must be to the improper exercise of the discretion. If the challenge were brought by W, it is trite that the burden would be on her to establish that the then trustees had improperly exercised their discretion. However, it is Line Trust that seeks a determination on the validity of a decision taken by its predecessors, albeit that from its perspective the exercise of the power by the then trustees and protector is valid and unimpeachable.

43 The background and motivation for the establishment of the trust is to be found in the witness statement of H. It is said by H that his family, who are Africans of Indian extraction, are said to have suffered great financial loss in 1973 when H's father's trading business and assets were seized by the Hastings Banda Government in Malawi. His family went on

to trade successfully in Nigeria until forced to abandon that business in 1983 when there was a military coup, with his family losing everything in Africa other than assets preserved through trusts; that the AC Trust, established in 1995 long before H met W, was a means of securing the family's long term financial survival and a vehicle through which to provide for future generations. Although it may be put on more strident terms in H's witness statement, it is right to say that the letters of wishes exhibited evidence a desire to protect assets and a conservative approach to the distribution of income to beneficiaries.

44 H's evidence is supported by the evidence of Mr. Bowers who in his witness statement says:

> "1.8 The beneficiaries of the ACT were [H], [H]'s mother, [A], the legitimate issue of [H] (his children, grandchildren, great grandchildren etc) and [H]'s brother . . . and his legitimate issue (children, grandchildren, great grandchildren etc). When the ACT was settled, and throughout the whole of my involvement in the ACT, it has always been a dynastic Trust: its purpose was always the preservation of wealth for the family's long term security and for future generations. The . . . family (and particularly [H]) were never ostentatious and their standard of living was comfortable but not expensive. [H] worked hard and was reasonably well remunerated. He lived within his means and had no need for any distributions from the ACT to maintain his standard of living.
>
> . . .
>
> 1.10 During my time as a Trustee of the ACT I discussed with [H] his wishes in relation to the ACT from time to time. Those wishes were always a variation on the theme of preservation of the Trust fund. [H] wanted his children to generate their own wealth rather than rely on handouts from the ACT, and he was absolutely clear that there were never to be any distributions made to support a lifestyle beyond the modest lifestyle that he led and that capital was not therefore to be distributed, only income. He was also consistent in his wish that [W] to be provided with £5,000 per month, from income, on his death, and to have no greater provision than that."

45 As to the circumstances leading to the 2012 deed of exclusion, the evidence of Mr. Bower, Mr. Bennett and H is consistent. In November 2005, H and the then trustees retained the services of HW Fisher & Co., Chartered Accountants, to advise H and the AC Trust regarding UK tax and subsequently in 2006, Mr. Baker, Q.C. was also asked to advise. According to Arthur Thompson, a partner with HW Fisher, the advice received from Mr. Baker, Q.C. was wide ranging but one element related to whether H would be taxable on income and gains arising in the AC Trust. In relation to this aspect the settled note of counsel's advice reads:

> "Counsel confirmed that with regard to the ACT structure . . . the settlor will be assessed on the UK source income arising to the Trust and underlying company structure (and the remittance basis is clearly not applicable).
>
> If the settlor and his wife were excluded from the settlement then the UK source income would not then be assessed on them on an arising basis. They would have to be irrevocably excluded and Counsel thought this would be a pretty drastic measure."

46 According to Mr. Thompson, at that time, the AC Trust's UK source of income was relatively modest and he opines that it may have been considered by H that there was no urgent imperative to have himself and his wife excluded. According to Mr. Thompson, as a consequence of certain changes brought about to the taxation regime by the 2008 UK budget, his firm wrote to H explaining the taxation liabilities he would be exposed to. Essentially, from the 2013/14 tax year onwards, if either he or W were to remain beneficiaries of the trust, he would have to pay a remittance basis charge of £30,000 annually, or pay tax on an arising basis on all of the AC Trust's worldwide income and gains. HW Fisher ceased to act for H in 2012 and had no involvement with the 2012 deed of exclusion, and although Mr. Thompson's statement is given *qua* witness of fact, he does however go on to opine that their exclusion as beneficiaries "was not an unreasonable tax planning step in relation to the Trust."

47 The evidence of H and Mr. Bowers, as to how matters progressed in respect of the exclusion following counsel's advice, is to the same effect: that H requested his and W's exclusion but that the then trustees did not at the time think it necessary to take such a step. On January 24th, 2011, HW Fisher wrote to H informing him that he would become liable to a remittance basis charge. On a similar vein, HSBC Private Bank wrote to John Murphy of Andco Corporate Services Ltd. (the Isle of Man licensed corporate service company of which Mr. Bowers is a director), in relation to a related Cayman Islands trust, and pointed out the need for comprehensive tax advice, in part as a consequence of changes to rules in 2008 which had an impact on non-domiciled individuals and related structures.

48 According to H, Mr. Bowers and Mr. Bennett were both approaching retirement and expressed their intention to resign and, before the move, the trustees agreed to bring the affairs of the trust up to date, and the exclusion of H and W was addressed in that context. In his witness statement, Mr. Bennett sets out factors considered by him before executing the deed (at para. 17):

> "Before executing the Deed of Exclusion, I discussed its contents with Ned [Mr. Bowers]. Since the Trust was intended for the next generations of the family, and was not intended to benefit [H] or his wife, I was not greatly concerned about the removal of [H] or his

> wife. However, I do recall discussing with Ned whether the exclusion would have any impact on the family. Ned's view was that [H] was comfortably situated and the exclusion would not have a detrimental effect on him or his family. This accorded with my own understanding, which was that [H] was a successful executive who did not need to draw on the Trust's assets. In relation to [W], I was comfortable that [H] was sufficiently well off in his own right to be able to provide for his wife. As I had no notion of any problems in their marriage, I did not give the issue of [W's] position much further thought than that. As I have said, the exclusion was driven by UK tax issues, and not by any desire to 'shut out' [W] as a result of marital problems."

For his part Mr. Bowers provides the following explanation at para. 2.6 of his witness statement:

> "Cains Advocates Limited, Manx advocates ('Cains') drafted the relevant deed. The Protector was consulted in relation to the proposed exclusion and asked if he consented to the proposed exclusion, which he did. We then considered whether it was appropriate to exclude [H], his wife and mother from benefit under the ACT. The Trustees treated [H], [W] and [H's] mother equally and we decided that it was appropriate to make the exclusions given that:—
>
> 2.6.1 [H] was able to look after his wife out of his income. It was clear to us that there was sufficient provision outside of the ACT for [H] and [W] from [H's] employment salary and an unencumbered house, and sufficient provision was available to H's mother from her husband.
>
> 2.6.2 The tax advantage of making the exclusion. My understanding at the time was that if [W] and [H] had not been irrevocably excluded as discretionary beneficiaries of the ACT, [H] would personally have been liable for tax on all Trust income, regardless of source or whether the funds were remitted to them or not, or there was at least a very real risk that he would have been made so liable. It was therefore in the family's interest to remove this risk."

49 For his part, Mr. Joosab, the protector of the trust, in his witness statement sets out his experience as a trustee and company director and his awareness of "fiduciary positions of responsibility." He details the steps and matters he took into account before consenting to the exclusion, including a telephone conversation with Mr. Murphy of Andco Corporate Services Ltd. and a discussion with his own accountant and "trusted adviser." A summary of the basis for his consent is to be found at para. 23 of his witness statement:

> "Ultimately, given what I was told regarding the tax advantages of the exclusion, and on the basis that I was content that [H's] employment, and the sizeable family home, meant that [H] was able to provide for himself and his family without needing to use Trust assets, I felt that the exclusion was a proper step for the Trustees to take. In those circumstances, I felt able to give my consent."

50 W's not participating in these proceedings self-evidently has the effect of her not advancing a case. However, in the English statement of case, the basis for her challenge to the validity of the 2012 exclusion deed is set out in some detail. In it, she asserts that at the end of June 2012, W moved out of the matrimonial bedroom as H was having an affair, that, as evidenced by certain emails exchanged from June 25th–28th, 2012, they had agreed to a "collaborative divorce." But that on July 9th, 2012, H met with lawyers from Hassans and informed them that W had already been excluded as a beneficiary even though in fact this was not to happen until September 2012. W goes on to assert that the 2012 deed of exclusion did not come about because of fiscal considerations and that this can be seen from the fact that there is no contemporaneous tax advice, with reliance having to be placed on the 2006 advice of Mr. Baker, Q.C. On the basis of those assertions, W says that the inference that should be drawn is that H procured her exclusion from the AC Trust to protect himself from financial claims by her. In the English statement of case, reliance is also placed upon the timeline leading to execution by the protector of the document evidencing his consent to the exclusion, and a reference in an email from John Murphy of Andco Corporate Services Ltd. to the trust's lawyers, which was copied to H, in which reference is made to obtaining the signature of the protector. It is said that this evidences that the protector did not properly consider the appropriateness of the exclusion.

51 On the basis of those allegations, it is said that if either the trustees or protector blindly followed the direction of H (or another person), their fiduciary duties would not have been exercised, rendering the 2012 deed of exclusion void. As I understand it, in context of the same allegations of fact, and in the alternative, it is said that the trustees and protector failed to properly exercise their fiduciary powers which should have been undertaken:

> "(1) in good faith;
>
> (2) for the benefit of the beneficiaries;
>
> (3) after proper consideration, having taken all and only relevant matters into account;
>
> (4) for the proper purpose in respect of which each power was given them."

And that such failure renders the exclusion voidable.

52 An additional argument is deployed in relation to the exercise of the protector's powers, in respect of which it is said that if (which it is denied) cl. 11 of the original trust deed allows the trustees to ignore the interests of any person interested, that power is not extended to cover the protector's exercise of his discretion, and therefore the protector cannot ignore the interests of a beneficiary whose exclusion was in prospect.

Discussion

53 The circumstances in which the court will consider the exercise of powers vested in a trustee were considered in an unreported judgment of Robert Walker, J., later quoted in *Public Trustee* v. *Cooper* (3) ([2001] W.T.L.R. at 922):

> "'At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).
>
> (1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to . . . [He then gave an example.]
>
> (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded

in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries.

(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.

(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court. I mention that fourth category, obvious though it is, for a reason which will appear in a moment.'"

The present case does not fall squarely into any of the four categories but I accept the submission advanced on behalf of H and A that it is closest to a category 4 case because although it is not hostile in the sense that the claim is not brought by W, it arises as a consequence of her challenge to the exclusion deeds in the English proceedings. I accept the submission that the onus is upon W to prove invalidity. The difficulty is that because of W's non-participation, the proceedings have not been adversarial and the evidence advanced by Line Trust is unchallenged. The case advanced by W in her English statement of case cannot be construed or treated as the evidence of a witness of fact and therefore the evidential burden which she carries is only capable of being discharged through an analysis of the evidence advanced by Line Trust.

54 There is generally no way of being absolutely certain as to whether or not a witness is telling the truth. In this case, undertaking that assessment is particularly difficult given that the evidence has not been

tested through cross-examination. Given the marital difficulties that prevailed at the time, I treat H's evidence and motivation in seeking the exclusion with an element of caution, however, the witness statements of the then trustees are compatible with that of the protector and of H, and the evidence of each of them is internally consistent and not self-contradictory. I therefore accept it.

55 *Lewin on Trusts*, 19th ed. (2015), accurately sets out the approach to be taken by the court when controlling the exercise of powers by trustees (para. 29–336, at 1386):

> "Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, *bona fide* and uninfluenced by improper motives . . . The principle is both that the court will not interfere before the trustees have acted to compel a particular exercise of the power and, except as stated, that after they have acted it will not overturn their exercise of the power. The mere fact that the court would not have acted as the trustees have done is no ground for interference. The settlor has chosen to entrust the power to the trustees, not to the court." [Footnotes omitted.]

Mr. Wilson in his skeleton argument, adopting language from *Lewin*, properly identifies what would have to be established for the court to make a determination that the 2012 exclusion deed is invalid. The evidence would have to show that the trustees:

(1) failed to act responsibly and in good faith;

(2) failed to take only relevant matters into account;

(3) failed to act impartially; or

(4) acted for an ulterior purpose.

In my judgment, the evidence does not disclose any breaches of those duties by the then trustees, other than evidently the duty to act impartially. But in the present circumstances, that duty is rendered meaningless given that the power of exclusion allowed the trustees to discriminate as between the beneficiaries whilst cl. 11 allowed them to ignore the interests of beneficiaries.

56 As regards the possible argument that the power to discriminate does not extend to cover the protector's exercise of his discretion and that therefore the protector cannot ignore the interests of a beneficiary whose exclusion is in prospect, I have not had the benefit of having that argument developed, but I do not see how it is made out. Although a protector owes fiduciary duties, those duties arise in the context of the trust deed and his role is to oversee the trustees in their discharge of certain obligations. If,

notwithstanding cl. 11, the protector were to have an overriding obligation to act impartially, the effect would be to render cl. 11 and the power of exclusion which cl. 9 affords nugatory; that would offend an objective and contextual interpretation of the original trust deed.

57 For these reasons I am satisfied that the 2012 deed of exclusion validly and irrevocably excluded H, W and A.

The 2015 deed of exclusion

58 H and W having been validly and irrevocably excluded by the 2012 deed of exclusion, the second limb of Line Trust's claim does not fall for consideration, in that having been excluded in 2012, they could not be re-excluded by the 2015 deed of exclusion.

59 What falls for determination in respect of the 2015 deed of exclusion is a narrow point of interpretation. So far as is material the deed provides:

> "1. The Trustees in exercise of clause 21 of the Trust and of every other power them enabling HEREBY IRREVOCABLY DECLARE that the Excluded Persons will be wholly excluded from future benefit under the Trust as from the date of execution of this Deed.
>
> . . .
>
> THE SCHEDULE
>
> (the Excluded Persons)
>
> 1. Any child or grandchild of the Settlor who is under the age of 18 (eighteen) years.
>
> 2. . . ."

The question that arises is whether, on its proper construction:

(i) X and Y (and others in their class) are only temporarily excluded while they remain under the age of 18 and regain their status as beneficiaries as soon as they achieve their majority; or

(ii) X and Y (and others in their class) were irrevocably excluded from benefit for all time upon the execution of the deed.

60 The approach to be taken in interpreting a written instrument was very recently considered by the UK Supreme Court in *Wood* v. *Capita Ins. Servs. Ltd.* (4) in which Lord Hodge said ([2017] A.C. 1173, at para. 10):

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the

> court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

And later (*ibid.*, at para. 11):

> ". . . where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense."

61 Given that the 2015 deed of exclusion was professionally drafted, particular weight must be given to the language used. However, according to Ms. Moss (a director of Line Trust), it came about as a consequence of certain tax advice that H had received from a Ms. Anna Steward at Charles Russell, in relation to both the AC Trust and a Cayman Islands law trust. That assertion is supported by an email from John Murphy of January 19th, 2015, to a trust administrator at Line Trust, and to a partner at Hassans who act as legal advisers:

> "[H] has been taking tax advice on his 2 Trusts from Anna Steward at Charles Russell, who has recommended that a deed of exclusion is entered into by both Trusts, to avoid the Trusts being considered a 'relevant person' from a UK income tax perspective.
>
> I attach the deed of exclusion that she has produced for the Cayman Trust.
>
> Could you please tweak this to suit the [AC Trust] and Gibraltar law . . ."

That it was fiscal considerations alone that applied is also evidenced by internal email communications within Line Trust and, in my judgment, it is plain from the deed itself. It is apparent from that context that it was not intended to exclude X and Y and others in their class for all time.

62 Moreover, there is an overarching point. On the evidence before me, the purpose of the AC Trust is dynastic and to adopt a meaning that excludes H's children and grandchildren from benefitting from the AC Trust would defeat that purpose for two generations. Objectively that cannot have been intended by the trustee.

63 For these reasons, on a proper construction the 2015 deed of exclusion is to be interpreted to mean that X and Y (and others in their class) are only temporarily excluded, and they will automatically regain their status as beneficiaries upon attaining 18 years of age.

64 Orders accordingly and I shall hear the parties as to costs.

Orders accordingly.