[2021 Gib LR 578]

CHURCH LANE TRUSTEES LIMITED (as trustee of the PILGRIM TRUST) v. E. BUNYAN and SEVEN OTHERS

SUPREME COURT (Dudley, C.J.): October 20th, 2021

2021/GSC/28

Trusts—powers and duties of trustees—exercise of discretion—sanction of court—court sanctioned trustee's decision to make final distribution of assets and terminate trust—trustee made painstaking effort to undertake fair process and proposals rational

Trusts—rights of trustees—reimbursement and indemnity—trustee has right of indemnity in respect of costs honestly and reasonably incurred—doubt to be resolved in favour of trustee—in absence of itemized and particularized objections to charges, trustee entitled to order approving its final accounts of administration of trust

A trustee sought orders in relation to a trust.

The trust was established in 1999 and the settlor died in 2007. He had been married three times. The third defendant (Susannah) was the settlor's widow and the first defendant (Edward), who was a young adult, was the child of that marriage. The settlor had two sons from his first marriage: the second defendant (Michael), who at the time of the settlor's death was in his 60s and semi-retired; and Christopher, who had died in 2004. The fourth and fifth defendants were Michael's adult children, and the sixth, seventh and eighth defendants were Christopher's adult children. The beneficial class of the trust included the settlor, Susannah, and the children and remoter issue of the settlor. The trust period was defined as 100 years or such earlier date as the trustees might specify. The trustee had considerable discretion under the trust and the settlor had provided guidance in letters of wishes.

The trust assets were divided into two parts: the Lloyds Fund and the Principal Fund. The Lloyds Fund comprised the shares in three companies (Greatheart Underwriting Ltd., Greatheart (UK) Holdings Ltd. and Greatheart UK Ltd.) and two accounts. Greatheart UK Ltd. carried on business as an insurance underwriter and was the principal business trading asset of the trust. The Principal Fund held the benefit of a loan owed by Greatheart and a portfolio of investments and cash.

In his last letter of wishes, the settlor requested that the Lloyds Fund be held in trust in equal shares for Michael and Edward, and that if they wished

to cease trading at Lloyds, Greatheart be wound up and distributed to Michael and Edward in equal shares. The settlor also set out his wishes in respect of the Principal Fund, from which Susannah, Edward, Michael and the grandchildren should benefit.

The trustee sought an order approving its final accounts of the administration of the trust; an order approving the trustee's decision to make a final distribution of the assets of the trust and thereby to determine the trust; and an order that the trustee be indemnified for its costs and expenses from the trust in relation to the claim. The overarching principles of the trustee's proposal were: (i) that the trust's shares in Greatheart be appointed to Michael and Edward in equal parts; (ii) that the liquid funds of the Lloyds Fund be distributed on the basis of equality between Michael and Edward, taking into account and equalizing the distributions made to Michael and Edward since the settlor's death (as at December 31st, 2020, £528,038 had been distributed to Edward and £167,979 to Michael); and (iii) that the Principal Fund be distributed to Susannah, Michael and Edward in line with the proportions in the settlor's letter of wishes, albeit that the trustee intended to take account (a) in making a distribution to Susannah, of the costs and expenses to the trust from hostile claims previously brought by her; and (b) of the remaining deficit in the equalization process between Michael and Edward. As distributions had already been made to the grandchildren, the trustee did not propose to make further distributions to them.

The trustee decided to hold Susannah responsible for £450,000 of the costs arising from her hostile litigation but in order to do so it would notionally gross-up the Principal Fund by that sum and then deduct it from the notional share which would have been distributed to her. In effect, the actual sum debited from her share was some £270,000. The trustee's reason for that approach was that Susannah should receive some money upon final distribution, notwithstanding the litigation history and that, if the cost of litigation had simply been deducted from her share, the sum distributable to her would have been minus £106,559.

Susannah raised concerns as to the level of fees. Edward contested the claim and applied for permission to instruct an expert accountant. He was given permission to do so and the court ordered that any expert report filed should set out the objections to the time charges and disbursement in the trust accounts as Edward intended to raise at the final hearing, in each case itemizing and providing reasons for any objections. The report prepared by a chartered accountant on behalf of Edward failed to itemize or provide particularized reasons for objecting to the trustee's charges and disbursements, and failed to comply at all with the requirements for expert evidence in CPR Part 35.

Edward's objections to the trustee's proposals concerned (a) a purported lack of disclosure by the trustee as regarded its decision-making process; and (b) the alleged failure by the trustee to take account of the disparity in age between Edward and Michael, and the trustee's decision to use the settlor's date of death, as opposed to Edward's 18th birthday, as the operative date for the purposes of the equalization process.

Held, granting the orders sought by the trustee:

(1) This was a *Public Trustee* v. *Cooper* category 2 case. The trustee sought approval without surrendering its discretion. The applicable principles were (i) the decision that was sought to be blessed was one that could be described as momentous; (ii) the trustee had in fact formed the opinion that it should act in the way for which a blessing was sought; (iii) the opinion of the trustee was one at which a reasonable body of trustees, correctly instructed as to the meaning of the relevant trust provisions, could properly have arrived; and (iv) the opinion was not vitiated by any conflict of interest under which any of the trustees laboured. In the present case, as regarded (i), it was self-evident that the decision to distribute the entirety of the trust assets and terminate the trust was a momentous decision. As regarded (ii), the trustee had evidently formed an opinion to distribute the assets in the manner in respect of which blessing was sought and consequently to terminate the trust. As regarded (iv), the unchallenged evidence was that the trustee had made the decision in good faith and was not aware of any conflict that would taint the soundness of the proposal. The core issue was whether the trustee satisfied (iii). The reasonableness test had two aspects: process and outcome. As regarded process, the court must consider whether the trustee had taken into account relevant matters and not taken into account irrelevant matters, and as regarded outcome, the court must be satisfied that the decision was one to which a rational trustee could have come (paras. 38–41).

(2) The weight which a trustee should attach to the wishes of a settlor was well established. Such wishes were always a material consideration in the exercise of fiduciary discretions. However, if they were to displace all independent judgment on the part of the trustee, the decision-making process would be open to serious question (para. 43).

(3) The trustee's decision that Susannah should carry some of the burden of the cost to the trust of the previous hostile litigation was wholly rational, as was the decision to take account of the settlor's wish that Susannah should derive a benefit from the trust and therefore undertake the notional grossing-up exercise rather than hold her directly responsible for the total loss to the trust. Although Edward was a co-claimant in the first action, he had been a minor and it was rational for the trustee to consider that it would be inequitable to burden Edward with litigation costs in respect of proceedings brought by Susannah very largely for her benefit (para. 55).

(4) Edward's objection based on the ground of non-disclosure failed. It was well established that trustees exercising a discretion were not in general required to disclose reasons for their decisions, although the court had a discretion to order disclosure if the circumstances of a case so required. In the present case, there were no circumstances which justified any further disclosure by the trustee. The reasons for the trustee's proposal had been set out and a director of the trustee had given evidence and been cross-examined. There was no evidential basis to support the proposition that the trustee had failed in its duty of candour (para. 62).

(5) In respect of Edward's objection as to the alleged failure by the trustee to take account of the disparity in age between Edward and Michael, Edward was in effect calling for the trustee to take account of the relative life circumstances of the beneficiaries when making dispositions and import into the exercise of discretion a value judgment as to whether Edward or Michael was more deserving. It could be a legitimate consideration which the trustee could have taken into account. However, absent a specific provision in the trust, it was not a consideration which if not taken into account vitiated the decision, particularly in circumstances in which the trustee's decision accorded with the expression of wishes (para. 67).

(6) It was wholly appropriate for the court to exercise its discretion and approve the trustee's proposal. The evidence advanced by the trustee reflected a painstaking effort to undertake a fair process in taking the decisions that it had and the principles underpinning the proposal were rational (para. 69).

(7) In relation to the trustee's accounts claim, by seeking the approval of its accounts, the trustee was entitled to require any challenge by a beneficiary to have been made in these proceedings and thereby prevent any future uncertainty or dispute. A trustee had a right of indemnity in respect of costs honestly and reasonably incurred. A doubt as to whether costs had been incurred by a trustee honestly and reasonably was to be resolved in favour of a trustee. Objections to charges incurred by a trustee as being unreasonable had to be itemized and particularized. Susannah and Edward had not provided any such itemization or particularization, notwithstanding the consent order requiring Edward's expert to itemize and provide reasons for any objection. In their absence, the trustee was entitled to an order approving its final accounts of its administration of the trust (para. 73).

(8) It followed that the trustee was also entitled to an order that it be indemnified for its costs and expenses from the trust in relation to this claim (para. 74).

Cases cited:

(1) *AAA Children's Trust*, *Re*, Judgment 29/2014, Guernsey Royal Ct., January 8th, 2014, unreported, considered.
(2) *Allen* v. *Jarvis* (1869), L.R. 4 Ch. App. 616, considered.
(3) *Close Trustees (Switzerland) SA* v. *Castro*, [2008] EWHC 1267 (Ch); [2008] 10 ITELR 1135, considered.
(4) *Davies* v. *Watkins*, [2012] EWCA Civ 1570, considered.
(5) *Fiduciary Trust Ltd.* v. *None Named*, 2018 Gib LR 187, considered.
(6) *ITG Ltd.* v. *Glenalla Properties Ltd.*, 2021 GLR 10, considered.
(7) *Londonderry's Settlement*, *In re*, *Peat* v. *Walsh*, [1965] Ch. 918; [1965] 2 W.L.R. 229; [1964] 3 All E.R. 855, referred to.
(8) *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Barnes* (1941), 64 CLR 268, considered.

(9) *Pitt* v. *Holt*, [2013] UKSC 26; [2013] 2 A.C. 108; [2013] 2 W.L.R. 1200; [2013] 3 All E.R. 429; [2013] S.T.C. 1148; [2013] Pens. L.R. 195, considered.
(10) *Public Trustee* v. *Cooper*, [2001] W.T.L.R. 901, referred to.
(11) *Tao Soh Ngun* v. *HSBC Intl. Trustee Ltd.*, [2019] HKCFI 1268, considered.

L. Baglietto, *Q.C.* with *S. Garg* (instructed by Hassans) for the claimant;
C. Finch (instructed by Verralls Barristers & Solicitors) for the first defendant.

1 **DUDLEY, C.J.:** This is the judgment following the trial of a Part 8 claim by which the claimant trustee ("the trustee") pursuant to CPR 64.2 and/or under the inherent jurisdiction of the court seeks the following orders in relation to the Pilgrim Trust ("the trust"):

(a) an order approving the trustee's final accounts of the administration of the trust ("the accounts claim");

(b) an order approving the trustee's decision to make a final distribution of the assets of the trust and to thereby determine the trust ("the "pproval claim"); and

(c) an order that the trustee may be indemnified for its costs and expenses from the trust in relation to the claim.

2 The trust was settled by the late John Bunyan ("the settlor"). The trustee is the sole corporate trustee of the trust. For ease of reference, and without intending any disrespect, I refer to the defendants by their first names. The settlor died on June 15th, 2007. He had been married three times. The third defendant ("Susannah") is the settlor's widow and the first defendant ("Edward") is the only child of their marriage. Edward is a young adult, the settlor having died when he was ten years of age. The settlor had two sons from his first marriage, the second defendant ("Michael") and the late Christopher Bunyan who died in 2004. According to Susannah's evidence, at the time of the settlor's death, Michael was 64 years of age and semi-retired. The fourth and fifth defendants ("Claire" and "Simon") are Michael's adult children. The sixth, seventh and eighth defendants ("Charlotte," "Laura" and "Mark") are the adult children of the late Christopher Bunyan. I refer to the fourth to eighth defendants together as "the named grandchildren."

Procedural background: Susannah

3 Having previously made certain proposals in relation to the final distribution of trust assets, the trustee issued this claim on June 13th, 2019. Each of Michael and the named grandchildren filed and served

acknowledgments of service not contesting the claim. They have not served any evidence and did not appear at the trial.

4 Susannah filed and served an acknowledgment of service. Initially she was represented by Robert Fischel, Q.C. who (like Mr. Finch) was instructed by Verralls Barristers & Solicitors. By her acknowledgment of service, Susannah indicated that she did not intend to contest the claim, although she went on to state that whilst she did not dispute the need to determine the trust in principle, she was "concerned at the level of fees incurred on the Trust." She stated that she would file evidence highlighting her concerns and expressed the view that there was a need for a forensic accountant and/or a costs draftsman to be engaged. Thereafter, when an application was in due course made by Edward for permission to instruct an expert, Susannah's then counsel expressly stated that she was not seeking permission to instruct an expert.

5 By her first witness statement, dated September 6th, 2019, Susannah asserted that the trust is "an interest in possession trust" as opposed to a discretionary trust. She provided a description and explanation of earlier litigation between her and the trustee; raised concerns in respect of alleged conflicts of interest between the trustee and Abacus Financial Services Ltd. (which has been engaged by the trustee to provide administration services to the trustee); and questioned the level of involvement by the trustee's lawyers, asserting that their services were engaged when they were not required and that consequently there has been a duplication of charges. At her para. 29 she stated that "prior to a final distribution of the Trust, I would like a professional to review these accounts to ensure that no misfeasance has occurred." Whilst purporting to reserve a right to file further evidence, she indicated she would desist from doing so pending determination of an application by Edward for the appointment of an expert accountant, which application was in the event successful.

6 By notice of change of legal representative dated December 9th, 2020, Robert Fischel, Q.C. ceased to act and thereafter Susannah has acted in person.

7 In a witness statement dated May 11th, 2021, Susannah persisted in her assertion that the trust is a "Qualifying Interest in Possession Trust." According to her, the settlor made himself principal beneficiary of the trust and was in full control of its management and he "used the trust as a vehicle to avoid paying more taxes than he needed." She restated allegations made by her in earlier litigation, that she has an interest in assets settled into the trust; she sought to deal with her litigation conduct in earlier claims and described the evidence put forward by the trustee as "slanderous and false." The witness statement concludes by dealing with the expert witness instructed by Edward as follows:

> "The forensic accountant that was hired was unable to complete the job due to illness . . . We need time to find another accountant that can complete the job. Due to Covid and the restrictions imposed and the unforeseen circumstances of our accountant's plight, we need permission to find another firm to complete the job and to use as a witness."

Neither Susannah nor Edward filed an application seeking any such permission.

8 The day before the start of the trial Mr. Finch emailed the Registry and, *inter alia*, stated:

> "I should mention at this point that Susannah Bunyan is unwell and cannot attend tomorrow's hearing. I will do my best to assist but I will be slightly impaired as I have to avoid a conflict arising with Edward."

Later that day, in the context of disparate views as to whether or not offers of settlement had been made, in an email directed to an officer in the Registry, Mr. Finch said: "Mrs Bunyan is not trying to torpedo the court hearing; I am told she is unwell in an email."

9 The trial of the action started on May 25th, 2021 and in the event Susannah did not attend. There is no record of her contacting the Registry to indicate why she was unable to attend or whether she wanted the trial adjourned. Mr. Finch on behalf of Edward did not seek an adjournment. I considered whether I should adjourn the trial but I formed the view that had an application for an adjournment been made by Susannah, it would have had to be supported by some medical evidence and that in the event that I had granted an adjournment, it would likely have been on the basis of an adverse costs order in respect of the costs thrown away by the trustee and Edward in preparing for the trial. Absent an application for an adjournment, it would have been wrong to make an adverse costs order against Susannah. In the circumstances I ruled that the trial would proceed.

10 The hearing concluded on May 27th, 2021 when I reserved my judgment. Susannah emailed the Registry on May 28th, 2021 and said: "Please forward the attached medical certificate to the Chief Justice as I understand he did not receive it." The medical certificate was issued on May 26th, 2021 by a doctor practising in Spain and sets out certain details relating to Susannah's then medical condition and expressing the opinion that she was not fit to attend court on May 27th, 2021. No explanation was given as to how I was supposed to have received the medical certificate earlier.

Procedural background: Edward

11 By his acknowledgment of service, Edward stated his intention to contest the claim and to seek "[a] full account and investigation by a Qualified

Chartered Accountant experienced in auditing trust accounts and a stay of [the claim] until that report is completed."

12 By an order dated March 3rd, 2020, the trustee and Edward were given permission to instruct an expert in the field of trust management and/or accounting to opine on the trustee's charges and disbursements. By an order dated June 4th, 2020, entered by consent, the earlier order was varied and the scope of Edward's expert report was circumscribed as follows:

> "Any expert report filed by [Edward] shall set out such objections to the time charges and disbursements set out in the trust accounts as [Edward] intends to raise at the final hearing, in each case itemising and providing reasons for any objections . . ."

13 A report was prepared by Mr. Keith Lawrence, a chartered accountant ("Mr. Lawrence") on behalf of Edward which was served on Hassans. As accurately submitted by Mr. Baglietto, the report not only failed to itemize or provide particularized reasons for objecting to the trustee's charges and disbursements, but also failed to comply at all with the requirements for expert evidence of CPR Part 35. Moreover, it engaged in matters of fact and law in a manner not appropriate in the context of expert evidence. Following certain email exchanges between Mr. Baglietto and Mr. Finch, *inter alia*, in relation to Mr. Lawrence's report, in an email dated April 23rd, 2021, Mr. Finch stated:

> "Keith Lawrence provided *a draft report* as an accountant on the instructions of Edward; he was not instructed as an independent expert in that sense, and your suggestion that your objections are legitimate is self-serving, as is your reference to more costs from an ever-depleting fund. Keith Lawrence is suffering from terminal cancer and is in no condition to work or give evidence, so if no agreement is reached, we will need time for a substitute to be instructed. And don't forget that even if the report is not technically admissible, I can still cross-examine on its contents and answers will still have to be given." [My emphasis.]

Although as aforesaid, by her second witness statement Susannah appeared to foreshadow an application to seek the appointment of another expert, no such application was made by either Susannah or Edward.

14 Mr. Baglietto did not object to the admissibility of Mr. Lawrence's (possibly draft) report, as I understood it out of a sense of pragmatism, and because according to him, in any event the issues raised had been dealt with in the trustee's evidence.

15 Beyond that, the evidence filed by Edward in these proceedings is limited to two witness statements dated November 26th, 2019 and January 29th, 2020, *inter alia*, in support of an independent investigation into the

trust's accounts, and which in the event led to the order granting permission to appoint experts.

The trustee's evidence

16 The trustee's evidence in support of the claim is to be found in the four comprehensive witness statements with substantial exhibits of Robert Guest ("Mr. Guest"). Mr. Guest is, and has been since February 18th, 2013, a director of the trustee. Mr. Guest also gave oral evidence and was cross-examined.

The trust

17 The trust is established under the laws of Gibraltar by declaration of trust made by Abacus Trustees (Gibraltar) Ltd. on August 16th, 1999. The trustee was appointed to succeed the former trustee upon its retirement on October 15th, 2001. It is evident that, if a label is to be used to describe the trust, "discretionary" is apposite. As aforesaid, in her witness statement dated May 11th, 2021, Susannah asserts (without providing a basis for the assertion) that the trust is a "Qualifying Interest in Possession Trust." That is not the position she adopted in earlier litigation. By her draft re-amended particulars of claim, in Claim 2008/B/163 she asserted that the trust "is and was a discretionary trust." On appeal from a decision in that claim, in a judgment of March 6th, 2014 (Civ. App. No. 7 of 2013), Sir Paul Kennedy P. set out the position as follows: "The trustees had considerable discretion under the terms of the trust, and John Bunyan gave them guidance in Letters of Wishes."

18 Whatever the short-hand label used to describe the trust, what is important are its terms. In the context of these proceedings the following provisions are relevant:

(a) Clause 1.1 defines the class of beneficiaries as including the settlor (as "the Principal Beneficiary"), Susannah, and the children and remoter issue of the settlor. Without any amendment to the class of beneficiaries in substance, by a deed of nomination and addition of beneficiary dated February 21st, 2008, Edward, Michael and the fourth to eighth defendants were expressly named as beneficiaries of the trust.

(b) Clause 1.10 defines the trust period as 100 years ("the applicable perpetuity period") or "(ii) such earlier date as the Trustees shall by deed specify (not being a date earlier than the date of execution of such deed)."

(c) Following the death of the settlor/principal beneficiary, cl. 5.1 provides the trustees with a discretionary power of appointment on the following terms:

"The Trustees shall hold the capital and income of the Trust Fund upon trust for or for the benefit of such of the Beneficiaries at such ages or times in such shares upon such trusts (which may include discretionary or protective powers or trusts) and in such manner generally as the Trustees shall in their absolute discretion appoint and any such appointment may include such powers and provisions for the maintenance education or other benefit of the Beneficiaries or for the accumulation of income and such administrative powers and provisions as the Trustees think fit."

(d) Clause 5.5.1 (as extended by cl. 8) provides the trustee with a discretionary power of advancement.

(e) Clause 9.2 provides that the trustee—

"shall be entitled in addition to reimbursement of its proper expenses to remuneration for its services in accordance with its published terms and conditions for trust business in force from time to time and in the absence of such published terms and conditions in accordance with such terms and conditions as may from time to time be determined by such Trustee or protector."

(f) Clause 24 of Schedule 1 provides the trustee with a power to employ and pay at the expense of the trust any agent to "do any act in the execution of these trusts."

19 The original protector of the trust, until his retirement on October 23rd, 2006, was the settlor. Thereafter, Joshua Kirkpatrick, the husband of one of the settlor's granddaughters, was appointed as protector in place of the settlor. Joshua Kirkpatrick retired as protector on May 30th, 2017. It is said for the trustee that given the trustee's intention to make a final distribution of the trust assets at that stage (subject to the conclusion of the then pending litigation by Susannah against the trustee), the protector has not been replaced.

The trust assets

20 The trust assets are divided into two parts, the Lloyds Fund and the Principal Fund. According to Mr. Guest, whose evidence in this regard is not challenged, at present the primary assets of these two parts are as follows.

21 The Lloyds Funds:

(i) The shares in three companies, Greatheart Underwriting Ltd., Greatheart (UK) Holdings Ltd., and Greatheart UK Ltd. (together, "Greatheart"). Greatheart UK Ltd. carries on business as an insurance underwriter at Lloyd's of London and is the principal business trading asset of the trust.

(ii) The CLT2 account, in credit in the sum of some £50,920. The purpose of which is to support Greatheart's underwriting business. But which has also been used to make distributions to Edward and, more recently, to pay for general expenses relating to the administration of the trust.

(iii) The CLT3 account, in credit in the sum of some £145,095. Which account was established in 2018 to segregate for Michael's benefit an equivalent amount that was being distributed by the trustee to Edward.

22 The Principal Fund:

(i) The benefit of a loan owed by Greatheart in the sum of approximately £280,000 ("the Greatheart loan")

(ii) A portfolio of investments and cash that are held with Lloyd's ("the investment portfolio") amounting to some £550,000.

The expression of wishes

23 The settlor executed a number of letters of wishes during his lifetime. The last, which is a detailed document executed shortly before his death, dated May 20th, 2007 ("the expression of wishes"), states that it is a revised expression of wishes for the trustee's reference after the settlor's death and requests that previous letters of wishes be destroyed. Paragraph 2.2 of the expression of wishes states: "The Lloyd's Funds are to be held in Trust in equal shares on behalf of two participants only, my two surviving sons, Michael John Bunyan and Edward John Bunyan." Albeit describing it as a 50% share each, that same wish is repeated at para. 14. Paragraph 2.6 also provides:

> "In the event of a joint decision, by Michael and Edward . . . to cease trading at Lloyd's, Greatheart is to be wound up and the residual assets distributed by crediting to his share of the Principal Fund the amount due to each, in equal shares."

The settlor's wishes in respect of the Principal Fund are provided for at para. 13 and is somewhat more convoluted. [Its provisions are set out in the table overleaf.]

24 Paragraphs 3.1.1 and 3.1.2 of the expression of wishes provide that the trustee may distribute to the named grandchildren their share of the Principal Fund standing to their credit at the time of the settlor's death. Between March and May 2008, the trustees in line with those provisions (but as Mr. Guest makes clear) in accordance with its discretion, made distributions of £178,111.81 to each of the named grandchildren. The trustee does not intend to make any further distribution to them out of the trust fund.

"13.0 **Beneficiaries of the Principal Fund**	**Initial share of the capital of the Principal Fund**	**Remarks**
13.1 **Primary beneficiaries—as to income**		
Susannah Isabel Bunyan	20%	
Michael John Bunyan (MJB)	17%	(15% on his death)
Edward John Bunyan	13%	(15% on MJH's death)
13.2 **Secondary beneficiaries—as to capital**		
Clare Elizabeth Menyes *née* Bunyan	10%	Michael's daughter
Simon Harvey Bunyan	10%	Michael's son
Charlotte Lucy Barkworth, *née* Bunyan (my late son Christopher's daughter)	10%	
Laura Rose Kirkpatrick, *née* Bunyan (my late son Christopher's daughter)	10%	
Mark Paul Bunyan (My late son Christopher's son)	10%	
13.3 **Ultimate beneficiaries—as to capital**		
My grandchildren above and my youngest son Edward John Bunyan"		

25 The expression of wishes also takes account of Edward's maintenance and education at paras. 2.5 (the Lloyds Fund) and 4.3 (the Principal Fund) as follows:

> "2.5 Any sums due to my son, Edward, until he reaches the age of 25, should be added to his share of the Principal Fund, and used to help meet the cost of his maintenance and education. After his 25th birthday, subject to authorization by his mother Susannah, any income or profit, or part of it . . . may be paid to him direct."

And

> "4.3 A sufficient amount, at the Trustee's discretion, to cover the cost of Edward's maintenance and education, be it at school or at university, is to be paid on his behalf, first from his share of the Lloyd's Fund

and, if this proves insufficient, from his share of the Principal Fund, viz:§2.5"

26 As Mr. Guest makes clear in his evidence, the settlor made additional separate provision for the maintenance of Edward outside the scope of the trust, from the proceeds of a life insurance policy and a maintenance and accumulation trust, with distributions for Edward's benefit from those two sources amounting to £97,102.40. Some provision outside the scope of the trust was also made by the settlor for Susannah.

27 The expression of wishes also sets out certain wishes in respect of the management of the Lloyds Fund/Greatheart. The settlor's wish was for this to be undertaken in the first instance by Michael until resignation, death or incapacity with Edward taking over thereafter. This, however, was subject to the settlor's wish that if a brother wanted to continue the underwriting business and the other did not, they should "buy out" the other's share and also that if they jointly agreed to cease trading they should each benefit on a 50/50 basis.

Litigation between Susannah and the trustee

Susannah's first claim (claim 2008–B–163)

28 On October 24th, 2008, Susannah issued a claim in this court ("the first claim") naming Edward, who at the time was still a minor, as co-claimant. The claim was brought against the trustee, the protector, Michael and the named grandchildren. The particulars of claim were subject to various amendments and proposed amendments, but at one stage, as Mr. Guest accurately sets out in his first witness statement of June 11th, 2019, she alleged that the settlor had defrauded her by falsely representing to her that the trust was set up solely for the benefit of her, Edward and the settlor; that assets belonging to her and/or which were "matrimonial property" had been settled into the trust by her husband without her consent and that those assets were held by the trust on a constructive or resulting trust for her.

29 For the benefit of the trust's beneficiaries the trustee defended the trust against the first claim and properly obtained *Beddoe* relief from the court to do so.

30 Following various interim applications, by a judgment dated February 19th, 2013 (reported at 2013–14 Gib LR 9), Prescott, J. refused an application to re-amend the particulars of claim and struck out the claim as disclosing no reasonable cause of action. And, without prejudice to the trustee's right to be indemnified from the trust, Prescott, J. ordered Susannah to pay the costs of both the trustee and Michael (including £30,000 and £10,000 on account respectively).

31 Susannah appealed that decision. The trustee made an application for security for costs which was not successful, although the costs of that application were dealt with by an order for costs in the appeal. The substantive appeal was dismissed in a written judgment handed down on March 6th, 2014. Susannah had sought to rely upon fresh evidence, but in his judgment Sir Paul Kennedy, P. (with whom Parker, J.A. and Waller, J.A. agreed) concluded that:

> "That sort of document does not help [Susannah] in relation to the main issue we have to consider, namely the incoherence of her pleaded case. In my judgment the judge was right to bring this litigation to an end, and I would dismiss this appeal."

By a subsequent order of March 19th, 2014, the Court of Appeal ordered that Susannah (and Edward who was then a minor) were to pay the costs of the trustee and Michael in relation to the appeal. That evidently encompassed the costs of the security for costs application. It also ordered Susannah (and Edward) to pay £20,000 on account of the trustee's costs and a further £8,000 on account of Michael's costs. With that costs order being made without prejudice to the trustee's indemnity.

32 Susannah failed to pay the aggregate of £50,000 on account of the trustee's costs of the first claim and the appeal and consequently the trustee brought enforcement proceedings. During the course of those proceedings Susannah was committed to prison for contempt of court. After her committal, Susannah paid £50,000 on account of costs. However, Susannah resisted the payment of interest on the costs of the first claim. On May 18th, 2016, Mr. Registrar Yeats (as he then was), found that no interest was payable on the trustee's costs. The trustee appealed, and on April 25th, 2017 I reversed that decision. Susannah appealed to the Court of Appeal and by a judgment of October 20th, 2017 (reported at 2017 Gib LR 293), that decision was upheld. The upshot being that Susannah was liable for judgment interest on the trustee's costs.

33 On November 13th, 2017, Susannah entered into a consent order to pay the trustee £116,000 (in addition to the £50,000 which she had already paid), as I understand it, that sum related to the costs of the first claim including the appeal; the enforcement proceedings and the related litigation in relation to judgment interest. That sum was payable in full by Friday, December 8th, 2017 and thereafter it was to attract judgment interest at 8% per annum until payment. Those costs have not been paid by Susannah.

Susannah's second claim (claim 2015–B–127)

34 In parallel to resisting the costs of the first claim, on August 28th, 2015, Susannah issued a second claim ("the second claim") initially acting in person and later instructing Charles Gomez & Co. By her draft amended

particulars of claim, Susannah sought to advance a proprietary claim in relation to moneys settled in the trust.

35 The second claim was stayed by an order of this court, dated December 16th, 2016, until such time as Susannah paid the costs of the first claim. Thereafter on February 26th, 2018 an unless order was made requiring payment of the agreed £116,000 plus interest by no later than April 3rd, 2018, failing which the second claim was to be "automatically struck out and stand dismissed without further order." Susannah was also ordered to pay the costs of that application, which were summarily assessed at £5,884. As aforesaid, Susannah failed to effect payment of the costs of the first claim by April 3rd, 2018 or at all and therefore the second claim was struck out. She has also failed to pay the £5,884.

Susannah's third claim (2018–Misc–021)

36 Again acting in person, Susannah issued her third claim on May 25th, 2018. Particulars of claim were not filed and on June 29th, 2018 she filed a notice of discontinuance. Accompanying the notice was a letter to the Registrar which states:

> "To the Registrar,
>
> Please take this letter as notification that I would like to withdraw Claim# 2018/Misc/021.
>
> I keep being victimized by Mr L Baglietto with threats and oppressive actions. I have attempted to be reasonable and come to a fair agreement with the trustees without further litigation. However, Mr Baglietto continues to harass and terrorize me with further legal actions such as the bankruptcy notice and restraining orders. This is causing further unnecessary litigation and legal costs. He deliberately goes out of his way to induce obstruction of justice and the truth coming to light, making the whole procedure unethical and morally incorrect. It is a clear indication of what is known as tyranny and 'abuse of power'.
>
> Naturally, I am overwhelmed and distressed. For this reason, I have missed the deadline for the submission of the Particulars of Claim.
>
> Sincerely,
>
> Susannah Bunyan"

Objectively, it is an unfair characterization of how the litigation has been conducted by Mr. Baglietto.

The trustee's statutory demand

37 The reference in that letter to a bankruptcy notice is to a statutory demand dated May 18th, 2018, by which the trustees sought payment of

the various costs orders and interest thereon, in the total sum of £126,082.59. In the event and notwithstanding that Susannah, by her own admission, had been advised by Charles Gomez & Co. not to dispute the notice, she filed an application to have the notice set aside. In the event and by an order entered by consent, proceedings in respect of that application were stayed until a final order in respect of what was then a proposed application by the trustee to determine the trust.

The test to be applied in the approval claim

38 This is a *Public Trustee* v. *Cooper* (10) "category 2" case. The trustee seeks approval without the surrender of its discretion. If approval is granted a beneficiary cannot thereafter complain that the trustee's exercise of its power amounts to a breach of duty. Such protection is however subject to a trustee making full disclosure of all relevant matters and considerations.

39 The applicable principles are well established, and are not in dispute. They are set out and reviewed in *Lewin on Trusts*, 20th ed., at paras. 39–093 – 39–095 (2020). They are accurately summarized in the trustee's skeleton argument from which I draw, as follows:

(i) the decision that is sought to be "blessed" is one that can be described as "momentous";

(ii) the trustees have in fact formed the opinion that they should act in the way for which a "blessing" is sought;

(iii) the opinion of the trustees is one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant trust provisions, could properly have arrived at; and

(iv) the opinion is not vitiated by any conflict of interest under which any of the trustees was labouring.

40 As regards the first element, it is self-evident that the decision to distribute the entirety of the trust assets and terminate the trust is on any view a "momentous" decision. As regards the second element, the trustee has also evidently formed an opinion to distribute the assets in the manner in respect of which "blessing" is sought and consequently to terminate the trust. As regards any possible conflict of interest, Mr. Guest's unchallenged evidence as set out in his fourth witness statement is that—

> "the Trustee has made this proposal in good faith and is not aware of any conflict that would otherwise taint the soundness of a proposal that lies within the ambit of the Trustee's discretionary powers."

41 The core issue is whether the trustee satisfies the third element. As I put it in *Fiduciary Trust Ltd.* v. *None Named* (5) (2018 Gib LR 187, at para.

9) citing *Lewin on Trusts*, 19th ed., at para. 27–079 (now *Lewin on Trusts*, 20th ed., vol. 2, para. 39–095, at 628):

> ". . . once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

It is not in dispute that the decision to distribute the trust assets and thereby terminate the trust is within the ambit of the trustee's powers of appointment and advancement. Therefore, what falls for determination is the *reasonableness* of the trustee's decision. The *reasonableness* test has two aspects, which *Lewin*, *op. cit.*, at para. 39–095 headlines as *process* and *outcome.* As regards *process*, the court must consider whether the trustee has taken into account relevant matters, and not taken into account irrelevant matters. As regards *outcome*, the court must be satisfied that the decision is one which a rational trustee could have come to.

42 That account be had of all relevant matters is not an absolute imperative. *Lewin*, *op cit*, at para. 29–042, at 82 puts it as follows:

> "It has been said in some recent authority that trustees are bound to take into account *all* relevant matters. Taken literally the proposition cannot be correct. Most decisions,whether taken by trustees or by any other person, could be better informed. To hold the trustees to be in breach of duty for failing to consider every matter which they might sensibly regard as relevant would be at best burdensome on the trustees and, in cost and delay, on the beneficiaries; at worst it would paralyse decision-making . . . The duty to take relevant matters into consideration is in our view best regarded as an element in the duty to act responsibly, so that the trustees must have arational basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational." [Emphasis in original.]

That passage was cited with approval by Wilson Chan, J. in the Hong Kong Court of First Instance in *Tao Soh Ngun* v. *HSBC Intl. Trustee Ltd*. (11) ([2019] HKCFI 1268, at para. 196) and whose statement I respectfully adopt (*ibid.*, at paras. 200–201):

> "200. Thus any failure to take into account a relevant consideration (or to ignore an irrelevant consideration) should only constitute a breach of duty if the consideration in question was sufficiently fundamental or significant so as to deprive the trustee's decision of any rational basis.
>
> 201. Moreover—and this again may represent a significant difference from the public law sphere—what *weight* (if any) is to be given to any

particular consideration is a matter for the trustee. He is free to consider but not act or rely upon a matter as well as striking his own balance as to the relative significance to be accorded to matters in his reaching a decision." [Emphasis in original.]

The materiality of the expression of wishes

43 The weight which a trustee is to attach to the wishes of a settlor is well established. In the United Kingdom Supreme Court in *Pitt* v. *Holt* (9), Lord Walker described the approach in respect of a settlor's wishes as follows ([2013] 2 A.C. 108, at para. 66):

"The settlor's wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff) the decision-making process would be open to serious question."

The trustee's proposals

44 According to Mr. Guest, defending the trust from hostile claims by Susannah over more than a decade forced the trustee to incur many hundreds of thousands of pounds in costs. On the premise that the trustee had formed the view that any further claims by her would be summarily dismissed by the court, the litigation risk which prevented the termination of the trust and a final distribution was finally extinguished. Consequently, in a lengthy letter dated November 23rd, 2018, from Hassans to Edward, Michael and Susannah, the trustee proposed a final distribution of the trust assets in a manner that it considered was fair, just and equitable and in accordance with the settlor's wishes ("the original proposal letter"). Having received representations from Edward, Michael and Susannah, those proposals were modulated, albeit three overarching principles remain. In what is a complex proposal in the context of trust assets which themselves are subject to somewhat complicated arrangements, I set out those overarching principles without condescending upon the granular detail of cross-payments between the Lloyds Fund and the Principal Fund or the allocation of relatively small sums to an individual beneficiary. Which cross-payments or intended allocations were in any event not canvassed at the trial in any material way.

45 The overarching principles are:

(a) That the trust's shares in Greatheart be appointed to Michael and Edward in equal parts;

(b) That the liquid funds of the Lloyds Fund be distributed on the basis of equality between Michael and Edward, taking into account and equalizing the distributions made to Michael and Edward since the settlor's

death. In that as at December 31st, 2020, £528,038 had been distributed to Edward from the trust and in contrast £167,979 had been distributed to Michael;

(c) That the Principal Fund be distributed to Susannah, Michael and Edward in line with the proportions at para. 13.1 of the expression of wishes and which (following the historic 10% distribution to each of the named grandchildren) work out as follows:

Susannah 40%;

Edward 26%; and

Michael 34%.

Albeit that the trustee intends to take account:

(i) in making a distribution to Susannah, of the costs and expenses to the trust arising from the claims brought by her; and

(ii) of the remaining deficit in the equalization process between Michael and Edward.

Greatheart

46 In relation to the allocation of Greatheart, the original proposal letter invited representations, stating at paras. 53–55:

"53. Greatheart is an illiquid but profitable enterprise. Practically speaking, it would appear that there are two options in respect of the future of Greatheart:

53.1 First, that Michael and Edward become co-owners of Greatheart, which is then operated by them as a joint enterprise; or

53.2 Alternatively, Greatheart is sold.

54. Michael and Edward are invited to make representations as to which of these approaches they favour.

55. Pending a final decision as to the future of Greatheart, the Trustee proposes to divide the Lloyd's Funds equally between Michael and Edward, as per the Settlor's Expression of Wishes."

Having received representations from Michael and Edward, and taking account of Edward's desire to be involved in Greatheart's activities and not see it sold, and Michael having indicated his willingness to mentor Edward in respect of the Greatheart activities in the immediate future (with a view to Edward purchasing Michael's shares when Edward is able to do so) the trustee now proposes to appoint to each of Michael and Edward 50% of the trust's shares in Greatheart. On the basis that thereafter it would be for Michael and Edward to agree the future of Greatheart between them. This

intended allocation is not, at least in principle, challenged by Edward or Susannah.

Paragraph 13 of the expression of wishes

47 During the course of the hearing I sought to explore the trustee's approach to para. 13 of the expression of wishes. In particular, whether there had been a misapprehension on its part in failing to take account of para. 13.3 which at first blush expresses the settlor's desire that Edward and the grandchildren should be the ultimate beneficiaries as to capital of the Principal Fund.

48 Mr. Guest's evidence was to the effect that the trustee regarded para. 13.3 of the expression of wishes as a longstop provision to the extent that the capital was not distributed. That at the time of formulating the proposal, the trustee considered whether the named grandchildren would receive a further benefit and that the trustee had decided that they had received their share of the trust as to its understanding of the settlor's wishes.

49 Mr. Baglietto cogently submits, and I accept, that the court should not interpret the expression of wishes as it would a contract, will or a trust instrument. Rather the approach is for the court to consider what the trustee reasonably believes the settlor's wishes to be. And he advances two compelling arguments:

(i) That distributions of approximately £180,000 each to the named grandchildren was quite generous and it was not outside the ambit of rationality for the trustee to decide that the named grandchildren should be entitled to no further distribution. The trustee could reasonably adopt this position irrespective of what was stated in the expression of wishes; and

(ii) Paragraphs 3.1.1 and 3.1.2 provide that the trustee may distribute to the grandchildren their share of the Principal Fund standing to their credit at the time of the settlor's death. According to cl. 13.2, the trustee could reasonably believe that this meant 10%.

50 In my judgment, the trustee's interpretation of para. 13.3 of the expression of wishes is reasonable, and its decision to exercise its discretion and not to make any further distribution to the named grandchildren, rational.

Legal costs and expenses arising from Susannah's litigation

51 It is evident that a fundamental consideration for the trustee, when seeking to adopt a fair, just and equitable distribution, has been the impact that Susannah's hostile litigation has had upon the trust. Those considerations were detailed at paras. 61–64 of the original proposal letter as follows:

"61. Conversely, a large measure of the administrative and legal costs and expenses incurred in the administration of the Trust are the direct

result of litigation initiated by Susannah. The Trustee wishes to make it clear that it does not believe that the fact that this litigation was brought should alter Susannah's status as a beneficiary of the Trust. Susannah is the Settlor's widow, and the Trustee considers that, even despite her extensive, hostile litigation against the Trust, she ought to receive a share of the Principal Fund as the Settlor intended. Having said that, the Trustee feels that it would be unfair to the other beneficiaries for them to have to bear the costs of this litigation, which was and is ultimately fruitless and a waste of costs.

62. Having reflected on the proportion of the global administration and legal expenses attributable to the litigation for which Susannah should be held responsible on a final division of the assets, and considering the exercise of its discretion, the Trustee proposes to hold Susannah responsible for £500,000 of expenses and legal costs. While the true damage to the Trust caused by the decade of hostile litigation waged by Susannah is nigh impossible to quantify with precision, the Trustee's initial view is that this is a fair approach to the final division of the Trust assets.

63. Because the Settlor wished Susannah to receive 40% of the Principal Fund, the Trustee proposes that she be held responsible for these costs by notionally grossing up the Principal Fund in the sum of £500,000 for the purpose of quantifying the other beneficiaries' interests.

64. Further, the Trustee proposes that Susannah ought to be held directly responsible for Michael's costs of the First Claim, again on the basis that she is responsible for those costs having been incurred. For the purposes of this Proposal, the Trustee estimates those costs at £40,000 but this is subject to provision of supporting evidence by Michael of his costs incurred."

52 In its discretion, the trustee has now decided to hold Susannah notionally responsible for £450,000 of the costs arising from her litigation, rather than £500,000. The basis upon which the £450,000 has been arrived at is to be found in Mr. Guest's fourth witness statement. His comprehensive explanatory evidence, which is not challenged in any material way, can very briefly be summarized as follows. The trustee paid its legal representatives the net sum of £459,500.50 between February 16th, 2009 and January 17th, 2019, the vast majority of which relates to the litigation brought by Susannah. There are some other sums invoiced thereafter attributable to the statutory demand and the adjournment of Susannah's setting aside application which are said not to be included in that sum. The trustee also considers it fair to deduct from the net sum of £459,500.50 the sum of £26,003.50 which was the sum paid by the trustee to its lawyers in 2013, on the basis that (although the trustee is owed the costs of the appeal in respect of which the security for costs application was made) it was

unsuccessful in its application for security for costs, and also by way of deduction for legal costs between 2009 and 2018 which may not be attributable to Susannah's litigation. The trustee also accepts that Susannah has made a part payment of £50,000 of the legal costs which she has been ordered to pay the trustee. Consequently, the trustee considers that £383,497 in legal costs ought to be attributed to Susannah. Additionally, the trustee also considers that £84,482.52 is attributable to Susannah in respect of Abacus' time charge. Originally the total sum invoiced by Abacus amounted to £170,911 but in March 2018 the trustee reimbursed the trust £86,429 in respect of those charges as part of a wider reimbursement of certain trustee fees. The total legal and administrative costs which the trustee says are attributable to Susannah therefore amount to £467,979.52 which they round down to £450,000.

53 In holding Susannah responsible for the cost of litigation in the sum of £450,000, the trustee does not intend to deduct that sum from her distribution, but rather to notionally gross-up the Principal Fund by that sum and then deduct that sum from the notional share which would have been distributed to her. In effect the actual sum debited from her share amounts to some £270,000. The trustee's reason for that approach is that Susannah should upon final distribution, and notwithstanding the litigation history, receive some moneys. Had the trustee sought to simply deduct the cost of litigation from her share without notionally grossing up the Principal Fund, then the sum distributable to her would come to minus £106,559.

54 In the High Court of Australia, on appeal from the Supreme Court of Victoria, in *National Trustees Executors & Agency Company of Australasia Ltd.* v. *Barnes* (8), Williams, J. said (64 CLR at 279):

> "If a trustee is sued by beneficiaries who complain of some act or omission by the trustee, he is entitled to defend his conduct as an incident of such administration . . . Even if he fails in the suit, he may be allowed his costs out of the estate, but, if he succeeds, as in this case, he is clearly entitled thereto. At the same time the indemnity must be given effect to in such a way as to make the burden fall upon the beneficiaries equitably having regard to the circumstances under which the costs, charges and expenses were incurred. Here they were incurred as a result of the action of nine out of the thirty-seven beneficiaries, so that the shares of these beneficiaries should be exhausted before any part of the burden is placed on the shares of the twenty-eight."

In the English High Court, in *Close Trustees (Switzerland) SA* v. *Castro* (3), Mark Herbert, Q.C., sitting as a Deputy Judge, when considering whether trustee's costs should be borne by the beneficiary taking action against them, referred to *Barnes*, but on the factual matrix before him adopted a more nuanced view, and said ([2008] 10 ITELR 1135, at para. 58):

> "Essentially the task of allocating the burden of litigation costs to capital or income is to strike an equitable balance between the interests of different categories of beneficiary. That decision may be influenced by the actions taken or threatened by different beneficiaries, so that costs may be made a greater burden for some beneficiaries who have supported the litigation, and less for others who have distanced themselves from it. *National Trustees Executors and Agency Company of Australasia Limited v Barnes* . . . is an example. Even so, it does not strike me as equitable to use that as the sole criterion in all circumstances. Another relevant criterion is whether the benefit of the litigation would enure for the benefit of one group of beneficiaries or another. In the present case Mrs Vildosola initiated the claim, but, if my understanding recorded in paragraph 10 above is correct, most of any damages or compensation which may be extracted from the investment management companies in the litigation would be received by the trustees as replenishment for the trust fund, so that all the beneficiaries would benefit in one way or another . . ."

55 It is evident that Susannah's hostile litigation would if successful have primarily benefitted her and possibly Edward. The trustee's decision to have her carry some of the burden of the cost of that litigation to the trust is wholly rational. As is its decision to also take account of the settlor's wish that Susannah should derive a benefit from the trust and therefore undertake the notional grossing-up exercise rather than hold her directly responsible for the total loss to the trust. Equally, although Edward was a co-claimant in the first action, given that at the time he was a minor and Susannah his litigation friend it is also rational for the trustee to consider that it would be inequitable to burden Edward with litigation costs in respect of proceedings brought by Susannah very largely for her benefit.

Division of the Principal Fund

56 The trustee intends, as set out above, to distribute the Principal Fund in line with the proportions at para. 13.1 of the expression of wishes (and which following the historic 10% distribution to each of the named grandchildren) work out as follows:

Susannah 40%;

Edward 26%; and

Michael 34%.

It is the trustee's view that ordinarily each of Susannah, Michael and Edward would be entitled to a proportionate share of the Greatheart loan, given that it is an asset of the Principal Fund. However, given that the trustee does not intend Susannah to acquire an interest in Greatheart, the trustee intends to

assign the Greatheart loan only to Michael and Edward in the proportion reflecting their intended share of the Principal Fund and paying Susannah's 40% distribution in respect of it out of the investment portfolio.

57 Broadly stated, the effect of that proposed assignment of the Greatheart loan, taking account of the legal costs and expenses arising from Susannah's litigation and the equalization process as regards Edward and Michael, results (on illustrative figures, and which are subject to further distributions which may have been made to Edward between the hearing and now and to expenses and costs incidental to the claim and the termination of the trust) in the Principal Fund being distributed as follows:

	Investment portfolio	Greatheart loan
Susannah	£73,440	£0
Michael	£462,737	£169,071
Edward	£39,330	£112,714

Overall intended distributions

58 Additionally, and as part of the equalization process it is intended that Michael receive all the funds in the CLT 2 and CLT3 accounts amounting to £196,015. So that the final overall distribution on the basis of illustrative figures would be as follows:

	Susannah	Michael	Edward
Greatheart		50%	50%
CLT 2 & 3 Accounts	£0	£196,015	£0
Investment portfolio	£73,440	£462,737	£39,330
Greatheart loan	£0	£169,071	£112,714
Total	£73,440	£658,752	£39,330
		+ £169,071	+ £112,714
		Greatheart loan + 50% shares in Greatheart	Greatheart loan + 50% shares in Greatheart

Objections by Edward

59 As regards the trustee's proposal to appoint to each of Michael and Edward 50% of the trust's shares in Greatheart, in principle, no objection is raised. As I understood them, the objections advanced on Edward's behalf are:

(a) a purported lack of disclosure by the trustee as regards its decision making process; and

(b) the alleged failure by the trustee to take account of the disparity in age between Edward and Michael. Closely related to that, the trustee's decision to use the settlor's date of death, as opposed to Edward's 18th birthday, as the operative date for the purposes of the *equalization* process.

Disclosure

60 Mr. Finch relies upon *Re AAA Children's Trust* (1) in which Richard Collas, Bailiff considered the decision-making process by trustees when reaching a "momentous decision." Of particular relevance in the context of the submission advanced is what Collas, Bailiff said (Judgment 29/2014, at para. 60):

> "60. The importance of full and complete disclosure in a case such as this is to enable the other parties concerned to understand what considerations were taken into account by trustees in reaching a momentous decision. Otherwise they cannot be satisfied that the trustees have properly exercised their powers. Hence, full disclosure of all relevant evidential material should have been made available to the other parties and, if that had happened, such of the material as is relevant and necessary to the Application could have been laid before the Court."

The momentous decision in *AAA Children's Trust* related to the proposed sale of a property held through a complex financial structure with the property being owned by a company with a nominee share arrangement and the trust having the benefit of certain loan notes. In his letter of wishes the settlor had described the property as unique, the "finest jewel in the jewel box" and said that it was only to be sold in "exceptional circumstances" and then "at an appropriately extraordinary price such that the news will reach him even in heaven" (*ibid.*, at para. 17). The proposed sale was supported by the trustees and one of two protectors. It was opposed by all the beneficiaries, namely the settlor's wife and children and the other protector who was the settlor's sister. The trustees had not considered the wishes of the settlor; it was unclear what advice the trustees had received as to the value of the property; there was insufficient evidence as to how the trustees considered options to preserve capital or what account they took of the wishes of the beneficiaries. The outcome was that although Collas, Bailiff could not conclude that the decision was not one that no reasonable trustee could properly take, he declined to bless the transaction. It is against that factual matrix that the phrase "in a case such as this" (*ibid.*, at para. 60) needs to be read, and not as establishing any wider principle requiring disclosure by trustees within the second category of cases identified in *Public Trustee* v. *Cooper* (10).

61 Mr. Finch cross-examined Mr. Guest in respect of an email dated August 6th, 2019 from Michael to Edward, copied to Mr. Guest which reads:

> "Edward
>
> I am concerned that you are embarking on a path that will add to both the closure time for Proposal 2 and to your debts. You are already, and increasingly, indebted to me until you graduate, and become self-sufficient. I have told the Trust that I am against what you are currently proposing, and will not participate in, or support, it.
>
> I offered to buy you out of Greatheart, which you have refused as being anathema to you; I have also offered you (presumably, with your [maternal uncle's] help) to buy me out, an offer you have not responded to. You have refused to jointly sell Greatheart.
>
> Given these developments, I cannot recommend you as a director of Greatheart until you obtain your degree, pay out what you owe, become solvent, and a truly 50/50 participant in Greatheart as your mother appears to want."

As I understood it, the suggestion was that this email evidenced communications between the trustee and Michael which could have impacted upon the creation of the original proposal and its subsequent modulations and that these communications had not been disclosed. In my judgment there is nothing in that email to suggest any such collusion. Moreover, and leaving to one side the appropriateness of relying upon that document when it had not been provided until cross-examination, the email is dated two months after this claim was issued.

62 It is well established that trustees exercising a discretion are not in general required to disclose reasons for their decisions (*In re Londonderry's Settlement* (7)), although the court has a discretion to order disclosure if the circumstances of a case so required. In my judgment in the present case, there are no circumstances which justify any further disclosure by the trustee. The reasons for the trustee's decision are set out in the original proposal, the amended proposal and in Mr. Guest's fourth witness statement which explains the reasons behind the final update. Moreover, and unusually for this type of case, Mr. Guest gave evidence and was cross-examined. There is no evidential basis whatsoever to support the proposition that the trustee has failed in its duty of candour, therefore Edward's objection to the relief sought on the ground of non-disclosure fails.

Edward's objections to the proposed distribution of the Principal Fund

63 Mr. Finch submits that unless Edward receives a substantial sum from the final disposal, the allocation to him of the 50% of the shares in Greatheart

would lose nearly all of its virtue. That it would be almost impossible for Edward to continue that business and he would likely be forced to sell his interest in Greatheart rather than lose it. And, that such an outcome runs counter to what the settlor wanted to achieve.

64 Mr. Finch's cross-examination of Mr. Guest, focused in some measure on what considerations the trustee had not taken into account, as part of the proposal for which the trustee is now seeking the court's blessing. In particular whether the age imbalance between Michael and Edward was considered by the trustee at the time of formulating the proposal. To which Mr. Guest answered that it did not. Mr. Guest was also asked whether the trustee had considered carrying out the equalization of the historic distributions between Edward and Michael from the age of 18, rather than from the date of the settlor's death. Mr. Guest answered that it did not.

65 Premised upon the failure to take account of the age imbalance, Mr. Finch advanced the following submission. That during the settlor's lifetime, Michael and his family must have benefitted from the settlor's largesse (without providing any evidence in support of that proposition). He also urges the court to draw the not unreasonable presumption that during Michael's minority many decades ago, Michael would have benefitted from maintenance and provision for education from the settlor (again without providing any evidence as to the extent of any such provision). Mr. Finch sought to draw a parallel between that historical provision the settlor would have made for Michael and the provision made for Edward's maintenance and education. He further asserts that notwithstanding his death, the settlor had a *legal* obligation *qua* father to provide for Edward's maintenance and education in a way which reflected the benefit that Michael had enjoyed. And that therefore, the settlor could never have intended Michael to benefit from the trust in an amount equivalent to that applied towards Edward's maintenance and education. That the effect of the trustee's intended distributions is that Edward would in effect end up paying for his own education and maintenance whereas Michael will receive a cash windfall from the trust, at Edward's expense. Mr. Finch asserts that consequently the exercise of equalization is misconceived.

66 Although evidently a dependant can make an application for financial provision from a deceased's estate pursuant to the Inheritance (Provision for Family and Dependants) Act, possibly not surprisingly no authority is relied upon in support of the more general proposition that there is a *legal* obligation on the estate of a deceased parent to provide for the maintenance and education of a child. In any event the trust forms no part of the settlor's estate.

67 What in effect Mr. Finch is calling for, is for the trustee to take account of the relative life circumstances of the beneficiaries when making dispositions and import into the exercise of their discretion a value judgment as to

whether Edward or Michael is more deserving. It could be a legitimate consideration which the trustee could have taken into account. But absent a specific provision in the trust, it is not a consideration which, if not taken account of, vitiates the decision because it does not deprive the decision of a rational basis. Particularly in circumstances in which the trustee's decision accords with the expression of wishes.

Conclusion on the approval claim

68 The giving of approval involves the court's exercise of discretion as part of its supervisory powers over trustees. The court must act with caution because by giving approval (subject to full disclosure by the trustee of all relevant matters and considerations) beneficiaries are deprived of the right to complain that a trustee has acted in breach of trust. That said, the court will also endeavour to assist trustees in cases such as this, where the decision is truly momentous. Moreover, the court can also properly take account of the consequences which could flow if approval is refused.

69 The evidence advanced by the trustee reflects what is a painstaking effort to undertake a fair process in taking the decisions that it has. The evidence shows that as far back as May 23rd, 2014 the trustee wrote to Susannah and Edward about a proposal to appoint the shares in Greatheart in equal parts to Edward and Michael. More recently, by its original proposal letter, it made a proposal to Edward, Michael and Susannah for the termination of the trust and final distribution; representations were received from the three of them following which the trustee circulated an amended proposal on February 28th, 2019. After the present claim was issued, between October 2020 and April 2021, without prejudice discussions took place between the trustee, Edward, Susannah and Michael, as Mr. Guest puts it at para. 11 of his fourth witness statement, "to seek a negotiated resolution to this claim and the future of the Trust" with the final proposal taking account of representations made during those discussions. And, as regards the principles which underpin the proposal, for the reasons given above they are rational. Susannah's historic litigious conduct is not necessarily a guide to her future conduct, but in my judgment there is a real possibility that in the event that approval is not given, more litigation will ensue and particularly given the relatively limited assets held by the trust, that would be to the detriment of all the beneficiaries. In my judgment, this is a case in which it is wholly appropriate for the court to exercise its discretion and approve the trustee's proposal.

The accounts claim

70 Mr. Lawrence's report was either a draft or if an expert's report wholly defective and I therefore attach no weight to it whatsoever. In the event at the trial no objection was taken on Edward's behalf to the trust

account and no objection was put to Mr. Guest in cross-examination. Nonetheless, Mr. Baglietto cogently submits that the court has jurisdiction to grant the relief sought and should do so. That the jurisdiction is not dependent on there being substantive objections by the beneficiaries. *Lewin on Trusts*, 20th ed., vol. 1, para. 24–104, at 1113 (2020), dealing with the release of trustees, puts it as follows:

> ". . . [I]f the case is complicated, or if the beneficiary behaves in such a way as to raise an apprehension that at some future time he may challenge the propriety of the proposed distribution, the trustee is entitled to insist that accounts be settled between them, either voluntarily or by the court."

71 Evidently, as regards the proposed distribution, the trustee has sought the court's blessing and therefore in that regard is afforded protection. However, Mr. Baglietto relies upon:

(i) the litigious history of the trust;

(ii) the fact that Susannah, although not present at the trial, has made unparticularized allegations regarding the propriety and reasonableness of certain of the trustee's legal costs; and

(iii) Edward's historic challenges to the trust's accounts.

In my judgment, in the circumstances of this case, the trustee by seeking the approval of its accounts is entitled to require any challenge by a beneficiary to have been made in these proceedings and thereby prevent any future uncertainty or dispute.

72 A doubt as to whether costs have been incurred by a trustee honestly and reasonably is to be resolved in favour of a trustee. In *Davies* v. *Watkins* (4), Lloyd, L.J. approved the passage in *Lewin*, then in its 18th edition, at para. 21–64, as having "fairly summarised" the position (quoted at [2012] EWCA Civ 1570, at para. 34):

> "The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in the execution of the trust. By this is meant costs which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee."

Mr. Baglietto submits that where a beneficiary does challenge the expenses incurred by a trustee such as to require a court to settle the trust's accounts, the beneficiaries must itemize their objections at the level of individual charges rendered on any particular invoice. That generalized assertions are

not sufficient. He relies upon *ITG Ltd.* v. *Glenalla Properties Ltd.* (6) (2021 GLR 10, at para. 370) where the Royal Court of Guernsey in the context of a strike-out/summary judgment application in respect of a trustee indemnity claim, approached the matter as follows:

> "Consistently with my treatment of the more focused or themed objections which have been identified and which I have dealt with individually above, I am of the view that the appropriate test for deciding whether to strike out objections or give summary judgment for charges claimed is at the level of the individual charges rendered on any particular invoice."

73 Mr. Baglietto further submits that the requirement for itemized objections is consistent with earlier authorities, such as the judgment of the English Court of Appeal in *Allen* v. *Jarvis* (2), where in the context of an account of charges to the testator's estate by a solicitor, Selwyn, L.J. ordered (L.R. 4 Ch. App. at 621):

> "I think, therefore, that without in the least degree interfering with the judgment or with the discretion of his Lordship, the Master of the Rolls . . . the order ought to be modified by striking out the direction to the Taxing Master to tax and settle the bill, and substituting a direction that the Taxing Master shall inquire and state whether any and which of the disputed items marked in red ink in the bill are fair and proper to be allowed, and to what amount respectively."

Similarly, in a concurring judgment, Giffard, L.J. held (*ibid.*):

> "I think it right that there, should be an inquiry to ascertain whether, as regards the particular items complained of, the bill is a fair and proper bill or not. That is the proper form, and not an order to tax and settle the bill, under which the Taxing Master must simply tax in the ordinary way."

On the basis of those authorities in my judgment it is evident that any objection to charges incurred by the trustee as being unreasonable have to be itemized and particularized. Neither Susannah nor Edward have provided any such itemization or particularization and this notwithstanding the consent order of June 4th, 2020, requiring Edward's expert to itemize and provide reasons for any objection. In their absence the trustee is entitled to an order of this court approving its final accounts of its administration of the trust.

74 It follows that the trustee is also entitled to an order that it be indemnified for its costs and expenses from the trust in relation to this claim.

Orders accordingly.