From the Holy City to the Isle of Man: Three Recent English Trust Cases
Outline of a talk given by David Way to the Nassau Branch of STEP, November 2003

Introduction

Of course there are every year many undecided cases in the English Courts relating to Trusts. Some will be of purely domestic interest but some have a wider resonance. I have picked three relatively recent cases falling within that second category. In the limited time available, I will try to outline the facts, the issues, the decision reached by the Courts and wonder how far, if at all, the position might be different in The Bahamas.

I. HIS BEATITUDE, THE ARMENIAN PATRIARCH OF JERUSALEM – V– SONSINO (RE CARAPIET'S TRUST)

The case primarily turns on the interpretation of a Settlement (the **Settlement**) made in July 1961 by Anna Gula Carapiet (the **Settlor**) but also involves some issues of considerable significance in the field of international Trusts: the impact of the Hague Trusts Convention, brought into English Law by the Recognition of Trusts Act 1987 (the **1987 Act**); the question of the charitable status of institutions operating outside the United Kingdom; and the impact of powers held by a third party over and against the Trustees – in this case, the power to direct investments. For the purposes of this talk, the 1987 Act issues will not be pursued. They and the case as a whole are considered in my article in the Journal of International Trust and Corporate Planning (Volume 10 No.1 2003).

The Facts

The Settlor was born in Iraq but subsequently married a Scot, thus acquiring British citizenship. The marriage ended but she continued to live in London with her mother, and she remarried in 1948. Her second husband was domiciled in India and thus she acquired, under the law at the time, an Indian domicile of dependency. She lived in Calcutta but visited London frequently. Her second husband died in 1956. There was some litigation (the details of which do not appear from the judgment), between the Settlor and the then Armenian Patriarch of Jerusalem. That litigation was settled by an Agreement executed in England at a time when the Settlor said she was resident in England, and subsequently the Agreement became a schedule to a consent order of the Indian Court of Appeal. It seems that there were stringent exchange control restrictions in India at the time, and the Settlor was given special permission by the Indian authorities to remove the relevant assets from India to London. She then returned to London, although subsequently she moved to Italy. The Settlement itself was executed on 26 July 1961 and presented for UK stamp duty shortly thereafter. The Settlor gave a London address in the Settlement; and in it she appointed National Westminster Bank (the **Bank**), also with a London address, as Trustee. The Settlor died in 1999.

In the litigation before the English Courts the first defendant was the residuary beneficiary under the Will of the Settlor who would be beneficially interested in the Trust Fund of the Settlement if the trusts thereof should fail for any reason – for example, as being not charitable; the Bank in its capacity as Trustee, was the second defendant. The Bank was also the Executor and Trustee of the Settlor's Will. The third defendant was the Attorney General

acting in his capacity as the protector of the interests of the charity (the Inland Revenue indicating that they would be bound by the judgment).

The Terms of the Settlement

The Settlement recited the Indian proceedings and that it was made in accordance with the Agreement settling the Indian litigation.

Clause 1 provided as follows:

> "The Settlor as Settlor hereby declares that the Bank shall hold the said assets upon Trust, that the Bank shall sell and convert into money such portion thereof as does not consist of money with power to postpone such sale and conversion…"

Clause 2 gave the Bank power to invest the residue of monies (after payment of its own fees):

> "In such manner during the lifetime of the Settlor as the Bank may in its absolute discretion think fit."

Clause 3 gave the Settlor an entitlement to the income from the Trust fund, and provided as follows:

> "The Bank shall stand possessed of the said investments or any investments and money for the time being representing the same (hereinafter referred to as "the Trust Fund" which Fund it is intended shall henceforth be generally known as the "Gregory George Carapiet Trust") upon Trust during the lifetime of the Settlor out of the income arising from the Trust Fund to pay the Bank's management fees as hereinafter declared and contained and to pay the residue of the said income to the Settlor during her lifetime."

Clause 4 provided for what should happen after the Settlor's death and it is those provisions that gave rise to the questions in the present case:

> "After the death of the Settlor the Bank shall pay the income arising from the Trust Fund subject in the first place to the payment thereout of the Bank's management fee to the Armenian Patriarchate of Jerusalem or to pay or apply the same as the said Patriarchate of Jerusalem in Palestine shall direct for the purpose of the education and advancement in life of Armenian children or for such other charitable purpose or purposes as the said Patriarchate may consider allied thereto and the receipt of the proper officer of the said Patriarchate shall be in all respects a sufficient discharge to the Bank."

Clause 7 gave the Bank power to compromise any proceedings and to adjust and settle and approve all accounts.

Clause 8 provided as follows:

> "Subsequent to the death of the Settlor the Bank shall have the same powers of investment of the Trust Funds as are vested in it during the life of the Settlor save that the Bank shall make such investments as may from time to time be particularly and

specifically directed to be make of it in writing from time to time by the Armenian Patriarchate of Jerusalem by its duly authorised representatives including investments in the purchase of land or buildings in England or Wales but not outside those countries unless the Bank in its own full and absolute discretion thinks fit."

The Issues

The learned Judge identified the following as the issues:

1. What is the proper law of the Settlement (the Settlement was silent on that point)?

2. Is the purpose of the Settlement payment of income to the Patriarch in his office? (this is not covered in these notes).

3. Are the objects wholly charitable?

4 Who is or are the Trustees?

On the first question, the Court decided that, whether under the common law or the 1987 Act, the proper (governing) law was England.

On the charity question, the learned Judge thought that the Settlement fell within the second of the "four principal divisions" identified by Lord MacNaghten in his speech in the *Pemsel* case 1891 AC531 at page 583 – in other words a trust for the advancement of education. If it were not within the second division, then it would fall within the fourth division – other purposes beneficial to the community.

The Jurisdiction over International Charities

If the Settlement, following the death of the Settlor, were to fall within the fourth division of types of charity – other purposes beneficial to the community – how far would it be charitable under English law? The Court's attention had been drawn to the Law and Practice Relating to Charities by Hubert Picarda, third edition, at page 28, where the author states that "charities within the fourth head of classification in the *Pemsel* case, i.e. for other purposes beneficial to the community, will, according to the [Charity] Commissioners, only be charitable if of benefit to the community of the United Kingdom". However, the true position, it was submitted, was that there could be a valid charitable Trust for purposes abroad under any of the four divisions or heads identified in the *Pemsel* case, although, of course, there might be a foreign purpose which would be regarded as being contrary to English public policy with the result that the trust would not be recognised. It was also noted that the Charity Commission did not share the view of Mr Picarda. Their position was apparently as follows:

> "We consider that in determining the charitable status of institutions operating abroad, one should first consider whether they would be regarded as charities if their operations are confined to the United Kingdom. If they would, then they should be presumed also to be charitable even though operating abroad unless it would be contrary to the public policy to recognise them, (see *Re Vagliano* [1905 75 LJ Ch 119; *Armstong v Reeves* [1890] LR 25 1r 325; *Re Jackson* [1910] Times 11 June; *Mitford v Reynolds* [1842] 1 Ph 185 and *Re Jacobs* [1970] 114 Sol Jo 515 and also the Canadian case of *Re Levy Estate* [1989] 58 DLR (4th) 375 and the Australian cases of

> *Re Stone* [1970] 91 WN (NSW) 704 and *Lander v Whitbread* [1982] 2 NSW LR 530). We consider that this approach reconciles the decision in *Keren Kayemeth Le Jisroel Limited* and the comments made in the *Dreyfus Foundation* case. In particular, we noted the words of Lord Evershed MR in the *Dreyfus Foundation* case that "to such cases the argument of public policy [meaning the United Kingdom public policy] might be the answer" and of Jenkins LJ in that case that "it is here only necessary for me to observe that it cannot be maintained that no purpose is recognised as charitable under our laws unless it is carried out in and for that benefit of the public, or some section of the public, of the United Kingdom." (1993) 1 C. Comm. Dec.17.

The learned Judge thought this was clearly right and derived comfort particularly from the decision in the *Dreyfus* case 1954 Ch 672 where the Court of Appeal was invited to overrule the decision in *Re Robinson* [1932] 2 Ch 122 in which it had been held that the purpose of benefiting German soldiers injured in the First World War was charitable. In *Dreyfus*, the Court of Appeal refused that invitation and indicated that the key factor was public policy. It followed therefore that the purposes of the Settlement were wholly charitable. But who was the Trustee?

Identifying the Trustee – The Question of Judicial Control

It had been proposed (apparently by the Patriarch) that the Bank should retire as Trustee in favour of the partners of a firm of solicitors. The Bank was agreeable but sought the views of the Charity Commission. The Commission raised some possible points of difficulty, as follows:

> "There is in addition a more fundamental problem of jurisdiction that may call into question the charitable status of the Trust. The proper law of the Trust appears to be that of England and Wales and its status falls to be determined according to English law. A Trust must not only be established for charitable purposes but it must be subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities. We see no difficulty in the separation of the roles of "investment Trustees" and the Trustee responsible for the application of the charitable funds, but the Patriarch has the power to direct how the investments should be made, subject only to the restriction that there may be no investment in land or buildings outside England and Wales (Clause 8 of the 1961 Settlement). The power on the part of the Patriarch raises the question of whether he is in fact the sole Trustee, with the "investment Trustees" merely acting as his agent or exercising delegated powers. If so, the Trustee would be outside the jurisdiction and the Trust would not be charitable."

This in turn breaks down into two parts: the question of jurisdiction, and the question of the powers to direct investment exercisable by the Patriarch.

Starting with the question of jurisdiction, the learned Judge held the proposition that the Trustee would be outside the jurisdiction of the Court and that the Settlement would therefore not be charitable could not be correct. To him, it was not essential for a valid charitable Trust to exist that there should be a Trustee within the jurisdiction of the English courts. He posed the question whether a charitable Trust with UK resident Trustees would cease to be charitable simply because all the Trustees went abroad whether temporarily or permanently: he thought the answer was obviously in the negative. He noted that of course if all the

Trustees were abroad permanently and if all the assets and objects of the Trust were abroad, the Charity Commission might have difficulties, but that was a quite separate question as to whether or not the Trust was charitable. Indeed, he very much doubted whether it was necessary for there to be a Trustee within the jurisdiction for a charitable Trust to fall with the Charities Act 1993 (the principal Act governing charities in the UK). Section 96(1) of the 1993 Act defines "charity" as meaning any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the Court's jurisdiction over Charities. Control does not necessarily require a presence within the jurisdiction. Equity, he said, acted in personam and could make orders against people who are abroad; there were also ample powers to order service out of the jurisdiction under the CPR and the Court would have ways of making its orders effectual, in particular by exercising the powers confirmed by Section 39 of the Supreme Court Act 1981 to order that a document be executed or indorsed by a nominated person as if it had been executed or indorsed by the person originally directed to deal with it. This has been held, in previous versions of that legislation, to be a power of extreme width.

The second question concerned the power given to the Patriarch to direct investments of the Trust fund, with certain limitations, as contained in Clause 8 of the Settlement. As we have seen, the Charity Commission had doubts as to whether the Patriarch was in fact a, or even the sole, Trustee in reality, with the Bank being no more than "investment Trustees" (whatever that means) simply acting as an agent or exercising delegated powers. The learned Judge dismissed any doubt as to whether the Bank was a Trustee. The definition of "charity Trustees" provided by Section 97 of the 1993 Act included "the persons having the general control and management of the administration of a charity" and this manifestly included the Bank which, in the absence of investment orders from the Patriarch, was entrusted with obligatory duties of investment and which also had the general administration duties of a Trustee, for example, with regard to the preparation of accounts. In the result, the Bank was a charity Trustee. However, – did the powers over investment make the Patriarch a Trustee as well?

The Effect of the Investment Power

Lewin on Trusts identifies three kinds of power: -

1. Beneficial or unrestricted powers;

2. Restricted powers, which have a good faith obligation but no requirement for their exercise to be considered from time to time; and

3. Fiduciary powers, which, amongst other things, are subject to an obligation to consider their exercise from time to time.

At 30-03, Lewin notes that when powers are conferred on third parties who are neither Trustees nor beneficiaries this will "ordinarily" be as fiduciaries. With regard to the power to direct investments, Lewin regards this as "normally a fiduciary one" (30-13). The authority for this is the famous House of Lords decision in *Vestey's Executors – v– IRC* [1949] 1 ALL ER 1108. That, of course, was a case on the meaning of the "power to enjoy" the income of a tax driven structure. In that case, the Revenue argued that the power to direct investments in the hands of particular individuals was not a fiduciary power, with the result that they could have used it for their own benefit and so should be taxed on the income of the structure. The

House of Lords held that the power was, however, a fiduciary power and so must be used not to benefit the holders of it but in the best interest of the beneficiaries. In the opinion of Lord Simonds on page 1115, in the passage cited in Lewin, "Nothing short of the most direct and express words would, I think, justify a construction which would enable those who exercise the power of direction to disregard the interests of the beneficiaries". The Law Lords felt that the Court would be bound to give short shrift to any argument from the power holders that they could rely on the terms of the power to direct the trustees to act in a way beneficial to themselves but prejudicial to the beneficiaries. They construed the Trust instrument in such a way that the power to direct was clearly a fiduciary power. Lord Morton traced the genesis of the relevant provisions to the Settled Land Act 1882, under which the tenant for life had the right to direct the investment or other application of capital money by the Trustees. It was clear under the statutory scheme, that in exercising such power of directions, the tenant for life was acting in a fiduciary capacity, and he thought that the draftsman of the *Vestey* Trust instrument must have intended to use similar words in a similar way.

In the present case, under Clause 8 of the Settlement, the Bank was to "make such investments as may from time to time be particularly and specifically directed to be made of it in writing from time to time by the Armenian Patriarchate in Jerusalem by its duly authorised representatives including investments and the purchase of land or buildings in England and Wales but not outside those countries unless that Bank in its own full and absolute discretion thinks fit". The learned Judge regarded the power of the Patriarchate to direct investments as not also carrying an obligation to exercise it. If that is so, then how could the power to direct investments be a fiduciary one since, according to Lewin, it is inherent in the nature of a fiduciary power that the person who holds it must consider its exercise from time to time? Of course, this is not a case where the holder of the power is able to benefit from it, because the Settlement created (ultimately) a charitable Trust; but that should not affect the question of the nature of the power.

The learned Judge went on to say that he did not agree with the letter from the Charity Commission which suggested that the Patriarch might also be a Trustee. He saw his position as analagous to the powers of the tenant for life under a Settled Land Act settlement, who was not a trustee of the settlement despite his wide powers (although as we have seen, under the old statutory scheme the life tenant was in a fiduciary position with regard to the exercise of his powers). Clearly, the power holder was not the Settlor; but does that make any difference? The conclusions in the present case are significant as regards the drafting of trusts, and not just English trusts, in cases where the Settlor is particularly concerned over the exercise of the investment function by the Trustees.

Lessons to be drawn from the case

With regard to the so-called sham trust issue, the great danger is not so much specific and express retained powers by the Settlor but rather the use of informal powers of influence, direction, or control. It would in principle therefore be much better for the Settlor or a person approved by him to have, for example, an express power to direct investments, fine-tuned as may be appropriate for the circumstances of the case, than to rely on letters of wishes or mere "understandings" between him and the Trustees. In The Bahamas, of course, one could have recourse to Section 3 of the 1998 Act (especially Section 3(2)(e) on investment). What does "anyone or more" actually cover? What does "shall not invalidate a trust" mean? Who indeed is "the Settlor"?

Section 3 does not say that a Settlor with the permitted reserved power(s) is not a Trustee (compare Section 81(3), dealing with "protector" powers). But, on that point, there are two reasons for saying that a Settlor who retains a properly constructed power to direct investments cannot be regarded as a Trustee: firstly, on the grounds put forward in the present case that he is under no obligation to exercise that power, whereas the trustees, in the absence of directions, were bound to fulfil their investment obligations; or simply on the grounds that he has no trust property vested in him and so cannot be a Trustee (except perhaps in a very extreme case of undue control unauthorised by the terms of the trust instrument, but in such a case the power to direct investments is hardly likely in itself to determine the result).

II. NATHAN – v – LEONARD AND THE NATIONAL ASSOCIATION FOR MENTAL HEALTH (IN THE ESTATE OF DIANA NATHAN).

The case involves a home made testamentary document that raises a point of fundamental importance: the validity of a condition against litigation, a "no-contest" clause.

The Facts

Mrs. Nathan died on 13th November 1998. She had made a Will on 30th April 1997 under which she directed that Sally and Paul Leonard (Mr. and Mrs. Leonard) be entitled to occupy the property for as long as they wished. Subject thereto her residuary estate, including her interest in the property and subject to the rights of the Leonards to occupy it, was to be dividend into three parts. Two-thirds were to go to Mr. and Mrs. Leonard, and the other third was to be held on discretionary trust for the deceased's son Andrew Nathan, his children and remoter issue, and the two named UK charities of which the third defendant (known as MIND) was one.

However before she died, Mrs. Nathan made a codicil. This was a home made document running to 4 pages of typed script. The key provisions are as follows.

"As a safeguard to my wishes and to protect them from any parties be they family members or the charities, should they wish to contest or disagree with my will. Then, I want the following clause to override everything previously stated in my will. The following will become my will in its entirety. This I hope will prevent anyone from taking this course of action.

I GIVE DEVISE AND BEQUEATH my beneficial share in the property known as Oakwood Farm, to my beneficiaries to SALLY LEONARD and PAUL LEONARD. Free of taxes, which will be covered by my estate.

I also give to the above named persons all my real and personal property. This clause cannot be superseded, and will only come into being if at anytime during the life of the Trust or up to 80 years has elapsed."

The 1975 Legislation

The United Kingdom has no forced heirship rules, under which a testator is obliged to leave a proportion of his estate to his spouse or children. There is however the Inheritance (Provision for Family and Dependants Act) 1975 under which an

application may be made to the Court by a person within defined classes of relationship to the testator and for whom "reasonable provision" has not been made. Andrew Nathan started proceedings under the 1975 Act to the effect that he had not received reasonable provision under the Will. Mr. and Mrs. Leonard, on the other hand, would clearly be better off if the codicil was valid and the condition was triggered, so that they took the whole estate. The charities would obviously argue that the Will should be regarded as operative rather than the codicil.

The Decision

The ultimate decision of the Court was that the forfeiture condition in the codicil was too uncertain to be enforced and so was not valid. Much more significant however was the attitude of the Court towards the idea of a forfeiture condition based on litigation or a "no contest" clause. The point in this case was that if the condition was triggered because of Andrew Nathan's application under the 1975 Act, the discretionary trust of residue in the Will would be revoked, and the charities (which had not themselves mounted any challenge to the Will) would lose any possibility of benefit from the estate.

The Court held that a condition which divested a gift if the donee disputed the Will was valid on the basis of old authorities. There was no argument in public policy as to why such conditions should be void.

It is also worth noting that in the view of the Court, which took a different view of this question from certain earlier Commonwealth decisions, the codicil would not prevent the Court from ordering "reasonable provision" for Andrew Nathan under the 1975 Act and the Court could simply take into account, as one of the relevant factors, the fact of his forfeited interest under the Will.

Lessons and Limitations

The first thing to say is that there is no reason that I can see why this decision should not apply equally to gifts through a trust or settlement made inter vivos. Some commentators have accordingly suggested that this kind of forfeiture clause may be a better means of protecting settlements from vexatious beneficiaries than provisions restricting their right to information – and on that point the third of our cases is highly relevant.

However there are limitations. Such a clause would be ineffective if it sought to oust the jurisdiction of the Court or where the deprived beneficiary might have a reasonable cause for litigation, for example against Trustees guilty of wilful default. Nor would such a clause be effective (at least in the case of a gift of personalty) where the provision is merely imposed in terrorem and there is no provision for a gift over on forfeiture. Next, at least in the UK, it may constitute a contempt of court if the Trustees make threats to discourage prospective litigants from taking proceedings or to punishing them for having done so. But this would not seem to cast any doubt on a clause which would take effect immediately and automatically on a beneficiary approaching the Court.

There appears to be nothing under the 1998 Act which is specific to Bahamian law on this question.

III. SCHMIDT -V- ROSEWOOD TRUST LIMITED

This is a decision of the Privy Council that concerns an issue at the very heart of the trust relationship: the provision of information by Trustees to their Beneficiaries. The opinion of Lord Walker has received eulogistic reviews in some quarters (but not all) and is now the starting point in considering any claim by a beneficiary for disclosure of Trust information.

The Facts

These are somewhat murky but in essence they are as follows.

Two Settlements (Angora and Everest) were established under the laws of the Isle of Man, in 1992 and 1995. The Claimant's father (a Russian businessman, a senior director of Lukoil), was the co-settlor and since 1997 the Defendant trust company had been Trustee of both Trusts. The Settlor died unexpectedly and intestate in Moscow in 1997 and Letters of Administration in the Isle of Man were granted to the Claimant in August 1998. The Claimant said that, during his life, his late father was a beneficiary under both Trusts, as indeed was he following his father's death and in fact significant amounts of trust capital were paid to the Claimant as administrator of his father's estate. The amounts settled exceeded USD$100 million; about USD$14 million had been paid to the Claimant as administrator of the estate. Subsequently the Claimant commenced proceedings in the Isle of Man against the Defendant trust company, its directors and other defendants alleging breach of trust and breach of fiduciary duty. The Manx Courts made an order prohibiting any dealings with the assets of the Trusts and requiring by way of discovery extensive disclosure of information. The disclosure obtained was unsatisfactory and in order to obtain full disclosure of Trust accounts and information on the Trust assets, the Claimant in June 1999 brought proceedings, claiming entitlement as a beneficiary under the Settlements were not clear, a result it seems of "tinkering" by the settlor and his Lukoil colleagues. Who, in fact (other than the Royal National Lifeboat Institution) were the beneficiaries? Were there in fact fixed shares in the Trust fund? The Privy Council did not (and did not have to) get to the bottom of these conundra. Nor did it have to consider whether the Trusts were "shams".

The Angora Letter was as follows: -

"I understand that I am a beneficiary of the Angora Trust. If I should die prior to the determination of the Trust I wish any portion to which I might have been entitled to be held on Trust [for the Claimant]".

The terms of the Letter of Wishes of the Everest Trust were as follows: -

"While I recognise the discretionary powers vested in you as Trustees of the above Trust, it would be my wish if I were to die prior to the termination of the Trust that my share of the Trust property be given to [the Claimant]".

The issue raised was whether the object of such a power had a right to apply to the Court for an order for such disclosure. The answer to this question depended on the basis on which the jurisdiction to order disclosure rested.

The Defendant trust company argued by way of defence that a discretionary beneficiary and the possible object of a power of appointment, who had no proprietary interest in the property of the Trust, had no right to disclosure. The Privy Council however rejected this defence. It held that the existence of a proprietary interest for the beneficiary was not the basis for the jurisdiction to order disclosure to the beneficiary of information relating to the Trust. Rather the Privy Council laid down that the true basis was the inherent jurisdiction of the Court to supervise (and where appropriate intervene in) the administration of trusts; and that the jurisdiction could be invoked by any person with an interest in the Trust whether proprietary or discretionary; and that in all cases the jurisdiction was discretionary. Because it is discretionary, it follows that disclosure may have to be limited and safeguards may have to be put in place. There are three areas according to the Privy Council in particular where the Court may have to form a judgment. First whether a discretionary object or beneficiary of defeasible interest should be granted relief at all; second what classes of documents should be disclosed either completely or in a redacted form; and third what safeguards should be imposed whether by undertaking to the Court, arrangements for professional inspection or otherwise, to limit the use which may be made of documents or information disclosed under the order of the Court. In many cases, it was said, the Court would have no difficulty concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief at all.

In the present case, whilst being reluctant to give specific guidance on particular issues to the High Court of the Isle of Man, the Privy Council identified some aspects of the claims which were clearly compelling. First, in his capacity as personal representative of the Settlor, the Claimant did not accept that all funds apparently distributed or allocated to the deceased had been fully accounted for. This seemed to be a very powerful case for the fullest possible disclosure in respect of those funds. Second, again as personal representative, he would seem to have a strong claim to disclosure of documents or information relevant to the issue whether, but for breaches of fiduciary duty such as overcharging, more funds would have been available for distribution to the Settlor and would be allocated to him in practice. In view of the Letters of Wishes he seemed to have an exceptionally strong claim to be considered as a possible object of the exercise of a very wide power. The Defendant trust company had argued that the Letters of Wishes had no legal effect.

Outstanding Questions

There are many questions to be asked and explored on the disclosure point. Some of them may be as follows:-

- Relationship to the Court of Appeal Decision in *Armitage – v – Nurse* (regarding Trust accounts).

- Whether the old learning on what is or is not a "Trust document" can now be consigned to the rubbish bin.

- Where the Trust purports to confirm or exclude rights of access to Trust documents or information.

- Standing of Letters of Wishes. Are file notes safer?

- Whether Trustees can refuse to give reasons for what they did or did not do.

- Whether a Trustee has a duty to disclose the existence of a Trust to the Beneficiaries.

- The impact of exoneration clauses.

In The Bahamas, of course, one would look at Section 83 of the 1998 Act for guidance, within its terms, on the disclosure question. What would the Claimant have been entitled to under Section 83? He was (it seems) merely an object of a discretion but the Letters of Wishes gave him a greater prominence.

The Wider Implications.

The opinion of Lord Walker is based on a well informed and realistic appreciation of what wealthy settlors have tried to do (in many cases) with endlessly flexible discretionary trusts. This trend started in the fiscal context but has a wider appeal for settlors who want to "have their cake and eat it" –alienating assets into a structure which seems to dilute all ideas of beneficial or proprietary interest to nothing, whilst retaining effective control via protector – type or reserved powers. In a common law (non-statutory) context, there may now be no trust which is beyond judicial intervention at the suit of an object thereof. I see some possible problems however, with this approach. First, is it going to be an encouragement for trustees (their lawyers) to be more ready to go to the Courts for direction before the beneficiaries do so? Beneficiaries might do worse than they would have done before this decision. The outcome is not in fact greater certainty at the operational level.

Second, will there not be an inevitable likelihood of Settlors and professional Trustees, when the Trust deed is being negotiated, seeking to replace the possible uncertainties of judicial supervision with specific rules. The result would be a growth of non-fiduciary alternatives possibly beyond the reach even of a determined Judge – or an intellectual dead-end of the kind reached under the Star Trust regime where the beneficiaries are not allowed to complain about the way their own interests have been taken into account. They have no such interests. Who then is the Trust for?

Third, is the approach of Lord Walker likely to be helpful or persuasive in jurisdictions which have adopted or which subsequently adopt a statutory code regulating issues of disclosure? (The Privy Council (I understand) is going to remain the final appellate Court for The Bahamas). Would the Courts of the forum of administration find Lord Walker's approach rather reassuring if they had to rule?

As a final observation, there is still some uncertainty as to documents relating to a Company in which the Trustees have invested or which they control. The approach in Butt-v-Kelsen [1950] CH187 was that the Court could of course order what was in effect only a shortcut to compelling the Trustees to use their powers to secure these documents. In some ways it is an unsatisfactory decision and perhaps it only reflects the Bartlett duty of Trustees to use their powers (as Shareholders) – but see paragraph 8 in the Schedule to the 1998 Act.

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