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IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO: 175 OF 2005 - Civil.

BETWEEN A.N. PLAINTIFF

AND 1. BARCLAYS PRIVATE BANK & TRUST (CAYMAN) LIMITED

2. B.O.
3. C.P.
4. D.Q.
5. E.R.
6. F.S. LTD.
7. G.T. HOLDINGS DEFENDANTS

BEFORE THE HON. CHIEF JUSTICE
THE 13th – 16th DAY OF JUNE 2006
AND 17th JULY 2006

APPEARANCES: Mr. John Martin QC and Mr. Thomas Lowe instructed by Mrs. Linda DaCosta of Myers and Alberga for the plaintiff.

Mrs. Shan Warnock-Smith Q.C. instructed by Ms. Sandie Corbett of Walkers for the 1st defendant.

Mr. Simon Taube Q.C. instructed by Ms. Andrea Dunsby of Turner and Roulstone for the 2nd and 3rd defendants.

RULING

1. In these proceedings the Plaintiff seeks declarations, among other relief, that Clauses 23 of the Deeds of Trusts known as the HIJ Trust and the KLM Trust, of which she is a primary discretionary beneficiary, are invalid.

2. Clause 23, referred to variously as a "no-contest" or forfeiture clause, appears in the following terms in both Deeds of Trust:

"Exclusion from Benefit

Whosoever contests the validity of this deed and the Trust created under it, of the provisions of any conveyance of property by any person or persons to the Trustee to form and be held as part of the Trust Fund and of the decisions of the Trustee and/or of the Protection Committee shall cease to be a Beneficiary of any of these Trusts and shall be excluded from any benefits direct or indirect deriving from the Trust Fund."

3. The Plaintiff also complains about certain decisions and actions of the Trustee and the Protection Committee and seeks further relief in that regard in these proceedings. Her complaints are explained more fully below as summarized from her draft Statement of Claim. There are now concerns however, that Clause 23 may be regarded as already having operated to exclude her from benefit under the Trusts, by dint of her contest taken in these very proceedings.

4. Directions were therefore sought by the Trustee and obtained from Henderson J. that before the Plaintiff's action could effectively be progressed; the issue of the validity of Clause 23 should be tried as a preliminary issue. On 6th December 2005 Henderson J. ordered the following three questions to be tried as preliminary issues in these proceedings:

   1.1 Whether Clause 23 of the HIJ Trust Deed is valid in whole or in part and, if in part, to what extent;

   1.2 Whether Clause 23 of the KLM Trust Deed is valid in whole or in part and, if in part, to what extent;

   1.3 If valid, whether the Court has jurisdiction to grant relief from forfeiture of the Plaintiff's interest under Clause 23.

5. These were the issues of law with which I became engaged over some four days of argument and I begin by recording my indebtedness to all counsel for their comprehensive arguments on the principles which inform this judgment.

6. In summary, the issues before me are to be answered for the purpose of informing the parties whether Clause 23 may be disregarded in whole or in part or whether it may be valid so as already to have operated to forfeit the Plaintiff's interests or may do so if she proceeds with her action; and whether the jurisdiction exists in the Court to relieve from forfeiture in the event of forfeiture.

The background and the complaints

7. While the scope here for factual enquiry is limited because the issues are legal in nature, following is a summary of the relevant background.

8. The main assets of the HIJ and KLM Trusts are their substantial holdings, through holding companies, in a large and very valuable research, manufacturing and trading company ("the Company"). The HIJ Trust, which holds approximately 23% of the shares of the Company, was settled by the Plaintiff's father. The KLM Trust, which holds approximately 5%, was settled by her mother.

9. The Company was founded by her father and his brother. Though formerly exclusively and privately owned by the Plaintiff's family through her parents and uncle, a wholly owned subsidiary of the Company (to which the assets and liabilities of the Company were hived down) became listed in December 2005. That a form of public listing was to take place had been agreed while the parents were still alive. The precise manner in which the public listing occurred and the

terms on which the Trustees hold their interest in the publicly listed subsidiary is the main basis of the plaintiff's complaint.

10. The Plaintiff, her sister and brother, (the 2nd and 3rd defendants), each individually hold 16.01% of the shares of the Company. Such shares as are available for public trading are still only a small minority and involve a portion only of the approximately 28% held ultimately by the Trusts.

11. The Plaintiff and her siblings are the primary discretionary beneficiaries as to a third each of the income of the Trusts as well as, if alive at the expiry of the Trust periods in 2039; the contingent beneficiaries of the respective one third shares of the capital. Failing them or any of them, their children would be the beneficiaries of their respective shares. Thus, the Company remains beneficially in the majority owned by family members, through the Plaintiff and her siblings and through the Trusts. Indeed, notwithstanding the recent initial public offering, the structuring of the ownership of the Company is such at present that it will remain essentially privately owned.

12. It is part of the Plaintiff's complaint that that re-structuring is contrary to the interests of the beneficiaries because it has made it impossible for the Trustee to dispose freely of the Trusts' shares without the approval of the Second and Third Defendants and prejudiced the Plaintiff because she is not able to divest herself of her personally held shares if she wishes. The new corporate structure, it is alleged, has diminished the value of the Trustee's interests. It is also, she asserts, contrary to the interests of the Trusts to be unable publicly to trade shares for the benefit of the beneficiaries and contrary to the interests of the Company, as a

whole that its ability to raise new capital for the purposes of research and development and for the expansion of its business was diminished.

13. These are concerns and objectives which she asserts were shared by her parents and by her father in particular.

14. In short, that it was never her father's intention that the ownership of the Company should remain locked up and ring-fenced for the sake of preserving a family dynasty.

15. The Plaintiff further alleges, that contrary to the declared objectives and wishes of her father and mother respectively as settlors of the Trusts, the Trustee and the members of the Protection Committee who also ultimately direct the affairs of the Company, have illegitimately combined with the second and third defendants to subject the Trusts' shareholdings to their control.

16. As an example of this, that further shares in the Company which had been pledged to a consortium of banks to which the Company was indebted (representing 5% approx.) and which the Banks were prepared to sell on the open market for the redemption of their debt, have instead been bought back by the Company. She alleges that this was done by the use of surpluses, at least some of which would ordinarily have been distributed to beneficiaries as trust income.

17. In what her draft statement of claim describes as a "Campaign to Concentrate the Family Shareholding"; the Plaintiff also asserts that these actions by the Trustee, the Protection Committee and the 2nd and 3rd defendants, have been taken out of "hostility" towards her.

18. In this respect, the draft Statement of Claim more specifically avers that the Trustee has allowed the interests of the HIJ Trust in the Company (held through the 7th defendant "G.T.") to be transferred into the ownership of a foreign company (the 6th defendant "F.S.") which is owned and controlled by the 2nd and 3rd defendants and through which they also hold their respective individual shares in the Company (as to 16.01% each).

19. Thus, that the Trustee has improperly and in breach of trust, ceded control of the assets of the HIJ Trust to that foreign company to the improper advantage of her siblings and to the detriment of herself and of the beneficiaries (including the remoter beneficiaries) of the Trust as a whole.

20. In summary, that the Trustee has acted unreasonably, has failed to hold the balance evenly between the beneficiaries and has acted in a manner prejudicial to the interests of herself and the remoter beneficiaries as a whole. ***Boe v Alexander et al*** ***41 D.L.R. (4th) 520*** was cited as an example of the Court's willingness to scrutinise the actions of trustees on such grounds and even in the face of provisions which deemed the trustees' decisions to be final and binding.

21. What the plaintiff seeks, is the setting aside of Clause 23 as being invalid and the removal of the Trustee and the Protection Committee. In the writ, she does not seek damages but the draft statement of claim indicates that the Plaintiff would seek to amend her pleadings to introduce a claim for damages.

22. Unsurprisingly, the Trustee does not accept the Plaintiff's complaints and intends to defend against her claim in the event she is allowed to proceed.

23. On behalf of the Trustee, Mrs. Warnock-Smith noted that, on the face of it, the Plaintiff has already, in the words of Clause 23 "contested the validity of the Trustee's decisions" by commencing her proceedings and by earlier having obtained injunctive relief. The apparent result, assuming Clause 23 is valid, is that she is therefore already excluded from benefit under the Trusts.

24. That state of affairs, coupled with the Plaintiff's extant challenge to the validity of Clause 23 itself, places the Trustee she said, in the difficulty that it does not presently know whether the Plaintiff is to be treated as a beneficiary or not. Even if the Plaintiff were to abandon her proceedings entirely (which she shows no intention of doing) the Trustee would still require directions from the Court as to whether or not the Plaintiff has already been excluded as a beneficiary.

25. It was emphasized however, that the Trustee does not either actively contend for, nor would it welcome, the actual or potential exclusion of the Plaintiff as a beneficiary. On behalf of the Trustee, Mrs. Warnock-Smith identified the following competing considerations, among others:

    (i) The Trustee considers the Plaintiff's actions to be misguided and regrettable. They are described as having had the potential to cause very serious damage to the value of the trust funds by disrupting the recent IPO; especially because of the injunction which she had obtained. Fortunately it is said that that danger was avoided when the injunction was discharged, the IPO took place and has so far been highly successful with the shares of the Company now valued significantly higher than before. But this is exactly the sort of

behaviour, says the Trustee, that the settlor intended to result in exclusion under Clause 23.

(ii) The Plaintiff is, however, the principal discretionary object of one-third of the very substantial trust fund until the end of the Trust Period (in 2039 or later) and the only beneficiary of that share at the end of that period if she is then living. Her sister and brother, the second and third defendants, have similar interests in the other two-thirds of the fund. In family terms, it would doubtless therefore have further divisive effect if the Plaintiff is excluded.

26. Primarily for those reasons, the Trustee's position before me on the preliminary issues has been one of declared neutrality.

27. Accordingly Mrs. Warnock-Smith did not contend for one result or another, save to ensure that the interests of the absent remoter beneficiaries – the existing and unborn children of each of the Plaintiff, the second and third defendants, - were properly represented.

28. Mr. Taube Q.C., on behalf of the second and third defendants also took a conciliatory approach, even while advancing a view of the principles which would impose a stricter construction of Clause 23. He did however make it quite clear that his clients, for reasons like those explained on behalf of the Trustee, were concerned for the welfare of the Trusts, even while not wishing to see the Plaintiff, their sister, excluded from benefit. They therefore anxiously sought the Court's construction on the meaning of Clause 23.

The Trusts

29. Apart from Clause 23, certain provisions of the Trust Deeds and certain aspects of their history, are of some relevance to the present issue of construction.

30. The present Trusts are successor trusts to those of which the parents were respectively originally the economic settlors.

31. The HIJ Trust was originally settled on 28th February 1985 as a New Brunswick settlement called the XYZ Trust. The father was its protector and the mother, the Premier Chairman of the Protection Committee. It is particularly notable that by Article 6(g), the father had retained a special power to be able to amend the XYZ Trust for the purpose of revising the proportions of the shares of the beneficiaries and to reduce the share to nil. Thus a beneficiary of whose actions the settlor disapproved could have been removed as a beneficiary.

32. Article 12 of the XYZ Deed contained the forerunner to Clause 23 in almost identical terms.

33. Clause 3 of the present Deeds declares the trusts of income and capital over the trust fund. The trusts and powers are declared to be in favour of "Beneficiaries" and they are the persons specified in the First Schedule and as described above, provided that they are not "Excluded Persons".

34. A beneficiary may become an "Excluded Person" and so excluded from benefit, if the Trustee so declares in writing under Clause 8; if a beneficiary so elects and declares under Clause 9 or if excluded from benefit by operation of Clause 23 - the provisions presently under consideration.

35. The Trust structure is complex. While the Trustee has a wholly unfettered discretion as to the appointment and distribution of income and capital and the powers of exclusion cited above, the named beneficiaries are the Plaintiff, her sister and brother and their children as described above and in the First Schedule of the Deeds. Thus, the Trusts are essentially family settlements even though there is an ultimate default or long stop provision in favour of Charity in Clause 3(c), if, at the expiry of the Trust Periods, the trusts of all the proportions as to capital designated to the named beneficiaries in the First Schedule, shall have failed.

36. The wide discretionary powers vested in the Trustee described in Clause 12 as "absolute and uncontrolled" are not in fact without fetter from other express provisions of the Deeds. By Clauses 16 and 17 the Protection Committee is established and is given power, among other things, by Clause 15, to remove from office, or replace any or if more than one, all of the Trustees and appoint new Trustees. Also given are powers and duties to supervise the accounts of the Trust Funds, to change if needs be the Proper Law of the Trust (by re-domiciling) and to extend the Trust period for further periods of two years. The Protection Committee also has the right to be consulted on and to advise the Trustee in respect of the operations of the underlying trust companies, the investment of the Trust fund and as to the accumulation, distribution or appointment out of the Trust income or capital.

37. This provision in Clause 12 suggesting an absolute and uncontrolled discretion, is nonetheless a fairly standard provision in a trust deed of this kind and was

explained in Gisborne v Gisborne; (1877) 2 App. Case 300: It means that their decision-making is a matter for the trustees and the Court will not interfere with a discretion so long as the trustees exercise it in good faith.

38. By further provisions in Clause 16, a Designated Beneficiary Committee (of which the Plaintiff and her siblings are the initial members) is established. It is given the important power to appoint replacements for members of the Protection Committee who die, become mentally incapacitated or otherwise demit office. It may also, with the consent in writing of the Trustee, by a majority, vote to remove a member of the Protection Committee.

39. Thus the Settlements comprise complicated and subtle rules which provide checks and balances as between the beneficial rights or expectations of beneficiaries and the power and duties of the Trustee and the Protection Committee.

40. Thus, if allowed to operate as intended, it would appear on the face of the Deeds and fair to assume, that the Settlors' wish would have been to see concerns, even of the kind raised by the Plaintiff; resolved internally by the machinery of the Settlements themselves, not by recourse to litigation.

41. Theoretically, if able to persuade her siblings to do so, the Plaintiff should be able with their support, to persuade the Protection Committee to advise a change in investment policies or even to replace the Trustee. That, however, is not to conclude that the Settlors had intended to bar recourse to the Courts irrespective of the circumstances.

42. It is one of the Plaintiff's three main grounds of challenge that, if intended to be thus construed Clause 23 would be void on grounds of public policy as seeking to

oust the jurisdiction of the Court. That and the other two grounds of challenge – uncertainty and repugnancy– will be considered below.

43. Given the nature of her challenge, other provisions in Clauses 11 and 19 of the Deed arise for consideration.

44. Respectively they provide in effect as follows:

(i) In the case of Clause 11, that the powers vested in the Trustees shall at all times be exercised to ensure not only that there is always a Trustee to fulfil the trusts, but also that the trusts of the Settlements shall be enforceable by the Beneficiaries.

(ii) Further, in the case of Clause 11, as read with the provisions of paragraph 5 of the Second Schedule, that among other things, the Trustee and the Protection Committee will be exonerated from and indemnified against all claims against them arising from or relating to anything done by them in their capacities as such, except only when such claims are the result of their own intentional fault or wilful misconduct.

This is now a standard provision in complex trust settlements serving to exonerate trustees and protectors from blame in respect of pure errors of judgment or simple negligence. However, the provision, by its exceptions, also implicitly recognizes the Trustee's irreducible core of obligations of which the case law speaks (see ***Armitage v Nurse*** below); to act bona fide in the interests of the Trust and beneficiaries.

(iii) In the case of Clause 19, that none of the provisions of the Deed shall be construed as permitting the Trustees to act contrary to the laws of the Cayman Islands [(the governing laws)]: "If anything herein contained is contrary to any such law then the offending provision shall be deleted or if possible construed in accordance with such law without prejudice to the remainder of the terms and provisions hereof."

The Operation of Clause 23

45. As already noted, Clause 23 is purportedly triggered when a beneficiary challenges the validity of the Trusts or transfers into the Trusts of trust property or the validity of decisions of the Trustee or Protection Committee. Thus there are three distinct limbs to the Clause – the first dealing with challenges to the validity of the trust, the second to the validity of transfers to it of its property; the third to the validity of decisions. For convenience, the Clause was generally referred to in the arguments as having two Limbs. It is better, however, for the purposes of analysis, that there are three and so I will refer to them as Limb 1, Limb 2 and Limb 3 as the context may require.

46. Different considerations arise depending on the nature of the challenge and the Limb to which it relates.

47. As a challenge under Limb 1 or 2 would contest the essential validity of the Trust itself or of the transfer of property into the Trust, the basis of the settlor's concern to protect the Trust from such a challenge would be immediately apparent. And the draconian consequences of mounting such a challenge are also more readily understood: a beneficiary could hardly expect to be allowed at once to challenge

the essential validity of the Trust or its property and yet be allowed to claim benefits under it.

48. When one contemplates a challenge under Limb 3 to a decision of the Trustee or of the Protection Committee a conundrum immediately arises as between the prohibitory and confiscatory terms of Clause 23 on the one hand, and those provisions of the Trust Settlements which clearly intend that the trusts of the Settlement shall be enforceable by the Beneficiaries. Clause 11 clearly embodies that intention.

49. For the Plaintiff, Mr. Martin argued that it is contradictory in terms that beneficiaries should be able to enforce the trusts of the Settlement while being unable at the same time to challenge the validity of the decisions of the Trustee or Protection Committee which affect the trusts. Such challenges which are more often mounted against the actions taken rather than against the decisions themselves, are usually the means by which beneficiaries might be expected to enforce a trust. And it is fundamental therefore, that they should be able to do so before the Courts.

50. Indeed, as Mr. Martin observed, it is fundamental to the existence of a trust that there will be beneficiaries to enforce it. As such, it would be repugnant to the very nature of a trust to prevent a beneficiary from doing so. The principle was concisely expressed by Millett LJ in ***Armitage v Nurse** [1998] Ch 241 at 253:*

> ***"I accept the submissions made on behalf of Paula [(the plaintiff beneficiary)] that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."***

51. Limb 3 of Clause 23 gives rise to the further difficulty which appears from the generality of the use of the words "contests", and "decisions". On its face, "contests" could be taken to mean all contests, whether taken bona fide or not and whether taken successfully or not. Similarly, all "decisions", however ill-advised, ill-informed or unauthorised.

52. With such concerns in mind, the arguments for the Plaintiff were developed by Mr. Martin directed mainly to Clause 23 Limb 3 on three main grounds of objection:

    (i) uncertainty;

    (ii) repugnancy; and

    (iii) ouster of the Court's jurisdiction being contrary to public policy.

53. The arguments were developed however, within the framework of the common law which also recognizes that it is permissible for donors to provide for the forfeiture of an interest in a will and such provisions have, in the past, been upheld in many circumstances.

54. It is settled from the leading cases ***of Cooke v Turner (1846) 15 M & W 727*** and ***Evanturel v Evanturel (1874) LR 6 PC 1*** (both more fully considered below) that there is no general rule of law that precludes testators from including in their wills provisions which would prevent or discourage beneficiaries from going to Court to contest a will and to provide for the forfeiture of interests where such contests are unsuccessfully mounted. This is provided further, that the provision is not imposed merely *in terrorem* as an idle threat, but, instead, effects the termination of the forfeited interest by making a gift over of that interest to someone else:

Leong v Lim Bong Chye* *[1955] A.C. 648, (cf. **In Re Hanlon** [1933] 1 Ch. 254 where there was a forfeiture without a gift over but it was held nonetheless to be effective because the doctrine of in terrorem is only applicable to conditions in restraint of marriage and disputing a will. There the condition was in restraint of the legatee daughter having relations with a particular man).

55. Some leading textbooks propose that, by analogy, the same principles applicable to conditions of limitation in wills should apply to prevent or discourage beneficiaries from litigating over inter vivos trusts, although the considerations are not identical, particularly where the beneficial interests are not vested but are purely discretionary. See for instance ***Lewin on Trusts*** *17th Ed. paras 5 – 03 – 5, 17*; ***Underhill and Hayton: Law of Trusts and Trustees*** *16th Ed. pp 216 – 217*, where the principles are applied interchangeably to wills and trusts; and ***Glasson's International Trust Laws*** *2002 Ed. para B1. 301* (citing ***Cooke v Turner*** and ***Adams v Adams*** *[1892] 1 Ch. 389)*.

56. However, as Mrs. Warnock-Smith emphasized, the reported cases which bear directly on the validity of "no-contest" clauses have all arisen in the context of wills and save but one (***Adams v Adams*** above) concern challenges to the validity of the will itself or to the gifts vested by it. The cases do not concern themselves with challenges to trustees' decisions. Moreover, the cases have not yet come to deal with this subject in the context of a modern complex discretionary inter vivos trust which vests wide powers in trustees and protectors, including powers of exclusion from benefit. She advised that such clauses are fairly common in modern offshore settlements because of a natural desire in settlors to reduce, as

far as possible, the opportunity for disaffected beneficiaries to embark on difficult and expensive litigation in relation to the arrangements they have so carefully put in place.

57. This is so she said, particularly where, as here, family operating companies are at the heart of the trust structure and where the desire and intention are to permit the Trustee and Protectors to manage and invest the trust shareholding in the Company as they see fit for the benefit of all the beneficiaries.

58. There are moreover, the provisions in the Deeds of Settlement which create the checks and balances already described above, such that it cannot truly be said that the trusts cannot be enforced if the beneficiaries are precluded from taking Court action. By the proper use of the democratic machinery of the Settlements beneficiaries should be able, at least in principle, to effect the reversal of policies and even the removal of trustees.

59. Finally in this regard, she also emphasised that the *in terrorem* doctrine can have no application in the context of these settlements so as to invalidate Clause 23. I can state immediately that this is accepted and no one argued otherwise. If the test is - by analogy with principles applicable to wills - the presence of a gift over on forfeiture; the provisions of Clause 3 of the Deeds which would substitute the Plaintiff's children for herself as the primary beneficiary, have that effect.

60. While in the context of a modern discretionary trust like the present, a forfeiture provision like Clause 23, would not operate to defeat what would typically be already vested entitlements to property as it would in the context of a will or will trust, its effect may be no less far-reaching or draconian.

61. Defeasible though they may be, the expectations of the beneficiaries in what can only properly be described as family settlements such as these, are no less real. And while the desire of a settlor will clearly be to protect and preserve the Trust assets for all beneficiaries present and future; where his primary beneficiaries are his own children, it is fairly to be assumed that conditions by which their interests are to be defeated must be equally strictly construed.

62. For such reasons I consider it appropriate to adhere to the relevant principles of construction which have been developed by the cases dealing with testamentary dispositions.

63. This is an approach which also recognises that the right to freedom of disposition of one's property will be of no less importance to a settlor of a lifetime trust, than it would be to a testator leaving under a will.

64. Certain concerns in this regard about Cayman Islands public policy, raised both by Mrs. Warnock-Smith and Mr. Taube, are best addressed at this juncture.

65. To the extent that these Islands are regarded as a jurisdiction of choice for the domiciliation of trust settlements because, among other things, of the assurance of freedom of disposition of assets; that can in no wise detract from the importance of the Islands' common law heritage. As the discussion of the cases reveals, part of that heritage are the principles which validate, but at the same time regulate, the operation of forfeiture clauses such as that being considered.

66. The Cayman Islands public policy in this regard is, in my view, clearly reflected in the provisions of the Trust Law (2001 Revision) Part VIII. There the statute prescribes a Special Trusts –Alternative Regime, which enables the creation of

special trusts (with the acronym "STAR" Trusts) which are exempt from the operation of certain of the common law principles which would otherwise apply.

67. Some of the statutory provisions are worth noting in this context:

Section 97: Nothing in this Part affects an ordinary trust or power directly or by inference.

Section 98: The law relating to special trusts and powers is the same in every respect as the law relating to ordinary trusts and powers save as provided in this Part.

Then there are important exceptions to the law relating to ordinary trusts and powers:

Section 100 (1): A beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.

Section 103(1): Subject to subsection (4), a special trust is not rendered void by uncertainty as to its objects or mode of execution.

68. And, of direct relevance to the argument here, **Section 96** provides that a trust is subject to Part VIII of the Law and is described as "special", if:

(a) it is created by or on the terms of a written instrument, testamentary or *inter vivos*; and:

(b) the instrument contains a declaration to the effect that this Part is to apply.

69. Notwithstanding that at the time of the resettlement here of the HIJ Trust, the settlor would have been aware of the STAR trust regime, he did not opt for it. So too, would have been the position when the KLM Trust was settled.

70. That must be regarded as being contrary to any supposition that the settlors would have wished to avoid the imposition of the common law principles of construction upon of their freedom of disposition in their settlements.

Construction

71. The common law principles do show that a condition of defeasance or forfeiture such as Clause 23 is to be regarded, must be strictly construed. While they will be upheld if they comply with the strict rules of construction, such conditions are liable to be set aside by the Courts if they fall foul of any of the three principles relied upon as grounds for objection here.

Uncertainty

72. The general rule is that, in order to be valid, a condition of defeasance or forfeiture must be so framed that the persons affected, or the Court (if its guidance is sought) can from the outset, know with certainty the exact event the happening of which will result in the defeasance or forfeiture of the beneficial interest.

73. This principle appears to have been settled at least as long ago as 1859 by the House of Lords in ***Clavering v Ellison*** *(1859) 7 H.L.C. 707* by reference to still earlier pronouncements of the Courts in ***Fillingham v Bromley*** ***Turn and Russ 530*** and ***Jones v Suffolk*** ***1 Bro. Ch. C. 528.***

74. In ***Clavering v Ellison***, George Clavering, by a will trust, vested title in his estate in his trustees upon trust to manage and invest and to pay the income to his son for life and then to the son's children and then to their heirs. He also gave all the residue of the estate to be distributed amongst all the children to be paid when

they respectively attained twenty-one. There was however the following condition attached to the gifts: *"...provided that the devises hereinbefore contained to the children of my said son are made upon this express condition, that they be educated in England, and in the Protestant religion, according to the rites of the Church of England and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of England, then I hereby do revoke.."* There were then provisions for a gift over to the children who met the conditions and if none did and the gift to them was revoked, then to his nephews and nieces.

75. Having been educated in England for a number of years and during that time brought up according to the Anglican persuasion, the four older grandchildren went with their father and mother (a Catholic French woman of whom the testator did not approve) to France when they were still quite young and remained with him there from 1802 until 1810. During that time he had been detained by the Napoleonic decree which made all Englishmen prisoners of war. Had their father so decided however, the children could have returned to England. They were, while in France, educated at Roman Catholic schools, but were not shown to have actually been taught Roman Catholic doctrines. Rather, they had been able to receive religious instructions from a Protestant minister while at school in France. On their return to England at the Declaration of the Peace in 1814, they were sent to English Protestant schools.

76. The bequests to the grandchildren were challenged by their youngest brother who had remained throughout, brought up and educated in England. He claimed that

he was the only grandchild entitled to take under his grandfather's will, the interests of all the others having been forfeited by the manner of their education and upbringing. It was held, that having regard to their circumstances, the grandchildren had not incurred the forfeiture within the meaning of the proviso. That the proviso constituted a condition subsequent which, in the event of certain contingencies would operate so as to defeat the beneficial interests which had become vested respectively at age 21, and so were to be construed strictly.

77. Their Lordships' judgment comprised of two speeches, the first by Lord Campbell and the other by Lord Cranworth.

78. Both arrived at the same result stated above but by different reasoning.

79. Lord Campbell seemed not to have doubted the efficacy of the proviso or the validity of the two conditions as to education in England and adherence to the Protestant Anglican faith – but concluded as cited above, that they had either been clearly met or that the contender had failed to prove, as he was required to prove, that they had not been met.

80. At p288 (paragraph 721) he observed:

> ***"I do not think that either of these conditions can be considered void, notwithstanding the latitude given to courts of justice, by the decision of this House in the Bridgewater case, to hold conditions void which they may deem contrary to public policy. Even as conditions subsequent, to defeat vested estates they must be construed strictly, and to work a forfeiture there must be shown a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture."***

81. Lord Cranworth, while declaring the proviso and in particular the condition of education in England to be too indefinite and uncertain to be valid, concluded

nonetheless that the circumstances of his older grandchildren would have satisfied the expectations of the testator. At page 289 paragraphs 725-726 he stated:

> *"...I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine.*
>
> *In my opinion, if there was no direct authority for it, I should still have arrived at the same conclusion; but I have looked at the authorities, especially that of Lord Eldon in the case of Fillingham v Bromley* [(above)]. *I think that, looking at the language here used, it is far too indefinite and uncertain to enable the Court to say what it was that the testator meant should be the event on which the estate was to determine....*
>
> *But the question is, not whether in the particular case (a particular grandchild) was educated abroad, but whether you can predicate on reading the will, what it was that was to defeat the vested estate. I concur in Lord Eldon's observation about an estate being defeated by a person not living and residing in a particular house which he thought too remote; and I think that this is far more remote than that."*

82. It is clear that the strict approach taken to construction of the condition and the great emphasis laid upon the need for certainty, was aimed at avoiding the injustice that could otherwise result from the divestment of an entitlement to an interest that had already vested. A condition which, by virtue of its operation after the vesting of the interest so as to defeat that interest, was referred to by Lord Campbell as a "condition subsequent".

83. By contrast, in general it seems a "condition precedent" would be one which stipulates the fulfilment of some condition as a prerequisite to the vesting of the

interest. So that when for instance, a gift is contingent on an event, until that event does take place, there is no vested interest: ***Williams on Wills*** *8th Edition Chap. 34 page 244 and following.*

84. As the test of certainty settled in ***Clavering v Ellison*** is expressed as being applicable to conditions subsequent, the question was raised in the arguments whether that test could appropriately be applied to Clause 23. As Mrs. Warnock-Smith framed the issue ......: *"it is difficult to see how the Clavering v Ellison test specifically applicable to the divesting of vested proprietary rights can be the right approach to an exclusion of a discretionary object (the Plaintiff here) from the consideration of the Trustee for benefit"*.

85. She proposed that if an analogy is to be drawn, Clause 23 should be regarded as a condition precedent. This would be in the sense that on each and every occasion before a distribution from the Trust fund is to be made thus giving a clear vested right in property, a beneficiary must be able to claim entitlement as not having already been excluded from benefit.

86. Mrs. Warnock-Smith (with the support of Mr. Taube on this point) further argued that while it would be open to the Court to find that even the strict uncertainty test would be satisfied by Clause 23, only ordinary rules of construction should be applied given the purely discretionary nature of the beneficial interests here. She was also careful to explain however, that this did not imply some weaker test than that in ***Clavering v Ellison***.

87. My considered view, for reasons already at least partially explained, is that **Clavering v Ellison** presents the appropriate test. Though they are not vested

proprietary interests and though also defeasible in certain other circumstances as we have seen; these are hugely valuable beneficial interests which also have ascribed to them a bundle of other rights intended to enable their enforcement. They may not be capriciously or unreasonably defeated by the exercise or operation of any power of exclusion under the Trusts. There is no compelling reason why any less strict an approach should be taken to the construction of the exclusionary provisions of Clause 23, than would be taken to the scrutiny of any other power which may operate or be exercised so as to defeat an existing entitlement to be considered for benefit.

88. So for instance, the fact that defeasance or divestment under Clause 23 may be triggered automatically by the conduct of a beneficiary herself, is no reason not to require certainty as to the circumstances under which that might occur.

89. The principles enunciated in ***Clavering v Ellison***, have been approved and applied by the Privy Council in ***Sifton v Sifton [1938] AC 656.*** That was a case in which a life interest given to a daughter in the income of a testamentary estate, was subject to a condition which required the payments to the beneficiary to be made; only so long as "she shall continue to reside in Canada".

90. That condition was held to be a condition subsequent to the vesting of her interest and, as it would work a forfeiture and did not meet the test laid down in ***Clavering v Ellison***, was void for uncertainty.

91. The question arose in circumstances where the daughter wished to be abroad for the purposes of travel and study for extended periods it seems of up to 11 months

each year for a number of successive years, but with no intention permanently to reside any where but in Canada.

92. Dicta from the case show its importance to the present issues before me.

93. At p670, after citing in full Lord Cranworth's dictum from his judgment in ***Clavering v Ellison***, Lord Romer, stated:

> ***"Much to the same effect has been said in latter cases, of which it will be sufficient to mention three. In In re Sandbrook Noel v Sandbrook [1912] 2 Ch. 471.477) Parker J stated the principle in these words:***
>
> > *'Conditions subsequent, in order to defeat vested estates or cause a forfeiture, must be such that from the moment of their creation the Court can say with reasonable certainty in what event the forfeiture will occur.'*
>
> ***In Re Viscount Exmouth, Viscount Exmouth v Praed [(1883)] 23 U.D. 158, 164 Fry J used the following language:*** *'...the condition must be clear and certain. That, in my opinion, includes not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect.'*
>
> ***These words of Fry J. were considered by Russell J in In re Lanyon, Lanyon v Lanyon ([1927)] 2 Ch. 264. He said (at page 269):***
>
> > *'They do not, I think, mean that the person affected must be in a position at all times to know whether he is committing a breach of a provision the nature of which is clearly expressed.'*
>
> ***Their Lordships respectfully agree. If the provision be clearly expressed, it is the fault or the misfortune of the person affected if he should fail to know whether he is committing a breach of it. But this is implied in the language used by Fry J. He said it must be "ascertainable" whether the provision has taken effect or***

not; not that it must be ascertained in fact by the person affected or even ascertainable by him without difficulty."

94. Looked at from the point of view of a Limb 1 or Limb 2 challenge here; that is: someone seeking to contest "the validity of this deed and the Trust created under it, of the provisions of any conveyance of property by any person or persons to the Trustees to form and be held as part of the Trust Fund" - there is no argument developed that Clause 23 should be deemed void for uncertainty. Those words are plain enough to convey what it is that should not be contested in any way. Taken with the exclusionary words, they also plainly tell what the consequences would be.

95. And, as to what the word "contests" itself should mean either for the purposes of Limb 1, Limb 2 or Limb 3, I hardly see any basis for doubt.

96. A similar question arose in ***Evanturel v Evanturel*** *[1874] L.R. 6 PC 1* where a testatrix had sought to prohibit challenges by her legatee daughters to the will by use of the words "takes any steps whatever (whether directly or indirectly) to contest my present will".

97. The Privy Council (per Sir James Colvile) made short work of the arguments that those words were void for uncertainty, in terms sufficiently wide to be of application here:

> ***"The terms, though general, seem to their Lordships to point to a contestation of the testament in a Court of Law, and to be made so general in order to embrace every form of legal proceeding wherein or whereby such contestation might take place. There is therefore no uncertainty in the Clause as might prevent its application."***

98. As already noted, the argument for uncertainty here relates to Limb 3 of Clause 23 – that the phrase "the validity....of the decisions of the Trustees and/or of the Protection Committee" is too vague to enable a beneficiary (or the Court) to know from the outset just what decision(s), if contested, would result in forfeiture under Clause 23.

99. Having regard to the further pronouncements in ***Evanturel v Evanturel*** and other cases to be considered below under the headings of "repugnancy" and "public policy", and having regard to the concessions which emerged during the arguments, it must be noted here that if the phrase "the decisions of the Trustees and/or of the Protection Committee" were to be read as meaning *any* such decision whether taken in good faith or not, or whether taken within the powers vested in the office or not; then Limb 3 would be invalid. The reasons for this will be explained below.

100. Nonetheless, the difficulties specifically over uncertainty with the phrases must be recognised as they were, in my view, properly identified by Mr. Martin: It must typically be unclear what is meant by "validity" when applied to a "decision" in the context of these complex arrangements.

101. These being discretionary Trusts, the fact that the Trustee would have decided to exercise its discretion one way or the other will typically, if not invariably, only be manifest from the actions taken as the result. The Trustee is not required to give prior notice of its agenda, nor reasons for its decisions: See **In Re** ***Londonderry's Settlement Peat and Others v Walsh [1965] 1 Ch. 918.*** It would therefore be to the actions of the Trustee taken after decisions have been reached,

that a contest would likely be directed. Indeed, that is ultimately the nature of the challenge raised by the Plaintiff by her institution of this suit – directed largely at the alienation of the HIJ Trust shares in the Company to F.S. While it implies also a challenge to the decision on which that action was based, it is, strictly speaking, against the alienation that her writ complains.

102. Would the settlors have wished and intended that *any* contest whatsoever, in whatever circumstances, by one of their beneficiaries to the validity of any deliberate action of the Trustee, should result in automatic and immediate forfeiture of benefit?

103. Should Limb 3 work a forfeiture in such circumstances, on the basis that the challenge is one nonetheless to the validity of a decision, because without decisions there are no actions?

104. To the extent that the wording does not provide an immediate and clear answer to such questions, it may, in my view, be regarded as uncertain. Seen in that light, I understood Mr. Taube to have conceded as much.

105. The failings of the wording become even more apparent when considered in respect of what is meant by a contest to the validity of the decisions of the Protection Committee in the context of these Settlements. The Protection Committee in its primary every day role does not exercise discretions or powers. Its function is primarily to give advice or to give or withhold consent. In the course of giving or withholding consent, the Protection Committee may take decisions; but as with the Trustee's decisions, those will not be the subject of a contest on their own, divorced from the actual consent or withholding of consent.

106. These are not merely theoretical problems. Practical uncertainty may well arise when a decision has been taken and the Trustee has yet to embark on the course of conduct.

107. In such circumstances the decision having already been taken, it may be unclear whether a challenge which is intended to prevent the exercise of the discretion or power – say, as being unauthorised – is caught by Clause 23 Limb 3.

108. Indeed, the present proceedings were initiated by way of injunction with a view, it is said, to have restrained the Trustee *before* it exercised its powers. And, in practical terms, such injunctive proceedings are less likely to disrupt the proper administration of the business of the Trust, because as an experienced draftsman advising the settlor would have known, such proceedings usually end up, if not preventing a course of action because it would be in breach of trust, then simply giving directions as to how best the course of action might be taken.

109. The foregoing is not to be taken as concluding that there could not be a contest going, strictly speaking, to the validity of a Trustee's decision itself. Consider for instance, a challenge to a decision on the basis that the decision was taken for an improper purpose or a decision taken without proper information or advice resulting in a breach of trust: ***A v Rothchild Trust*** ***2004-095 CILR 485*** applying the principle from ***In Re Hastings Bass Dec'd*** ***[1975] Ch. 25,*** as more recently explained in **Sieff v Fox** [2005] 1 W.L.R. 1312.

110. But such examples only give more currency to the question whether those are the sorts of challenges to the validity of decisions contemplated by Clause 23 Limb 3.

111. In support of her submissions that the word "decision" gives rise to no uncertainty, Mrs. Warnock-Smith observed that the only decisions the Trustee and Protection Committee can make are those in conformity with their powers and discretions under the Trust instrument; and that Limb 3 is therefore directed to those powers and discretions. A challenge against any decision would be a challenge to the exercise of those powers or discretions and would therefore be caught.

112. This, however, immediately begs the question whether a challenge to the validity of a decision would imply that the decision may *not* have been taken in conformity and, therefore, whether such a challenge is meant to trigger the forfeiture. Construed literally, Limb 3 would be too uncertain to be enforced.

Repugnancy and Ouster

113. As to repugnancy, ***Williams on Wills** Volume 1 8th Edition 2002 page 347* states the principle thus: *"A repugnant condition is one which attempts to make the enjoyment of a vested gift contrary to the principles of law affecting the gift"* citing ***Saunders v Vautier** [1841] Cr & Ph 240.* Conditions which are repugnant to the estate to which they are annexed, are absolutely void: ***Williams on Wills** 8th Edition Vol. 1 2002 p.347*, citing ***Re Dugdale** [1888] 38 Ch. D. 176.*

114. Specifically in the context of this complex lifetime settlement, plainly there are no "vested gifts" to which it might be said Clause 23 is repugnant. Rather it is said that as it is fundamental to the existence of the Trust that there are beneficiaries who can enforce it (see ***Armitage v Nurse*** above), it is therefore repugnant to the very nature of the trust to prevent a beneficiary from doing so.

115. If Clause 23 Limb 3 on its literal construction would prevent a beneficiary from challenging the validity of *any* decision of the Trustee, it ought, therefore, to be held to be void for repugnancy.

116. Whether the forfeiture occurs as soon as the challenge is made or only when it is pressed further through proceedings or even to trial, does not matter. By forfeiting the beneficiary's interest and doing so automatically, Clause 23 Limb 3 renders the trusts incapable of being enforced by anyone.

117. Further, it was submitted that as it is an essential attribute of property that there is the right to go to Court to vindicate and protect the property, that right cannot be ousted directly or indirectly. In this regard, said Mr. Martin, it does not matter whether Clause 23 would operate only as a deterrence construed as applying only where the challenge is unsuccessful (as proposed by Mr. Taube) or as an outright prohibition. It would be unconscionable for a beneficiary, who on good grounds seeks to challenge a decision of the Trustee, to have to assume the risk of the forfeiture of her interest in order to be able to do so.

118. Thus, the objections based on the ground of ouster and that of repugnancy are objections which essentially overlap in nature: the notion further, that whatever private rights of disposition a donor might have, it is fundamentally wrong or repugnant such that the public conscience should be offended, if the conditions of his deposition should operate in the draconian manner proposed by barring a beneficiary from seeking vindication before the Courts. In other words, such a provision must be void for being repugnant to the trusts of the Settlement or for being against the policy and liberty of the law.

119. Notwithstanding the cautionary words of Lord Simon from ***Blathwayt v Lord Cawley** [1976] A.C. 397* (at 427) that it is not for the Courts "to embark on an independent and unfettered appraisal of what they think is required by public policy on any issue"; the decided cases do reveal a line of policy, though not always consistently developed.

120. So much so, that, as indicated above, there came about a time in the arguments when it was accepted both by Mrs. Warnock-Smith and Mr. Taube, that Clause 23, at any rate in Limb 3, could not validly be construed as a complete prohibition of access to the Courts.

121. The proposition was put by Mr. Taube in this way drawing upon the actual decisions in some of the leading cases which must be considered: *"The short answer to the plaintiff's argument is as follows. On its true construction Clause 23 does not deprive a Beneficiary of the right to sue in the Court. On any view, Clause 23 has no application to a claim by a Beneficiary to sue the Trustee in respect of the trustee's fraud or bad faith. Further, if the Beneficiary's claim on any other ground is successful (alternatively, brought bona fide and probabilis causa litigandi), Clause 23 will not apply."*

122. A most helpful summary of the development of the law on this aspect of the matter appears in the judgment of Danckwerts J from ***In re Wynn, dec'd Public Trustee v Newborough** [1952] 1 Ch. 271.*

123. There a clause in the will which purported to refer the determination of all questions and matters of doubt arising in the execution of the trusts to the trustees and which attempted to make the trustee's determination "conclusive and binding

on all persons interested under the will", was held to be void and of no effect, for being repugnant to the benefits conferred by the will upon the beneficiaries, and as being an attempt to oust the jurisdiction of the Court to construe the testator's will and to control the administration of his estate.

124. It may be worth noting here again that there appears, in my view, no reason in principle to distinguish for these purposes between a will and an inter vivos settlement.

125. I take up the narrative from the judgment of Dankwerts J at page 276:

> *"It may be said that beneficiaries under a will take what they take purely by the bounty of the testator, and it might be said that, as they are not entitled to anything of right apart from the provisions of the will, they must take their benefits subject to the conditions which are contained in the will and abide by them. Therefore, it may be asked, if that is so, why cannot the testator impose on the beneficiaries under his will conditions which require them to abide by the decision of the trustees as to various matters?*
>
> *One's mind naturally turns to provisions which are often found in contracts providing for the decision upon disputes by an arbitrator, the common arbitration clause. After considerable doubt, the position of an arbitration clause appears to have been settled by* Scott v Avery *as being valid provided that it merely requires as a condition precedent to the bringing of legal proceedings upon the contract that there shall have been an arbitration fixing the amounts to which the parties are entitled; and on the other hand, that anything which goes beyond that, and attempts to deprive the parties of their right to bring an action is unlawful as an attempt to oust the jurisdiction of the court.*
>
> *The matter is not entirely devoid of authority, though there are not many authorities upon the question. It appears, for instance, that not all disputes could be referred lawfully to the decision of an arbitrator, and that, in particular, in regard to real property the courts were*

very unwilling to allow their jurisdiction to be lessened or impinged on by the decisions of some outside tribunal; and as long ago as 1695, in Philips v Bury (1695) Skinn. 447, 469, there is a statement to the effect that the decision of the construction of a will cannot be referred to arbitration.

The case concerned the rights of rectors to St. Michael's Rectory within the city of Oxford; and Eyre J. said: "He did not doubt, but that an action upon the case lay against the visitor in this case, as well as against a bishop, who will not assoil the party, or against an archdeacon, etc., and he said, thirdly, that a man cannot erect a jurisdiction which shall not be examined, no more than he can appoint by his will, that if any difference arise, that this shall be determined by J.S. and his determination shall be final."

As long ago as that, there was a statement which, on its face, seemed to me to be contrary to the provisions of the kind which are to be found in clause 30 of this will.

In In Re Raven [1915] 1 Ch. 673 there was a *decision of Warrington J. on a clause of a will which provided that* "if any doubt shall arise in any case to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." *It was claimed that the institution entitled to claim a legacy of £1,000 given to the "National Association for the Prevention of Consumption" should be decided by the trustees and should not be referred to the decision of the court. It was held in that case that "the direction in the will so far as it purported to oust the jurisdiction of the court was void and inoperative (1) on the ground of repugnancy, and (2) as being contrary to public policy."*

That case, of course, might be said to be rather exceptional, and one which might not apply to more ordinary circumstances, because the identity of the actual beneficiary was to be referred, according to the will, to the decision of the trustee; but Warrington J approved and followed the Irish case of Massy v Rogers, 11 L.R. Ir. 409, which goes very much further and deals with a much wider clause than the case which he had to decide. He approved the Irish decision and applied it to the case which he had to decide. It seems to me that that case is

authority for the proposition that a testator cannot compel the beneficiaries taking under his will to have their rights decided by the decision of the trustees.

The principles on which the law proceeds are to my view, explained by the Court of Appeal also in Czarnikow v Roth, Schmidt & Co. [1922] 2 K.B. 478. In that case, where there was a provision for arbitration contained in a contract, there was a term which provided that "neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall require, nor shall they apply to the court to require, any arbitrators to state in the form of a special case for the opinion of the court any question of law arising in the reference, but such question of law shall be determined in the arbitration in manner herein directed."

Scrutton L.J. said: *"I think it is necessary to add a word about the effect of Scott v Avery S.H.L.C. 811. I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the King's courts, they can agree that no action shall be brought in those courts till the amount of liability has been settled by arbitration. Alderson B (ibid 844) states this as agreed by all parties, and Lord Cranworth begins his judgment in the same way. I do not think the language of Lord Dunedin in commencing his judgment in Atlantic Shipping Co. v Dreyfus [1922] 38 T.L.R. 534, can have been meant to impugn the first part of this proposition. The courts always decline to recognize an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's courts. I prefer the language of Lord Sumner, concurred in by Lords Buckmaster and Atkinson, to the effect that as long as a clause does not exclude the claimant from such recourse to the courts as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think that Lord Sumner would have regarded a clause depriving a claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English courts would decline to enforce.'*

> *That shows the limitations which are to be imposed even on an arbitration clause in a contract, and it seems to me that as regards the construction and administration of a will the policy of the law is still more severe. I consider that I am bound to hold, on the authority of* ***In Re Raven*** *[1915] 1 Ch. 673, that a provision which refers the determination of all questions and matters of doubt arising in the execution of the trusts of a will to the trustees, and which attempts to make such determination conclusive and binding upon all persons interested under the will, is void and of no effect; because it is both repugnant to the benefits which are conferred by the will upon the beneficiaries; and also because it is contrary to public policy as being an attempt to oust the jurisdiction of the court to construe and control the construction and administration of a testator's will and estate."*

126. A number of other cases were cited to the same effect in the arguments before me: ***Rhodes v The Muswell Hill Land Company*** ***[1861] 29 Bear 560***; ***Massy v Rogers*** ***15 11 L.R. 1r. 409*** (decision of Chatterton VC cited with approval by Dankwerts J. in ***In Re Wynn*** above)***;*** ***Re Williams*** ***[1912] 2 Ch. 399;*** and ***In Re Tuck's Settlement*** ***[1978] Ch. 49.*** In this last case, some of the leading earlier cases were considered by the Court of Appeal. The issue related to a provision in his father's will which provided that the Baronet (and any successor) could benefit only so long as he remained of "the Jewish faith" and married to an "approved wife", or, if separated, certified by one of two designated Chief Rabbis in London as being so separated through no fault of his own. The question whether a wife was an "approved wife" was, in case of dispute or doubt, also to be referred to a Chief Rabbi whose decision on the matter "shall be conclusive".

127. The main challenge to the provision on the ground of uncertainty was dismissed but there was a further question whether the reference of dispute to the sole and

conclusive determination of the Chief Rabbi was also void as being an ouster of the court's jurisdiction. Lord Denning MR found no difficulty with the provision even if seen as an ouster of jurisdiction on the purely pragmatic basis that the Chief Rabbi would have been – if the question ever arose – better placed than the Courts to determine what the testator meant by "Jewish blood" or "adherence to the Jewish faith". In this respect, he was in the minority but at page 61 letters E–G appears his summary of the wider principles:

> ***"I see no reason why a testator or settlor should not provide that any dispute or doubt should be resolved by his executors or trustees, or even by a third person. To prove this, I will first state the law in regard to contracts.***
>
> [He then referred to the position of binding arbitration agreements].
>
> ***"Such an agreement (to abide by the decision of a third person) does not oust the jurisdiction of the Courts. It only offends when the parties go further and seek by their agreement to take the law out of the hands of a private tribunal without recourse to the courts in case of error of law ...***
>
> ***If two contracting parties can by agreement leave a doubt or difficulty to be decided by a third person, I see no reason why a testator or settlor should not leave the decision to his trustees or to a third party. He does not thereby oust the jurisdiction of the Court. If the appointed person should find difficulty in the actual wording of the will or settlement, the executors or trustees can always apply to the court for directions so as to assist in the interpretation of it."***

128. Those statements were relied upon by Mr. Taube for the proposition that an ouster clause will not be held to be invalid unless it attempts entirely to deprive the parties of all right to bring an action in the Courts to enforce their rights. The

exercise of construction must proceed on the basis that questions of law must remain questions ultimately for the Courts.

129. That is a proposition which is acceptable so far as it goes and it must be immediately noted, as clearly appears from the last sentence of the quoted passage, that Lord Denning MR was not dealing with a situation where a complete prohibition against litigation before the Courts was contemplated by the settlement (albeit suggesting only a vicarious access for beneficiaries through their trustees). Much less a situation where litigation would result in the immediate forfeiture of an interest.

130. An examination of other cases dealing directly with public policy objections to forfeiture clauses is, therefore, necessary.

131. The recognised starting point is ***Cooke v Turner*** *[1846] 15 M & W 727.*

132. There the question for the Court of Appeal was whether a certain condition, in a will devising real estate including a life interest to the testator's daughter, was valid. The challenge was brought in the face of the condition which stipulated that if the daughter or her husband or anyone on their behalf were to dispute the will or the testator's competency to make it or should refuse when required by the executors to confirm it, the disposition in her favour shall be revoked.

133. The condition construed both as a condition precedent (referencing her refusal to confirm the will) and subsequent (referencing her challenge after the will was deemed effective), was held to be valid. The result was that the daughter forfeited her bequests.

134. Notwithstanding that the testator had in 1826, some 15 years before he made his will in 1841, been duly adjudged to be a lunatic, the Court found no public policy basis for an objection to the condition in the will. In his judgment given on behalf of the Court, Baron Rolfe said [at paragraph 734-736]:

> *"The ground on which the argument against the (condition) was made to rest was, that every heir at law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane person, and would, in the language of (Shepard's) Touchstone be "against the liberty of the law". We cannot, however, adopt this reasoning. There appears no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubtful question of fact or law, on which the title of a devisee or grantee may depend.*
>
> ....
>
> *The truth is that in none of [(the cases considered)] is there any policy of the law on the one side or the other. The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition to a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the state has no interest whatever apart from*

> *the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient as to the raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another."*

135. While that trenchant discourse upon the limitations of public policy intervention in private arrangements for the disposition of property appears to have stood the test of time, it does, with respect, beg the question whether the law should intervene where there is doubtful capacity to make such arrangements.

136. With the passage of time and from the perspective of a changed social context in which there is no longer legislative indifference to the disinheritance of dependents, one wonders whether ***Cooke v Turner*** would be decided differently today involving as it did, the possible suggestion of insanity and thus, implicitly, fraud avoiding the will.

137. And although the case was subsequently approved by the Privy Council in ***Evanturel v Evanturel*** (above); it is quite clear, from the result there, that its impact has been significantly mollified. While, in approval of ***Cooke v Turner***, it was held that a no-contest clause by which a testator sought to protect his estate and representatives against attempts to litigate his will would not be contrary to public policy, and would be valid; the Privy Council also declared that this would not apply to cases where the challenge was successful.

138. That result was achieved by the introduction of the principle that ***"such a condition (of forfeiture) can only, in practice, be applied where a will has been***

unsuccessfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament."

139. The outcome in ***Evanturel*** is readily reconcilable with the circumstances of that case. There a daughter of the testatrix, in the face of a no contest provision, by protracted litigation unsuccessfully challenged the validity of the will itself on grounds of lack of execution and as having been obtained by fraud and captation and undue influence of her brother, the appellant, upon their mother. Moreover, to the extent that she had been allowed to recant her challenge before the final judgment was given, the daughter had not done so.

140. She was held to have forfeited because her challenge had been unsuccessful; although no such qualification had been written upon the forfeiture clause itself (see appendix hereto).

141. At page 26 the question was posed and the answer was given in the following terms on behalf of the Judicial Committee by Sir James Coleville:

> ***"...the question is, therefore, reduced to this viz; is this Clause contrary to public order, because it is designed to prevent the doing of that which it is against the public order to discourage....***
> ***And (their Lordships) must deal with the proposition laid down by [(counsel for the daughter)] and indeed involved in the judgment of Mr. Justice Taschereau [(in the Supreme Court for the Province of Quebec)] viz: that every condition which implies the prohibition to dispute a will as a whole, as distinguished from a particular Clause in it, upon any grounds which affect the legal validity of the instrument as a testamentary disposition, seems against public order, and must be treated as "non-ècrite"[(invalid)].... For, if society has an interest in securing the trial of the question whether all legal formalities have been observed in the execution of a will, it seems to have an equal interest in the trial of the question whether a will has been obtained by fraud, or the***

exercise of undue influence from a person of imperfect capacity.

The question may be considered on principle and on authority. Upon principle, it is to be observed that the prohibition cannot be absolute, and can only be invoked where the validity of a will has been unsuccessfully contested. If there is a clear and patent defect in the formalities attending the execution of the instrument, or if the incapacity of the alleged testator be clear and notorious, the heirs or other parties interested will, of course, contest the will, and contesting it successfully, will set it aside with the Clause of forfeiture. On the other hand, it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee, "I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the validity of my will if you please; but you do so at the peril of losing, if it is established, what it gives you."

142. So, I think it is fair to discern from ***Evanturel***, at least implicitly, the recognition and acceptance of a public policy interest in ensuring that persons who may be interested in taking under an estate, should not be barred from raising before the courts a challenge to the will which turns out to be successful, notwithstanding the existence of a no-contest clause to the contrary. This view of the ratio of the case is, I think, supported by the fact that the Privy Council took into consideration Articles 76 and 81 also of the Civil Code which identify such public policy concerns (see appendix).

143. But ***Evanturel,*** important a case as it is, does not directly answer the question whether an extant challenge, as yet unresolved as to its merits by judicial determination, may be regarded nonetheless as having triggered a no-contest forfeiture provision.

144. Support for the notion of a meritorious but ultimately unsuccessful challenge being spared from forfeiture, appears to have been first recognised by the law as long ago as in ***Powell v Morgan*** ***(1688) 2 Vern 90.***

145. That surviving report of the case, written in the style of the time, is not easily explained; although it is clear that the legacy in question was given on condition that the plaintiff "shall not dispute the will" of his mother, the testatrix.

146. While the testatrix' parents had been alive, they owned land in respect of which she had been the beneficiary of the income from a lease granted over the land. When her father died, she inherited the land outright and so the leasehold rights "merged" in law with the fee in her. By her will, she purported to bequeath the leasehold as if it had remained a separate portion charged upon her estate to someone else (it seems a creditor) who would get the income, and gave the plaintiff a legacy of the fee, upon the condition that he did not disturb or interrupt her will.

147. The plaintiff nonetheless contested the validity of the will, arguing correctly in law that upon her succession to the legal estate in the property, the testatrix' interest in the lease had merged with her legal estate and consequently, as her legatee and heir at law, he was entitled to the property outright.

148. The Court, in the exercise of its equitable jurisdiction decided to grant "relief against the merger" and decreed the portion under the lease to go according to her will.

149. The point which next arose for the Court was whether the plaintiff had forfeited his legacy, having thus unsuccessfully contested the validity of the will.

150. The decision of the Court on that question is reported as given in one sentence: *"There was probabilis causa litigandi; and it [(the litigation)] was not a forfeiture of the legacy."*

151. In other words, the legatee son, having had good cause at law for litigating the issue, his contest did not operate as a forfeiture of his legacy. Had equity not relieved against the merger, he would have been entitled to succeed.

152. This conclusion does not appear to have been arrived at so much as a matter of the construction of the will to find the intention of the testatrix, but rather as an axiomatic statement of principle: equity would not admit of a construction resulting in injustice. To the extent that the concerns for the intentions of the testatrix influenced the outcome, it seems that could only have been in the sense that she ought not to have been taken as intending otherwise.

153. In ***Adams v Adams*** (above), a forfeiture clause which prohibited the plaintiff from "in any way intermeddling with or interfering in" or attempting so to do, in the management of the testator's estate, was, although strictly construed, upheld by the Court of Appeal. The result was that the plaintiff forfeited the bequeathed annuities there being a gift over to someone else, because his challenge to the management of the testator's estate by the trustees, one of whom was his sister, on allegations of deliberate fraud and misappropriation were found to be "frivolous and vexatious".

154. Approval of the first instance judgment of Lord Justice Fry (sitting as an additional judge in Chancery) was expressed differently by the Justices of Appeal. First by Lindley L.J. in these words (at page 373):

"It seems to me that the Lord Justice took the view which is in accordance with authority, and in accordance with good sense.

He said that if the Plaintiff had any reason to complain to his trustees and was seeking the protection of the Court to vindicate and establish his rights, that would not be such an interference as would amount to a forfeiture of his interest; but this action was nothing of the kind; it was a frivolous and vexatious action, the object being to get a receiver appointed and to get the management of these estates out of the hands of the defendants."

By Lopes LJ (at p. 375)

"The learned Lord Justice seems to have interpreted [(the words in the will)] in this way. He holds that if this had been a bona fide action brought for the purpose of vindicating the annuitant's rights, then it would not have been such an intermeddling or interference as contemplated in this proviso. But if, on the other hand, it was, as he holds it is, a frivolous and vexatious proceeding on his part, then it is that sort of intermeddling and interfering which is contemplated by the testator. I think the Lord Justice is perfectly right...."

And, finally, per Kay LJ (at p. 377)

"I entirely concur in what Lord Justice Fry said in his judgment to the effect that if this had been a bona fide action brought in defence of the Plaintiff's rights, it should not be held to be an attempt to interfere with the management. If this had been a bona fide action brought for the protection of the annuitant – if for example, the annuities had been improperly withheld from him, and he could not get them without suing for them – even if he had asked for a receiver in a case of that kind, I am not at all prepared to say that that would have been such an attempt as would have come within the proviso; and for that again there is distinct authority in the case which is cited ..namely Powell v Morgan *2 Vern, 90, in 1688. There was a similar provision in that case and the judgment is given in two lines: 'There was probabilis causa litigandi; and it was not a forfeiture of the legacy.' Those are pregnant words and they show that if there had not been an excuse for litigation, probabilis causa, the*

Court in that case would have held that it was a forfeiture.

Here there was no excuse whatever for any part of this litigation...."

155. Note, from these passages, the range of the dicta used to describe the qualification upon the draconian effect of the proviso – involving variously a requirement that there be "a reason to complain"; that the contest "not be merely frivolous and vexatious", but "bona fide", "based on *probabilis causa*", or "an excuse for litigation".

156. Again here, it seems the process was not merely one of construction by which the qualifying words were implied as attributable to the intention of the testator, although what the testator would have contemplated was held by Lopes LJ as embodied within them. Lord Justices Lindley and Kay both referred to the qualifying words as being "consistent with authority."

157. Similarly in ***In Re Williams, Williams v Williams*** (above); the provision did not operate as an outright forfeiture but, instead, so as to visit by way of penalty, the entire costs of any court action upon the respective share of a plaintiff beneficiary. It was held that the provision did not apply to the action which was brought on grounds of wilful default on the part of the executors and trustees.

158. Swinfen Eady J. rested his decision primarily on the footing that the penalty clause could not oust the power of the Court to award costs in the action, as it would in its discretion, think fit. He went on also to say by reference to decided principles:

"I do not, however, rest my judgment on that ground alone. I am quite satisfied that Clause 13 has no

application to a case like the present. In the first place it does not apply to an action for administration on the footing of wilful default, which is the gist of the present action. This point is really covered by Powell v Morgan and Adams v Adams [(both above]) where it is pointed out that such a clause does not apply where there is probabilis causa litigandi. In this case where capital moneys have been withheld for years and the trustees have been guilty of wilful default and the cestuis que trust have been driven to take proceedings to enforce their rights, the clause is inapplicable.

Again, the clause if applicable to such an action would be void for repugnancy." (citing Rhodes v Muswell Hill Land Co. 29 Bear. 560, 563 (and above))

159. ***In Re Whiting's Settlement Whiting v De Rutzen*** *[1905] 1 Ch. 96* was, among the many cases cited in the arguments, the only one involving an inter vivos settlement, but it did not involve a no-contest provision. The forfeiture clause was of the archaic kind formerly often seen in settlements in purported restraint of marriage. There was a condition providing for the forfeiture of interests given by the settlor to his daughter and her children; to operate upon the marriage of the daughter at any time under the age of 26 without the consent of the settlor or, after his death, of his wife or his trustees or, if she were to marry at any time whatsoever, to someone not of an approved ethnicity. The condition was held to be valid and enforceable, as it was not generally in restraint of marriage (and so not contrary to public policy) and as there was a gift over of the fund to charity, following ***Dashwood v Lord Bulkeley*** *(1804) 10 Ves 230;* ***Lloyd v Branton*** *3 Mer. 108; 17 R.R. 33* and ***Scott v Tyler*** *2 Dick. 712.*

160. The Court of Appeal considered itself bound by a settled line of authority to hold that the daughter's interest was forfeited when she married in breach of the

condition, since there was a gift over but (per Vaughn Williams L.J.): could not regard the present state of the law as satisfactory and ***"I should have been very glad if we could have decided otherwise"***. Romer LJ and Cozens-Hardy LJ were equally unenthusiastic but were not prepared to overrule ***"…this long series of decisions extending over two centuries."***

161. And, in my view, of some passing relevance here, Cozens-Hardy LJ concluded that ***"…although our attention has not been called to any case in which the rule [(that is, "the long series of decision")] has been applied to a deed as distinct to a will, I can see no ground for drawing any distinction between the two."***

162. While that case can easily be distinguished from the present on the basis that it did not deal with a no-contest clause (but one in partial restraint of marriage); the provision, regarded by the Justices of Appeal as repugnant to precepts of fairness and human dignity; was upheld nonetheless because it was not applied merely *in terrorem*, was not repugnant to the gift under the settlement and, in light of the by then settled case law especially on provisions on partial restraint of marriage, was not contrary to public policy.

163. It is just as well that for present purposes, the only guidance I need take from ***In Re Whiting's*** is to be found in the last observations of Cozens-Hardy LJ as to the lack of distinction between a deed of settlement and a will.

164. Only three more of the cases cited in the arguments on this point I consider that I need mention, and then only for the purposes of distinguishing them.

165. *In the Will of Gaynor, dec'd [1960] V.R. 640,* the Supreme Court of Victoria considered a condition in a will that if either of his beneficiaries (a son and a

daughter) *"be dissatisfied with any of the provisions of this my will and institute or cause to be instituted ....any action ...or proceeding to contest any of the provisions of my will, such beneficiary shall upon the institution of such action...or proceeding forfeit all...share or interest in my estate."*

166. The daughter wished to make application under Part IV of the Administration and Probate Act 1958 for further provision for herself.

167. It was held that -

(1) Such an application would be a proceeding "to contest" the provisions of the will;

(2) The declaration contained a condition subsequent attached in the case of the daughter's legacy to a gift of personalty which provided for a bare forfeiture on the happening of the condition with no gift over on forfeiture and having regard to the nature of the condition, it was merely imposed *in terrorem,* was repugnant to the gift and void.

(3) The condition was also void as being against public policy because its object and effect was to deter the beneficiary from having recourse to the courts in a matter in which it was in the public interest – there as reflected by the statute – that she should be free to have recourse.

168. A similar view was taken by the British Columbia Supreme Court in 1982 in ***Re Kent*** ***139 D.L.R. 318*** where a no-contest provision which allowed only such recourse to the Courts as may be "necessary for judicial interpretation" of the will or for the direction of the Court was held to be void on similar grounds of public policy. The provision was void "because the Wills Variation Act 1979, C. 435,

under which the applicants wished to apply for an order for support, was enacted as a matter of public concern that a testator's dependents should not be left without adequate provision for their maintenance and support".

169. In ***Nathan v Leonard*** *[2002] WTLR 1061,* a similar problem arose for consideration under the Inheritance (Provisions for Family and Dependents) Act 1975 (U.K.). There, while a no-contest clause was held to be void on grounds of uncertainty, the Learned Deputy High Court Judge did go on (in the event the case were taken on appeal) to consider the other grounds of objection which included repugnancy and public policy.

170. He concluded that the clause would not have been void for repugnancy because it did not purport to operate in a manner that was inconsistent with the nature of the interests given to the donee – a conclusion readily understood on the facts of the case where the donee's interest was only of a limited reversionary kind.

171. The public policy objections raised at least two different issues. One was the question whether the State had an interest in the prompt and orderly administration of the deceased's estate and whether the purported forfeiture provision would have operated in such an arbitrary and disruptive manner as to be contrary to that public interest. In light of the authorities and in particular ***Cooke v Turner*** (above) no such broadly stated basis for a public policy interest was found.

172. However, the conclusion expressed obiter, that the Clause would not operate to prevent, but only deter applications to the Court by dependants under the Act, and

so was not contrary to public policy; is less readily understood. (Particularly in light of the other cases such as ***In Re Gayner*** and ***In re Kent*** above).

173. But I need not take a firm view on that. As we have seen, no such statutory entrenchment upon a settlor's freedom of disposition of his bounty exists in the Cayman Islands, imposing any such public policy reason to invalidate a no-contest provision in a trust settlement.

174. The answer here therefore depends upon what is to be made of the pronouncements at common law from the many cases cited above.

175. From the foregoing survey of the case law, I consider that it is safe to summarise the principles which guide my decision here as follows:

(1) To be valid, Clause 23, subject to the severability of any invalid Limb, must be certain within the meaning settled in ***Clavering v Ellison***.

(2) In the case of a challenge to the essential validity of the Trust itself (a Limb 1 contest) there is no general public policy reason why a no-contest provision should not be valid (see ***Cooke v Turner***, and ***Evanturel v Evanturel***).

Such a challenge, if successful, would likely serve to set aside the Trust as invalid and with it, the provisions of the no-contest Clause itself.

If the challenge is unsuccessful and without any good cause, there appears no public policy reason why the Clause should not operate to exclude the contender from benefit and, subject to any discretion of a Court if it exists (a matter to be considered below) to give relief from forfeiture, he will be excluded.

However, even in a case of a challenge to essential validity (Limb 1 or Limb 2) as in any other case of challenge, including as to the validity of decisions or actions of a trustee (Limb 3); a no-contest clause cannot be validly construed so as entirely to shut out challenges which are based on probable cause or good faith or which are not taken merely frivolously and vexatiously or without good reason (***Adams v Adams***); ***In Re Wynn***; ***In re Williams***; ***In Re Raven***; all above).

Where the challenge is to a particular transfer of property or disposition – a Limb 2 contest – see for example ***Powell v Morgan*** (above), the challenge, even if successful, will leave the no-contest clause in tact with the rest of the settlement. On the authority of that case, such a challenge is deemed not to work a forfeiture. Equally, the obverse would be true – there would be no reason why the forfeiture clause should not be valid and effective where such a contest was brought without good or probable cause and failed.

From the survey of the decided cases, each case must depend on its own circumstances for an assessment; to ascertain whether there has been or is an extant challenge and, if so, whether such good faith or probable cause or good reason can be found.

In light of all the cases, it cannot be concluded that the only qualification upon the operation of a no-contest or forfeiture clause must be "success" as discussed in ***Evanturel.***

(3) Nor would it matter, for these purposes, whether the trusts themselves contain, as here, internal machinery for controlling a defaulting trustee. Even if the control mechanism is vested in a majority of beneficiaries so that an aggrieved beneficiary can, by the democratic process, obtain the removal and replacement of a trustee or the protection committee; that can be no justification for a complete prohibition against access to the Courts.

Such a complete prohibition would be repugnant to the Trusts themselves, to the beneficial interests of the beneficiaries and to their right to seek vindication of their positions before the Court in an appropriate case where such vindication may be necessary (***In Re Raven; In Re Wynn***; ***Armitage v Nurse***).

It would also be contrary to public policy entirely to preclude them from having such access (***In Re Wynn***; ***In Re Raven***; ***Massy v Rogers***; ***Evanturel v Evanturel; In Re Tuck***).

(4) The foregoing conclusions are, in my view, only reinforced, in the context of the present Deeds, by the provisions of Clause 11 in particular (reflecting the principles identified in ***Armitage v Nurse*** (above)), that the trustees will not be exonerated from claims against them, relating to their irreducible core of obligations, and arising from their own intentional fault or wilful misconduct. It would be repugnant to the trusts and to the public conscience in such circumstances to hold that the beneficiaries might not be able to enforce the trusts by appropriate action before the Courts.

176. These conclusions do not arise only as a matter of construction of the intentions of the settlor. Taking the leading case of ***Evanturel*** as expressing an axiomatic statement of principle (no doubt influenced also by the mandate of Articles 760 and 831 of the Civil Code which applied in Quebec, considered at pp 23-24 of the judgment of the Privy Council – see Appendix) there is then support for this proposition. Their Lordships did say (as more fully set out at p. 46 above hereof):

> ***"Upon principle,*** *it is to be observed that the prohibition cannot be absolute, and can be invoked only where the validity of a will has been unsuccessfully contested."* (Emphasis supplied.)

177. That proposition of principle, though differently stated, was, it seems to me, equally axiomatically identified in the other cases which exempt bona fide challenges brought on grounds which could be justified, even if such challenges fell short of success.

178. Thus viewed, in the context of the present Trusts, the principle is not one to be derived merely from a construction of Clause 23 itself seeking to find the intention of the settlors. The principle is one derived from the corpus of the common law as it has developed. Law with which those advising the settlor, on the resettlement of the XYZ Continuation Trust (as it was then known) to the Cayman Islands; would have been well acquainted.

179. Indeed, as Mrs. Warnock-Smith and Mr. Taube observed from time to time during the arguments ***Evanturel v Evanturel***, a Privy Council case from Canada, would have been well known to the original draftsman of this Settlement which started life in New Brunswick and which, from the outset, included Clause 23 but then in its original form as Clause 12 of the XYZ Settlement.

180. What then is to be made of Clause 23, which contains no such qualifying words as "success", "bona fide", or "justified"?

181. The answer must be that the Clause must be construed in accordance with all the terms of the Deed in the light of the settled common law principles which have been identified.

182. It is plain enough that Clause 23 was not intended to be construed as flying in the face of the established principles. Rather, Clause 19 of the Deed makes it plain that the contrary would have been the intention in as much as it provides that, if possible, any offending provision shall be construed in accordance with the laws of the Cayman Islands.

183. Further, I am reminded of the maxim; *verba ita sunt itelligenda ut res magis valeat quam pereat:* ***where two constructions of an instrument are equally plausible, upon one of which the instrument is valid, and upon the other of which it is invalid, the Court should lean towards that construction which validates the instrument.*** **See** ***Langston v Langston*** *[1834] 2 Cl & Fin 194* cited in ***The Interpretation of Contracts****, **by Lewison, Sweet & Maxwell, 2004; pp231-232.***

184. I am satisfied that construed as intended to conform with the decided cases, Clause 23 can be validated so as to eliminate any concerns about uncertainty, repugnancy or ouster of the jurisdiction of the Courts.

Conclusion

185. Clause 23, if construed literally according to its terms and taken by itself, would be void for uncertainty and repugnancy and for being contrary to public policy.

186. However, in light of Clause 19 of the Deed, Clause 23 is not to be construed as intended to operate contrary to the established principles.

187. Viewed in this way, and making the best I can of the import of the decided cases, Clause 23 must be read by implication as allowing not only such contests which are successful; but also contests which are "justifiable", in the sense of being taken bona fide, not frivolously or vexatiously and with *probabilis causa litigandi.*

188. Thus construed, Clause 23 would read:

> *"Whosoever unjustifiably contests the validity of this deed and the Trust created under it, of the provisions of any conveyance of property by any person or persons to the Trustee etc…."*

189. That construction saves all Limbs. It lays to rest, in my view, any concerns over uncertainty, the Clause then plainly speaking, in the context either of Limbs 1, 2 or 3, to any unjustifiable contest; it then being irrelevant whether such a contest is to the validity of the Trust, its property or to any decision or related action of the Trustee or Protection Committee. With that implication, it would be, in my view, an overly sophisticated position to take, that an unjustifiable challenge (if that be the case) to an action, is not the same thing as an unjustifiable challenge to the related underlying decision.

190. I am cognisant that the plaintiff as represented by Mr. Martin in particular, would not find this process of implication to be entirely satisfactory. Such a gloss placed upon Limb 3 Clause 23 would also introduce its own further uncertainties, he advised.

191. One may no doubt again ask what does "lack of bona fides", or as I have found, "unjustifiable" mean in the context of describing a challenge to the validity of a decision or action of the Trustee. In the end he suggested the only acceptable qualification would be "not frivolously or vexatiously". But in my view, that too would have to depend on the circumstances of the case and is not as effective as the concept of justification to capture the nuances of the other expressions which have been used.

192. Regrettably perhaps, from the Plaintiff's point of view, it all remains a matter that this Court, before which the contest has been raised, may yet have to decide; given the particular circumstances of this case.

193. The decided cases show that over the years, contestants to wills and will trusts, who did mount their contests, often did so, as has the plaintiff here, with "their eyes wide open" to the presence of the no-contest clauses. In so doing, the risk that the clauses might have been upheld would have been measured, no doubt also with advice, but nonetheless assumed.

194. In this respect - as in the other respects with which I have had to deal in this ruling - beneficiaries taking under a complex *inter vivos* settlement such as this can, in principle, be no differently placed than beneficiaries under a will or will trust. The difference, if there is one, is only a matter of degrees – the risks, as indeed the operation of the principles, may be more difficult to assess in the present context. This will be because of the wide discretionary powers given to the Trustee, the complexity of the underlying provisions of the Settlement and the complexity of the nature of its business interests and operations. In a context such as this, a

challenge to the decisions or actions of the Trustee where the reasons may not yet be disclosed, and in the face of a forfeiture clause, will be an inherently risky step to take.

Relief from Forfeiture

195. As this Court might yet be called upon to determine whether the Plaintiff's contest has been or has become such as to trigger the operation of Clause 23 (as read with the implied term of justification), the question whether there would be jurisdiction to grant her relief from forfeiture, is not merely academic.

196. That question of jurisdiction is, however, all that remains for me to answer here; any further question as to whether if it exists, it should be exercised, being left for determination at a later stage.

197. Counsel in this matter accepted in varying degrees, that there are grounds for thinking that the Court has jurisdiction to grant relief from forfeiture in a case like the present and in appropriate circumstances.

198. Mrs. Warnock-Smith's tentativeness in this regard was explained as again being related to the fact that no complete parallel is to be drawn between the operation of a condition of defeasance here as in a will or will trusts. Here there are no vested proprietary interests in respect of which relief from forfeiture might be sought or given. Thus, that the cases in which the principles were developed, all related in one way or another to actual proprietary interests which could be defeated or divested.

199. For reasons already discussed and further to be developed below in this context, I am persuaded that such concerns – properly raised though they may have been –

do not impede jurisdiction. Put as succinctly as I can, jurisdiction must exist to grant relief in respect of the very same beneficial interests, however described, as Clause 23 might operate to defeat or divest. The jurisdiction which is equitable in nature, derives from the principle that equity acts on the conscience of the parties; and is not to be excluded by virtue simply of the formal context in which the parties may act. By their very nature the Settlements are not merely contractual but equitable also.

200. In this case the beneficial interests are substantial. As already noted, they comprise the entitlement to be considered for the distribution of income; the bundle of inchoate rights which beneficiaries must have in order that there may be a trust and in order to enforce the trust; (some of which are in fact spelt out in the Deeds) and the contingent right to the respective shares of the capital at the end of the Trust period.

201. For his part Mr. Taube, while accepting that the jurisdiction may well exist here as it does in relation to wills, laid emphasis instead on the cases which suggest that the jurisdiction may not be exercised to grant relief where the forfeiture occurred as the result of the applicant's own wilful default. And that is how he sought to describe the plaintiff's conduct here, in raising her challenge against the decisions or actions of the Trustee and Protection Committee; from his clients' point of view, without justifiable cause.

202. Mr. Martin, as was to be expected, put the proposition in favour of jurisdiction more strongly. This was to the effect that the limitations upon the exercise of the jurisdiction recognised in the cases, are not intended to apply to a case like the

present, which should be regarded as involving the operation of a condition subsequent; but only to cases involving conditions precedent.

203. The reason, as I understand it, is that if relief is given to the operation of a condition precedent, the result of the Court's order will be to vest property in the applicant without the applicant having fulfilled the condition strictly in keeping with its terms and at once depriving the person, intended to take by the gift over, and which would have taken effect, had the relief not been given.

204. Such a proposition would involve a fundamental rewriting of the will or trust; in effect, the Court substituting its views for the intentions of the settlor. That is what is regarded as contrary to principle.

205. That result, the argument goes, would be avoided here, with Clause 23 regarded as a condition subsequent; ie: as potentially working a forfeiture upon beneficial entitlements – however discretionary – which are already settled.

206. In that event, the concerns identified by the Courts over the years in the case law would bear different emphasis; the refusal of relief would result in the divestment of an already existing entitlement and so there has developed no limitation, in principle, on the grant of relief in such cases.

207. While it must be noted that no definitive answer to the issues raised is readily to be found in the case law; ***Williams on Wills*** *(op cit,) page 363 para 34.25,* provides a concise statement of the principles which have incrementally emerged:

> *"A Court grants relief against a condition precedent or against forfeiture under a condition subsequent on the usual equitable grounds of such relief, eg: where performance [(of the condition)] has been prevented by the contrivance of the executors [(Brooke v Gerrard [1857] 2 De G & J 62)] or of other persons interested such as the beneficiary under a gift over*

[(D'Aguilar v Drinkwater [1812] 19 Ves 1 at 17)] or where the condition is in the nature of a penalty. The court also grants relief in the case of conditions relating to the payment of legacies or other sums [(Paine v Hyde (1841) 4 Beave 468)] or the release of claims [(Hayward v Angell (1683) 1 Vern 222; Hollingrake v Lister (1826) 1 Russ 500)]; where performance has not been made within the time required by the testator, and generally where time is not of the essence of the condition and it is capable of being adequately performed at any time [(Perpetual Trustee Co Ltd. V Waddell (1949) 49 SRNSW 266)]; on compensation being made for the delay [(by the payment of interest from the time when the payment should have been made: Grimston v Lord Bruce (1707) 1 Salk 156)].

The court, however, does not give relief in such cases where there is a gift over to any other person other than the person who would take by operation of law [(Simpson v Vickers (1807) 14 Ves 341)].

Except in such cases, the Court cannot give relief [(Thus there is no relief against forfeiture under a condition for marriage with consent: Dashwood v Lord Bulkeley (1804) 10 Ves 230 at 239; Clarke v Parker (1812) 19 Ves 1; nor where the condition forbids the legatee to become a nun: Re Dickson's Trust, ex p Dickson (1850) 1 Sim N.S. 37)].

208. There is some support from the cases cited for both of the propositions advanced by Mr. Martin and Mr. Taube.

209. While the cases tend to show that the limitation on the grant of relief arises from circumstances involving the non-compliance with conditions precedent, the same cases often also reveal that there was wilful default, in varying degrees, on the part of the legatee seeking relief. ***Simpson v Vickers*** (above) is a clear example. There the plaintiff, who was the testatrix' brother and heir-at-law and entitled to her residuary estate, was given a legacy by his sister; on condition that he released by deed all other claims against her estate, including any claims in respect of a legacy left to him under the will of their elder brother of which she had been the

executrix. Failing this, he would forfeit her bequest with a gift over to someone else. Rather than giving the release within the required period of six months, he contested her will. It was held that not having complied by reason of his own default, with what was a condition precedent to the entitlement of the legacy; the gift to him never took effect but went over according to the will and there was no basis for relieving him from the terms of the will.

210. The following passages from the judgment of the Master of Rolls Sir William Grant are instructive:

> ***"But it is said (for the plaintiff), this Court relieves against forfeiture and breaches of condition.***
>
> ***To that it was answered by the Defendants, that this is not a mere breach of condition, but a conditional limitation over in a given event; and, where there is a devise over to any other than that person, who would by disposition of Law take the estate, the Court never relieves; and for that distinction the case of Cage v Russel (2 Vent. 352) was referred to. That this is a conditional limitation, and not a mere condition, is clear from the case of Avelyn v Ward (1 Ves [Sen] 420).***
>
> ***The question there was not of the same kind but the clause in the will was precisely the same, as this: a limitation to the heir-at-law upon condition of giving a release within a certain period, and that was held a conditional limitation, not a strict condition. If this is a conditional limitation, it seems to follow, that, the event having taken place, the Court cannot possibly relieve".***

211. The argument that that strict approach evolved primarily but not exclusively in respect of conditions precedent, is borne out by other cases.

212. In ***Hayward v Angell*** (above) the legatee who did not fulfil the condition precedent of releasing certain portions of the devised estate to others, forfeited even while her sisters who took under the same will did not.

213. In ***Falkland v Bertie*** (above) the ratio is expressed in short unequivocal terms: "This is a condition precedent, and equity cannot relive against non-performance".

214. The result was the same in cases where relief was sought from conditions precedent in partial restraint of marriage. In ***Clarke v Parker*** and in ***Dashwood v Lord Bulkeley*** (both above) the legacies were given on condition that if the legatees were to marry without the consent of the executors (or trustees) the gift would be forfeited outright (in the case of Sarah Clarke) or a smaller legacy given (in Dashwood) with gifts over to others.

215. It was a further condition of the gift to Sarah Clarke that she should execute such further settlement of a portion of the devised properties as the trustees required for the benefit of others.

216. The judgments were delivered in both cases by Lord Eldon LC, who became known for the rigidity of his strict application of the legality of wills and contracts during the early 19th century: First from ***Clarke v Parker*** (at paras: 23 – 24):

> ***"The view I take of this case, which is perhaps as hard as circumstances can frame is this: In case Sarah Creswick Clarke should marry without consent, or refuse to execute such settlement as the trustees should advise the property is given over.***
>
> ***It is extremely difficult for the Court to say, that the property shall not go over in these circumstances, according to the terms of the instrument, in which it is given over. The settlement proposal was not only represented to her by two of the trustees as having the consent of the third, who she and her intended husband happened not to consult, but the two other trustees say by their answer, that they did prepare it on behalf of all three".***

217. It is to be also noted from this cited passage, the implicit suggestion that the result was in part due to Sarah's fault in not having directly consulted the third trustee.

That sense of fault on her part was an important factor also in her having obtained the express consent to her marriage only of the two but not of the third trustee. The requirement of their unanimous consent was the other conditional limitation upon her entitlement under the will.

218. Nonetheless, it is clear that the real ratio of the case turned upon the principle, that the Court could not grant relief where there had been failure strictly to comply with the conditional limitation upon the gift and where there was a gift over to someone else.

219. Equally, again per Lord Eldon LC (in Dashwood above at para 244):

> ***"In this case, upon the circumstances it is not possible for the Court, at the expense of so much as will be put at hazard [(ie: the gift over of the larger sum to someone else)] to gratify any inclination it may have to give the larger part of this fortune [(to the applicant)].***
>
> ***It is expressly stated, that, if she marries either before or after the age of 21 without the consent of the four trustees, she is to have $400 a year; and the rest is to accumulate for those who are to take afterwards".***

220. There is obiter dictum from ***Clavering v Ellison*** (above) pointing to the existence of the jurisdiction to grant relief from forfeiture in circumstances where it is implicit that the applicant for relief is not himself at fault, but failed to comply with the condition subsequent, because of circumstances beyond his control.

221. The Court having held, for the reasons already discussed above herein, that the forfeiture had not been incurred either because the condition had not been shown to have been breached or because the condition was void for uncertainty; Lord Campbell LC went on (at p.722) to say:

> *"I am further of the opinion that weight is to be given to this vis major. Had the children been included in the arrest, I conceive that their residence abroad, under continued duress, would not have worked a forfeiture, and if their residence abroad may be fairly ascribed to the imprisonment of their father by Napoleon, the forfeiture might be saved on this ground, were there a necessity to resort to it".*

222. This passage, though expressed only obiter, does suggest (as is discussed in a carefully written article: "*Forfeiture Clauses in Wills*", ***Trust Quarterly Review 2003 Issue 1, Volume 1 page 6,*** that even in cases where there is a gift over, the Court might, if it is only just and reasonable to do so, grant relief from forfeiture. This must not however be regarded as a paradigm shift from the doctrinal paramouncy ascribed to the intentions of settlors in the other 19th century cases; because in ***Clavering v Ellison*** the Court dealt with a condition subsequent.

223. Echoes of that doctrine resonated in ***Nathan v Leonard*** (above) as we have seen in the views expressed there that the no contest clause expressed the wishes of the testatrix, was a permissible deterrent to Court action and the fact that it deterred but did not prohibit applications under the 1975 Act; was no basis for regarding it as contrary to the policy of the Act.

224. On the question whether relief would have been available had the codicil in question been found to be valid, the Learned Deputy Judge first accepted that there was jurisdiction to grant such relief and distinguished ***Simpson v Vickers*** (above); on the same grounds as were more generally argued before me that, whereas the grant of relief in ***Simpson v Vickers*** would have involved divesting the existing owner and creating a new estate in another, all that would have

resulted in the ***Nathan*** case, would have been relief from the divesting consequences of the Clause.

225. On the basis, as I have accepted, that Clause 23 here would operate as a condition subsequent, I also accept that distinction as pointing to the existence of the jurisdiction.

226. Before turning to summarise what I think I might properly venture by way of conclusions here, I should note the reliance which Mr. Martin also invited me to place in this context on the decision on the House of Lords in ***Shiloh Spinners Ltd. V Harding*** *[1973] 1 All E.R. 90.*

227. In his often cited speech Lord Wilberforce declared (at p. 100a):

> *"There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case....".*

228. I think it is safe to say that taken as a general pronouncement of principle, that statement would be applicable even in the present context of a discretionary *inter vivos* trust.

229. However, the other pronouncements of his Lordship, given upon the main question of whether relief should be available against contractual stipulations, contained the following caveat (p.101 d – g):

> *"As regards the present appeal it is possible to disengage the following considerations. In the first place, there should be put on one side cases where the Court has been asked to relieve against conditions in wills or gifts inter vivos. These raise considerations of a different kind from those relevant to contractual stipulations".*

230. The reasons are not hard to find: Unlike in contractual arrangements, beneficiaries seeking relief from forfeiture under a will or trust will typically be volunteers, having no legal entitlement, but reliant instead upon the beneficence of their grantors. In such contexts, unlike in contract where the giving of consideration is essential, concerns to protect the intention of the grantor and to ensure the ultimate intended destination of his gifts, especially where (as we have seen) there are to be gifts over on forfeiture; are special factors relevant to wills and trusts, which, having been "put to one side" did not become engaged in the deliberations of their Lordships' judgment.

231. It follows that the particular factors which they went on to consider as appropriate to consideration for relief from forfeiture in contractual arrangements, are not to be generally relied upon in these cases.

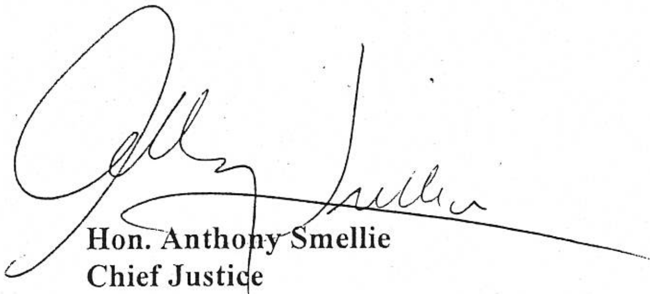
Conclusions

232. The jurisdiction exists to grant relief from forfeiture in appropriate circumstances. It appears from the decided cases that where the condition would operate as a condition precedent so that non-compliance would mean that the gift or interest was never acquired and where there would be the equivalent of a gift over to some one else, the Courts have no power to relieve from the operations of the condition, as that would involve a fundamental "re-writing" of the settlement.

233. This would be the case particularly in this jurisdiction where there is no equivalent statutory provision such as the 1975 U.K. Act considered in ***Nathan v Leonard*** (above).

234. There is dictum however, which suggests that even in a case of a gift over, where there is a condition subsequent, equity might intervene to grant relief where non-compliance, through no fault of her own, was the result of circumstances beyond the control of the applicant.

235. This would be equally applicable in circumstances where non-compliance with the condition, would result in the divestment of an existing beneficial interest, under an inter vivos settlement. That is how I would describe the operation of Clause 23 here.



Hon. Anthony Smellie
Chief Justice

July 17 2006

Judgment further codified at the request of the parties on 14th February 2007