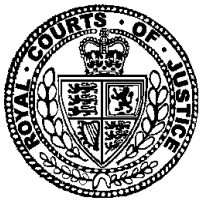

Neutral Citation Number: [2019] EWCA Civ 966

Case No: A3/2018/1394

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
PROPERTY TRUSTS AND PROBATE LIST
MR. JUSTICE MARCUS SMITH
[2018] EWHC 166 (Ch)

IN THE MATTER OF THE CHARLES WILLIS HARRISON 1924 SETTLEMENT

BETWEEN:

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE MALES
and
SIR TIMOTHY LLOYD

- -

Between:

ANNE-MARIE HELENE HARRISON-MILLS	**Appellant**
- and -	
(1) THE PUBLIC TRUSTEE (as trustee of the Charles Willis Harrison 1924 Settlement)	**Respondents**
- and –	
(2) GUY CHARLES DAVID HARRISON	
(3) JUDY TESSA ROSEMARIE MACKAY	

- -
- -

The Appellant appeared in person, represented by her husband Dr. Douglas Harrison-Mills
The First Respondent did not appear and was not represented
Ms. Sarah Bayliss (instructed by McLoughlin & Co.) appeared for the Second and Third Respondents

Hearing date: 27 March 2019

- -

Approved Judgment

Sir Timothy Lloyd :

Introduction

1. This appeal concerns the correct interpretation of an Indenture of Settlement dated 6 March 1924 (which I will call the Settlement), by which Mr Charles Willis Harrison, the Settlor, made provision for his only child, Jeannette Harrison ("Jeannette") and her issue, with alternative provision, in case (as happened) she did not have issue, for his nephews and nieces, children of his brother, and their issue. Part of the Trust Fund was the subject of an Order made by Vaisey J in the High Court in 1953 (the "Order"), by which one part (called the Life Tenant's Fund) became the sole property of Jeannette, another part (the Released Fund) continued to be held on the trusts of the Settlement but released from the exercise of powers vested in her, and a further part (the Appointed Fund) was to be held on trust for five named persons who were children of three of the nephews and nieces, as if Jeannette had made appointments in their favour under a testamentary power reserved to her in the Settlement, and had died. Two of those five were brothers, Jeffrey Graham Harrison ("Jeffrey") and David Lakin Harrison ("David"), the sons of James Maurice Harrison ("James"). Jeffrey died in 1978 leaving two children surviving him. They are Guy Charles David Harrison and Mrs Judy Tessa Rosemarie Mackay, the First and Second Defendants to these proceedings, and Respondents to the appeal.

2. David died in 2015 leaving no issue. The question in the proceedings is what happens to the fund in which, until then, he had a life interest under the combined effect of the Settlement and the Order as part of the Appointed Fund. This was referred to below as the Disputed Fund. Marcus Smith J held that it should go and be held as an addition to what had been Jeffrey's fund, and accordingly that it is divisible equally between the First and Second Defendants. The contrary argument is that it should accrue to the funds subject to the Settlement generally and held in default of appointment. In that case it would be divisible between some 31 people (the "Wider Family"), descendants of the nephews and nieces, of whom the Third Defendant, Mrs Anne-Marie Helene Harrison-Mills is one (as are the First and Second Defendants). She argues in favour of that reading of the Settlement and contends that the judge's reasoning and conclusion are incorrect. The judge ordered that she should bear her own costs of the proceedings and should pay those of the First and Second Defendants, on the standard basis. With permission granted by Lewison LJ she appeals both on the issue of construction and against the order that she pay the costs of the First and Second Defendants.

3. The proceedings were brought by the Public Trustee, which is the sole trustee of the relevant trusts. No need was perceived for the trustee to attend the hearing of the appeal, so such attendance was dispensed with. Accordingly the appeal hearing proceeded as between Mrs Harrison-Mills, the Third Defendant, who acts in person and is represented by her husband, Dr Douglas Harrison-Mills, on the one hand, and the First and Second Defendants represented, as they had been below, by Ms Sarah Bayliss. I am grateful to both for their written and oral submissions. Given the way the appeal has proceeded I will refer to the First and Second Defendants together as the Respondents, even though the Public Trustee is also a Respondent to the appeal.

The 1924 Settlement: a summary

4. The Settlement recites the Settlor's intention to make further provision for Jeannette and her issue and, in the event of failure of her issue, for others of his relatives. He transferred to the trustees shares and debentures in Harrison Trust Ltd and in Atherton Investment Corporation Ltd. He was a ship-owner with an address in Mark Lane, and one of the founders of the Harrison Line, which was presumably the principal source of the wealth from which he made this provision for his daughter and other relatives.

5. The Settlement defined a trust period, so as to satisfy the rule against perpetuities, which has not yet expired. It created, or allowed for the creation by appointment of, interests in income, all or most of which were subject to protective provisions in case of alienation and in some other events. These protective provisions do not matter for present purposes and I will ignore them.

6. The Settlor seems to have wished to ensure that no-one would become entitled to the capital of any part of the Trust Fund for a long time. In the primary trusts, for Jeannette and her issue, there were to be successive life interests, first for her under clause 5, then for her child or children under clause 10, and in turn for their children under clause 13, with a substitution under clause 14 if a grandchild of hers died before its relevant parent leaving a child or children who did survive. They too would be entitled to life interests. Entitlement to capital would only arise, first, under clause 15, after the death of a grandchild of Jeannette, as to which, first, the relevant grandchild had a power of appointment which, unlike the power given to Jeannette under clause 6, could create trusts and provisions rather than merely designating which persons took what proportions of the fund, and could also benefit one or some objects to the exclusion of another or others. In default of appointment the relevant part of the fund was to go to such children of the grandchild, if more than one in equal shares, who being sons attained 21 or being daughters attained that age or married.

7. Clause 16 of the Settlement set out the provisions for accruer if the trusts affecting part of the fund were to fail. They lie at the centre of the present issue. I will set them out later as part of a detailed review of the document.

8. Clause 18 deals with the case in which no child or issue of Jeannette attained a vested interest under the trusts which I have summarised. If Jeannette had died before the Settlor, she had a general power of appointment, but otherwise she could appoint by will to all or one or more of a list of thirteen, and their issue. Of these thirteen, twelve were nephews or nieces of the Settlor. The other entry in the list was "the child or children of the Settlor's nephew Ralph John Harrison by his wife Olive Martin Harrison". Any such appointment would only determine which of the objects of the power would be entitled to the Trust Fund and in what shares. The trustees were to retain the Trust Fund or the shares of it on trusts specified later in the Settlement. In default of an appointment under this power, the trustees were to hold the Trust Fund in thirteen equal shares. Shares arising under that provision or under an appointment were, under clause 20, to be held on trusts for the nephews, nieces and their issue corresponding to those arising under the provisions for the issue of Jeannette.

The Settlement: the detailed provisions

9. The principal trusts established by the Settlement were, first, a life interest for Jeannette in the whole income, and then trusts for her children or remoter issue as she might appoint by deed or will, and in default of appointment for all or any of her children who, if sons, attained 21 or, if daughters, attained that age or married, if more than one in equal shares. Her power of appointment could not reduce the share that any child of hers would take in default of appointment by more than half. Moreover, any appointment could only designate which object or objects of the power was or were to be entitled to the Trust Fund and in what shares. By virtue of clause 7(iv) the trustees would hold the Trust Fund or the shares thereof (according as the appointment might be)

> "upon such trusts and with and subject to such powers and provisions as would for the time being be applicable thereto if the same had devolved on the object or objects in question or on the parent or remoter ancestor of such object or objects under the trusts in default of appointment hereinafter contained."

10. Clause 7(ii) set out a hotchpot provision. If a child or his or her issue took any part of the Trust Fund under an appointment, then unless the appointment provided otherwise that child was not to take any share of the unappointed part without bringing into hotchpot the share or shares appointed to him or her or his or her issue.

11. After provision in clause 8 for a power of appointment in favour of a surviving spouse, the Settlement then set out the trusts in default of appointment, applicable under clause 9 to "any share in the Trust Fund which may devolve in default of appointment on a child of [Jeannette] or the whole of the Trust Fund (if it shall so devolve)". It was to be held by the trustees on the trusts and with and subject to the powers following, starting in clause 10.

12. Clause 10 gave the child in question a life interest in the income of "such share", and so that the word "share", if the whole Trust Fund devolved in default of appointment, was to be taken as meaning the whole. Under clause 11 such a child had a power of appointment of an income interest to a surviving spouse.

13. Subject to all that, clause 12 would apply. This is of particular importance to the present issue, because it uses the terms "share" and "sub-share" as terms of art applying to entitlements under the Settlement.

> "Subject as aforesaid the Trustees shall from and after the death of each son or daughter of [Jeannette] stand possessed of his or her share Upon trust if such son or daughter shall die leaving but one child him or her surviving to hold his or her share upon the trusts hereinafter declared concerning the same AND if such son or daughter shall die leaving more than one child him or her surviving Upon Trust to divide his or her share into as many sub-shares as there may be such children of such son or daughter and to appropriate one such sub-share to each of the children upon the trusts hereinafter declared concerning the same."

14. The Settlement still withheld any entitlement to capital at this stage. Clause 13 creates life interests, providing for the trustees to pay the income of the undivided share (in the former case) to the only child of such son or daughter of Jeannette and, in the latter case, the income of each such sub-share to the child to whom it is appropriated, for life.

15. Then, to cover the case of a child of a son or daughter of Jeannette predeceasing that son or daughter but leaving a child or children who survive the son or daughter, clause 14 contains a substitution provision. The share or sub-share, as the case may be, which would have been held for or appropriated to such child had he or she survived the son or daughter of Jeannette, is to be appropriated to such son or daughter's grandchild or grandchildren by such predeceased child in equal shares if more than one, and "the share or sub-share or share of a sub-share as the case may be" so appropriated to a grandchild of a son or daughter of Jeannette is to be "held as nearly as possible on the same trusts and with and subject to the same powers and provisions in favour of such grandchild and his or her issue as those on which it would have been held if the child had been a child of a son or daughter of [Jeannette] who survived such son or daughter the necessary verbal alterations being made in reading those trusts powers and provisions for the purpose of giving effect to this clause". It also contained this provision: "a share of a sub-share being treated for all purposes of these presents (save as hereinafter provided) as if it were a sub-share".

16. Thus, grandchildren of Jeannette, and great-grandchildren whose relevant parent had died before his or her relevant parent, were entitled to income interests in proportions of the Trust Fund (I avoid the use of the word "share" because of its technical meaning under some provisions of the Settlement) which were equal as between each stock or line of Jeannette's issue except insofar as otherwise provided by any appointment by Jeannette between her children and remoter issue under clause 6.

17. As for the eventual capital provision for Jeannette's issue, this is governed by clause 15 which prescribes the trusts on which the trustees are to hold "each undivided share" or "the sub-shares into which any share may be divided". Each grandchild of Jeannette had a power of appointment between his or her children or remoter issue, which could provide for trusts powers and provisions including deferring (though not indefinitely) the age at which such object would take a vested interest. In default of any such appointment the relevant share or sub-share would be held on trust for the children of the relevant grandchild who being male attained the age of 21 or being female attained that age or married, if more than one in equal shares. The clause also included a hotchpot provision as between interests taken under an appointment and interests devolving in default of appointment, which applied whether the benefit in either case was taken by a grandchild or by issue of the grandchild. This is quite similar to the provision in clause 7(ii) mentioned above. It refers to "a child of any such grandchild who or whose issue shall take any part of any undivided share or any sub-share appropriated to any grandchild under an appointment" bringing the part appointed to him or her or to his or her issue into hotchpot (unless otherwise appointed) on any question of entitlement to a "share of the unappointed part of such undivided share or sub-share".

18. Then we come to clause 16, the accruer clause. It is in three parts, the first dealing with the failure of the trusts of any sub-share, the second with failure as regards the trusts of any share of a sub-share, and the third with failure of the trusts of the original share of any son or daughter of Jeannette. It is as follows (omitting immaterial wording):

> " PROVIDED always that:
>
> (i) In case the trusts hereinbefore declared concerning any sub-share shall fail then and in every such case … the same sub-share including any further share or shares of another sub-share or sub-shares which may accrue and be added thereto under this present provision shall accrue and be added to the other original sub-share hereinbefore directed to be appropriated in equal proportions and shall be held on the like trusts as are hereinbefore declared concerning such original sub-share so far as the same are capable of taking effect.
>
> (ii) In case the trusts hereinbefore declared concerning any share of a sub-share shall fail then and in every such case … the foregoing provisions of this clause as to the accruer of sub-shares shall apply to such share of a sub-share it and the other shares of the same sub-share being as between themselves treated as sub-shares of the original share out of which they were all derived and subject to the like provisions for accruer and if there shall be a failure of all the trusts of all the shares of any sub-share then the foregoing provisions as to the accruer of sub-shares shall apply.
>
> (iii) And in like manner in case the trusts hereinbefore declared concerning the original share of any son or daughter of [Jeannette] shall fail then and in every such case … the same share including any further share of the original share which may accrue or be added thereto under this present provision shall accrue and be added to the other original shares (if any) in equal proportions and the share or shares which shall so accrue to any original share shall be held upon the like trusts as are hereinbefore declared concerning such original share so far as the same are capable of taking effect. "

19. The question of entitlement on David's death to the part of the Appointed Fund of which he had received the income depends on which part of clause 16 applies. That clause applies directly to failure of trusts for the benefit of Jeannette's issue. It is applied to the actual case where Jeannette died without issue by reference through clauses 18 to 20. Next I must turn to the relevant details of those provisions.

20. As already mentioned, clause 18(ii) gave Jeannette a power of appointment as between twelve persons, her cousins, and their issue, and a further class of persons, who were children of one of her cousins, Ralph John Harrison (Ralph), and their issue. Given that Ralph was excluded from all benefit under the Settlement, it would not be difficult to infer that he had incurred the Settlor's disapproval as a result of his personal conduct. In turn, given that benefits were limited to Ralph's children by a named wife, it could be inferred that the source of this disapproval might be connected with his possibly having (already or in the future) children by one or more other women. The evidence indicated that this was indeed the case. He did remarry and had further children. However, the reasons for Ralph's exclusion do not matter for present purposes.

21. In clause 19, the trust in default of appointment under the clause 18 power, the trustees are directed to divide the Trust Fund into thirteen equal shares and to appropriate one of such shares to each of the Settlor's thirteen named nephews and nieces including Ralph, whether then living or not, and to hold those shares on the trusts set out thereafter, the share appropriated to Ralph being held on such trusts as if he were dead.

22. Then we come to clause 20 by which the trusts affecting shares held by the Trustees under clauses 18 and 19 are defined. This is as follows:

> "The shares so appropriated and the sub-shares thereof and the shares of such sub-shares and the income thereof respectively shall be held by the trustees upon the same trusts and with and subject to the same powers and provisions as are by and in Clauses 10 to 17 inclusive of these presents declared and contained concerning the original shares, sub-shares and shares of sub-shares thereby dealt with as if such clauses were here repeated but giving to the nephews and nieces of the Settlor (other than [Ralph] who shall have no interest in or power over the Trust Fund or any part thereof) such interests and powers in and over their respective shares as are thereby given to the children of [Jeannette] in and over their respective shares and to the children grandchildren and issue of such nephews and nieces (including the children grandchildren and issue of [Ralph] by his said wife but excluding all other issue of his) such interests and powers in and over their respective shares sub-shares or shares of sub-shares as are thereby given to the children grandchildren and issue of the children of [Jeannette] in and over their respective shares sub-shares or shares of sub-shares and making such other verbal alterations as are necessary for giving effect to this clause. "

23. Thus, the structure of the Settlement is that, whether for issue of Jeannette or for her cousins and their issue, a proportion of the Trust Fund is appropriated to each stock or line and is held to pay the income to the beneficiary of the first generation, whether a child of Jeannette or a cousin of hers (with the special exception of Ralph), and then to the second generation, being divided as necessary between the issue of the second generation in each line, and with the substitutional provision under clause 14 for the third generation if the relevant member of the second generation died before the relevant member of the first generation. If Jeannette had had only one child then the proportion of the fund held to apply income to that child would have been the whole. Otherwise it would be either an equal share or, if Jeannette so exercised her power of appointment under clause 6, an unequal share according to the terms of the appointment. At the stage of the first generation, the given proportion was referred to as a share, even if it was the whole. At the stage of the second generation, if in the relevant line there was more than one beneficiary, the share was to be divided into sub-shares, and each sub-share would be held on trust for the relevant grandchild and his or her issue, under clause 12. By contrast, if there were only one child and so no need for a division, it is still referred to as a share ("the undivided share" in clause 13), not a sub-share. At the stage of the third generation, if the substitutional provision came into effect under clause 14, then if there was only one relevant issue, the fund held for that

person would be the share or sub-share that would have been held for his or her parent if having survived his or her own parent, but if there were more than one, then the parent's notional share or sub-share would be divided between the issue of the third generation, which explains the phrase "share of a sub-share".

24. As applied by clause 20 in the case of Jeannette dying without issue, the same structure was to be followed, the first generation being the Settlor's nephews and nieces, subject to the exclusion of Ralph, the second generation being (a) the children of the twelve non-excluded nephews and nieces and (b) the children of Ralph by his wife Olive, and the third generation being the children of those children.

25. The word "share" is not always used as a term of art in the Settlement. Sometimes it is used in a general sense, for example in clause 4(ii) under which, in certain circumstances, the trustees had power to apply income arising during the first three years of the Settlement as between certain persons "in such shares and manner" as they think fit. It is first used as a term of art in clause 1, the perpetuity provision, which refers to "the capital or income of the Trust Fund or any share or sub-share thereof".

26. "Share" is used as a term of art in clauses 7(iv), 9 and 10, referring to the part of the Trust Fund (or, as the case may be, the whole) which devolves on a child of Jeannette. "Sub-share" is always used as a term of art.

27. The same approach applies under clause 20 to the situation in which the trusts under clauses 6 and following do not come into effect because Jeannette has no issue. It is clear from clauses 19 and 20 that the thirteen nephews and nieces are to have shares, and that the next generations may have shares, sub-shares or shares of sub-shares.

28. Thus, which term is applicable at any given stage in the devolution of interests in the Trust Fund through the generations depends not on which generation is in question but on whether the share which was the starting point (that of a child of Jeannette or of a nephew or niece of the Settlor) has had to be divided and if so whether once or twice.

The 1953 Order

29. The Order divided part of the Trust Fund between Jeannette as life tenant, five children of three of her cousins, and the wider family who were entitled to the Trust Fund in default of appointment. The part which she took absolutely requires no further attention. The part which gives rise to the issue before the court is the Appointed Fund. It is worth considering briefly the devolution of the Released Fund before turning to the contested issue about the Appointed Fund.

30. The Released Fund was released from Jeannette's powers to appoint to a husband under clause 8 and from her testamentary power of appointment under clause 18(ii). Thus, this part of the fund would, on Jeannette's death, pass to the entire class as provided for under clause 19. On Jeannette's death the Trustees would divide the Released Fund into thirteen equal shares and hold one of such shares for each of the named nephews and nieces on trusts identified by and under clause 20, but treating Ralph as if he had already died even if he had not by then. In the case of James, the share appropriated to him would be held on trust to pay the income to him for life, if he was still alive when Jeannette died, under clause 10 as applied by analogy under clause 20. On the later of her death and his, the trustees were to divide that share equally between Jeffrey and

David, as under clause 12, each of them being thus entitled to a sub-share. The income of each sub-share was to be paid to Jeffrey or David as the case may be for his life, as under clause 13. On Jeffrey's death, leaving two children both of whom attained 21 (the Respondents), clause 15 came into operation. It seems that Jeffrey had not exercised his power of appointment under that clause, so his sub-share passed to them in equal shares absolutely. On David's death, by contrast, he leaving no issue, clause 16 applied to his sub-share. It is not in dispute that clause 16(i) applied at that stage, so that his sub-share accrued to and was added to Jeffrey's sub-share, and thus the Respondents became entitled to that sub-share as well, equally between them.

31. Turning now to the destination of the Appointed Fund, the question is whether the same applies, or whether it makes a difference that David took his interest in it (as did the other four named beneficiaries of the Appointed Fund) under a deemed appointment, rather than in default of appointment.

32. The effect of the Order was that part of the Trust Fund was treated as devolving as if under an appointment made by Jeannette under clause 18(ii) in favour of five named persons in unequal shares, all being members of the second generation, that is to say being children of a nephew or niece of the Settlor. Two were Jeffrey and David, already mentioned, who were the two children of James; their shares are equal at 5/25 of the whole relevant fund. Two others were both children of Caroline Sleap, namely June Waddilove and Derek Harrison-Sleap; their shares were not equal, June taking 12/25 and Derek taking 2/25. The fifth was the Appellant's father Reginald Harrison, who took 1/25.

33. The effect of an appointment is governed by clause 18(ii)(B). The relevant shares of the Trust Fund are to be retained by the Trustees on the same basis as for a share appropriated by them to the relevant object or objects or to the parent of the relevant object or objects under the trusts in clause 19 in default of appointment. In terms, those trusts require appropriations of shares to the cousins (i.e. the first generation) whether or not then living, including Ralph who, even if still living, is to be treated as dead. In that context the provisions of clause 20 apply those of clauses 10 to 17 to the shares appropriated to each cousin, for the benefit of the cousin, and for his or her children, grandchildren and remoter issue as the case might require.

Discussion

34. The debate on this appeal has been as to how the provisions of clause 18 apply to an appointment directly to a member of the second generation, a child of a nephew or niece of the Settlor.

35. The judge held that the Disputed Fund, that is to say that part of the Appointed Fund which had prior to his death been held on trust to pay its income to David, was a sub-share and that its accruer was therefore governed by clause 16(i). It was a sub-share, he said, because the term "sub-share", in the trusts set up for Jeannette's issue, described the fund held for a grandchild of hers, and that terminology applied, by virtue of clause 20, to children of the thirteen nephews and nieces, that is to say to Jeffrey and David respectively: see paragraphs 31(i) and 32 of his judgment.

36. What he said at paragraph 31(ii) is not exactly accurate, because he says that if a child of Jeannette died leaving only one child, that child (a grandchild of Jeannette) would

have a sub-share even though it was the whole of his or her parent's share. That is not correct under clause 12 or 13, both of which state expressly that if a son or daughter of Jeannette leaves only one child, the son or daughter's whole share is held on trust to pay the income to the son or daughter's sole child. However, this inaccuracy does not affect the present case, since there were two children of James such that, if they had been children of a child of Jeannette, the latter part of clause 12 would have applied, requiring a division of the child's share into sub-shares for the grandchildren.

37. For the Appellant, Dr Harrison-Mills submitted that it is wrong to treat the position as the same under an appointment as it would be in default of appointment, and that there is no reason to treat the five named beneficiaries of the Appointed Fund as entitled to sub-shares rather than to shares. His argument is that the deemed appointment made by the Order gave David a share, as it did to Jeffrey and the other three objects of the appointment, so that when David died without issue the provision that applies is clause 16(iii) on the failure of an "original share". If that is correct, David's one fifth interest in the Appointed Fund would accrue to "the other original shares", that is to say (by analogy under clause 20) to the shares of all the nephews and nieces in default of appointment, in equal proportions.

38. He contended that it is wrong, unnecessary, unrealistic and unjustified to treat David's interest in the Appointed Fund as a subdivided part of a notional share appropriated to James, especially as this depends on the application of clause 19 (the provisions in default of appointment) which appears to require the trustees to hold the income on trust for James for his life, whereas James was clearly not intended to be a beneficiary of the appointment. James is not identified as a party to the 1953 proceedings, which is odd if he was still alive, but a date of December 1971 for his death is given in a family tree which was in evidence before the judge. If that is right, he survived Jeannette. Caroline Sleap was certainly still alive at the date of the Order, so the point would apply in principle to the benefits given to her children by the deemed appointment.

39. Dr Harrison-Mills argues for a difference in the treatment of a benefit which arises under an appointment under clause 18 – at any rate a benefit conferred directly on a member of the second generation – and that of a benefit in default of appointment under clause 19 which would go to a member of the first generation and only through him or her to the second generation. He accepted that in the latter case the trustees have to divide the fund, or the unappointed part of the fund, into thirteen equal shares in relation to each of which, if still alive, the relevant nephew or niece (other than Ralph) would take a life interest. In that case, as he accepted, the interest of the nephew or niece would be in a share and the interests of children (assuming there were more than one) of the nephew or niece would be in sub-shares.

40. By contrast, where the relevant benefit arises under an appointment directly to a member or members of the second generation, he submitted that there is no need to hypothesise an initial appropriation to a nephew or niece, who takes no benefit from the appointment, and therefore to construct a notional share for the nephew or niece which is then sub-divided, if there is more than one appointed beneficiary in the second generation, into two or more sub-shares. His proposition was that an appointment such as was deemed to be made by the Order should be regarded as conferring a share on each of the five named objects, or rather as requiring the trustees to hold the Appointed Fund for those five persons, appropriating a share of the correct size to each, which would then devolve onwards in accordance with the provisions of clause 20, applying

by reference those of clauses 10 to 17. On that basis, if the trusts applying to the share of one object failed on his or her death without issue, then the part of clause 16 applicable would be that which applies to an "original share", not that for a sub-share.

41. Clause 18 confers the power of appointment. It does not do more than allow Jeannette to decide which of the objects is to be entitled to the Trust Fund and if more than one in what shares: clause 18(ii)(A). However, it does allow her, as she did in this case, to pass over the first generation, her cousins, and appoint directly to objects in the second generation. The beneficial provisions applying to the Trust Fund or to any part of it which is the subject of an appointment are governed by clause 18(ii)(B), set out above. One of the difficulties for Dr Harrison-Mills' argument is that this provision states expressly that the fund, or the appointed part of it, is to be held by the trustees on the trusts which would be applicable to a share appropriated by them to the object in question or *to the parent of the object* under the trusts in default of appointment (my emphasis). This provision clearly contemplates the case of an appointment to a second generation object, and requires reference to the trusts applicable to a share appropriated to the parent of that object.

42. The Settlement thus creates exactly the link between the provision for the effect of an appointment and those governing the position in default of appointment which Dr Harrison-Mills contends is unnecessary and inappropriate. There is an apparent oddity in this provision itself. It seems to require the appointed part to be held on the same trusts as would apply to an unappointed part under clauses 10 to 17 as applied by clause 20. At first sight these start with a life interest for the relevant nephew or niece (except of course in the case of Ralph), but that would be inconsistent with the terms of the appointment. It might seem to have the result that there would be no difference between an appointment to the nephew or niece on the one hand and an appointment to his or her child or children on the other, unless the appointment to the next generation was in unequal shares or was to only one or some of several members of that generation.

43. The analogy with an appointment by Jeannette to her own children or remoter issue under clause 6 is not exact, because she was not able to appoint away from any child of hers entirely, because of clause 7(i). Even if she appointed to the fullest extent to one or more members of the class of her own grandchildren, her child or children had to take at least half of the default entitlement in any event. In the case of clause 18(ii), by contrast, she could pass over the first generation, her cousins, entirely.

44. As it seems to me, however, the words at the end of clause 18(ii)(B) do require reference onwards to the provisions of clause 19 and the application to any appointed funds of the process which is there prescribed in relation to interests passing in default of appointment. Thus, the trustees must be treated as appropriating a share to the relevant nephew or niece. The extent of that share is not, however, necessarily an equal share. The size of the share must be determined by the terms of the appointment. Equally, as it seems to me, the trusts applicable to that share must take account of the terms of the appointment, so that if the appointed object is of the second generation, then despite the terms of clause 18(ii)(B) the applicable trusts have to be treated as omitting the life interest in favour of the nephew or niece, so as to give an immediate life interest to his or her child or children. The treatment of Ralph's line provides an analogy for this, but even without that special provision the need to give effect to the terms of the appointment seems to me to require that modification of what appears to be the literal effect of clause 18(ii)(B).

45. If the words of clause 18 and 19 of the Settlement were applied literally to the case of an appointment to a second generation object, they could prevent the appointment having effect in accordance with its terms. If Jeannette had appointed to David by her will under clause 18(ii), and if James had still been alive when she herself died, then a literal application of the words of clauses 18 and 19 of the Settlement would prevent the appointment having the effect which it was intended to have, being an effect entirely legitimate within the terms of the power of appointment. Similarly, if she had appointed in unequal shares, the literal application of clauses 18 and 19 would override that and prevent it from taking effect. Ascertaining the intention of the document objectively from its own terms, this cannot have been intended. The problem arises from the drafting approach of applying to one situation or set of situations provisions designed to deal with a different situation, without making or allowing for necessary modifications. It seems to me that, on the normal canons of construction, the provisions of clause 18(ii)(B) should be read as if they were subject to a proviso such as "but subject to such modification of such trusts (if any) as may be necessary to give effect to the terms of the appointment", added at the end of the clause.

46. A similar modification might also be needed in clause 16(i) to override as necessary the direction about accruer in equal proportions, which might not be appropriate if the appointment had been in unequal shares. But that point does not arise in the present case.

47. It is necessary to read the language of clauses 18 and 19 together in such a way as to allow an appointment to have effect as intended, whether as regards the number and size of the parts of the Trust Fund which are created by the appointment or the identity of the objects selected for the appointment. But the adaptation of the language must be no more than is necessary to allow effect to be given to the appointment according to its terms.

48. A different argument in favour of the Appellant's contention could be advanced as follows. If one accepts that the terms of clause 18(ii)(B) do require a deemed appropriation of a share to the relevant nephew or niece, so as to give effect to an appointment to his or her child or children, it might not necessarily follow that, where the appointment is to two or more children of one nephew or niece, the deemed appropriation is of one share for both or all the children, which then has to be divided into sub-shares to establish that part of the fund to the income of which each child is entitled. Instead, there could be a deemed appropriation of a separate share to the given nephew or niece for each of his or her children who are the appointed objects. Thus, on the facts of this case, two separate shares would be treated as appropriated to James, each being of 20% of the Appointed Fund, and two separate shares also to Caroline Sleap, one of 12/25 parts, for the benefit of June Waddilove, and the other of 2/25 for Derek Harrison-Sleap. Each such share would be held on trust to pay the income to the appointed object for life. On the death of David without issue, his part of the Appointed Fund would then be a share, rather than a sub-share, and its accruer would therefore, it would be argued, be governed by clause 16(iii), not by 16(i).

49. It seems to me that this argument is incompatible with terms of the Settlement which cannot properly be modified or overridden. Under clause 19 the trustees must divide the Trust Fund, or the relevant part of it, into the relevant number of shares, and appropriate one of such shares to such of the nephews and nieces as are relevant under the terms of the appointment, because of the terms of clause 19. So here, three nephews

or nieces are relevant and the shares are not equal, but the application of clause 19 requires the trustees to divide the Appointed Fund into the relevant number (and size) of shares and to appropriate one of such shares to each of the relevant nephews and nieces. If one share goes to any relevant nephew or niece, that means that one share is appropriated to James, one to Caroline Sleap and one to Reginald Harrison. That share is then divided, in the case of James, equally between Jeffrey and David and, in the case of Caroline Sleap, unequally between June Waddilove and Derek Harrison-Sleap. Each of those four objects of the appointment thereby becomes entitled to the income of a sub-share rather than of a share.

50. That construction is not merely the correct result of a close reading of clause 19. In my judgment it is also supported by the overall approach of the Settlement as disclosed by its language, including the careful use of the words "share", "sub-share" and "share of a sub-share", as already discussed.

51. It therefore comes back to the question whether what Jeffrey and David took in the Appointed Fund under the deemed appointment in the Order was a share or a sub-share. Dr Harrison-Mills argues that each of them had a share because there had been no division other than that created by the appointment, and that therefore each had an "original share". I cannot accept that proposition, because it is not consistent with the words of clause 19 requiring the trustees to divide the Trust Fund into shares and to appropriate one of such shares to the relevant nephew or niece. Applying the words of clause 19 as closely as possible to the particular circumstances of the appointment directly to objects in the second generation, while the shares may not be equal (as they are not in this case) and they may not be appropriated to each of the nephews and nieces, where some lines do not benefit under the appointment, it seems to me clear that the share is created at the level of the first generation, the relevant nephews and nieces, and that although in the present case none of the objects of that generation take any benefit themselves, the "original shares" are those that are required to be appropriated to James, to Caroline Sleap and to Reginald Harrison, and that the parts of the Appointed Fund in which Jeffrey and David were interested were sub-shares of James' original share.

52. This has also the result that the devolution of the part of the Released Fund in which David was entitled to income is the same as that of the part of the Appointed Fund of which he enjoyed the income. In each case he had the income of a sub-share. Any other result would seem to me to be anomalous and improbable.

53. Thus, for the reasons I have set out, it seems to me that the judge was right to hold that, on David's death without issue, the part of the Appointed Fund of which he had been entitled to receive the income, known below as the Disputed Fund, accrued under clause 16(i) and was to be added to what had been Jeffrey's sub-share.

The appeal against the order for costs

54. Having handed down his judgment, the judge received written submissions as to the order to be made for costs. He held that the trustee was entitled to its costs out of the Trust Fund, but that the Appellant should pay the Respondents' costs and should not be entitled to her own costs out of the Trust Fund. In his short reasons on costs he said, on the one hand, that the construction of the Settlement contended for by the Appellant was not unarguable and that she was entitled to contend for it, but that she having failed "there can be no question of [her] recovering her costs out of the Disputed Fund".

Moreover he said that it was "entirely appropriate that [she] pay the costs of the [Respondents]". They had been obliged, because of the position she took, "to contend for their construction of the settlement and they have prevailed." On that basis he said that they should not bear the costs of the exercise.

55. With respect to the judge, it seems to me that this is not the correct approach where an issue as to the true construction of a trust document or documents requires to be determined by the court, because it is not clear how the trustee should apply the relevant property in the circumstances that have occurred.

56. The approach of the court in such a case is set out in *Re Buckton* [1907] 2 Ch 406. Kekewich J said this at page 414:

> "In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate."

57. He also recognised that there were cases different in form but not in substance from these, where the proceedings are brought by one or more beneficiaries, rather than by the trustees, but they are concerned to resolve an issue of construction or of administration which would have justified an application by the trustees. In such cases the same result should follow.

58. He distinguished both of these from a third category, at page 415:

> "There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

59. This case was referred to in the written submissions made to the judge on behalf of the Public Trustee about costs, but he did not refer to it in his reasons. Presumably he

regarded the case as falling outside the first category, but it is not clear why he did so. The Respondents had contended that the Appellant should bear the costs because she had acted without legal advice and because if she had had legal advice she would not have put forward the arguments that she did present. Despite this contention, once the judge had recognised that the Appellant's contention was arguable, and indeed that this was accepted, it would at first sight seem that the case should fall into the first *Buckton* category. There was a doubt as to the true construction of the trust documents in the events which had happened, and the trustee needed to have this resolved in order to be able safely to distribute the relevant part of the fund.

60. Before the present proceedings were commenced, the trustee had sought advice from Counsel, David Rees, as to the correct devolution of the Disputed Fund. He had advised that the Disputed Fund should accrue to Jeffrey's sub-share, but that the contrary view was not wholly unarguable, and that accordingly the trustee should seek to ascertain whether there was a real dispute as to the correct position. If there was not, then the trustee could seek the necessary protection for its position by applying to the court under section 48 of the Administration of Justice Act 1985. If there was a real dispute, then proceedings would be necessary such as were in fact brought. Counsel was clear that the trustee ought not to distribute the fund without an order of the court, because the point was arguable and the Disputed Fund is substantial in value, in excess of £1 million.

61. The trustee, by its solicitors, then canvassed the views of those who might claim to be interested in the Disputed Fund, including distributing Mr Rees' advice. This led to the Appellant asserting the position that she has since maintained.

62. In the course of the correspondence and exchanges that followed from this process, it is clear that there was a degree of misunderstanding of the process, which might have been eliminated or reduced if legal advice had been obtained. It is also true that this led to views being expressed, sometimes rather strongly, which were based on misunderstandings as to the relevant law and as to the practice and procedure involved in cases of this kind. In a Respondent's Notice on this aspect of the case the Respondents contend that the Appellant adopted a highly adversarial approach and a stance that was unreasonable in all the circumstances, and that this conduct was responsible for generating a substantial part of the Respondents' costs, through her refusing to take legal advice and advancing arguments some of which were irrelevant, inadmissible or unarguable.

63. It is a fair point that the Appellant sometimes adopted an aggressive approach which no competent legal representative would have adopted in the circumstances. It is also true that the Appellant may well have failed to understand the significance of some of the steps taken or proposed on behalf of other parties, and that some of the arguments advanced on her behalf were clearly bad in law. Nevertheless, the fact remains that, in its nature, the case fell fairly and squarely within the first *Buckton* category, so that in principle the correct order for costs would have been that all Defendants to the proceedings should have their costs out of the fund. There could have been a qualification to that if it had been shown that the conduct of the proceedings by one party or another had involved costs being wasted or improperly incurred. Such a situation might have led to the party in question being allowed only part of his or her costs out of the fund. Possibly, if a party's unreasonable conduct had been shown to have caused another party to incur a substantial volume of unnecessary costs, there

could have been an adversarial order for that part of the other's costs to be borne by the party guilty of unreasonable conduct. But I find it difficult to see how even conduct of that kind could take the case entirely out of the first *Buckton* category, so that there should only be an adversarial order for costs.

64. Ms Bayliss submitted that the three *Buckton* categories are not exhaustive and cited to us a passage from Lewin on Trusts, paragraph 27-145, as follows:

> "A fourth category has been recognised where proceedings are commenced by a trustee but have the characteristics of category (3). For not all proceedings commenced by a trustee for the determination of some question affecting entitlement to the trust fund are within *Buckton* category (1), particularly in a case which does not involve the construction of the trust instrument but rather a dispute over the beneficial ownership of the trust fund. One example of a category (4) case is where there is a hostile dispute between two persons who claim to be the true owner of the trust fund and the trustee intervenes by seeking the determination by the court of the construction of the trust deed."

65. Indeed there may be such disputes, but this is not one of them. This dispute does involve the construction of the trust instrument, in circumstances in which the trustee had been advised that it could not properly distribute the fund without the court's protection. I therefore reject the argument that this is not a case within the first of the *Buckton* categories. The judge was wrong to treat the case as one of adversarial litigation rather than as one falling within the *Buckton* principles.

66. Some of the material advanced on behalf of the Appellant in the court below was framed in intemperate terms, and her witness statements included a good deal of argument rather than evidence. Moreover some of the factual material she did seek to rely on was legally irrelevant. She does not seek, by the appeal, an order to have her own costs incurred in the court below paid out of the Disputed Fund. Such an order might perhaps have been denied, or at any rate limited so as to exclude recovery of the costs of some documents. What she challenges by the appeal on costs is the order that she should pay the Respondents' costs below. It seems to me that she is right in her contention that such an order ought not to have been made in the circumstances. The Respondents might have sought to show that their costs of the proceedings had been materially increased by conduct on the Appellant's part which could be categorised as unreasonable. They made such an assertion before us, though not in the written submissions below, but they did not attempt to back up the assertion by details from which it could be tested. Nor, indeed, would it have been appropriate to take such a course, raising the point for the first time on appeal.

Conclusion

67. In conclusion, therefore, I would dismiss the appeal on the issue of construction but I would allow the appeal on the issue of costs and set aside paragraph 4 of the order of Marcus Smith J that the Appellant do pay the Respondents' costs of the proceedings in the High Court. Since the Respondents are between them absolutely entitled to the Disputed Fund they may not need the order that the judge might otherwise have made, namely that their costs be paid out of the Disputed Fund, on the indemnity basis.

Lord Justice Males:

68. I agree.

Lord Justice Patten:

69. I also agree.