Neutral Citation Number: [2021] EWHC 624 (Ch)

Case No: PT-2020-000524

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/3/2021

Before:

MASTER CLARK

- -

Between:

(1)	**WOMBLE BOND DICKINSON (TRUST CORPORATION) LIMITED**	**Claimant**
(2)	**SIR CHARLES JOHN PATRICK LAWSON**	
(3)	**MIRANDA LOWTHER**	
(4)	**PATRICK HUGH PETER DE PELET**	
(5)	**ESME CHARLES HARLOWE LOWE**	
(6)	**NEIL ELLIOTT BRAITHWAITE**	
(7)	**THE HONOURABLE JAMES NICHOLAS LOWTHER**	
(8)	**CHARLES ANDREW HUNTINGTON-WHITELEY**	

- and -

(1)	**SARAH GLENN**	**Defendant**
(2)	**GEORGE STEPHEN HUNT**	
(3)	**TESS LAWSON**	
(4)	**JACK WILLIAM TREYMAYNE LAWSON**	
(5)	**THOMAS CHARLES LANCELOT LAWSON**	
(6)	**RALPH HUGH ARTHUR LAWSON**	
(7)	**MATILDA GRACE LOWTHER**	
(8)	**ISHBEL LOWTHER**	
(9)	**JAMES WILLIAM LANCELOT LAWSON**	
(10)	**FLYNN LOWTHER (A MINOR BY HIS LITIGATION FRIEND)**	
(11)	**RICHARD PIKE**	

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Penelope Reed QC (instructed by **Payne Hicks Beach**) for the **Claimant**
Elizabeth Weaver (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Defendant**

Hearing date: 6 January 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 24 March 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

....

Master Clark:

1. This is an application by Pt 8 claim form dated 8 July 2020 by the trustees ("the Trustees") of a trust created by a settlement dated 6 March 1992 ("the Trust Deed"). They seek directions as to whether they can advance capital to certain beneficiaries pursuant to their power under section 32 of the Trustee Act 1925 (as varied by clause 11(2) of the Trust Deed) ("the Power").

2. The Trustees make the application as they wish to use the Power in order to bring the trust to an end. Their stated reasons for doing so are that the trust fund will otherwise be eroded by future administration costs and IHT charges.

3. The application is made under two of four categories of jurisdiction identified in *Public Trustee v Cooper* [2001] WTLR 901 at 923 and is:
   (1) for determination of whether, as a matter of construction, the proposed advances are within the Power, and can be made by the Trustees (category 1); and
   (2) if so, for approval of the decision to make the advances, on the basis that it is momentous (category 2).

Background

4. The settlor of the trust was James Lowther, the 7th Earl of Lonsdale. The Trust Deed established a trust fund (divided into 5 parts) for the benefit of his children and remoter issue. This application concerns the part called "the Remaining Fund" (cl.2(g)).

5. Clause 9(2) of the Trust Deed, so far as relevant, provides:

> "the Trustees shall hold the Remaining Fund and the income thereof in trust for all or any one or more of the Beneficiaries who shall attain the age of twenty five years or shall be living and under that age at the end of the Trust Period in such shares as the Trustees shall at any time or times during the Trust Period … by any deed or deeds revocable or irrevocable appoint…"

6. "The Beneficiaries" are defined to include the settlor's present and future grandchildren.

7. Clause 10 of the Trust Deed (as varied by an arrangement approved by the order dated 29 March 2001 of Patten J), so far as relevant, provides:

> "Provided always that the share (hereinafter called "the Allotted Share") taken by any of the Beneficiaries (in this clause referred to individually as "the Beneficiary") under the trusts declared by Clause 9 … shall not vest in him or her absolutely but shall be retained by the Trustees and held on the following trusts:
>
> (1) The Trustees shall hold the Allotted Share and the income thereof in trust for the Beneficiary during his or her life
>
> (2) Subject as aforesaid, the Trustees shall hold the Allotted Share and the income thereof … upon trust-
> (a) for the first and other sons of the Beneficiary successively according to seniority in tail male with remainder
> (b) for the first and other sons of the Beneficiary successively according to seniority in tail with remainder
> (c) for the Beneficiary absolutely.
>
> (3) Notwithstanding the foregoing trusts and powers if in any such appointment the Trustees so declare the Allotted Share shall be held upon trust for such period or periods (and so that different periods [may] be declared for different Beneficiaries) as shall be specified in such appointment upon the following trusts-
> (a) Upon trust to hold the income of the Allotted Share on trust for the Beneficiary absolutely and the provisions of Section 31 of the Trustee Act 1925 shall not apply to such income
> (b) Subject as aforesaid upon the trusts set out in sub-clauses (1) and (2) of this Clause"

8. Clause 11(2) provides that section 32 of the Trustee Act shall apply to the trusts of the Trust Deed, but is varied to permit the advancement of the whole of the beneficiary's presumptive or vested share. (This is the Power referred to above.)

9. Section 32 provides (in its unamended form[1]), so far as relevant:

> "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of **any person entitled to the capital of the trust property or of any share thereof,** whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power

[1] i.e. before amendment by the Inheritance and Trustees Powers Act 2014, which does not apply in this regard to instruments made before it came into force

of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that—

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property[amended by Clause 11(2)]; and

…

(c) no such payment or application shall be made **so as to prejudice any person entitled to a prior life or other interest, whether vested or contingent, in the money paid or applied** unless such person is **in existence** and of full age and consents in writing to such payment or application."

(emphasis added)

10. Clause 17 of the Trust Deed empowers the trustee to appropriate property in or towards satisfaction of any share of the Trust Fund with binding effect on all the beneficiaries.

11. By a deed dated 6 April 2001 ("the 2001 Appointment") the Trustees exercised their powers under clauses 9 and 17 of the Trust Deed to appoint certain property to form a fund called "the Grandchildren's Fund", the income from which was declared to be held on trust (in the events that have happened) for 12 named grandchildren of the settlor. The first to ninth defendants in this claim are 9 of those 12 grandchildren. They consent to the claim.

12. By a deed dated 18 July 2007 ("the 2007 deed"), the Trustees partially revoked the 2001 appointment to let in a further grandchild, Flynn Lowther, the 10th defendant. He is a minor and acts by his mother as his litigation friend. He does not oppose the claim. I refer to the first to 10th defendants individually as a "Grandchild" and collectively as "the Grandchildren".

13. The Trust Period ended in 2007 (when the eldest grandson, George attained 25 years of age), so no further appointments can be made by the Trustees.

14. The eleventh defendant (who is a solicitor) has been joined as a party on the basis that an order is sought that he represent the interests of and advance arguments on behalf of the unborn beneficiaries of the trusts in question, namely the unborn sons and remoter issue of the first to 10th defendants ("the Unborns"). I granted the representation order at the hearing.

Issues

15. In these circumstances, the Trustees ask the court to determine four issues:
    (1) Whether the Trustees can exercise the Power, on the basis that there are no beneficiaries with prior interests whose consent is required;
    (2) If the consent of the Unborns is required before the Power is exercised, whether the court has power to dispense with that requirement;
    (3) If the court has power to dispense with the requirement, whether it should it do so in these circumstances;

(4) If the Power can be exercised, either without any consents being required or if the court has power to and does dispense with consents, whether the court should approve the proposed exercise of the Power under the *Public Trustee v Cooper* jurisdiction.

Issue 1

16. On the facts of this case, this issue can be reformulated as 3 linked issues:
    (1) whether, on the proper construction of the Trust Deed, the rule in *Hancock v Watson* applies: whether
        (i) the Grandchildren are absolutely entitled to their Allotted Shares, albeit that their interest is defeasible on the birth of the persons entitled in tail; or
        (ii) the interest of the Grandchildren is not absolute, but subject to the entailed interests;
    (2) If the relevant provisions in the Trust Deed do engage the rule, whether the Grandchildren have an interest in capital within the meaning of section 32;
    (3) If so, whether the interests of the Unborns are "prior interests" (within the meaning of section 32) to those of the Grandchildren.

17. The general principles of interpretation of lifetime trusts are found in *Marley v Rawlings* [2015] AC 129 at [19] - [22]. In construing the Trust Deed, therefore, the court is seeking to ascertain the expressed intentions of the settlor by interpreting the words in their documentary, factual and practical context, reading the document as a whole.

18. In this case, the argument focussed on the nature and scope of the rule in *Hancock v Watson* [1902] AC 14, in which Lord Davey (at p22) stated it to be:

    "Where there is an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of- kin as the case may be".

19. The rule was restated by Lord Romer in *Fyfe v Irwin* [1939] 2 All ER 271 at 281:

    "it sometimes happens that a will contains two dispositions of the same property which, if literally construed, are inconsistent with one another. In such cases the court always endeavours to reconcile the dispositions, and will, if it be possible, so construe them that neither has to be rejected altogether.
    …
    In other words, the court endeavours to reconcile the two inconsistent [dispositions] made by the absolute gift on one hand and by the trust on the other hand, and it does so by imputing to the testator the intention to modify the absolute gift on only in so far as necessary to give effect to the trusts."

20. Both sides agree that the rule is one of construction. In *The Secretary for Justice v Chinachem Charitable Foundation* [2015] HKCFA 35, Lord Walker of Gestingthorpe, sitting in the Hong Kong Court of Appeal, having characterised it as such, continued

> "Its scope is not restricted to subsequent limitations which are struck down by the rule against perpetuities or are void for uncertainty; as the citation from Lord Davey [set out at para 17 above] makes clear, it also covers failure by lapse or any other reason. In all those situations it might have been argued that even though the subsequent limitation has failed, its presence in the will (and the need to read the will as a whole) shows that the initial gift cannot be taken at face value. … But the rule says otherwise, and the court will normally be guided by the rule, unless there are compelling reasons for reaching another conclusion."

21. In *Hancock v Watson* itself, the will gave the testator's residuary estate to his wife for life, and after her death to be divided into 5 portions, and gave 2 portions to Susan Drake. The will then provided that the 2 portions allotted to Susan ("the share") should remain in trust for her life for her separate use, and after her death in trust for her children upon attaining 25, if sons, or upon attaining 21 or marriage if daughters; "but in default of any such issue" the share to be divided among the children of the testator's brother Charles, payable to sons at 25, or to daughters at 21 or marriage.

22. Susan died without having had a child. The gift to Charles' children (who were also the testator's next of kin) was held to be void for remoteness. As next of kin, they argued that the share therefore passed on intestacy to them. That argument was rejected. Lord Davey said (at p22):

> "I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words "I give," and speaks of the shares subsequently as "allotted" to her. [Counsel for the next of kin] contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said: he has directed that during her life she shall have only the income of her share for her separate use without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the trusts declared of it and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts, she takes for life only."

23. It is unclear from the report whether the trusts created by the will were exhaustive of the beneficial interest in the share. However, this factor does not form part of the basis of the decision.

24. The issue in *Attorney General v Lloyds Bank* [1935] AC 382 was whether death of the settlor prompted an estate duty charge. By a deed of settlement the settlor had declared trusts of certain company shares for such beneficiaries (including her children), as she, the settlor, should appoint; and, until and in default of appointment, upon trust to divide the trust fund into 3 equal shares, and to appropriate one share to each of her 3 named children, but providing that the 3 shares should be retained by the trustees upon the trusts declared in the settlement.

25. The settlor then made a deed of appointment in which she directed that the trustees of the settlement should hold the trust fund in trust during her life to accumulate the income, and after her death to stand possessed of the trust fund (and accumulations) in trust for her 3 named children in equal shares,

> "but so that the share which after the death of the [settlor] shall be so held in trust for each of the said three children shall not vest absolutely in such child but shall be retained by the trustees upon the trusts hereinafter declared concerning the same."

26. Those trusts were as follows:
    (1) during the life of each child to pay to him or her the income of his or her share; and
    (2) after the death of such child to hold that child's share in trust for the children or remoter issue of that child as he or she should appoint; and
    (3) in default of such appointment in trust for all or any of the children of that child who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or marry, if more than one in equal shares.

    There followed a hotchpot clause, and an accruer clause, in case the trusts declared concerning the share of any child should fail. Finally the deed reserved to the settlor a power of revocation by deed or will.

27. The settlor died without having revoked the appointment. The 3 children survived her and were unmarried.

28. The starting point of Lord Tomlin's analysis (on p395) is that the gift is the first instance absolute in form: "in trust for the three children .... in equal shares". He notes a direction for dealing with the thing described as "the share" "shall be so held in trust"; and phrases in the engrafted trusts indicating ownership, such as the "share of each child" or "the shares in the trust fund of the others of the settlor's three children." He also notes that there is nothing in the engrafted trusts providing for the position if none of the 3 children have children. On this basis, he concludes that

> "the absolute gift stands, or, to employ Lord Davey's language, "takes effect," except to the extent to which it is cut down by the events which actually happen. At the death of the settlor nothing had happened to cut down the absolute gifts beyond the fact that all three children were living."

29. Lord Tomlin concludes, at p395:

> "No doubt in respect of each share the absolute gift was defeasible because it might be defeated to a limited extent by the other children surviving so as to enjoy a life interest in it, or by the birth of issue becoming entitled under the trust, but the defeasibility was not ended by reason of the death of the settlor … But for the possibility of the birth of issue the three children together could in the settlor's lifetime have stopped the trust for accumulation and demanded a transfer to themselves of the whole fund and the accumulations. To-day,

after the settlor's death, the position is the same. But for the possibility of the birth of issue the three children together could require that the whole fund and the accumulations should be transferred to them on their joint receipt. Their interests to-day are the same as they were before the settlor's death, i.e., they together own the whole fund and the accumulations subject to the same defeasance. Their position in this regard has not been altered by the settlor's death."

30. The guidance in the extensive case law on the rule in *Hancock v Watson* was summarised by Peter Gibson J (as he then was) in *Watson v Holland* [1985] 1 all ER 290 at 300 in the following propositions:

"(1) In each case the court must ascertain from the language of the instrument as a whole whether there has been an initial absolute beneficial gift onto which inconsistent trusts have been engrafted (see, for example, *Lassence v Tierney* 1 Mac & G 551 at 562, [1843–60] All ER Rep 47 at 51–52 and *Re Burton's Settlement Trusts, Public Trustee v Montefiore* [1955] 1 All ER 433 at 439–440, [1955] Ch 348 at 360).

(2) If the instrument discloses no separate initial gift but merely a gift coupled with a series of limitations over so as to form one system of trusts, then the rule will not apply (see *Rucker v Scholefield* (1862) 1 Hem & M 36, 71 ER 16).

(3) In most of the cases where the rule has been held to apply, the engrafted inconsistent trusts have been separated from the absolute gift either by being placed in a separate clause or sentence or by being introduced by words implying a contrast, such as a proviso or words such as 'but so that' (see, for example, *Hancock v Watson, A-G v Lloyds Bank Ltd* and *Re Litt's Will Trusts, Parry v Cooper* [1946] All ER 314, [1946] Ch 154). But this is not an essential requirement, and in an appropriate context the engrafted trusts may be introduced by the word 'and' or the words 'and so that' (see *Re Johnson's Settlement Trusts, McClure v Johnson* [1943] 2 All ER 499, [1943] Ch 341 and *Re Norton, Wyatt v Bain* [1949] WN 23).

(4) References in parts of the instrument other than the initial gift claimed to be absolute to the share of the donee are usually treated as indicative that the share is owned by the donee (see *A-G v Lloyds Bank Ltd* [1932] AC 382 at 395, [1935] All ER Rep 518 at 525, *Fyfe v Irwin* [1939] 2 All ER 271 at 282–283 and *Re Burton's Settlement Trusts* [1955] 1 All ER 433 at 437, 440, [1955] Ch 348 at 356, 361), though in an appropriate context even a reference to a share given to a beneficiary will not be treated as belonging to the beneficiary (see *Re Goold's Will Trusts, Lloyds Bank Ltd v Goold* [1967] 3 All ER 652; in that case Buckley J held that an express provision that the share was not to be held in trust for a beneficiary absolutely was decisive).

(5) If a donor, by the trusts which follow the initial gift, has sought to provide for every eventuality by creating what prima facie are

> exhaustive trusts, it is the more difficult to construe the initial gift as an absolute gift (see *Lassence v Tierney* 1 Mac & G 551 at 567, [1843–60] All ER Rep 47 at 53–54 and *A-G v Lloyds Bank Ltd* [1935] AC 382 at 395, [1935] All ER Rep 518 at 525)."

Whether the rule in Hancock v Watson is engaged

31. In this case, it was common ground that the language of clause 9(2) is apt to create an absolute gift. The issue is whether the effect of clause 10 is:
    (1) to engraft trusts on to that gift, so as to engage the rule in *Hancock v Watson*, or
    (2) together with clause 9, to make a gift coupled with a series of limitations over so as to form one system of trusts

32. The starting point in considering this issue is the fact that, as a rule of construction, the rule is concerned with the settlor's intention at the time of declaring the trust. Although *Hancock v Watson* itself refers to trusts failing from lapse or invalidity or for any other reason, these subsequent events cannot be relevant to the construction of the trust deed.

33. I therefore reject the Unborns' counsel's submission that the rule is only engaged when the engrafted trusts fail. In my judgment, this is not a relevant consideration in determining whether the rule applies. This is illustrated by *AG v Lloyds Bank,* in which the rule was held to apply though there had been no failure of the trusts. It is also shown by *Hancock v Watson* itself. Although the trusts failed because they were void for remoteness, the settlor must be assumed to have intended that his trusts would take effect. The court's task, in my judgment, is to ascertain what the settlor intended to be the position should the trusts fail for any reason, and there is no requirement that they should have failed.

34. I turn therefore to the guidelines in *Watson v Holland*. The Trust Deed contains the following indicators of engrafted trusts identified in that decision.

35. First, there is the structure of the Trust Deed: the initial absolute gift in clause 9, followed by the separate clause 10 commencing "Provided always that…". The drafter of the Trust Deed is using a structure expressly identified in the cases concerning the rule and, it is to be inferred, with the intention that it should apply.

36. Secondly, this structure is to be contrasted with the provisions in clauses 5, 6 and 7 of the Trust Deed. These provisions create 3 funds for 3 children of the settlor, respectively Miranda, Caroline and James, in terms that unequivocally create life interests, followed by trusts in remainder. They do not contain an absolute gift in the terms of clause 9, and this, in my judgment, is indicative of a different intention on the part of the drafter from their intention in clauses 9 and 10.

37. Thirdly, the use of words "the share", "the Allotted Share" and "taken" in clause 10 are indicative of ownership of the share by the Beneficiary.

38. Fourthly, the fact that clause 10 provides that the Allotted Shares shall not vest absolutely in the Beneficiary is not sufficient to prevent the rule from applying. In

AG v Lloyds Bank, the rule was held to apply, even though the deed of appointment included such a provision.

39. It is necessary, however, to consider a factor relied upon by counsel for the Unborns as showing the rule does not apply to the Trust Deed.

40. She submitted that in the trust context the rule operates to avoid a resulting trust on the failure of the engrafted trusts. In this case, the trusts are exhaustive of the beneficial interest and cannot fail, because the ultimate beneficiary is the same Grandchild to whom the initial gift was made. She submitted that this made it more difficult to construe the gift as an absolute gift, replying on proposition (5) in *Watson v Holland*.

41. I agree that the decision in *AG v Lloyds Bank* is in part based on the non-exhaustive nature of the trusts:

> "I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children."[2]

42. By contrast, in the Trust Deed, the initial gift to the Grandchild is followed by an ultimate gift to the same Grandchild. The trusts which follow the initial gift are therefore exhaustive of the beneficial interest in the gift. The Unborns' counsel submitted that this prevents an intention to make an initial absolute gift from being attributed to the settlor, because, if the trusts fail, the Trust Deed expressly provides for the Grandchild to have an absolute interest. Indeed, she submitted, applying the rule would have the curious result of two gifts of capital: first, under cl. 10(1) and then under cl. 10(2)(c).

43. As to this, I do not accept that the rule can only apply when the engrafted trusts are not exhaustive of the beneficial interest. In *Hancock v Watson*, as noted above, it is not clear that the trusts were not exhaustive. Similarly, in *Fyfe v Irwin*, the testator intended that the trusts should be exhaustive of the beneficial interest, and the argument that this prevented the rule from applying was rejected by Lord Russell:

> "It was first said that, even assuming that the will contained an absolute gift to Flora in the first instance, the rule in *Lassence v Tierney* did not apply in the present case because there was, in addition to the destination over on Flora's death to her issue, a further destination over failing issue to other persons. For myself, I can see no justification for this contention, either on principle or on authority. As to principle, every destination over, whether in favour of issue or of strangers, seems alike, whether as regards its effect upon, or its inconsistency with, or its relation otherwise to, the original absolute gift. To the extent to which it takes effect, it hinders the operation of that absolute gift, and there seems no reason why, when the hindrance disappears, the original gift should not operate as much in the one case as in the other."

44. As to the final gift being to the Grandchild, this does not, in my judgment, prevent the rule from applying. If the initial gift is absolute, then this provision is strictly

[2] *AG v Lloyds* Bank per Lord Tomlin at p395

unnecessary to ensure that the gift returns to the Grandchild if the trusts fail. However, this is not sufficient to displace the inference to be drawn from the other features of the Trust Deed set out above. In the light of those features, it is, in my judgment, a "belt and braces" provision by the drafter, seeking to draft provisions falling within the rule in *Hancock v Watson*. An alternative way of putting it is that of the Trustees' counsel, namely, that by including the Beneficiary as ultimate beneficiary, the drafter is acknowledging that *Hancock v Watson* is intended to apply.

Whether the Grandchildren have an interest in capital to which section 32 applies

45. *AG v Lloyds Bank* supports the analysis that since none of the Grandchildren have children, they have absolute interests, albeit defeasible, in capital.

46. This is the view taken by the editors of *Lewin on Trusts* (20th edn) at para 32-027, discussing the issue which falls to be determined in this case:

> "We consider that section 32 is applicable since the beneficiary takes a vested interest in capital, subject to satisfying any relevant contingency, that interest being defeasible in the event of others taking capital under engrafted trusts. Consequently, until that interest in capital has been defeated the beneficiary retains an interest in capital, and the statutory power is available, though the interests of the other capital beneficiaries (at least if in existence) will perhaps amount to prior interests, requiring their consent."

47. The Unborns' counsel submitted that if the rule applies, it does not give the Grandchildren an interest in capital to which s.32 applies. She submitted that the court in *AG v Lloyds Bank* was only considering the beneficiaries' interests from the perspective of the position before and after the death of the settlor. It did not, she said, analyse the nature of the interests of the unborn issue.

48. In support of this, she relied upon the following passages in the authorities:

> "…the absolute gift takes effect **so far** as the trusts have failed…"[3]
>
> "To the extent that it [the engrafted trusts] takes effect, it hinders the operation of the absolute gift …**when the hindrance disappears**, there is no reason why the original gift should not operate…"[4]

49. She submitted that the interests of the initial donees are subject to the interests in capital of beneficiaries under the engrafted trusts, which are contingent on them being born and surviving their parent. Accordingly, she said, unless and until the interests under the engrafted trusts fail, they are prior interests to the interest of the initial donees. In support of this submission, she relied upon the following passage:

> "… as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as **between**

[3] *Hancock v Watson* per Lord Davey at page 22

[4] *Fyfe v Irwin* per Lord Russell of Killowen at page 277

herself and the parties taking under the engrafted trusts, she takes for life only."[5]

50. In my judgment the fact that an interest in capital is liable to be defeated by, for instance, the birth of a child, does not prevent it from being an interest in capital unless and until the event of defeasance occurs. As the Trustees' counsel submitted, it is not uncommon to find absolute interests that can be defeated, for example, where the capital to which the beneficiary is entitled is subject to an overriding power of appointment or revocation.

Whether the interests of the Unborns are "prior interests" within the meaning of section 32

51. Paragraph 32-001 of *Lewin* explains that:

> "The general purpose of a power of advancement is to enable trustees in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they release it from the trusts of the settlement and accelerate the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and where the contingency on which the vesting of the beneficiary's title depends fails to occur or there is a later defeasance or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts of the settlement are materially altered by the operation of the power."

52. The Unborns' counsel's argument that they have prior interests is based on the passages set out in paragraphs 48 and 49 above. She submitted that the Grandchildren's interests are subject to those of the Unborns, which are therefore prior interests to those of the Grandchildren.

53. The concept of unborns having an interest under a trust is a familiar one, and the fact that they are not yet in existence does not prevent there being such an interest. Section 32 itself implicitly contemplates persons not yet in existence having a prior interest, as is acknowledged in *IRC v Bernstein* [1961] Ch 399, at 411.

54. The argument in this case turns on the meaning of "prior": if the absolute interests of the Grandchildren are, as between themselves and the Unborns, subject to those of the Unborns, does that render the latter "prior" to the former? I have not found this an easy question to answer.

55. As the passage from *Lewin* set out above explains, exercising a power of advancement inevitably requires the removal of the capital which is advanced from the trust, so that it is no longer available to the other beneficiaries under the trust. The section permits this, even though the interest of the beneficiary in whose favour the power is exercised may fail e.g. if they die before reaching a specified age.

[5] *Hancock v Watson* per Lord Davey at page 23

56. The section recognises this potential prejudice, and seeks to limit its extent in para (c) of the proviso. Logically, the power to advance must not be used to prejudice those with interests in advance of the person(s) intended to benefit from the exercise of the power. Para (c) therefore requires the consent of persons entitled to "any prior life or other interest". In my judgment, "prior" refers to the order in which the trust property is enjoyed, a life interest being enjoyed before the interest in remainder. It follows, in my judgment, that the consent of persons with interests subsequent to the capital beneficiary is not required. The trustees are not of course entitled to disregard the interests of those persons. They must exercise their powers as fiduciaries, and are bound to consider those interests. But provided they have done so, and made a balanced decision, the power is there to be used.

57. In this case, my starting point is the position if a son is born to a Grandchild. This would cause the Grandchild's absolute interest to become a life interest, limiting their entitlement to the income of the trust property. That interest is a "prior life interest" to that of the son. It follows that the son's interest, even when unborn, is not prior, but subsequent to that of the Grandchild, and falls outside para (c) of the proviso.

58. In my judgment, therefore, the interests of the Unborns under the Trust Deed are not a "prior life or other interest", and the Trustees are accordingly entitled to exercise the Power unfettered by s.32(c).

Issues 2 and 3

59. It follows from the above that it is not necessary to decide issues 2 and 3.

Issue 4

60. The court is asked to approve the exercise by the Trustees of the Power. The principles applicable to category 2 *Public Trustee v Cooper*[6] approvals are well established, and it is sufficient to refer to para 39-095 of *Lewin*, so far as relevant:

> "The approach of the court has been summarised both in England and overseas as requiring the court to be satisfied after proper consideration of the evidence that:
>
> (1) the trustees have, in fact, formed the opinion that they should act in the way for which they seek approval;
>
> (2) the opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at;
>
> …
>
> The second requirement involves two aspects. First: process. Has the trustee properly taken into account relevant matters and not taken into account irrelevant matters? Second: outcome. Is the decision one with a rational trustee could have come to?"

[6] [2001] WTLR 901, 922-924

61. I also respectfully adopt the summary, taken from paras 39-095 and 39-096 of *Lewin*, of Chief Master Marsh in *Schumacher v Clarke* [2020] EWHC 3381 (Ch) at [46]:

> "(1) It bears emphasis that the giving of approval is a matter of discretion. Trustees have no entitlement to demand a blessing if the relevant criteria are met. The court is exercising a broad discretion as part of its supervisory powers. Of course, as a general rule, the court will wish to be supportive and helpful to trustees if it is indeed the case that the decision is momentous. That said, and I agree with the observation made in Lewin, that the court acts with caution because the result of giving approval is that the beneficiaries cannot later complain that there has been a breach of trust, provided full disclosure to the court has been given.
>
> (2) The court is entitled to take into account the consequences of refusing to approve the trustees' decision."

62. The reasons why advancement would be for the benefit of the Beneficiaries are put forward in paragraph 31 of the witness statement dated 7 July 2020 of Neil Braithwaite. The value of the assets in the sub-funds of each Grandchild vary between £850,000 and £900,000. They are subject to 10 yearly inheritance tax charges, except in the case of George. The Trustees have set aside a retained fund of £350,000 for each sub-fund to meet these charges.

63. Seven of the Grandchildren are adults ranging in age from 23 to 38. The Trustees have decided to advance their funds to them in the near future. The purpose of the advance would be to enable them to buy a property. In the case of Sarah Glenn, the Trustees of her fund have very recently bought a beneficial interest in a house for her to live in, and have made a loan to her fiancé to enable him to purchase the remaining beneficial interest. If an advance is made, the Trustees' interest (and benefit of the loan to her fiancé) would be advanced to Sarah. This would allow her and her fiancé to hold the house between them absolutely.

64. William and Flynn Lowther are 19 and 15 respectively. The Trustees have decided to advance capital to them but defer the advance until they are older, at the latest when they reach 30.

65. George Hunt is the eldest Grandchild. He has a pre-March 2006 interest in his sub-fund, so there will be an inheritance tax charge on his death if his interest is not terminated. There will be no inheritance tax to pay if his interest in possession is terminated in his favour. Different considerations apply to him, as he has been diagnosed with learning difficulties and Asperger syndrome. The Trustees have determined to advance sufficient capital to allow him to invest in a property, but the remainder will be retained to provide an income to meet George's particular lifestyle needs.

66. The Trustees' counsel submitted that these are extremely good reasons why they wish to advance capital to the young adult Beneficiaries. The advance will, she said, make a very significant difference to their lives, by enabling them to buy property to live in. By contrast, retaining the funds in trust for the benefit of future

generations will simply see them eroded by professional fees and inheritance tax charges. In addition, she submitted, it is to be anticipated that future generations will benefit from their own parents' improved financial position.

67. The Unborns' counsel did not challenge the benefit in enabling the Grandchildren to buy property to live in, although she submitted that the Trustees could use their existing powers to benefit them by acquiring property. However, as she acknowledged, in order to preserve the retained funds, such property would be of lesser value.

68. Having held that the Trustees are entitled to exercise the Power without obtaining consents, I consider that they can properly form the view that the proposed transaction is for the benefit of the Beneficiaries, for the reasons put forward by the Trustees' counsel and set out above. I will therefore grant the approval sought.