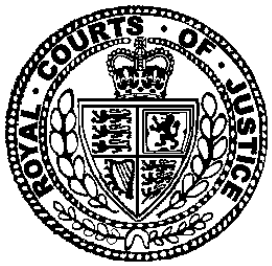

Neutral Citation Number: **[2024] EWHC 2784 (Ch)**

Case No: PT-2024-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Friday, 01 November 2024

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

(1) JOHN MICHAEL WYTHE
(2) ROY MATTHEW DANTZIC
(3) JOHN HOLMES STEPHEN
(4) JAMES FAIRWEATHER EDMONDSON
(5) DAVID HAMILTON FOX
(6) EUAN MICHAEL ROSS GEDDES (BARON GEDDES OF ROLVEDEN)
(as trustees of Funds 3, 20, 21, 22, 23, 24, 26, 37, 38, 39 and 58 of the Portman Estate)

Claimants

- and -

(1) ANDREA ZAVOS
(as representative of the unborn beneficiaries of Funds 3, 20, 21, 22, 23, 24, 26, 37, 38, 39 and 58 of the Portman Estate who, if born, will be children or remoter issue of the present Viscount Portman)

Defendants/Respondents

- -
- -

Mr Michael Furness KC and Mr Jamie Holmes (instructed by **Farrer & Co LLP**) for the Claimants
Mr Jonathan Hilliard KC and Mr Samuel Cathro (instructed by **Boodle Hatfield LLP**) for the Defendants

Hearing dates: 4 October 2024

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APPROVED JUDGMENT

This judgment was handed down via remotely at 10.00 am on 01 November 2024 by circulation to the parties or their representatives and by release to the National Archives.

Mr Justice Fancourt:

Introduction

1. On 4 October 2024, I heard the Part 8 claim of these Claimants for approval of a restructuring involving various steps intended to be taken by the Portman Estate trustees before 30 October 2024. These are to transfer the partnership assets of the various Funds identified above (which own many of the Portman Estate property assets) into the ownership of a single limited company, in return for which that company will issue shares to the trustees of the Funds on the terms of the company's articles of association, a shareholders' agreement and a business transfer agreement ("the Proposal").

2. The claim was brought on the basis that the Court, in exercise of its supervisory jurisdiction, should approve the trustees' decisions, made on 5 September 2024 ("the Decision"), to enter into this momentous, once in a lifetime restructuring of assets of the trusts, pursuant to what is known as the second category of cases explained by Hart J in his decision in The Public Trustee v Cooper [2001] W.T.L.R. 901 at p.923, as follows:

> "… where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers."

3. In addition to the reason explained there by Hart J for bringing the matter before the Court, the trustees do so in this case additionally because there exists a conflict of the duties that the same trustees owe different beneficiaries of different trusts (the First Claimant being a trustee of each of the Funds, and other Claimants being trustees of more than one Fund). The trustees therefore wish the Court to consider whether the Decision is vitiated by that conflict of duties, despite the considerable care that they have taken to ensure that it is not and to make the Proposal, so far as reasonably possible, even-handed as between all the living and unborn beneficiaries.

4. There is in fact one small wrinkle in the Decision, in that the powers of the trustees of one Fund are arguably insufficient for that Fund to participate in the Proposal, owing to a lack of an express power to make use of the single company structure. Here, the relevant Claimants invite the court to iron out the wrinkle using the powers in s.57 of the Trustee Act 1925, conferring the necessary power on them, on the basis that it is expedient to do so. Subject to that point, there is no real doubt that the Claimants have the express powers to do what they propose to do.

5. All the principal living beneficiaries of the trusts have consented to the Proposal on an informed basis. The Defendant has been appointed to represent the interests of the principal unborn beneficiaries of the trusts and, in that capacity, she has scrutinised the Proposal and concludes that the Decision is one that a reasonable body of trustees properly directing themselves could properly have made, and that it is not vitiated by any conflict of interest or duties.

6. Having heard Mr Michael Furness KC and Mr Jamie Holmes on behalf of the Claimants explain the Proposal, its implications and the decision-making process, and Mr Jonathan

Hilliard KC and Mr Samuel Cathro on behalf of the Defendant explain her approach to and assessment of the Proposal, I indicated that I would approve (or in the words of Hart J, give my blessing to) the Decision, and that an order would be made to that effect. That order was sealed on 16 October 2024. I said that I would give at a later date fuller reasons for my decision than I pronounced orally in court. Those reasons now follow.

The Trusts

7. The trusts comprise various Funds, each of which includes various real property assets of the Portman Estate, and some other assets. There are four principal beneficiaries of the Funds: the current 10th Viscount Portman and his three sons, Luke, Matthew and Daniel. As Mr Furness did, for convenience I shall use the sons' first names in this judgment. There are also some adult and minor beneficiaries with small interests in some of the Funds ("the minor beneficiaries"), including Viscount Portman's younger half-brother, Piers Portman. None of the three sons currently has any children but all or any of them may do so in future, and they will then fall within the class of beneficiaries of some of the trusts. The class of beneficiaries may remain open for about 40 years.

8. Each of the Funds has pooled some or all of its assets with those of other Funds, and it carries on a business in partnership with those other Funds. These are the 3 partnerships identified below. Some of the assets of Funds 3, 21, 22, 23, 24 and 58 are "left out", i.e. they are not held within the partnership but are retained by the Fund as separate assets controlled solely by its trustees, or they are pooled with other assets of one or more Funds but not so as to be partnership assets. The structure of the various Funds and beneficial interests in them is a little complex but, in broad outline, the position can be summarised as follows.

9. There are three partnerships: the Taunton One Partnership ("P1"), which comprises assets in Fund 3 and Fund 21 (in each of which Viscount Portman has the sole interest in possession) and an investment from a smaller fund, Fund 37; the Berkeley Two Partnership ("P2"), which comprises assets of Fund 22, in which Luke currently has a 1000/1012 share and his brothers and ten other minor beneficiaries each has a 1/1012 share, and an investment from a smaller fund, Fund 38; and the Bryanston Three Partnership ("P3"), comprising assets in Funds 23, 24 and 58, in which Luke, Matthew and Daniel each has a substantial share, Viscount Portman has a share (in Fund 58 only), and Piers Portman has a smaller share (in Fund 23 only), and an investment from a smaller fund, Fund 39. I refer to the P1, P2 and P3 partnerships together as "the Partnerships", or to any of them as "the Partnership", as appropriate.

10. In some cases, the beneficiaries of Partnership assets held by the Funds have absolute interests, but in most cases there are life interests, to be followed (subject in some cases to powers of advancement or appointment and specific gifts) to further interests in remainder, and then residual entitlements at the end of the trust period for each Fund. The left out assets in the pooled Funds are held on bare trusts for the contributing Funds.

11. The trusts were established at different times by successive Viscounts Portman, and some of them have been extensively varied by the Court, in 1976 or 1979.

12. As things stand, the effect of the trusts in relation to the Partnerships is broadly as follows:

13. Each Fund has an interest (direct or indirect) in one of the Partnerships, to the extent of the value of the assets that it contributed to that Partnership. The income of each Fund is derived from its partnership share and from its left out assets.

14. Funds 3 and 21, which are pooled within Fund 20, are held by their trustees on trust for Viscount Portman for life, and, subject to powers of advancement, the residue is held in equal shares for Luke, Matthew, Daniel and their issue and any further children of Viscount Portman. The income of the assets in P1 therefore goes to Viscount Portman, who is resident abroad for tax purposes. The net asset value of the partnership assets within these Funds as at April 2023 was £155.2 million. The assets are primarily real property and cash.

15. Funds 23, 24, which are pooled with the assets of Fund 58 within Fund 26, are held in (in once case) equal, or (in the other case) unequal shares, principally for Luke, Matthew and Daniel, with a smaller share in Fund 23 for Piers, and with the residue in both Funds held in equal shares for their future children. Fund 58 is subdivided into 3 discrete trusts, in one case subject to a life interest for Viscount Portman but otherwise for some or all of his children. The net asset value of the partnership assets within these Funds as at April 2023 was £195.4 million.

    i) Fund 22 is held subject to life interests in favour of all male descendants of the 9th Viscount Portman other than the 10th Viscount. The life interest of Luke, as heir to the Viscountcy, is 1000 times greater than the shares of the other beneficiaries (of whom there are currently twelve, including Piers Portman, his brothers, Matthew and Daniel, all of whom have a single share each). The class is not closed, but each future beneficiary will only take a single share, so by far the main recipient of the income of Fund 22 is Luke, who is a UK resident for tax purposes. The net asset value of the partnership assets within Fund 22 as at April 2023 was about £385 million.

16. The left out assets are mainly real property and cash, but also some investments in shares and some valuable chattels, such as paintings. Fund 22 holds its own left out assets, valued as at April 2023 at about £109.5 million. The Fund 20 pooled left out assets were valued at about £56 million and the Fund 26 pooled left out assets at about £81.5 million. These left out assets give the trustees greater flexibility in dealing with advancement and discharge of liabilities, including Inheritance Tax liabilities, which are payable from time to time.

17. The trustees of the individual Funds are the partners in P1, P2 or P3. As trustees, they have absolute control, subject to the trusts, over the assets of each Fund, but as partners in the relevant Partnership they are required to act unanimously with their partners on all major decisions, the trustees of the other relevant Funds. Upon any of the individual trusts coming to an end, the beneficiaries absolutely entitled would own an undivided share in the Partnership, to the extent of that Fund's assets.

The Proposal

18. The Claimants have caused to be incorporated a limited company, The Portman Estate (Primary) Limited (company number 09967998) ("the Company"), to which each of the Partnerships will transfer its business and the Funds' their assets. The Company will assume the debts of the Partnerships by novation, as sole obligor. In consideration of the

transfers, the Company will issue shares, predominantly to the Funds that made up the Partnerships, but a very few individual shares will be allotted and issued to the beneficiaries of Fund 58 (that initially will be held on bare trust for them). Each Fund will receive shares in proportion to the value of its Partnership assets (but not the left out assets) as a share of the total transferred businesses and assets.

19. Fund 22 will also receive £10 million in cash consideration, for the purpose of equalising the benefits and disbenefits of the restructuring as between the principal beneficiaries with life interests (see below).

20. The transfers are expected to qualify for Capital Gains Tax roll-over relief, under s.162 Taxation of Chargeable Gains Act 1992. While no advance clearance from HMRC in that regard is available, KPMG on behalf of the trustees has engaged with HMRC, in considerable detail, resulting in a (non-binding) comfort letter dated 25 January 2024 being provided by HMRC. On that basis, the majority of the potential CGT impact of the restructuring will be rolled over into the shares, with CGT expected to arise only in relation to the £10 million cash consideration.

21. Three of the existing trustee Claimants in addition to Mr Wythe as chair will be appointed directors of the Company, one by each of the Partnerships; and an independent non-executive director will be selected by agreement between them and appointed.

22. Apart from the assets transferred to the Company, Funds 22, 23 and 24 will continue to hold life insurance policies that they currently hold. The left out assets will remain left out and will be retained by Fund 22 and by the pooled Funds 20 and 26.

23. The consequences of this restructuring are, in outline, the following:

    i) The trustees of each Fund will have less control over the underlying assets and the businesses. The businesses of the three Partnerships will be merged and managed as one business by the directors of the Company.

    ii) As Fund 22 will be allotted over 50% of the shares of the Company, all the other Funds will be minority shareholders. However, the consequences of that are mitigated by the shareholder agreement: 70% voting majority is required for actions that require shareholder consent.

    iii) Instead of each Fund being entitled to its share of the Partnership profits and the beneficiaries being absolutely entitled to that share, or a share of losses, the Funds' income will depend on dividends being declared by the directors and approved by the Company. The value and quantum of distributions to the beneficiaries will therefore depend on performance of the Company and the amount of distributable profits. Although each Fund will in theory benefit from a more diversified portfolio of assets, a Fund that currently has high yielding assets will be likely to receive a lower level of income than it currently enjoys, and vice-versa; though a lower income return may be compensated by a greater degree of capital growth in the longer term. Different share classes are proposed to be used to mitigate, to some extent, the short to medium term impact of income differentials.

    iv) When a beneficiary becomes entitled to an absolute interest in a Fund, he will be entitled to shares in the Company, instead of an undivided share in assets of a

Partnership. In time, and in particular upon the future death of Viscount Portman, which triggers the end of some of the trusts, that will result in more shares in the Company being directly owned by beneficiaries rather than by trustees.

v) The Company will pay corporation tax on its income and capital profits, and the Funds will pay income on dividends paid by the Company at the dividend rate (or alternatively the beneficiary will pay income tax, if the dividends are mandated directly to the beneficiary).

24. The reasons for restructuring the trusts by incorporating their businesses and most of their assets are encapsulated in a document that the Claimants call "the Manifesto", dated September 2023, which acts as a short summary of the rationale and objectives, and which was provided to all the beneficiaries who were consulted about the Proposal.

25. The Manifesto explains how the Proposal will provide greater flexibility to distribute the profits of the Company to the beneficiaries, regardless of whether they are income or capital profits. It explains how it will help to preserve the Portman Estate intact, rather than having interests in Partnerships vesting absolutely in different beneficiaries as and when the trusts come to an end. Fragmentation of the Estate will make it more difficult for the beneficiaries to cooperate, and more difficult to use the assets as security for borrowing. The advantages and disadvantages of diversifying beyond the Estate have been considered, and the principal beneficiaries all support the Claimants' opinion that it is preferable to remain invested in the Estate and to keep it intact. The left out assets provide an opportunity in future for diversification, if desired.

26. The Manifesto also explains the various key commercial benefits of incorporation, and potential benefits to individual beneficiaries, as understood by the Claimants and their professional advisers, and the tax disadvantages that have been identified by those advisers, in particular an up-front liability to Stamp Duty Land Tax ("SDLT") on transfer of the individual properties from the Partnerships to the Company.

27. The Manifesto concludes:

> "There are always likely to be costs occasioned by incorporation, with the direct financial benefits being unquantifiable and to a certain extent speculative. The question is whether the trustees pause because in a higher interest rate environment the figures are less attractive than before, or they continue on the footing that the ideal time to proceed is unknowable except in retrospect. The risk of waiting for the ideal time is that incorporation gets so delayed it never happens.
>
> The trustees understand that the principal beneficiaries wish to remain invested in the Estate in the long term and that they share the view that collectively they are all better off if they all remain so invested. If that is the case, the trustees firmly believe that incorporation is the best way forward. If that is not the case, the trustees will, of course, reassess the merits of the project."

28. The Manifesto was issued following receipt by the Claimants of a main report from PwC that they had commissioned, seeking advice on the way that incorporation might be structured for the longer term benefit of the beneficiaries collectively and individually,

so far as possible. This report followed an earlier process of engagement with PwC by the trustees and beneficiaries. The main report is extremely detailed and thorough. It assesses the value of the potential benefits of incorporation, on the preferred structure. The assessment supports the existence of commercial benefits.

29. At the same time as seeking structural and valuation advice from PwC and legal advice from Farrer & Co LLP, the Claimants sought advice from KPMG and specialist Counsel in England on tax consequences, and from O'Melveny & Myers LLP in relation to potential tax arising from the novation of some structured lending in the United States of America. The tax advice covered the liability to tax arising from the restructuring transaction and the liability of the Company and the beneficiaries to tax on profits and income respectively. The advice given (as more recently updated) assured the Claimants that they could be reasonably confident in their assessment of the amount of SDLT liability, subject only to a slight risk of a higher liability arising in relation to a portfolio of assured shorthold tenancies, where there was some risk that an additional £600,000 might be payable. The advice assured the Claimants that there was little risk that HMRC would deny that CGT roll over relief was available; and it assured the Claimants that there was only a remote risk that any US tax liability would arise as a result of the transaction.

30. The advice in relation to income tax was that, for UK resident beneficiaries, the main consequence would be (after taking account of corporation tax on profits) a higher rate of tax on dividends paid by the Company, as compared with tax payable on property income; but for non-UK resident beneficiaries, such as Viscount Portman, the dividends would be payable without any withholding of tax, save for the corporation tax payable by the Company. Accordingly, beneficiaries such as Luke would be relatively worse off as a result of the incorporation, and Viscount Portman and other beneficiaries resident overseas would be relatively better off. PwC was able to take this into account, in its later reports, in adjusting the structure of the transaction (by proposing the issue of different classes of shares with preferential rights, and by the trustees' proposed payment of cash consideration), with the informed consent of all the principal beneficiaries, to try to make the restructuring fair to all of them.

31. The advice in relation to Inheritance Tax was that the burden should be reduced, as the beneficiaries would be taxed on the basis of minority (or at least non-controlling) shareholdings in the Company, not on undivided shares of property assets.

32. PwC has modelled the impact of the Proposal on a global basis for all Partnership assets, and in relation to individual Funds, showing the projected post-tax income for each as compared with the status quo. The June 2024 PwC supplementary report updates the global projections and provides forecast nominal and net present value post-tax income for each of the principal beneficiaries for the periods 2025-2033 and 2025-2050. All the beneficiaries benefit substantially in both timescales, in the case of Luke by reason of the additional cash consideration, and in the case of Viscount Portman by reason of his non-UK tax residence. In terms of increase in income, Matthew and Daniel benefit the most, in proportionate terms, but their income is more modest than that of Luke and Viscount Portman.

33. All of the advice received by the Claimants has been shared with the principal beneficiaries, who have been given access to the Claimants' expert advisers and obtained

their own professional advice in relation to it. They have therefore consented to the Proposal on a fully informed basis.

34. The Defendant, who represents a class of unborn beneficiaries, has scrutinised the Proposal with the benefit of professional advice paid for by the Claimants; and, while not necessarily agreeing with every part of the proposed structure, the Defendant accepts that the Proposal is a perfectly rational one. The Defendant also agrees that the necessary power should be conferred on the trustees of Fund 24, pursuant to the Trustee Act.

35. On the issue of diversification, the Defendant explains in her evidence that she raised this with the trustees, who consider that the Estate should be kept intact. The Defendant accepts that this is a rational conclusion to reach, on the basis that the principal beneficiaries all wish it to be so, there may be marriage value in the Estate as a whole, rather than fragmented, and the Estate provides a unifying purpose for the trusts, which might otherwise be lost. Further, sale of real property assets in order to diversify would have additional CGT consequences, which would be likely to be onerous.

36. The Defendant accepts that the nature of the conflict of duties for the trustees is not so serious that they cannot make a decision on the Proposal, but is one that requires them to take independent professional advice, which they have done, and to seek the Court's blessing. The conflict will be, in a sense, built into the corporate structure that is proposed, in that 4 of the 5 directors will be trustees of more than one Fund. But the corporate structure that has been decided to be adopted ameliorates the potential impact of any conflict, and the presence of a fifth, independent director (who can only be removed by the shareholders acting together) will assist the trustees to manage any difference between the interests of the beneficiaries. The Defendant accepts that that was a matter properly within the Claimants' discretion, in making the Decision, and that appropriate advice had been taken.

The Trustees' Decision-making Process

37. Mr Furness told me that the process of investigating and forming the Proposal, taking detailed and wide-ranging advice and consulting appropriately about it, has taken some 2 ½ years. Mr Wythe explains that each Fund's trustees met on 19 July 2022 and decided, in the light of initial advice, that it was appropriate to proceed to work up the Proposal in detail and to start to prepare for this claim.

38. The working up of the Proposal has been a long process and it is clear from the content of the material put in evidence that extensive advice has been taken at various stages of that process from numerous expert advisers, right up to the final PwC report in June this year. At the same time, the trustees and their advisers have been engaging in detail with HMRC to ensure that the likelihood of any adverse tax consequences is properly understood and assessed.

39. On 12 March 2024, the Claimants, as trustees of each individual Fund, took the provisional decision to proceed with this application to bless the Proposal. That decision was taken in light of all the advice received and the principal beneficiaries' informed support for it, as evidenced by their written confirmations and brief explanations of why they support the Proposal.

40. The claim form was issued on 11 April 2024, supported by the first witness statement of Mr Wythe, which explains the provisional nature of the decision to proceed and the need for further matters to be addressed before the final decision could be taken. These included completion of consultation with the principal beneficiaries and the Defendant; finalising the terms of the shareholder agreement, the articles of association of the Company and other corporate documents; forming a definitive view on the CGT roll over relief issue; and updating the PwC analysis to a date shortly before the final decision was taken.

41. In view of the agreement of the principal beneficiaries to the Proposal, they were not joined as defendants, or represented before me. The principal unborn beneficiaries were represented by the Defendant. The minor beneficiaries were not consulted, joined or represented as a class, though Mr Furness told me that their interests in in Funds 22 and 23 were indistinguishable from the interests of the unborns, who are represented, and that under Fund 21 some of the minor beneficiaries take a fixed sum of £5,000 each upon the death of Viscount Portman. He also said that the decision not to consult the minor beneficiaries was deliberate, on account of the excessive and disproportionate cost to the Claimants of enabling any person consulted to take appropriate advice to enable them to express an informed view on the matter, a view which in any event would be unlikely to be a material consideration for the trustees.

42. As a matter of law, it is not necessary to join any or all beneficiaries as defendants to a trustee's application of this kind, though the court may decide that joinder is desirable and direct the trustees to do so. In light of the decision of the Court of Appeal in Denaxe Ltd v Cooper [2024] Ch 65, which explains that the protection that trustees obtain from the court's approval depends on the principles of res judicata and abuse of process, not immunity arising from the approval, the protection may be more limited if beneficiaries are not joined; however, in this case the Claimants are willing to take that risk. In In the matter of the Portman Estate (application by Roy Matthew Dantzic and others) [2015] EWHC 536 (Ch), Birss J held that, in view of minimal impact of that application on the beneficiaries, the large number of them, and the cumbersome and costly process of joinder, the claim should be permitted to continue with no beneficiary as defendant.

43. In view of the apparently minimal impact on the value of the minor beneficiaries' interests, the relatively small value they have, the additional, considerable cost of involving them, and the fact that other minor interests are represented by the Defendant, I do not consider that it is necessary or appropriate for the minor beneficiaries to be joined or represented.

44. Following the issue of the claim form, the trustees of each Fund wrote to its principal beneficiaries to explain their proposed policies on income distribution, if the restructuring were to proceed, subject to the decisions to be taken by the directors of the Company. The principal beneficiaries' advisors had meetings with the Claimants' advisers to discuss the finer details of the transaction. The Claimants continued negotiations with the Partnerships' creditors to novate the obligations to the Company and release the guarantors of the Partnerships' debts. Further meetings took place with HMRC to discuss any issues with the tax consequences of the proposed transaction. As at 14 August 2024, the date of Mr Wythe's second witness statement, this process had not been completed.

45. Following the March 2024 PwC supplementary report, PwC produced another update in June 2024, incorporating some revised assumptions. The expected impact of

incorporation was nevertheless largely unchanged, in global terms, compared to the September 2023 report, except somewhat more favourable overall. The position for some individual Funds on those assumptions, taking into account also recent transactions by the Partnerships, was more favourable, and the position for other Funds slightly less favourable. These differences were factored in by PwC when finalising the structure of the Company and the interests of its shareholders. The Claimants formed the view that the June 2024 report of PwC reinforced their provisional view that incorporation was in the best interests of the Funds and their beneficiaries.

46. Nearly final versions of the transactional documents were then produced, which embed the requirement for 70% voting shareholder consent to specified matters, such as the appointment of directors, issue of shares and transfer of shares to a non-shareholder. As a result, although Fund 22 will on incorporation have more than 50% of the voting shares, it will not have the ability to vote through decisions on important matters. These provisions have been carefully crafted, on expert advice, to ensure that an appropriate and fair balance is struck as between the various beneficiaries in the running of the Company and the decisions that it takes.

47. The trustees of each Fund then met on 5 September 2024 and were given an update by KPMG on the potential impact of an increase in the amount of SDLT or Inheritance Tax in the event of an increase in value of Fund properties for tax purposes. They also received an update from Gerald Eve on values, from the Portman Estate Office on the fair value of the debt allocated to each Fund, and from PwC on the impact of these updates on the estimated Fund by Fund equity percentage allocations of shares in the Company. With the benefit of that further advice, the trustees of each fund then resolved, subject to court approval, to proceed with the Proposal, for the reasons previously identified.

The Test that I should apply

48. As explained above, the Claimants have made the Decision, which is to proceed with the Proposal, in the exercise of their discretion, subject only to the Court's willingness to sanction the decision.

49. The Claimants have no doubt that they have the necessary powers under the trust instruments to effect the Proposal, with one exception, in relation to Fund 24, to which I have already referred. I will address that point after having considered the right approach to giving or withholding the Court's sanction for the Decision to be carried into effect.

50. I am satisfied that this is a momentous decision for the trustees of each Fund to take. They will give up the relatively greater control that they enjoy over the assets of the Fund, subject to the terms of the Partnership in each case, in return for shares in the Company. The Company will hold in its own right the businesses of the Partnerships and the partnership assets of each Fund. The transfer will give rise to a substantial and immediate liability to tax, and different tax consequences for each beneficiary. The intention is that, in the longer term, the restructuring will be beneficial to each of the Funds and its beneficiaries. This, on any view, is a momentous, once in a generation decision to take.

51. The reference to the court is also justified by the fact that the same trustees owe duties separately to different beneficiaries under different Funds, who will be likely to be impacted differently by a restructuring of the Partnerships' businesses. In fact, the

Proposal attempts to deal fairly with all the principal beneficiaries and to ensure that they each benefit, without there being a significant difference in the degree of benefit. The Proposal is also designed to be fair to unborn beneficiaries and to ensure that the minor living beneficiaries do not lose out. Nevertheless, there is the potential, if not the actuality, of a conflict of different duties owed by the trustees, though no conflict of interest and duty. The relevant question for the court is whether, in those circumstances, the Claimants have taken adequate steps to ensure that all risks arising from the conflict have been appropriately managed, so that there is no breach of duty on their part.

52. The approach of the Court on an application under the second category in *Public Trustee v Cooper* is simple to state. The Court is asked to confirm only that the decision that the trustees have taken is one which a reasonable and appropriately advised set of trustees could properly come to, in the exercise of their discretion. In other words, regardless of whether the Court considers that the decision is the best decision, was it a rational decision within the powers of the trustees to make. Accordingly, once the Court is satisfied that the trustees have taken the decision, the Court will consider:

    i) whether the decision was one which a reasonable body of trustees, correctly instructed as to their powers, could properly have arrived at; and

    ii) Whether the decision was vitiated by any actual or potential conflict of interest:

    see *Public Trustee v Cooper* at pp. 925-6 and Cotton v Earl of Cardigan [2014] EWCA Civ 1312; [2015] WTLR 39 at [12].

53. The Court is therefore also concerned with the decision-making process, in order to be satisfied that the trustees have acted as prudent men of business and taken into account relevant considerations and not been influenced by irrelevant ones. To enable the Court to be satisfied on these matters, the trustees are required to make full disclosure, so that all relevant matters are before the Court.

54. The Claimants have, rightly, put a considerable volume of material before the Court relating to their consideration of the restructuring and the decision-making process, the professional advice that they have sought at various stages of the process, and the interaction between the trustees and the principal beneficiaries and the Defendant in relation to the Proposal. The only matter on which there was little material was the consideration of the interests of the minor living beneficiaries of some of the Funds. However, that was because there was very little to disclose. For reasons that Mr Wythe justified in evidence, the Claimants decided not to embark on a process of consultation with beneficiaries who have only very minor interests in some of the Funds.

55. It therefore appears to me that the Claimants have made appropriately full disclosure to the Court.

56. Mr Furness suggested that, in deciding whether to give the Claimants' decision the Court's blessing, I should consider the following questions:

    i) Do the trustees have the powers to effect the Proposal?

    ii) Have the trustees obtained appropriate professional advice on all the relevant aspects of the Proposal?

iii) Have the trustees adopted an appropriate decision-making procedure?

iv) Have the conflicts of duties been appropriately managed?

v) Has there been appropriate consultation with beneficiaries, and have the trustees taken account of the views expressed by them or on their behalf?

vi) Has a reasonable case been made in favour of the incorporation of the Company and the restructuring scheme?

vii) Have the trustees properly understood and taken account of the costs, risks and disadvantages of incorporation?

viii) Overall, does the Proposal appear to be a rational response to the position of the Partnerships at present?

57. I am satisfied that the conclusion to which the trustees have come - with the benefit of expert advice - as to the scope of their powers is a correct decision. The 2015 court order, which confers powers in relation to the trusts of Funds 3, 21, 22, 23 and 58, provides:

> "The Trustees shall have power to carry on any business or trade or other venture either alone or jointly with any other person (whether or not that person is a beneficiary) or in partnership (whether a general partnership, limited partnership or limited liability partnership) or through a company formed for that purpose and employ therein any capital of the Trust Fund …"

The 1976 court order, which confers powers in relation to the same trusts, confers:

> "power at any time or times to form in any part of the world any company either with unlimited or limited liability and to sell transfer lease or otherwise dispose of all or any part of the Trust Fund to such company in consideration for the issue of shares therein (with or without other consideration) or for any other consideration."

58. Although I heard no argument against the conclusion that the trustees have the necessary powers, it does not appear to me that there is a reasonable argument to the contrary. These provisions expressly confer on the trustees power to carry on a business in a company formed for that purpose and to use trust capital for that business; and additionally to form a company and to sell trust assets to it, in consideration of the issue of shares and/or other consideration. Given that the Funds have the power to carry on business jointly with others or in partnership, as well as in a company, there is no occasion for a restrictive interpretation requiring sole ownership of any company used, as long as the trustees of each Fund are issued with shares or given other consideration for the disposal. These are general powers and their exercise is subject to proper exercise of the trustees' discretion in a given case.

59. I therefore conclude that the trustees of Funds 3, 21, 22, 23 and 58 have the necessary powers to carry the Proposal into effect.

60. I set out briefly my conclusions on the other questions below, each of which, I accept, is a necessary question for me to decide, on the balance of probability, in order to decide the overarching questions set out in para 49 above.

My conclusions on the Proposal and the Claimants' decision.

61. The trustees have obtained extensive professional advice of high quality from well-known and respected advisers. The advice was thorough, responsive to the views of the trustees and the principal beneficiaries on important issues, and regularly updated to the date of the Decision. I am satisfied that the decision has been made by the trustees of each Fund, with the benefit of appropriate professional advice on how best to effect the restructuring and on its practical and financial implications for the beneficiaries. There is no relevant aspect of the Proposal on which the trustees have failed to obtain advice that they should have obtained.

62. In obtaining advice, the trustees have been conscious of the differing interests of different principal beneficiaries, and have consulted with them extensively on the Proposal and its timing. They have given the principal beneficiaries (and the Defendant) access to the trustees' advice and the opportunity to take their own independent advice. It is evident that the trustees have taken appropriate account of the views expressed by the beneficiaries or on their behalf. Not consulting the minor living beneficiaries was a rational judgement.

63. In seeking advice and consulting the beneficiaries, it is evident that the conflicts of duties have been properly managed, in that the conflicting interests have been drawn to the advisers' attention and understood by the trustees, and the trustees have heard the views of each of the beneficiaries and taken them into account. Most pertinently, the trustees have relied on professional advice as to the way that the transaction should be structured in order to try to be even-handed between the principal beneficiaries and the unborns.

64. On the basis of the professional advice, in view of the preferences of the principal beneficiaries to keep the Estate together rather than diversify, there is plainly a reasonable case for restructuring and incorporation. It is evident that the trustees have understood the risks, particularly the up-front costs and tax implications, and the risks, such as they are, that they might have underestimated such liabilities. The advantages and disadvantages of incorporation have been understood and weighed.

65. The decision-making process was thorough and appropriate, proceeding in stages, with updated professional advice throughout and at the very last stage, on 5 September 2024, when each of the Funds' trustees took the Decision.

66. The Proposal is a rational response, taking a longer term view of the interests of the principal beneficiaries, given their desire to keep the Estate together for their common benefit.

67. Accordingly, I conclude that the Decision was one which a reasonable body of trustees, correctly instructed as to their powers, could properly have arrived at, and that it was not vitiated by any potential or apparent conflict of duties on the part of any of the trustees.

Subject only to the question of the arguably missing power, the Claimants therefore have the Court's blessing to give effect to their Decision.

The s.57 Application

68. The Schedule to the 1983 Trust Deed for Fund 24 provides that:

> "Subject always to the provisions of clauses 8(a) and 11 above the trustees shall have the following powers exercisable from time to time at their discretion:
>
> …….
>
> (j) Power to carry on any farming or other business whatsoever in any part of the world either directly or through a company owned by the trustees or in partnership or any other form of joint venture and for that purpose to lay out the whole or any part of the trust fund …."

69. It is clearly arguable that, as a matter of interpretation of this clause, the power conferred is to carry on business through a company that is wholly-owned by the trustees, or at least controlled by the trustees, not one in which the trustees have only a minority shareholding. The contrary argument is that, since the same clause contemplates that the trustees may carry on business in a partnership or joint venture agreement, there is no reason to interpret the power to use a company so as to exclude a vehicle shared with others. Although the Defendant supports the s.57 relief sought by the Claimants, Mr Hilliard helpfully set out in his skeleton argument the argument against the existing provision conferring the necessary power.

70. If I had to decide the point, I would probably agree with Mr Hilliard that only a wholly-owned company (or at least one controlled by the trustees) would be within the scope of the power. Mr Furness was also inclined to agree that that was the correct interpretation. However, as Mr Hilliard points out, it is unnecessary for me to rule on that, as the Court has power to grant relief under s.57 to take effect to the extent that there is otherwise no available power, if satisfied that it is expedient to do so: Lewin on Trusts (20th ed) at 52-010, citing Re Thomas [1930] 1 Ch 194.

71. Section 57 provides:

> "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confirm upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income."

72. The Court must therefore consider whether the Proposal is expedient and is prevented by the absence of a power of the kind falling within the section. The conferring of a power to incorporate a company in which the trustees have a minority interest would be an example of a power that falls within the scope of the section. The fact that the power would amount to the removal of a restriction in the terms of the existing power, viz (assumed) that only a company in which the trustees have at least a majority stake may be used, does not prevent the exercise of the statutory power: Alexander v Alexander [2011] EWHC 2721; [2011] WTLR 187 (Ch) at [14]-[16].

73. I am satisfied that it is expedient to confer a power in the terms sought, so that the Proposal may be implemented in the interests of all the beneficiaries of Fund 24. The settlor, Viscount Portman, consents to the application. It would be highly inexpedient to refuse to confer the power, as this would prevent the Decision being given effect in its preferred form, contrary to the informed wishes of all the principal beneficiaries.

74. The final question is whether the power should be conferred on a one-off basis, or more generally. Given that the power exists under the trusts of the other Funds, and that the existing power in the trust deed of Fund 24 permits the trustees to carry on any business in partnership or in any other form of joint venture with others, it seems to me that it is at odds with the breadth of the power otherwise granted that the trustees could not use a company in which they had only a minority share to carry on a business with others. Given the wishes of the beneficiaries and the effect of the Proposal, it seems to me that there is some benefit in bringing the terms of the trust deed of Fund 24 into line with the powers in the trusts of the other Funds.

75. I will therefore confer a general power, the effect of which is to vary the terms of para (j) in the schedule to the 1983 Trust Deed so that the relevant part reads:

> "or through a company owned wholly or in part by the trustees …..".

It does not appear to me to be necessary or appropriate to impose any express terms, provisions or conditions on the exercise of such a power.