Neutral Citation Number: [2023] EWHC 12 (Ch)

Case No: PT-2019-BRS-000015

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 12 January 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

SWISSINDEPENDENT TRUSTEES SA	**Claimant**
- and –	
(1) ROBERT SOFER	**Defendants**
(2) TAMARA WOLPERT	
(3) JAY WOLPERT	
(4) LINDSAY PERLMAN	
(5) MARISSA SERDA	
(6) KEITH NICHOLAS DUNNELL	

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Richard Wilson KC and **James Weale** (instructed by **Weightmans LLP**) for the **Claimant**
Burges Salmon LLP for the **First Defendant**
The **Second to Fifth Defendants** were not represented and did not appear
Luke Harris (instructed by **Farrer & Co LLP**) for the **Sixth Defendant**

Hearing date: 4 October 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 12 January 2023.

HHJ Paul Matthews :

Introduction

1. These are the reasons for my decision on the trial of the first part of a Part 8 claim, dealing with an issue of construction of certain trust instruments expressed to be governed by English law. The claimant is the sole trustee of all the trusts from inception, and is a Swiss corporation. The first five defendants are the adult beneficiaries of the trusts concerned (who all live in Australia) and the sixth is a London solicitor appointed to represent the interests of minor and unborn beneficiaries.

2. The first defendant did not file an acknowledgment of service, but is represented by solicitors, and did file a witness statement, agreeing with the trustee's construction and consenting to the relief sought. The second to fifth defendants filed acknowledgments of service, each indicating no intention to contest the claim. They were not represented, did not make witness statements, and like the first defendant played no part in the hearing.

3. The claim form was originally issued against the first five defendants only, on 4 March 2019. It made a claim for the construction of the trusts, alternatively for their rectification. It was amended pursuant to my order of 29 September 2022, to add the sixth defendant. That order also provided by paragraph 9 that the hearing in October 2022 be limited to the construction claim, in order to save costs, but, in the event that that claim was determined but no application for directions on the rectification claim were then sought, that the rectification claim should be dismissed. The sixth defendant filed a witness statement on 23 September 2022, in which he stated that he had taken specialist advice, and as a result he had decided not to oppose the claim for construction which he understood the claimant intended to pursue.

4. The matter was argued before me at an attended hearing by Richard Wilson KC and James Weale, for the claimant, and Luke Harris, for the sixth defendant. At the end of the hearing I announced my decision, which was to construe the trust documents in the sense argued for by the trustee. I said I would give my written reasons in due course. These are those reasons. I am sorry for the delay in preparing them, caused by pressure of other work.

Background

5. Hyman Sofer was born in South Africa in 1918, though he subsequently settled in Australia, where he died. He had two children, Robert (the first defendant) and Tamara (the second defendant). Robert is married, but has no children. Tamara is also married, and has three adult children (the third to fifth defendants), and (as at March 2019) nine minor grandchildren. On 25 July 2006, when Hyman Sofer was 88 years old, he created a new trust structure to hold his wealth, replacing an existing trust structure that had been set up previously by an Australian law firm, and which pre-dated the involvement of the defendant as trustee.

6. In the new trust structure, set up by a different Australian law firm, Clayton Utz, there were five trusts in all. These were named the Jordi Unit Trust, the Gabri Trust, the Puyol Trust, the Xavi Trust and the Valdes Trust. I was told that these trusts were named after footballers of the Barcelona Football Club. The defendant was trustee of all four trusts. A BVI company which Hyman Sofer controlled, Cilantro Holdings Ltd ("Cilantro"), acted as formal settlor, settling the sum of US$10 on the trusts of each trust, to which of course further assets would be added in due course.

7. The Jordi Unit Trust was essentially a holding vehicle, whose function was to hold the investments. The assets from the earlier trust structure were transferred to the new one. Beneficial entitlement to share in the trust fund which the Jordi Unit Trust held was divided into units, which were initially allocated to Cilantro. The other trusts were ultimately to hold the units in the Jordi Unit Trust for the benefit of the intended beneficiaries. I call these other trusts the "beneficiary trusts".

8. On 8 September 2006 Cilantro transferred certain of its units in the Jordi Unit Trust to the defendant as trustee of the Puyol Trust (and similarly in relation to the other beneficiary trusts). Subsequently, these units were substituted by other units, but nothing turns on that. It is accepted that ultimately each of the beneficiary trusts was entitled to one third of the value of the Jordi Unit Trust. The Valdes Trust was wound up in January 2009, and need not be mentioned further.

The form of the trusts

9. The original form of each of the beneficiary trusts was entirely discretionary. No person had a fixed interest. Nevertheless, at the time of creation, the Puyol Trust was apparently intended to benefit Robert and his wife, whereas the Gabri Trust and the Xavi Trust were apparently intended in the longer term to benefit Tamara and her husband on the one hand, and their children on the other. So Tamara's family would have twice as much as Robert's. However, the casual reader of the trust documents at the time of execution would not have thought so.

Beneficiaries

10. The terms of the three "beneficiary" trusts provided for two classes of beneficiary, "Specified Beneficiaries" and "General Beneficiaries". When the trusts were executed, the class of "Specified Beneficiaries" consisted of the then youngest partner of each of two law firms, one in London, England, and the other in Calgary, Canada. The "General Beneficiaries" were essentially the closest relatives of the Specified Beneficiaries (although certain other persons connected with those relatives were also General Beneficiaries, and there was also power to appoint further such beneficiaries). It goes without saying that neither Tamara nor Robert had any connection with the youngest partners in the law firms concerned.

11. However, the trustee of each trust had power, under clause Q1 of the terms of the respective trust instrument, to add further persons to the class of "Specified

Beneficiaries". In relation to the Puyol Trust, that power was exercised by a deed of 23 August 2006 (*ie* less than one month after creation of the trust). This added Hyman Sofer as a Specified Beneficiary of the Puyol Trust, and thereby made Robert, Tamara and their respective issue General Beneficiaries of the trust.

12. I should also mention that, in the event that there are no beneficiaries in the class when the trust comes to an end, the draftsman seeks to avoid a resulting trust for the settlor by providing for the remaining assets to be held on trust for "the Final Repository". This is the person (not being a member of the Excluded Class or an Excepted Beneficiary) who is the youngest partner at the date of the trust of two *other* London firms of solicitors. Once again, there is no basis for supposing that either Tamara or Robert had any connection with whoever turned out to be the youngest partner in each of the two law firms. There is also provision limiting any trustee's obligation of disclosure to the Final Repository of his or her interest in the trust until it has become absolutely vested and indefeasible.

13. The result of this elaborate structure was that neither Hyman Sofer nor his children or remoter issue appeared in the original trust instruments as settlor or beneficiaries (though they all later became beneficiaries), and the persons who did so appear as beneficiaries have never benefitted, and indeed I imagine were never intended to benefit: *cf Re TR Technology Investment Trust plc* [1988] BCLC 256, 263-64, per Hoffmann J; *Re Gea Settlement* (1992) 13 Trust Law Intl 188, R Ct Jsy (Tomes DB). Moreover, the assets held on these trusts are not set out or referred to in the original trust instruments. In other words, a person reading the original Puyol Trust instrument alone would learn almost nothing about what it involved.

Powers of variation

14. In addition, there were certain powers of variation of the trusts. Clause 16 of the Jordi Trusts provides:

> "Power to vary
>
> The Trustee may, only with the Consent of the Unitholders who are entitled to vote in accordance with clause 6.2, alter revoke or add to any of the provisions in this deed in any way at all as it sees fit (including, to confer on the Trustee either generally or in a particular instance any power needed to effect any Transaction which the Trustee considers to be desirable) except:
>
> (a) to revoke or vary subclause 11.6 or to do anything which results in any part of the Trust Fund or its income being applied for the benefit of the Trustee or a former Trustee (except in the capacity of trustee of another trust);
>
> (b) to divest or modify the entitlement of any Unitholder to any income or capital, or to any investments made from that income, to which the Unitholder has become absolutely entitled; or

> (c) to extend the Vesting Day in a manner inconsistent with the law relating to remoteness of vesting."

15. In the three beneficiary trusts, clause L1 (1) provided:

> "Prior to the Vesting Day the Trustees may subject to clause 3 clause 4 clause 12 clause 14 and the following provisions of clause LI of this Deed at any time or times and from time to time by deeds revocable or irrevocable revoke add to or vary all or any of the trusts powers terms and conditions contained in this Deed or the trusts powers terms and conditions contained in any variation or alteration or addition made thereto from time to time (except where and to the extent that such earlier variation alteration or addition prohibits any further variation alteration or addition) and may in like manner declare any new or other trusts powers terms and conditions (whether of a beneficial or an administrative character) concerning the assets of this Trust or any of them … "

The Australian tax dispute

16. In 2011, there was a dispute between Hyman Sofer and the Australian Taxation Office ("ATO") as to whether he was a resident of Australia for income tax purposes and whether he was liable to pay income tax in Australia on amounts paid from the Jordi Trust or accrued within it. This dispute was settled by an agreement dated 18 July 2012. This provided, inter alia, that Hyman Sofer would pay the ATO AUS$9,450,596.93 within a certain timescale, and (by clause 3.4) that, with limited exceptions, no further assessments or amended assessments would be issued to Hyman Sofer or any "Related entity at any time in relation to any income dealt with by this deed". For this purpose, the term "Related entity" included members of Hyman Sofer's family.

17. Clauses 3.6 and 3.7 of this deed, which (by clause 7.7) was expressed to be governed by the law of New South Wales, provided as follows:

> "3.6 The Commissioner acknowledges that the amount of the corpus of the Trust Estate at 30 June 2010, as set out in that statement, is AUD 59,245,591 before the recovery of accumulated accounting losses.
>
> 3.7 The Commissioner also acknowledges that any amounts that, in the future, are paid to, or applied for the benefit of the taxpayer or any of his Related Entities from corpus, that would otherwise be included in the assessable income of the taxpayer or that Related entity by virtue of paragraph 99B(1) of the ITAA 1936 (or any future provision of the ITAA 1936 that replaces that provision), will not be so included to the extent that the amounts are attributable to, or are expressed to be paid from, the Original amount."

As I mention below, and as explained by the Australian tax lawyer Mr Ken Lord, in his opinion, these clauses establish in effect a tax-free corpus ("the Original Amount").

Further events

18. Following this settlement with the ATO, the claimant, pursuant to the powers in that behalf, but with "protector" consent, by a deed dated 8 October 2015 formally amended the trusts of the various beneficiary settlements. Before I come to these amendments, I will complete the narrative by saying that, on 24 March 2016, Hyman Sofer made his last will, and also a memorandum of wishes. In the latter document, he expressed the wish that one third of the tax-free corpus should go to each of the Gabri, Puyol and Xavi Trusts. On 8 July 2016 Hyman Sofer died, at the age of 97 years. In September 2016, having taken advice, the trustee determined that the balance of the Original Amount referred to in the ATO Settlement Deed as at 8 July 2016 was just under US$24 million, or about US$8 million per beneficiary trust.

The 2015 Amendments

19. The 2015 amendments to the beneficiary trusts included the insertion of new clauses A3(1a) and A3(1b) into each trust, as follows:

> "(1a) On the Corpus Vesting Day, the Corpus of the Trust Fund (being one third of the balance of the 'Original amount' as defined in the Deed of Settlement between Hyman Sofer and The Commissioner of Taxation of the Commonwealth of Australia, but in no event must that amount exceed one third of the corpus of the trust estate within the meaning of that term in Section 99B(2)(a) of the Australian Income Tax Assessment Act 1936, when applied to this Trust) will be held by the Trustee upon trust absolutely for Robert John Sofer as to 50% and Lindsay Perlman, Jay Wolpert and Marissa Serda as to the other 50%, as tenants in common in equal shares between them, but if any of those children are not then alive, but leave a child or children that are then alive that child or children would take the share which their parent would otherwise have taken and if more than one as tenants in common in equal shares between them.
>
> (1b) After the death of Hyman Sofer distributions of corpus may be made to Robert John Sofer as to 50% and Lindsay Perlman, Jay Wolpert and Marissa Serda as to the other 50% as tenants in common in equal shares between them, but if any of those children are not then alive but leave a child or children that are then alive then that child or those children shall take the share their parent would otherwise may have taken and if more than one then as tenants in common in equal shares between them PROVIDED THAT: during the period from the date of death of Hyman Sofer up to the date 10 years after the death of Hyman Sofer the total distributions of corpus in any period or year ended 30 June must not exceed the lesser of $US500,000 or 10% of the market value of the net assets of the Trust as at I July at the beginning of that period or year."

20. These clauses provide for the vesting of the "Corpus of the Trust Fund" (as defined) and the remainder of the trust funds. Clause A3(1a) provides for automatic vesting of the Corpus of the Trust Fund on the "Corpus Vesting Day" (which is defined to mean the date of the death of Hyman Sofer), while clause A3(1b) provides for discretionary vesting of the remainder of the trust funds in the exercise of discretion *after* the death of Hyman Sofer. Although the phrase "Corpus of the Trust Fund" is further explained by the words in parenthesis

immediately following in clause A3(1a) (set out above), it is also defined in Clause S1(8a) of each Unit Trust (as amended in 2015) as

> "the amount held on trust pursuant to clause 8.9 of the Trust Deed governing the Jordi Unit Trust, but in no event will that amount exceed the 'Corpus of the Trust Estate' within the meaning of that term in Section 99B(2)(a) of the Australian 1936 Tax Act, when applied to this Trust".

As to clause 8.9 of the Jordi Trust, referred to in clause S1(8a), it provided:

> "On the Corpus Vesting Day the Corpus of the Trust Fund will be held by the Trustee upon trust absolutely for the holders of the F Class Units in proportion to their holdings of F Class Units."

21. The problem lies in the difference between the definition of "Corpus of the Trust Fund" in clause A3(1a) and in the definition of the same term in Clause S1(8a) of each beneficiary trust. Now, the words in brackets immediately following the words "Corpus of the Trust Fund" in clause A3(1a) ("being one third of the balance of the 'Original amount' as defined in the Deed of Settlement") in their context clearly refer to the division of the "Original amount", referred to in the settlement between Mr Sofer and the ATO, into three equal shares, one for each of the three beneficiary trusts. However, having identified the corpus of each of the three trust funds, the draftsman then nominally subdivides it again, by using the words "in no event must that amount *exceed one third of the corpus of the trust estate* within the meaning of that term in Section 99B(2)(a) of the Australian Income Tax Assessment Act 1936, *when applied to this Trust*" (emphasis supplied). But he or she does not do that in the definition in Clause S1(8a), which instead refers to the Jordi Trust (and not the ATO Settlement).

22. The question is, what, if anything does this second subdivision in clause A3(1a) mean? On the face of it, it reduces the tax-free corpus to one third of its original size under the settlement between Mr Sofer and the ATO. That makes no commercial or fiscal sense. And how does it fit with the definition in clause S1(8a)? The claimant, supported by the other defendants, says it is meaningless, and should be ignored.

The principles of construction

General

23. The well-known principles of interpretation for commercial documents (*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912-3) also apply to trusts and wills: see for example *Marley v Rawlings* [2015] AC 129 (construction of a will). In Lord Neuberger's words in *Marley*, in commercial cases,

> "19 … the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was

executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

Then, looking at unilateral documents such as wills and settlements,

"23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents."

Property transactions

24. I have myself applied these principles in other will and trust cases, such as *Millar v Millar* [2018] EWHC 1926 (Ch), and *Armstrong v Armstrong* [2019] EWHC 2259 (Ch). Judge Elizabeth Cooke also did so in *Gaspar v Zaleski* [2017] EWHC 1770 (Ch). So did Marcus Smith J in *Public Trustee v Harrison* [2018] EWHC 166 (Ch) (though his decision on costs was subsequently altered by the Court of Appeal: [2019] EWCA Civ 966). Nevertheless, it is fair to say that unilateral (and even bilateral) documents creating or disposing of property rights often exhibit characteristics which are different from those carrying out typical commercial transactions. And accordingly it may be right that the interpretation of such documents should, to an appropriate extent, take into account those differences.

25. Thus, for example, in *Barnardo's v Buckinghamshire* [2019] ICR 495, in the Supreme Court, Lord Hodge (with whom Lady Hale, Lords Wilson, Sumption and Briggs agreed) said, in the context of a pension scheme:

"13. In the trilogy of cases, *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since *Prenn v Simmonds* [1971] 1 WLR 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.

14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties

> to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.
>
> 15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts … "

26. In my judgment, this reflects the general truth about the difference between commercial contractual and property rights. Commercial contractual rights are created by and usually operate only between the parties themselves, who know what they agreed at the time, and the context in which they did so. They are usually intended to take effect in the short to medium term. On the other hand, *property* rights (including rights arising under will and trusts) may or may not have been created by the parties, but in any event bind the world, and are usually intended to take effect over the long term. Moreover, the world knows only what is in the documents themselves, and not all the surrounding circumstances of what may have been said or done years before. The characteristics referred to by Lord Hodge, or most of them, for this reason apply also to *non*-pension trust documents.

27. In this connection, I refer to the recent decision in *Re the X Trusts* [2021] SC (Bda) 72 Civ (7 September 2021) in the Bermudian Supreme Court. Although this is not an English decision, it is one based upon English law, with copious citation of English authorities, argued by English leading counsel, where the only local authority was one decided by retired English judges. In that case Kawaley AJ said:

> "24. I accept that primacy should ordinarily be given to a textual analysis of trust instruments and that the pension scheme context in which Lord Hodge's pronouncements were expressed is very broadly analogous to that of trust instruments, although there may for some purposes be material differences. The X Trusts are intended to last for a long time and it ought not to be necessary, decades after instruments have been executed, to delve into historic evidence about the circumstances of their creation to ascertain their meaning. This does not mean, of course, that the effect of doubtful provisions may not in exceptional cases be elucidated when cogent evidence exists as to their intended purpose, in the form of letters of wishes or otherwise. The importance of placing primary emphasis on the text and context when interpreting trust instruments is explicitly supported by the binding dicta of Sir Christopher Clarke (P) in *Grand View Private Trust Company v Wong et al* [2020] CA (Bda) 6 Civ (20 March 2020) in a case which concerned (a) the construction of the scope of a power of amendment and (b) whether it had been improperly exercised. … "

Two approaches or one?

28. There is obviously a question as to whether these two approaches (which might be termed the 'commercial' and the 'property' approaches) to interpretation of documents are really different, and how far they are simply two ways of saying the same thing. After all, in each case, as Lord Neuberger said in *Marley*,

> "the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words".

Moreover, in either case the court will ignore subjective evidence of any party's intentions. What is different is the context, and the weight to be given to different factors in that context. Of course, as Lord Neuberger said, there may be statutory rules of interpretation which must be taken into account (such as section 21 of the Administration of Justice Act 1982, in relation to wills). There may also be established rules of construction for certain types of conveyancing or trust documents which will be applied, come what may, so as not to "shake titles": *cf Re Lashmar* [1891] 1 Ch 258, 267.

29. In the present case, as in many others, it is not however necessary to go into the question how far these different approaches might lead to a different conclusion. This is because, in many, indeed perhaps most, cases, they will lead to the same one. And, in my judgment, they do so in the present case. The problem that has been thrown up in the present case would be the same one, whether revealed today or in fifty years' time. And so would the solution.

30. As part of the process of construction, the court may correct obvious errors in expression, but only where the mistake is clear on the face of the document, and it is clear what correction is needed to cure the mistake: see *eg East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, 112, per Brightman LJ (with whom Lawton and Oliver LJJ agreed). In considering both of these matters, the court takes into account admissible evidence of background facts and matters: *Generali Italia SpA v Pelagic Fisheries Corporation* [2020] EWHC 1228 (Comm), [109], Foxton J. But, if it is not clear what correction needs to be made, it is not a matter for construction at all, and a claim will need to be made for rectification: *Arnold v Britton* [2015] AC 1619, [78], per Lord Hodge.

The impact of foreign law

31. A curious aspect of the provision to be construed here is that, although it occurs in a settlement (or settlements) expressed to be governed by English law, it includes an express reference to a foreign law, that is, the (Australian) Income Tax Assessment Act 1936, s 99B(2)(a). As has been seen, this arises because of the terms of the settlement between the taxpayer and the ATO, leaving a significant trust fund *free of Australian tax* in the hands of the trustee. It was therefore important that the English law settlements should incorporate a reference to the relevant foreign tax law. The sixth defendant considered it desirable that the court in construing these settlements should be aware of this relevant foreign law. The trustee accordingly procured an opinion from a specialist Australian tax barrister, Mr Ken Lord, on this point. This is in the papers before the court.

Mr Lord's opinion

32. Mr Lord sets out the relevant text of the 1936 Act as follows:

> "**99B Receipt of trust income not previously subject to tax**
>
> (1) Where, at any time during a year of income, an amount, being property of a trust estate, is paid to, or applied for the benefit of, a beneficiary of the trust estate who was a resident at any time during the year of income, the assessable income of the beneficiary of the year of income shall, subject to subsection (2), include that amount.
>
> (2) The amount that, but for this subsection, would be included in the assessable income of a beneficiary of a trust estate under subsection (1) by reason that an amount, being property of the trust estate, was paid to, or applied for the benefit of, the beneficiary shall be reduced by so much (if any) of the amount, as represents:
>
> > (a) corpus of the trust estate (except to the extent to which it is attributable to amounts derived by the trust estate that, if they had been derived by a taxpayer being a resident, would have been included in the assessable income of that taxpayer of a year of income) … "

33. Amongst other things, in his opinion Mr Lord says this:

> "29. The effect of other provisions in Division 6 of Part III of the ITAA 1936 (in which s 99B and s 99C are situated) is that s 99B and s 99C are most relevant to distributions from non-resident trust estates to Australian resident beneficiaries of untaxed foreign source income. …
>
> 31. The general term 'corpus of the trust estate' where used in the opening part of s 99B(2)(a) is not defined in the Australian income tax law. That general term should take its meaning under trust law principles and the terms of the relevant trust deed.
>
> 32. Further, the concept of 'corpus' of a trust is not necessarily a static amount under trust law and trust accounting principles. The amount of corpus should be adjusted appropriately – such as to recognise distributions of corpus, any allocation of losses to corpus or additions to trust corpus.
>
> 33. In my opinion, the phrase '*the corpus of the trust estate within the meaning of that term in Section 99B(2)(a) of the Australian Income Tax Assessment Act 1936, when applied to this Trust*' in cl A3(1a) (and similar phrases in definitions of 'Corpus of the Trust Fund' in cl S1(8a) of the Puyol Trust deed and in cl 1.1 of the JUT deed), requires the application of the exception in the parentheses in s 99B(2)(a). Not to do so, and to simply apply a general trust law meaning of 'corpus of the trust estate', would make the reference to the provision of the ITAA 1936 redundant. The words '*within the meaning of that term in Section 99B(2)(a)*' should be given effect. The words '*applied to this Trust*' also indicate that the entirety of that provision is to be applied in relation to the circumstances of the Sub-Trust. As discussed, the application of s 99B(2)(a) has a significant impact

> on Australian income tax treatment of distributions from a foreign trust. The drafting strongly indicates that such tax treatment has been considered.
>
> […]
>
> 36. The impact of the parenthetical in s 99B(2)(a) would include the exclusion from the 'corpus of a trust estate' of capital gains that would be taxable to an Australian resident taxpayer, of taxable components of share buybacks (as in *Howard*) and accumulated income credited to corpus that would have been taxable to an Australian resident taxpayer. That is not an exhaustive list of amounts falling within the parenthetical in s 99B(2)(a).
>
> 37. In tax disputes where s 99B issues arise in relation to foreign trusts and Australian resident beneficiaries, determining what is the 'corpus of the trust estate' within s 99B(2)(a) is often very difficult in practice. The accounting records kept by a foreign trustee may be relatively basic and may not include the necessary information for the calculation of the hypothetical Australian tax treatment required by the words in the parenthetical in s 99B(2)(a). It can also be difficult for a taxpayer to establish whether a distribution 'represents' the corpus of the trust if the trust's accounting records do not clearly show the source of the funds distributed and do not clearly allocate that distribution to income or corpus of the trust.
>
> 38. Accordingly, the recognition in the Deed of Settlement of the "Original amount" of the corpus of the 'Trust Estate is significant in relation to the Australian tax treatment for the Australian resident beneficiaries of distributions received from the Sub-Trusts.
>
> […]
>
> 59. As discussed above, the key relevant Australian tax aspect is that under s 99B of the ITAA 1936, the corpus of a trust estate (within the meaning in s 99B(2)(a)) may be distributed to Australian resident beneficiaries without an Australian tax liability arising. As a practical matter, in determining the relevant amount of corpus, regard should be given to the Deed of Settlement agreed with the ATO in 2012 and the 'Original amount' for the corpus of the JUT identified in that instrument."

I have no reason not to, and do, accept this as an accurate statement of the relevant law and practice.

The admissibility of Mr Lord's opinion

34. The question arises however whether and how far this legal opinion is admissible in evidence before the court, and for what purposes. In English civil law, a fundamental distinction is drawn between evidence of fact and evidence of opinion. The former is generally admissible on any relevant matter. The latter is generally admissible only where the evidence is that of an expert holding a relevant opinion on a matter within the scope of his or her (recognised) expertise, *and* the court gives permission for that evidence to be adduced under

CPR Part 35. It might be thought that Mr Lord is giving an expert opinion on the content of Australian taxation law. And so, in certain respects, he is. But what matters here is *why* this evidence is being adduced.

35. In the present case, these settlements are not themselves governed by foreign law. It is simply that part of the context in which they fall to be construed depends on aspects of that foreign law. I do not think that, for present purposes, the opinion of Mr Lord is to be treated as expert opinion evidence of what that foreign law *is*, so much as descriptive of the system of taxation in Australia known to potential taxpayers, against the backdrop of which the court is asked to construe English law settlements. In this case, the content of the relevant foreign law is not in issue before me, and I do not need to find what it is.

36. Instead, I need to understand only the context in which a taxpayer or potential taxpayer might wish to structure his or her personal affairs. In itself it does not matter if that view was technically right or not (though I have said that I accept it as correct). As I said in *Brake v Guy* [2021] EWHC 671 (Ch),

> "37. Although there was no expert evidence given at this trial, significant … factual evidence, including descriptions of how email systems work, were given by three professional witnesses working in the field of IT … I emphasise that this was not opinion evidence. It is like the 'tutorial' evidence that judges are often treated to in relation to, say, how an unfamiliar market operates: see *eg Darby Properties Ltd v Lloyds Bank plc* [2016] EWHC 2494 (Ch), [27], [45]."

37. For these reasons I consider that the evidence of Mr Lord, so far as relevant to the issues before me, is not opinion evidence, but evidence of fact. (I emphasise that, in another context, it could have been expert opinion evidence.) Accordingly, permission to adduce his opinion was not needed under CPR Part 35, and, this being a claim under CPR Part 8, it was properly adduced by simply being exhibited to a witness statement under CPR rule 8.5. However, in case I were wrong about that, and it were expert evidence, I should go on to say this.

Expert evidence of foreign law

38. In English civil procedure, CPR Part 35 generally governs the admissibility of expert opinion evidence, for example evidence of a relevant foreign law. When it applies, it requires that expert evidence be given in the form of a report (CPR rule 35.5), pursuant to the court's permission to adduce it (CPR rule 35.4). But Part 35 is not a complete code for expert evidence, and the civil courts have frequently received expert evidence outside that regime: see *Rogers v Hoyle* [2015] QB 265, [63], [64], per Christopher Clarke LJ (with whom Arden and Treacy LJJ agreed).

39. In addition, there are several pre-CPR authorities holding that foreign law may be proved by the certificate of the relevant ambassador: see *eg In bonis Dormoy* (1832) 3 Hagg Eccl 767, *In bonis Klingemann* (1862) 32 LJ Prob 16, *In bonis Oldenburg* (1884) 9 PD 234; *Krajina v The Tass Agency* [1949] 2 All ER 274, CA. Since Part 35 is not exclusive, I do not doubt that such certificates would

still be admissible today, though not conclusive. But this is not an opinion given by a relevant diplomat, so I need not consider these authorities further.

40. More generally, in *FS Cairo (Nile Plaza) LLC v Brownlie* [2022] AC 995, the Supreme Court was dealing with the presumption that unpleaded foreign law was similar to English law. Lord Leggatt (with whom Lords Reed, Lloyd-Jones, Briggs, and Burrows agreed on this point) said:

> "148. … The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says. If, for example, the question is whether a spouse has a right to claim damages for bereavement under the applicable foreign law, producing a copy of the relevant foreign legislation (with, if necessary, an English translation) is a much more secure basis for a finding than presuming that the foreign law is the same as the English law. Of course, a judge needs to be alert to whether the text relied on is current. But even if that cannot be guaranteed, the presumption of continuity may be a more reliable foundation in the absence of contrary evidence than the presumption of similarity."

Again, this is not directly applicable to the facts of this case, but it helps to understand the limits of Part 35.

41. So, returning to my question, if Mr Lord's opinion *had* been expert evidence in this case, then I consider that it would not have been necessary to adduce it in the form of an expert report under rule 35.5. The opinion would not have been altered in any way by being put in the form of a report, save that it would have been surrounded by the usual statements under Part 35, and produced subject to that procedure. Since the opinion was not challenged, but on the contrary welcomed by the parties, that would have added nothing. Finally, if it had been necessary for the court to "direct otherwise" under rule 35.5(1), I would have done so.

The question of construction

42. Finally, therefore, I turn to the question of construction itself. I bear in mind that this is a power granted by the settlor of the trusts to amend the term of those trusts. So the relevant intention is that of the appointor (the trustee), although only within the scope of the power so granted. The purpose of the document was to amend the trusts in light of the settlement between Hyman Sofer and the ATO, which (as Mr Lord explains) left the trusts holding a tax-free corpus.

43. It is clear from the documents that that corpus was to be divided equally between the three beneficiary trusts (I ignore the memorandum of wishes, of course).

Clause S1(8a) of each such trust is consistent with that. But the words in parenthesis in clause A3(1a) are not. From just looking at the words of the two clauses alone, one could not be certain that they were intending to refer to the same thing. However, once one takes into account the terms of the ATO Settlement and the Jordi Trust (one referred to in each definition), it is clear that they *were* intended to be dealing with the same thing, namely the tax-free sum for each beneficiary trust produced by dividing the original trust corpus into three equal parts.

44. Common sense tells the reasonable reader that something has gone wrong. The two forms of words cannot be left to stand with one another. One or the other, or both, must be read otherwise than literally. There is an old rule of the construction of deeds (rather than wills) that where two provisions in a deed are inconsistent, the former takes precedence over the latter, on the basis that the latter is repugnant to the former: see *eg Forbes v Git* [1922] 1 AC 256, 259; though see *Martin v Martin* (1987) 54 P & CR 238, 243, for a different explanation. But it may be a matter of pure accident which expression comes first and which second. So, as Vinelott J said in *Joyce v Barker Bros (Builders) Ltd* (1980) 40 P & CR 512, 514, this is a rule of "absolutely last resort". As a result, it is (rightly) little relied on these days. In most cases (as here) there are other matters to take into account, which resolve the problem.

45. First of all, looking at the actual words used, it is clear that the definition in clause S1(8a) and the words in parenthesis in clause A3(1a) are not on the same ordinal level in the structure of the document. Clause S1(8a) is a formal definition clause, whereas the words in clause A3(1a) are not. The latter is a parenthesis, and therefore an explanation by the way, rather than itself a definition. This is confirmed by the fact that the phrase begins with the word "being", which is a typical introduction to an explanation. Such an explanation would not normally be expected to cut down a formal definition given elsewhere. In my judgment, clause S1(8a) is that formal definition, and is more important than the words in parenthesis in clause A3(1a). On the face of it therefore, clause S1(8a) should take priority in case of any inconsistency.

46. But there is more. Common sense also plays a part. To retain the extra words in clause A3(1a) would result in the (tax-free) corpus of each trust being artificially reduced to one third of what it could be. In the light of the decision to embark upon the process of amendment in order to take advantage of the settlement with the ATO, that makes no commercial sense. To treat those extra words as inserted in error, and therefore meaningless, would enable the full tax-free corpus to be utilised, instead of merely part. It would also be consistent with clause S1(8a). And it is usually easier (as it is here) to ignore superfluous words in the construction of a document than it is to write extra words into it (as would be needed in clause S1(8a) to make the two forms of words consistent): *cf Homburg Houtimport BV v Agrosin Ltd (The Starsin)* [2004] 1 AC 715.

47. Counsel for the sixth defendant was concerned to argue for the interests of minor and unborn beneficiaries. He noted that the trustee's preferred approach was not in the interests of those minor and unborn beneficiaries, but found it very difficult, if not impossible, to see why the trustee's approach was not correct in

the circumstances. I am satisfied that the matter has been properly considered from the point of view of those beneficiaries that his client represents.

Conclusion

48. As a result, I conclude that the trustee's preferred approach, to prefer the definition in clause S1(8a) and to omit the inconsistent words in the parenthesis in clause A3(1a) is correct, notwithstanding the potentially negative effect on the minor and unborn beneficiaries.

Rectification

49. As I have already said, and as is common in such construction cases as this, there was also a claim for rectification of the settlements, in case the construction case failed. However, as already stated, consideration of that part of the claim was formally postponed until the question of construction was determined, and, if the latter claim was determined without any application for directions being made, then dismissed. In the circumstances, I obviously do not need to consider this further, and do not do so.

Conclusion

50. In the result I made the following declaration:

> "On the true construction of sub-clause A3(1)(a) of the trusts settled on 25 July 2006 and known as, respectively, the Puyol Trust, the Xavi Trust and the Gabri Trust (together, the 'Trusts') (as amended on 8 October 2015 (the '2015 Amendments')) the 'Corpus of the Trust Fund' refers to the full extent of the Corpus of the Trust Fund as defined in clause S1(8a) of each of the Trusts (as amended by the 2015 Amendments) notwithstanding inclusion of the following words in that clause:
>
> > '(being one third of the balance of the "Original amount" as defined in the Deed of Settlement between Hyman Sofer and The Commissioner of Taxation of the Commonwealth of Australia, but in no event must that amount exceed one third of the corpus of the trust estate within the meaning of that term in Section 99B(2)(a) of the Australian Income Tax Assessment Act 1936, when applied to this Trust)'."

51. I am very grateful to the parties and their lawyers for the helpful way in which this case was dealt with. I repeat my apology for taking so long to provide these written reasons.