COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00341

IN THE MATTER of the trusts of the Deed of Settlement dated 30 June 1992 and designated the Glenfinnan Settlement

AND the trusts of the Deed of Settlement dated 23 March 2009 and designated the Moray Settlement

AND the trusts of the Deeds of Settlement dated 20 December 2006 and designated the Emo Settlement, the Hewish Settlement and the Came Settlement

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

(1) GRAMPIAN TRUST COMPANY LIMITED

(2) LYNDHURST LIMITED

Defendants

Before Hon. Mr. Justice Ian R. Winder

Richard Wilson QC with John Minns (Instructed by Graham Thompson) on behalf of the Plaintiff

Eason Rajah QC with Sean Moree and Vanessa Smith (Instructed by McKinney Bancroft & Hughes) for the First Defendant

27 and 30 November 2020, 1, 2, 3, 4, 7, 8, 9, 10, 14, 15, 16, 17, 18 and 21 December 2020, and 1, 2, 3,4 and 5 February 2021

JUDGMENT

WINDER, J

This is a claim by the plaintiff (Ashley) for breach of trust alleging that the defendant (Grampian) failed to consider her interest in the making of appointments from the Glenfinnan trust fund (Glenfinnan) in 2006 and 2009. Ashley is a beneficiary of Glenfinnan, a discretionary family settlement.

A. Background

[1.] Glenfinnan's wealth derives principally from the estate of the late George Skelton Yuill (Yuill). Yuill had emigrated to the Far East at the end of the 19th century and became an extremely successful businessman. Yuill died on 10 October 1917. By his will, dated 13 April 1917, Yuill established a will trust.

[2.] On 1 February 1907, Yuill's only daughter Winifreda Yuill, married Lionel Dawson-Damer, the 6th Earl of Portarlington. They had one son, George Dawson-Damer, Viscount Carlow. Viscount Carlow married Edith 'Peggy' Cambie on 7 January 1937. They had two children – George, who was born 10 August 1938, and John, who was born 12 October 1940. Viscount Carlow died in active military service on 17 April 1944.

<u>The 1973 Settlement</u>

[3.] Settlements were made in 1951 and 1961 but thereafter the assets which originated from the Yuill will trust were resettled onto a new settlement in 1973. This new settlement (the 1973 Settlement) was established by a Declaration of Trust dated 29 May 1973 by Arndilly Company (Cayman) Limited (Arndilly).

[4.] The class of beneficiaries established under the 1973 Settlement included:

> *"the children and remoter issue of the late Viscount Carlow for the time being living and the respective wives husbands widows and widowers for*

the time being living of all or any children or remoter issue of the late Viscount Carlow".

George, John, their spouses (including Ashley), and their children and remoter issue were therefore within the class of beneficiaries of the 1973 Settlement. The terms of the 1973 Settlement did not differentiate between the rights of George and John under the trust.

[5.] A feature of the family trust structure has always been the office of the trust or Family Adviser. This office was not specifically provided for in any of the trust's instruments but is said to exist to give advice and make proposals to the trustee in the exercise of their discretion towards beneficiaries. Their role, it is said, arose as a result of the fact that whilst the trustees operated from the Caribbean (Bahamas or Cayman) the beneficiaries resided in the United Kingdom and in Australia.

[6.] John married Ashley in 1982. At the time of the marriage Ashley had an adopted son, Piers. Piers was subsequently adopted by John and together they adopted their daughter, Adelicia.

[7.] As a result of Piers and Adelicia being adopted, an issue arose as to whether they were included in the class of beneficiaries of the 1973 Settlement. Advice from Bahamian and English counsel was taken by the trustee, Arndilly, on the issue and it was the opinion of all counsel consulted, that adopted children were not within the beneficial class of the 1973 Settlement. Whilst the advice of leading English counsel, Robert Walker QC, was that adopted children were not in the class of the 1973 Settlement, he nonetheless expressed a view that there was some doubt over the issue which could only finally be resolved by an application to the Bahamian Court. The advice was also that any doubt should not prevent the trustee from exercising its discretion under the terms of the 1973 Settlement in a manner that conferred a benefit on John, in a manner that also benefitted his

adopted children. Ashley and Grampian differ as to whether this type of distribution, termed a *Pilkington* advance, was subject to any limits.

The 1992 Restructuring

[8.] In or about 1989-1990 Arndilly determined that it would restructure the 1973 Settlement. That restructuring (the 1992 Restructuring), which was achieved over several years, was concluded in 1992. Whilst there is no challenge to the 1992 Restructuring in this action there is considerable dispute as to the true intent and purpose of the restructuring. The restructuring nonetheless achieved certain objectives as to tax planning and providing for John and Ashley's adopted children.

[9.] I accept Ashley's description that, at its core, the 1992 Restructuring involved the following steps[1]:

(1) Arndilly, as trustee of the 1973 Settlement, would transfer trust assets absolutely to a corporate beneficiary, i.e. to a company that would receive the assets absolutely and beneficially.

(2) The corporate beneficiary would be restricted by the terms of its own constitution to making gifts or setting up trusts for the benefit of a class of persons comprising members of the Dawson-Damer family. Because the corporate beneficiary's freedom of action was restricted in this way, the trustee (Arndilly) was able to form the view that a transfer of the trust assets to the corporate beneficiary was for the benefit of the beneficiaries of the 1973 Settlement.

(3) Later, and entirely at the behest of its own board of directors, that corporate beneficiary might choose to deal with those assets, either by making gifts to, or settling new trusts for the benefit of, the persons specified in its own memorandum of association, but was under no obligation to do so.

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[1] Paragraph 112 of Ashley's Closing Submissions

Additionally, as part of the restructuring, and prior to the steps identified above, Arndilly in 1990 caused substantial funds to be transferred for the benefit of George and John to establish Australian trusts for their respective families.

[10.] Spey Ltd. (Spey), incorporated on 1 August 1991 as a Bahamian company, was the corporate beneficiary that received the assets of the 1973 Settlement absolutely and beneficially. The Memorandum of Association of Spey, at paragraph 4(1), provided:

> "The objects for which the Company is established are (subject to the proviso to this sub-clause (1) and subject to sub-clause (2)) below to engage in any business or activity or act whatsoever not for the time being prohibited by the laws of The Bahamas including in particular the provision from time to time of benefits (whether by way of outright gift or gift in settlement or interest-free loan or otherwise howsoever) for all or any of the descendants (including at the discretion of the directors adopted and legitimated descendants) of George Lionel Seymour Dawson-Damer commonly called Viscount Carlow who died on 17 April 1944 and the spouses of his descendants (all such descendants and spouses being hereinafter called "the specified class"). Provided as follows:-
>
> a. That the Company shall not make a gift or otherwise voluntarily dispose (otherwise than for full consideration) of any of its assets except (i) to or in favour or for the benefit of all or any of the specified class or (ii) in a way which is in furtherance of or incidental to some authorised business activity or act of the Company.
>
> b. That the Company shall not in any event make a gift or otherwise voluntarily dispose (otherwise than for full consideration) of any of its assets if the result would be to reduce the net value of the Company's assets (after allowance for its debts and liabilities) below the aggregate par value of all its outstanding shares.

c. That the Company shall not act as a trustee or other fiduciary but shall hold all its assets as the absolute beneficial owner thereof".

[11.] The Board of Directors of Spey were Geoffrey Johnstone, Reginald Lobosky and Roland Lowe. On 2 October 1991, Arndilly resolved to transfer all of its shares in A&OT Investments Ltd (A&OT) and to assign the whole of an outstanding debt from A&OT to Spey. A&OT was the investment company which held the family assets.

[12.] The Board of Spey met on 12-14 February 1992, in order to decide how to deal with Spey's assets. The meeting was attended by the directors of Spey, as well as (by invitation) Mr Michael Hamilton (Hamilton), Mr John Duff (Duff), and Mr Michael Stanford-Tuck (Stanford-Tuck). Hamilton and Duff were the Family Advisers (also referred to as Trust Advisers) under the 1973 Settlement. Stanford-Tuck was a solicitor who had acted for Arndilly. It is accepted that Stanford-Tuck had not been engaged to act for Spey.

[13.] According to paragraph 2 of the minutes of the 12-14 February 1992 board meeting of Spey:

> It was agreed that the Company should transfer the beneficial ownership of all the Assets other than a cash sum of US$10,000 representing the intended amount of the paid-up Share Capital of the Company ("the Share Capital") to a number of new settlements for the benefit of the persons mentioned in its Memorandum of Association and it was therefore resolved:-
>
> (a) To arrange for the formation of a new trust company ("the New Trust Company") in the Bahamas to be named (if possible) Grampian Trust Company Limited, [redacted].
>
> (b) To establish four new settlements in The Bahamas, with the New Trust Company as Trustee and in the terms of the draft trust deeds produced to the meeting such settlements to be known as follows:-
>
> (1) The 1992 Glenfinnan Settlement (for the benefit of the beneficiaries of a settlement established in 1973 with

Arndilly as trustee for the benefit of the family of the late Viscount Carlow known as "the 1973 settlement")

(2) The Islay Settlement (for the benefit of the Earl of Portarlington and his family known as "the Portarlington Family")

(3) The Annan Settlement (also for the benefit of the Portarlington Family)

(4) The Willards settlement (for the benefit of the Hon John Dawson-Damer and his family known as "the Dawson-Damer Family").

At paragraph 4 of the minutes, it was resolved:

> It was noted that the 1973 Settlement had retained certain assets held by Arndilly for the· benefit of the family of the late Viscount Carlow. It was further noted that, prior to the transfer of the Assets to the company, certain distributions had been made by Arndilly to certain Australian Settlements for the benefit of the Portarlington and Dawson-Damer Families.

At paragraph 5 of the minutes, it was also resolved:

> After discussing with the Trust Advisers the fair and equitable distribution of the Assets between the Portarlington and Dawson-Damer families having regard to (a) fact that the Hon. John Dawson-Damer's children are adopted and thus not beneficiaries under the 1973 Settlement and (b) all other relevant considerations, the Directors agreed that the Assets (other than the Share Capital) should be distributed among the 1992 Glenfinnan, Islay, Annan and Willards Settlements ("the New Settlements") in such a way that the ultimate distribution of all the assets emanating from the 1973 Settlement (including the assets retained by the 1973 Settlement referred to in Minute 4, the assets distributed to the Australian Settlements referred to in Minute 4 and the Assets and hereafter referred to as "the Total Assets") will be approximately in the following proportions:
>
> The 1992 Glenfinnan Settlement (50%);
> Australian assets distributed to the Portarlington Family and/or Australian Settlements for their benefit,
> The Islay Settlement, The Annan Settlement (25%);
> Australian assets distributed to the Dawson-Damer Family and/or Australian Settlements for their benefit
> The Willards Settlement (25%)
>
> ...
>
> The Directors took the view that, after the distributions to the Australian Settlements referred to in Minute 4 and the further distributions referred to

in this Minute, sufficient provision would have been made for the adopted children of The Hon. John Dawson-Damer and that their view on this should be made known to the Trustees of the 1973 Settlement and the 1992 Glenfinnan Settlement.

[14.] In accordance with the resolutions, Spey settled the Glenfinnan, Islay, Annan, and Willards settlements by separate deeds all dated 30 June 1992. The settlements were subsequently funded with assets.

[15.] Stanford-Tuck prepared a memorandum dated September 1992 entitled the Explanatory Memorandum and Diagrams (the Explanatory Memorandum). A customised copy of the Explanatory Memorandum was said to have been settled for Johnstone, the Family Advisers, George and John.

[16.] In the background section of the Explanatory Memorandum, Stanford-Tuck sets out what he describes as the objective of the 1992 Restructuring. He stated at paragraph 6 of the Explanatory Memorandum:

> "6. Since 1988, a more comprehensive review of the family trusts has been undertaken, resulting in a complete reconstruction of the family settlements and companies, with a view to:-
>
> (a) benefitting John by allotting further funds to him and his adopted children and by creating new discretionary trusts with his adopted children as potential beneficiaries;
>
> (b) creating separate trust funds for George's family (on the one hand) and John's family (on the other), in order to accommodate the respective families' differing needs and investment philosophies;
>
> (c) providing substantial funds in Australia out of which the living expenses of all the beneficiaries could be met;
>
> (d) terminating the 1973 Bahamian Settlement (except for a small continuing fund) and establishing new ones, in order to address potential (but, in the trustees view, specious) UK capital tax problems;

(e) providing modern trust powers and provisions with fresh perpetuity periods to see the families through the next 50 - 75 years;

(f) addressing certain contingency planning issues."

Stanford-Tuck also described the three phases of the reconstruction process in the Explanatory Memorandum. In particular, Phase III was described as follows:

(C) Phase III - (November 1991 to June 1992)

This phase involved the transfer of the assets held by Spey Limited ("Spey") to new Settlements in three different categories:-

i) Discretionary trusts for the benefit of all the issue of the late Viscount Carlow (excluding adopted children and their descendants) - i.e. the same trusts as those of the 1973 Bahamian Settlement.

ii) Discretionary trusts for the benefit of George and his family (including adopted children).

iii) Discretionary trusts for the benefit of John and his family (including adopted children).

The basis on which these assets were apportioned between the three categories of settlement was agreed by the Board of Spey after lengthy discussions with the Trust Advisers. The apportionment was that approximately half of the total assets derived from the GS Yuill Estate should go into the category i) settlements; that approximately one quarter should go into the category ii) settlements; and that approximately one quarter should go into the category iii) settlements. The rationale for this apportionment is set out in the relevant Board minutes of Spey and the intention was to make a permanent division of the trust assets between the two families.

At about the same time as the new settlements were established, a new holding company, A&OT Investments Limited, was formed. This is a mutual company, incorporated in Bermuda. All the portfolio investments held by the Bahamian settlements (other than those held by Arndilly Investments Limited) were transferred to this company and its shares were issued to those settlements (or their holding companies) in the appropriate proportions. This arrangement has the advantage that all the portfolio investments held by the family trusts can be administered by Baillie Gifford as one fund.

As at the date of this Memorandum (September 1992) Spey has retained approximately 4% of A&OT Investments Limited, worth approximately US$5m. This final holding will probably be the subject of a further settlement in favour of George and his family later in 1992. Spey is also the owner of the remaining shell of A&OT which it proposes to liquidate in due course.

In the Explanatory Memorandum, Stanford-Tuck described the several settlements created as a result of the restructuring. He describes the Glenfinnan Settlement as follows[2]:

Glenfinnan 1992
Settlement Date - 30th June 1992
Settlor - Spey Limited
Trustee - Grampian Trust Company Ltd incorporated in the Bahamas. (Directors: Geoffrey Johnstone, Peter Higgs and Sarah Lobosky - Shareholders: Protec Trust Management-Establishment).
Protector - Michael Hamilton and Michael Stanford-Tuck jointly.
Holding Company - Glenfinnan Trading Company Ltd incorporated in Bermuda. (Directors: Geoffrey Johnstone, Peter Higgs, Sarah Lobosky, John Campbell and Timothy Counsell).
Trusts - Discretionary for the benefit of George and John and their families (excluding adopted children).
Assets -Bride House
Rye Machinery
Baring Hambrecht Yuill
60% interest in A&OT Investments Ltd
(Total value about us $90m)
Objects - Long term accumulating trust for benefit of next generation beneficiaries.
Tax Status - Bahamian Resident.

[17.] What, if anything, the Explanatory Memorandum means is the main source of contention between Ashley and Grampian. Grampian says, and pleads, that the Explanatory Memorandum is a document prepared by or on behalf of Spey, and that it records the wishes of Spey as settlor of the trust. Ashley says that the Explanatory Memorandum is not a record of Spey's wishes and was not prepared by anybody acting on Spey's behalf.

[2] Page 8 of the Explanatory Memorandum

John's Death and his request for a review of Glenfinnan

[18.] In a letter dated 6 July 1999 John wrote to Duff seeking what he describes as a further review of Glenfinnan. In the letter he stated:

> In 1989, much discussion took place which resulted in a major restructuring of the Trusts of which my brother and I are the primary beneficiaries.
>
> At that time, there were specific Trusts established for both George and his family, and myself and my family. The result was that the assets of the 1973 Bahamian Settlement were generally apportioned over three new Settlements being two new Settlements and a fresh variation on the 1973 Bahamian Settlement.
>
> That was ten years ago and I would like to discuss with you a further review of these Settlements. This review is to do with a further transfer of assets and not any change to the Trust structure. Let me refer back to the discussions of 1989.
>
> Those discussions started in early 1989 and went through to 1991. There were two primary aspects to be achieved in the restructuring. Firstly, there was to be a reorganization of the Bahamian Trusts in such a way that part of the funds are held for my brother's family and another part for my family. Secondly, there were to be additional funds to the Australian Trusts under which my children qualify as beneficiaries. ...
>
> In the discussions that took place in 1989, a matter that required much consultation, opinion and time was a possible liability for UK Inheritance Tax. Whilst the Directors of Arndilly did not accept that there was any liability to the UK Revenue, it was accepted by the Trust Advisers that, should any of the beneficiaries decide to take up residence in the UK, the situation would need to be reviewed. That uncertainty was taken into consideration by the Trust Advisers in determining the split of the assets. With ten years now past, the influence of that tax aspect could be reviewed.
>
> The result of the restructuring achieved a structure very appropriate to the needs at that time. That structure continues to be appropriate today, but some of the underlying concerns at that time are still present.
>
> Since those 1989 discussions, there have been instances which may not have been easy for the Trust Advisers with decisions on business investment. The separate Settlements for my brother and myself have eased the difficulty but, whilst there continues to be a significant Settlement where the members of both families have a joint interest, then

differences of opinion and difficulties in decisions of business management will continue to exist for the Trust Advisers. That is reason for a further review. The settlement that would be the centre of this further review is the Glenfinnan 1992 Settlement.

...

The other needs, of course, were the reorganisation of the Bahamian Trusts in such a way that part of the funds were to be held for my brother's family and another part for my family. The original proposal that was put to the two of us jointly by Michael Hamilton was for a split of 25% each with 50% remaining in the Bahamian Settlement for later consideration. The rationale for this apportionment was determined by the Trust Advisers and the intention was to make a permanent division of the trust assets between the two families. That permanent division between the two families has not yet been concluded which is reason for a further review.

The 50% that remained without reallocation was put into the Glennfinan 1992 Settlement. This settlement continues the previous tradition of providing for George and me and our families, though it does specifically exclude adopted children. The exclusion of adopted children, in itself, might seem strange in this new Settlement since one of the significant differences of opinion between this beneficiary and the Trust Advisers was just that topic. What is interesting, though, is that the new settlements for George and his family, and me and my family both now include any adopted children as beneficiaries. However, what is unsavoury about this Glennfinan 1992 Settlement is that, whilst George and I are both beneficiaries of the Settlement, there are indications that our needs are now to be satisfied from our own Trusts and the Glennfinan 1992 Settlement is for the benefit of next generation beneficiaries. That makes us "Claytons Beneficiaries" which is when you are a beneficiary but are not a beneficiary. That kind of indication must put the Trust Advisers in a conflict of responsibility and could also leave some beneficiaries with the feeling that their Interests are not being recognised. This is another reason for a further review.

A simple solution, subject to any continuing concerns in regard to UK Inheritance Tax and any other matters, would be to further split the assets in the Glennfinan 1992 Settlement with the proceeds of the split being put into the other overseas Trusts (in my case Willards). The ratio of the split could be up to the Trust Advisers but could be 50/50 if you consider it based on George and me, or 60/40 if you consider it based on the total number of family members. I would be interested in the Trust Advisers' views on this.

...

[19.] Duff discussed John's letter with the other Family Advisers but it does not appear that the letter was immediately discussed with Grampian or passed onto them for consideration. Whilst the Family Advisers discussed the matter considerably among themselves, but not with Grampian, they consulted George, who in turn discussed the matter with his family. Duff met with John in October 1999 and replied to his letter advising him that he misunderstood the permanent nature of the division. John was to consult his papers and revert to discuss the matter further with Duff.

[20.] John died on 24 June 2000 in a motor racing accident without any further discussion on the matter with Duff.

[21.] In August 2000, shortly after John's death, Michael Morrison (Morrison), then a Family Adviser, wrote to Johnstone indicating that:

> "[B]efore his death, John Dawson-Damer was arguing in a rather desultory fashion that the reconstruction of the trusts in 1989-1992 was only provisional and that a further reconstruction, dividing Glenfinnan equally between the two families, was due. We advised him that the 1989-1992 reconstruction was intended to be final and that the Glenfinnan trust was intended to be an accumulating trust for the benefit of the original beneficiaries".

This appears to have been the first time that Grampian became aware of John's request.

[22.] On 23 December 2000, Ashley, through her advisor Tony Carroll wrote to Hamilton, requesting that Grampian consider exercising its discretion to make further provision for John and Ashley's children and issue. Following considerable discussion amongst the Family Advisers the request was passed onto Grampian. Grampian indicated, in a letter dated 5 April 2001, that it considered that it would

be "wrong" to make any indirect provision for John and Ashley's children from Glenfinnan.

The Family Advisers and the Separation of the Willards Settlement

[23.] Shortly after John's death, relations between the Family Advisers and Ashley broke down. By September 2001 discussions were held concerning the possible extraction of the Willards settlement from the trust structure. The Willards settlement was the Australian settlement established through the restructuring, for the exclusive benefit of John and Ashley and their family and for which Grampian was trustee.

[24.] The eventual extraction of the Willards Settlement from the trust structure was negotiated and finalised in 2002. The negotiations were difficult and acrimonious. By the time Willards had been separated from the trust structure, the relationship between Ashley and the Family Advisers had broken down irretrievably. They were no longer in direct contact with her and no longer acted for her interests. Grampian was made aware of this fact.

[25.] During 2003, the Family Advisers, through Hamilton, proposed to Grampian that Ashley, George and his wife Davina be excluded as beneficiaries of Glenfinnan as *"a pre-emptive action"* in what was expected to be a further challenge by Ashley against the trust. George who had been consulted, welcomed the exclusion as it benefitted his UK tax position. Ashley had not been consulted and no similar benefit would have accrued to her.

[26.] Grampian rejected the proposal but acceded to Hamilton's proposal that Grampian pass a resolution "*to the effect that: -*

(i) *the Glenfinnan 1992 Settlement was established for the benefit of "the beneficiaries of the 1973 Settlement";*

(ii) *The beneficiaries of the 1973 Settlement do not include adopted children and the 1992 Settlement should not include adopted children; and*

(iii) *The 1992 reorganisation made sufficient provision for John's adopted children and the Trustees of the 1973 and 1992 Settlements should be made aware of this.*

Grampian, by a written resolution dated 3 July 2003, resolved that:

> "*no distributions of capital or income should be made from the 1992 Glenfinnan Settlement for the time being except in the event of changed circumstances and unforeseen contingencies and that the income of the trust assets should be accumulated for the future benefit of the next generation of beneficiaries, meaning George's natural children, grandchildren and remoter issue and their wives and widows*".

[27.] In response to correspondence from Ashley, seeking a rescheduling of an investment meeting to permit George and Davina to attend Piers' wedding, Johnstone wrote to Ashley. In the correspondence, Ashley was also seeking to attend a rescheduled investment meeting. In the letter, dated 2 June 2004, Johnstone stated:

> "*[T]he trustees are currently of the view that the Glenfinnan Trust should be treated as an accumulation trust for the benefit of future generations. However, I should make it clear that this has no effect on your legal rights under the settlement. The trustees have no power and no desire to prejudice the rights of beneficiaries. It simply means that, in the absence, of good reasons to the contrary, and on the assumption that beneficiaries of the first generation are adequately provided for, the capital and income of the settlement are to be accumulated for future generations.*
>
> *Subject to that comment we have no reason to and will not consider you differently or to the disadvantage of other beneficiaries. You will realize that our discretion is unfettered.*
>
> *You ask how are the trustees to be aware of your conditions and needs. We assume that at the present time you are comfortably placed. The trustees will be happy, however, to listen to your submissions on the manner in which we should exercise our discretion if our assumption is not*

> *correct or if your status alters. Obviously we will expect, as you put it, "detailed knowledge of your circumstances and requirements"."*

The 2 June 2004 Johnstone letter represented the last communication between Ashley and Grampian prior to the commencement of these proceedings.

The 2006 Appointment

[28.] In May 2006, Duff circulated a document entitled "*Yuill Trusts Discussion Paper*". The discussion paper proposed the creation of four new trusts, each for the benefit of one of George's four children and their respective families. According to the proposal, each of the new trusts would be distributed 20% of the corpus of Glenfinnan, leaving a 20% rump in Glenfinnan. George and Davina were to be excluded, with their consent, to improve their tax position and cure issues associated with their UK tax residence. The proposal was subsequently amended to exclude a new settlement for George's daughter, Marina and to leave 40% in Glenfinnan. Marina's exclusion was as a result of her UK residence which would have adverse tax consequences. Marina's 20% although not distributed, was said to be earmarked in Glenfinnan for her benefit.

[29.] According to the *Yuill Trusts Discussion Paper*

> "The 1991/92 restructure was designed to give assurance to the two families - Portarlingtons and Dawson-Damers - whilst also leaving a large remainder fund which was principally meant to be for the benefit of the then younger generation. It seems timely to consider further restructure in order to give Charles, Edward, Marina and Henry greater certainty as to the funds which may be available to them at the trustees' discretion in future. As their families grow and as business opportunities emerge for them, it will be highly desirable that they have separate funds they can look to if they wish to supplement their Australian funds. Establishment of separate trust funds would remove the possibility that meeting the requirements of one family could be prejudicial to another or that a marriage break-up could impinge unfairly on the interests of other beneficiaries.

> Given that we are seeking to provide for the generation represented by George and Davina's children, as the primary beneficiaries, there is a case for re-settling the Glenfinnan Trust by allocating 20% of its funds to each of four new settlements, leaving 20% in Glenfinnan for the beneficiaries as currently defined. However, it is necessary to take into account U.K. revenue law. This suggests that three new (Bahamian) settlements, for Charles, Edward, Henry and their families, could have a shared investment pool whilst funds intended for Marina's benefit could be settled on a new trust for her, pooled with Islay. Islay, you will remember, does not hold investments likely to produce U.K. source income - that policy was adopted in 2004 in view of George and Davina's residence in the U.K. and the possibility that they may also be declared domiciled in the U.K. in the not too distant future. The same circumstances apply to Marina.

[30.] The Family Advisers received tax advice to the effect that, any portion of the Glenfinnan assets distributed to each of the new settlements would be regarded for Australian tax purposes as being part of the original corpus of the new settlements and thus is available for distribution direct to the relevant Australian beneficiaries without any Australian tax problems arising.

[31.] Grampian accepted the proposal and sought the advice of English counsel, Simon Taube QC (Taube QC). Taube QC's instructions were that the trustee intended to notify all of George's children but was concerned about Ashley. Taube QC's advice, as recorded in his 2 August 2006 meeting note, was:

> *There was a duty on trustees to consider Ashley's claims; but it did not follow that the trustee was bound to notify Ashley of their proposal to distribute – the law might change; even so, what would be the remedy for the trustee's failure to notify Ashley provided they had considered her claims on her bounty <u>AND</u> had sufficient info to do so; their resolution ought to make clear that they had weighed the claims of all [beneficiaries] including Ashley.*

[32.] Stanford-Tuck, in his attendance note of that meeting, wrote:

"This was an important point and Counsel referred the meeting to Underhills "Law of Trusts and Trustees" on page 673 onwards. Counsel felt that the law might change in the future but at the moment there was no obligation or duty on the trustees to discuss the proposals with discretionary beneficiaries as opposed to those with IIPs and particularly with [Ashley]. In practice, from a practical point of view the trustees would want to discuss the proposals with the beneficiaries affected, meaning George's four children. However any trustees' resolution implementing the proposals should indicate that the claims of all beneficiaries had been taken into account before adopting the proposals. Finally the trustees should be aware that 40% of the main long-term fund (worth approximately £80m) would remain available to meet the needs of the original class of beneficiaries. There was no proposal to remove [Ashley] as a beneficiary of the long-term settlement at this stage".

[33.] The Family Advisers consulted George and his children and their families about the proposed advancement. There was no consultation with Ashley. The decision was deliberately taken not to tell Ashley about the distributions at the time as it was expected she would complain about appointments made to the others.

[34.] On 21 December 2006, Grampian appointed 60% of the assets of Glenfinnan to three new Bermudian settlements, Came, Emo and Hewish for the families of each of George's three sons. The new Bermudian Trusts provided for adopted children and issue to be within the class of beneficiaries of those trusts.

[35.] George and Davina were thereafter excluded as beneficiaries of Glenfinnan.

[36.] On 30 June 2008, notwithstanding George's exclusion from Glenfinnan as a beneficiary and that he was not a settlor of Glenfinnan, he wrote a letter of wishes to Grampian. In his letter of wishes he asked the trustee to consider his and Davina's wishes concerning the comparative treatment of their four children as beneficiaries of the family trusts.

The 2009 Appointment

[37.] On 18 November 2008, two years after the 2006 appointments, the Family Advisers formally proposed to Grampian that the entirety of the assets of Glenfinnan be appointed onto a new settlement which did not include Ashley. The Family Advisers were again the promoters of the proposal, as they had been in 2006. Advice was obtained from Alan Robertson SC that an appointment onto another settlement would be beneficial to Glenfinnan's Australian beneficiaries.

[38.] At this time Johnstone had retired from the Board of Grampian. Its directors now included Philip Dunkley (Dunkley) , Surinder Deal (Deal) and John Delaney. The Family Advisers now included Morrison, Jim Burns (Burns) and Kerry Smith (Smith).

[39.] Grampian says that it resisted the original proposal insisting that a small proportion amounting to 2% of the capital of Glenfinnan be retained. It is said that the retention was made on the basis that "*if the unimaginable happened and Ashley lost all her money*", there would be a "*reserve*" on which she could draw. In monetary terms the fund retained was an amount of US$6.6 million in 2009. That fund is now said to be valued at some US$11 million.

[40.] On 23 March 2009, Grampian resolved to transfer 95% of the assets of Glenfinnan onto a new Bermudian trust, the Moray Settlement. The beneficiaries of Moray were *the children and remoter issue of The Rt Hon George Lionel Seymour Dawson-Damer 7th Earl of Portarlington whether living at the date of the Settlement or born thereafter during the Trust Period.* Ashley was therefore also excluded as a beneficiary of the Moray settlement.

[41.] Ashley's complaint, inter alia, is that as a result of Johnstone's 2004 letter, she regarded Glenfinnan as a safety net, and she did not contact the trustees at that time, indeed at any time between 2004 and 2012, because she was at that time able to meet her everyday needs.

[42.] Ashley eventually learned about the Appointments from Grampian's solicitors following communication with George, whose support she was seeking for her request to Grampian to assist in funding a charitable foundation in John's memory.

B. Evidence

[43.] The evidence in the trial was taken over 16 days in November and December 2020 with the court hearing from 9 witnesses. Ashley gave evidence and called her advisor Tony Carroll (Carroll) as a witness. Dunkley, Deal, Burns, Taube QC, Stanford-Tuck, Morrison and Duff gave evidence for Grampian. Hamilton settled a witness statement but unfortunately died prior to the commencement of the trial. His witness statement was read into evidence under the appropriate hearsay rule and the Court empowered to treat it with the caution attendant to such statements. He was not a witness who gave evidence in the trial and was not tested on the facts and matters contained in the witness statement.

[44.] There was also a considerable amount of contemporaneous documentary evidence which had to be considered in the trial. In excess of 2000 individual documents comprising some 21 lever-arch files were placed before the Court.

[45.] Whilst I found Ashley to be a truthful witness, she was of little assistance as to determining much of the important issues at trial. Neither she, nor Carroll actively

participated in the restructuring and were unable to shed much light on the long term intent for Glenfinnan by Spey or Arndilly. Likewise they had no direct evidence as to what transpired when the appointments were made in 2006 and 2009. Much of the Court's determination would turn on an assessment of the documentary evidence and the assessment of the witnesses who gave evidence on behalf of Grampian.

C. The Pleadings

[46.] Ashley commenced this action by Writ of Summons on 20 March 2015 seeking to challenge the 2006 and 2009 appointments and for the removal of Grampian as trustee. Paragraphs 45 - 49 of her Amended Statement of Claim, which sets out the nature of the attack on Grampian, are settled as follows:

> "45. By June 2004, the fiduciaries were treating the Plaintiff as though she had ceased to be a beneficiary of the Settlement. In a document provided to the Plaintiff, they recorded that "once the [First Defendant] decided that [the Settlement] should be operated as an accumulating trust for the benefit of the younger generation of beneficiaries (and their descendants), [the Plaintiff] and her family ceased to be potential beneficiaries ... "
>
> 46. By 2005, the fiduciaries had entirely closed their minds to the possibility of making any further provision for the Plaintiff from the Settlement and to this end considered that in the event that the Plaintiff requested further distributions from the Settlement, the notes prepared ten years previously by Mr Stanford-Tuck "may be of help".
>
> 47. There were no further communications, of any kind, between the Plaintiff and First Defendant or the Trust Advisers until October 2012, when the Plaintiff wrote to George and enquired about the possibility of receiving assistance in establishing a charitable foundation in John's memory and bearing his name. George referred the request to the fiduciaries, who made no attempt to find out any information about the Plaintiff's then current circumstances. Rather, the conclusion of the Trust Advisers, on which the First Defendant relied, was that "nothing had changed since her request in 2003 and [the First Defendant's] reply to her of June 2004", in which the First Defendant "very ably deflected" the request.

Rather than seek further information from the Plaintiff, the Trust Advisers opined that the Plaintiff's charitable donations had been illustrative of her "rather flamboyant and expansive life style", and advised that "the suspicion is that many of her gifts are politically motivated", without once discussing this with her. The First Defendant did not inform the Plaintiff that by that stage, 98% of the trust fund of the Settlement had been appointed out for the benefit of the other beneficiaries. It is averred that rather than seeking to ascertain relevant information from the Plaintiff and/or about her circumstances and considering her request having considered those matters which it ought to have considered, the First Defendant (together with the Trust Advisers) sought merely to construct a case for not making any provision for the Plaintiff.

The First Defendant's duties

48. As trustee of the Settlement, when considering the exercise of its dispositive powers under the Settlement, and when exercising them the Defendant owed *inter alia* the following duties to the Plaintiff:
    a. to exercise its powers only for a proper purpose;
    b. a duty to give genuine and responsible consideration to the exercise of its powers;
    c. a duty to inform itself as to matters material to the decision to be made;
    d. a duty not to take into account any irrelevant matters when making its decision;
    e. a duty to act even-handedly and fairly as between the competing beneficiaries and not to discriminate unfairly or improperly against one in favour of another;
    f. a duty to exercise their powers by reference to the facts and circumstances pertaining at the time of exercise and not to decide to exercise those powers (or not exercise those powers) in any particular way in advance; and
    g. a duty to act reasonably.

Breaches of Duty

49. In the premises, when exercising the 2006 Appointments and/or the 2009 Appointment the First Defendant failed to exercise its discretion fairly, properly, reasonably or even-handedly and in particular it has breached its aforesaid duties in that it wrongfully:
    a. unfairly discriminated against the Plaintiff by adopting a policy that she would not benefit under the Settlement and took that policy into account when considering how to exercise its fiduciary discretionary powers under the Settlement;
    b. failed to give any or any proper consideration whether provision ought to be made for the Plaintiff from the Settlement whether at that time or in the future;

c. failed to make any enquiries of the Plaintiff as to her financial needs and wishes (or obtain such information elsewhere) before making a decision;

d. failed to take into account the Plaintiff's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were made and in particular George's children and remoter issue for whom ample provision (greatly exceeding any provision that had previously made for the Plaintiff) had already been made;

e. failed to take into account that by the time of the 2009 Appointment that the result of the 2006 Appointments was that George's children and remoter issue were the beneficiaries under the 2006 Settlements which already had substantial value and that there was therefore no need to make the 2009 Appointment in their favour;

f. took into account the personal views of its directors and the Trust Advisers towards the Plaintiff (which were hostile) and allowed itself to be influenced thereby;

g. failed to take into account the legitimate and reasonable expectation of the Plaintiff that the First Defendant would not appoint almost the entirety of the trust fund of the Settlement to her exclusion without giving her the opportunity to make representations to it concerning her current and future financial needs;

h. applied a requirement that the Plaintiff should be required to demonstrate serious financial hardship before being able to benefit, a standard that was not applied to the other beneficiaries (and in particular George's children) who by the time of the 2009 Appointment were already beneficiaries of settlements with a far greater value than the funds remaining comprised in the Settlement;

i. failed to take account of the need for the Plaintiff to make proper provision for her children;

j. inappropriately and deliberately preferred the interests of one class of beneficiaries over another from an early stage, and overlooked the fact that the apparent "*equality*" between George and the Plaintiff was illusory as a result of the exclusion of the Plaintiff's children from the class of beneficiaries under the Settlement;

k. made appointments in favour of settlements governed by the law of Bermuda the effect of which was to confer benefits on *inter alia* George's adopted issue whilst failing and/or refusing to consider whether to make provision for John's adopted issue in a similar way;

l. purportedly decided by 2004 that the Plaintiff would not benefit from the Settlement (despite her remaining a beneficiary) and

thereby wrongfully closed its mind to the interests of the Plaintiff and the question of whether she should benefit from any exercise of discretion under the Settlement thereby effectively (and improperly) limiting the scope of the powers conferred on it;

m. alternatively, exercised its powers for the ulterior and improper purpose of excluding the Plaintiff from benefiting from the vast bulk of the trust fund, having determined not to exercise its power to exclude the Plaintiff from the class of beneficiaries on the grounds that it would be provocative to do so."

[47.] Grampian defended the action by the filing of a Defence on 6 November 2015. Paragraphs 4, 5, 6, 7, 9 and 14 of the Defence provide:

"...

4. In Part B below Grampian will plead specifically in response to the Plaintiff's allegations. In summary though, Grampian's case is as follows.

(1) The 2006 Appointments and the 2009 Appointment were made by Grampian validly and in good faith in exercise of its powers of appointment.

(2) Grampian, acting by its directors Geoffrey Johnstone and Philip Dunkley QC, made the 2006 Appointments and acting by its directors Philip Dunkley QC and Ms. Surinder Deal, made the 2009 Appointment. Contrary to the Plaintiff's express and implied allegations, the decisions to make the 2006 and 2009 Appointments were taken exclusively by Grampian. Grampian denies the Plaintiff's express and implied allegations that the Trust Advisers (or Family Advisers) made the relevant decisions.

(3) In exercise of its powers of appointment in the Glenfinnan Settlement, Grampian, as trustee of a discretionary trust, was entitled to appoint capital in favour of some, but not all, of the Glenfinnan Beneficiaries. The Plaintiff's claim, in so far as it proceeds on the express or implied basis that Grampian was bound to appoint to (or treat) all the Glenfinnan Beneficiaries equally, is legally unsound. There was no duty to appoint to Lord Portarlington and his four children and remoter descendants and their spouses, on the one hand, and to John and his widow, on the other hand, equally.

(4) As one of the Glenfinnan Beneficiaries who is an object of the trustee's powers of appointment, the Plaintiff has a right to be considered by the trustee as to whether to exercise the trustee's powers to appoint in her favour. Before making the

2006 Appointments and the 2009 Appointment Grampian duly considered the claims of the Plaintiff on the trust funds, as appears from the terms of the relevant instruments containing the 2006 Appointments and the 2009 Appointment.

(5) In the light of the factual and family background to the Glenfinnan Settlement and the 2006 and 2009 Appointments (which is summarized below) any reasonable trustee could validly and in good faith have concluded that it was appropriate to make the 2006 and 2009 Appointments, and not to appoint any part of the trust funds in favour of the Plaintiff.

(6) Grampian denies the Plaintiff's allegations that Grampian (or its directors) was hostile to the Plaintiff, or that the 2006 and 2009 Appointments were affected by alleged hostility towards the Plaintiff (whether on the part of Grampian or anybody else).

(7) Grampian denies that it had any duty to consult the Plaintiff before making the 2006 and 2009 Appointments.

(8) Furthermore, in a letter to the Plaintiff dated 2 June 2004 Grampian, through one of its then directors Sir Geoffrey Johnstone, expressly gave the Plaintiff the opportunity to put forward submissions on the manner in which the trustee should exercise its discretions and to inform the trustee if she was not "*comfortably placed*". She did not do so.

5. At trial Grampian will adduce full evidence about the factual circumstances surrounding the creation of the Glenfinnan Settlement and the background to the 2006 and 2009 Appointments, but the following summary was and is relevant in considering whether or not Grampian exercised its powers of appointment validly.

(1) The Glenfinnan Settlement was made in 1992 as part of wider arrangements ("the 1989 – 1992 Reconstruction") that related to the assets originally derived from the fortune created by Lord Portarlington's and John's great-grandfather G. S. Yuill, who died in 1917, for the benefit of his descendants. Those wider arrangements were intended to provide separate benefits for the different branches of those descendants, namely Lord Portarlington and his family and descendants, on the one hand, and John and his family and descendants, on the other hand.

(2) The assets derived from the fortune of G. S. Yuill included (a) assets held in Australian trusts and (b) trust funds held by Arndilly Trust Company Limited ("Arndilly"), a Bahamian company, as trustee of the settlement dated 1973 ("the 1973

Settlement"). The 1973 Settlement was a discretionary trust in favour of the legitimate but non-adopted descendants of Viscount Carlow (i.e. Lord Portarlington's and John's father) and their spouses.

(3) As part of the 1989 – 1992 Reconstruction, and in accordance with the advice of Mr Robert Walker QC (as he then was), Arndilly exercised its power to apply capital for the benefit of one or more of the beneficiaries by transferring almost all the trust capital to a Bahamian company, Spey Limited ("Spey").

(4) Later, in 1992 Spey exercised its own powers to transfer capital in the following proportions (stating the matter broadly):-

   (a) 25% to Grampian as trustee of a discretionary settlement ("the Willards Settlement") for the benefit of John, the Plaintiff and their adopted children and remoter issue;

   (b) 25% to Grampian as trustee of two discretionary settlements ("the Islay Settlement and "the Annan Settlement") for the benefit of Lord Portarlington, his wife Davina and their descendants; and

   (c) 50% to Grampian as trustee of the Glenfinnan Settlement.

(5) At the time of the 1989 – 1992 Reconstruction there was full consideration by Arndilly and Spey of the claims of all the descendants of Viscount Carlow on the bounty of the settlors and on the fortune derived from G.S. Yuill; Lord Portarlington and John were given full opportunity to make representations about the proposed reconstruction; and the directors of Grampian were made aware of the considerations affecting the decisions of Arndilly and Spey.

(6) Upon the completion of the 1989 – 1992 Reconstruction Mr Michael Stanford – Tuck (who was one of the initial protectors of the Glenfinnan Settlement and involved as a solicitor in the legal arrangements for carrying out the reconstruction) prepared an Explanatory Memorandum dated September 1992.

(7) In the Explanatory Memorandum Mr Stanford – Tuck set out matters of past history, including the distributions of other funds to the separate Willards, Islay and Annan Settlements for the benefit of the generation of Viscount Carlow represented by (a) Lord Portarlington (and his wife Davina) and (b) John (and his wife the Plaintiff). The Explanatory Memorandum reflected the conclusions that had been reached by Spey on the making of the Glenfinnan, Willards Islay and Annan Settlements as guidelines for their future

administration. At page 8 of the Explanatory Memorandum the policy objects of the Glenfinnan Settlement are then described as follows:-
"Long term accumulating trust for benefit of next generation beneficiaries" [meaning the next generation of Viscount Carlow's descendants, not Lord Portarlington and John (and their wives)].

(8) John's adopted children were not beneficiaries of the 1973 Settlement or the Glenfinnan Settlement, and John and the Plaintiff were not members of the "next generation" of Viscount Carlow's descendants. The Explanatory Memorandum made clear it was not the general policy or object of the Glenfinnan Settlement that the 50% of the funds allocated to its trustee would go to John, the Plaintiff or their adopted children.

(9) As a result of the Willards Settlement, and other historic distributions of funds for the benefit of John and his family from the Australian trusts and other sources, John and the Plaintiff were, by any standards, exceptionally well provided for financially.

(10) After the death of John there were no blood descendants of Viscount Carlow surviving apart from Lord Portarlington and his descendants.

(11) In June 2004 Grampian had indicated to the Plaintiff that she had the opportunity to make representations as to why the trustee should make further provision for her, but she declined the opportunity to do so.

6. Neither prior to the 2006 and 2009 Appointments nor in the present proceedings has the Plaintiff advanced to the trustee any compelling reason (a) why Grampian should not have appointed funds in favour of the "next generation" of Viscount Carlow's descendants in accordance with the long standing purposes of the Glenfinnan Settlement or (b) why Grampian should have appointed funds to her.

7. Much of the Statement of Claim consists of the Plaintiff's allegations about the "Trust Advisers" or "Family Advisers" (whom Grampian will hereinafter refer to as "the Family Advisers"). These allegations are irrelevant to the issues in this case, namely whether or not Grampian properly exercised its powers in making the 2006 and 2009 Appointments. This is because Grampian, not the Family Advisers, exercised the trustee's powers. Although Grampian pleads below in response to the Plaintiff's allegations about the Family Advisers, such pleading is without prejudice to Grampian's

primary case that the Plaintiff's allegations are embarrassing and irrelevant.

...

9. As regards paragraphs 16 to 19 and the allegations relating to the Family Advisers, the position (stated briefly) was as follows.

    (1) Before and after the 1989 – 1992 Reconstruction three persons, who were sometimes called Trust Advisers and sometimes called Family Advisers, have acted as intermediaries or one channel of communication between (a) the beneficiaries of the various above-mentioned settlements who were resident both in the United Kingdom and Australia and (b) the trustee companies who were based in the Bahamas.

    (2) One function of this arrangement was to enable the beneficiaries to pass information to the trustee companies about their circumstances and needs. In practice though, the beneficiaries also had separate personal contact with the directors of the trustee companies from time to time in Australia or the UK, and the beneficiaries were always free to contact the trustee companies or their directors personally if they wished, as the Plaintiff was expressly told.

    (3) The family Advisers sometimes also acted as intermediaries between the trustees' professional and investment advisers, and they assisted the trustees in connection with obtaining and considering such professional and investment advice. But the Family Advisers were not the sole or exclusive channel of communication between the trustees and their professional and other advisers.

    (4) Additionally, the Family Advisers sometimes acted as directors of companies in the UK or Australia in which the trustees had investments and informed the trustees about the management of such companies.

    (5) The Family Advisers included (a) from 1963 to 2004 Michael Hamilton, a London solicitor in the firm that later became Taylor Wessing LLP, (b) from 1990 to 2006 John Duff, an Australian accountant based in Sydney, (c) from 1994 until the present Michael Morrison, who was formerly a London solicitor in the firm that later became Taylor Wessing LLP, (d) from 2004 to the present James Burns, an accountant based in London, and (e) from 2012 to the present Mark Cohen, an Australian solicitor based in Sydney.

    (6) Down to about July 2003 the Family Advisers, in particular John Duff, tried to continue to act as an intermediary or channel of communication for the Plaintiff, but thereafter the Family Advisers ceased to do so, because the Plaintiff made plain that she had no confidence in them. As pleaded in

paragraph 4(8) in section A above, one of Grampian's directors Sir Geoffrey Johnstone wrote to the Plaintiff by letter dated 2 June 2004 (in the terms mentioned there). At trial Grampian will refer to that letter for its full terms.

(7) Furthermore, even if Sir Geoffrey had not written the Plaintiff such a letter, she ought to have known, in particular from their dealings with her and Tony Carroll in the past, that Grampian's directors would in practice always have listened to any representations that she or her advisers such as Tony Carroll wished to make or information that she chose to give to Grampian. It is to be inferred from her failure to contact Grampian or its directors for so many years after 2004 that this failure had nothing to do with the absence of any Family Adviser acting for her; but, instead, it was because the Plaintiff recognized that there were no good reasons why Grampian should make a distribution in her favour from the Glenfinnan Settlement.

(8) Grampian denies the unparticularized innuendo in paragraph 19 that decisions of the trustees were taken by the Family Advisers.

(9) Subject as aforesaid no admissions are made as to paragraphs 16 to 19 and the role of the Family Advisers.

...

14. As regards paragraphs 31 and 32 Grampian pleads as follows.

(1) Grampian admits and avers that, from time to time in 2003 (as well as in subsequent years, including at the time of the 2006 and 2009 Appointments), Grampian, consistently with its duty as the trustee of the Glenfinnan Settlement, considered whether or not to exercise its dispositive powers in favour of the Plaintiff, it decided not to do so; a reasonable trustee was entitled to come to the same conclusion as Grampian; and Grampian has never exercised its power to exclude her from the class of beneficiaries of the Glenfinnan Settlement.

(2) Subject as aforesaid, in so far as the Plaintiff makes allegations (whether there or elsewhere in her Statement of Claim) about the deliberations of Grampian as trustee about the possible exercise of its dispositive or administrative powers or about the reasons for its decisions, Grampian relies on section 83(8) of the Trustee Act 1998. Grampian, as it is entitled to do, refuses to disclose the subject matter of those deliberations or its reasons for any decisions or any legal advice that it obtained in connection therewith.

(3) The Defendant denies that it has treated the Plaintiff "as a non-beneficiary" or that there was ever intended to be

equality between the treatment of the descendants of Lord Portarlington, on the one hand, and John, on the other hand.

..."

[48.] Ashley filed a reply to Grampian's Defence which provided as follows:

"...

4. As to paragraph 4, and in reply to the Defendant's summary of its case:

(1) As to paragraph 4(1):

(a) For the reasons pleaded to at paragraphs 49 and 50 of the Statement of Claim, the 2006 and 2009 Appointments were made in breach of the Defendant's duties as trustee of the Settlement, but for which breaches of duty the Defendant would not, alternatively might not, have made the said appointments. In the premises, it is denied that the 2006 and/or 2009 Appointments are valid, alternatively it is averred that they are voidable and are liable to be set aside.

(b) The Plaintiff does not currently plead that the Defendant acted dishonestly in appointing assets out of the Settlement onto trusts of which she was not a beneficiary. However, it is the Plaintiff's case that the Defendant consciously disregarded her interests as a beneficiary and its duty to consider her prior to making the Appointments, alternatively that the Defendant had made the Appointments with the improper purpose of excluding the Plaintiff from benefit.

(2) The first sentence of paragraph 4(2) is admitted. The second sentence of paragraph 4(2) is embarrassing in purporting to deny an allegation that is not made in the Statement of Claim (namely, that the Trust Advisers took the decision to effect the 2006 and 2009 Appointments). Paragraph 49(f) of the Statement of Claim avers, not that the Trust Advisers took the decision to effect the 2006 and 2009 Appointments, but that in making the 2006 and 2009 Appointments the Defendant acted in breach of its duties by taking into account the personal views of the Trust Advisers towards the Plaintiff (which were hostile), and by allowing itself to be influenced by those hostile views.

...

(4) The first sentence of paragraph 4(4) is admitted. The second sentence of paragraph 4(4), as particularised by the

Defendant's Amended Further and Better Particulars served on 17 January 2018 pursuant to an order dated 3 December 2017, and supplemented by letter dated 27 March 2018 (hereinafter together the 'Amended Further and Better Particulars'), is denied, as to which:

(a) It is denied (as particularised at paragraph 1(b) of the Defendant's Amended Further and Better Particulars to paragraph 4(4) that at all times since the creation of the Settlement the Defendant had intended that, save in "exceptional circumstances", the assets of the Settlement should not be applied for the benefit of, inter alia, the Plaintiff, but should instead be preserved for the succeeding generations of beneficiaries. It was no part of the Glenfinnan Restructuring that the rights of John or the Plaintiff would be restricted via the imposition of an "exceptional circumstances" test. In fact, the beneficial class of the Settlement purported to replicate the beneficial class of the 1973 Settlement, pursuant to which both John and the Plaintiff, as John's spouse, were real beneficiaries with an expectation of benefit that was in no way qualified by an "exceptional circumstances" threshold as now alleged. As pleaded at paragraph 49(h) of the Statement of Claim, the subsequent application of such a threshold to the Plaintiff's interest in the Settlement constituted a breach of trust by the Defendant.

(b) It is denied (as particularised at paragraph 1(c) of the Defendant's Amended Further and Better Particulars to paragraph 4(4) that the Explanatory Memorandum has any status as a trust document or as a letter of wishes in respect of the Settlement, and the Defendant's decision to take its contents into account in the making of the 2006 and 2009 Appointments constituted a further breach of trust by the Defendant. In fact, the Explanatory Memorandum does not accurately record the purposes for which the Settlement was established.

...

(8) As to paragraph 4(8):

...

(d) Indeed, Sir Geoffrey's letter represented in terms to the Plaintiff that the trustee's "current view" was that the Settlement should be "treated as an accumulation trust for the benefit of future generations" (which the

Plaintiff will aver was an incorrect and unwarranted statement given the circumstances in which the Settlement was established), but that this "has no effect on your legal rights under the settlement... [and] simply means that, in the absence of reasons to the contrary, and on the assumption that beneficiaries of the first generation are adequately provided for, the capital and income of the settlement are to be accumulated for future generations". By this, Sir Geoffrey made a positive representation to the Plaintiff that the capital and income of the Settlement would be accumulated, but without prejudice to the legal rights of the Plaintiff as a beneficiary of the trust. One of those rights was to be properly considered by the Defendant when exercising its discretionary dispositive powers under the Settlement.

5. As to paragraph 5, and in reply to the Defendant's purported "summary" of the evidence it avers it will adduce at trial:

(1) As to paragraph 5(1):

...

(b) It is averred that, while the Glenfinnan Restructuring did provide for separate benefits for the different branches of the family, in the form of the creation of the Islay, Annan and Willards Settlements, the Settlement itself purported to replicate the beneficial class of the 1973 Settlement, and accordingly cannot at the time have been understood as being settled to provide benefits for one branch of the family only. In subsequently treating the Settlement as if it was settled for this purpose, the Defendant has acted contrary to the founding intentions of the Settlement and contrary to the wishes of John, as expressed at the time of the Glenfinnan Restructuring and subsequently, and has thereby acted in breach of trust.

...

(5) As to paragraph 5(5):

(a) As to the averment that Arndilly and Spey gave full consideration to the claims of all the descendants of Viscount Carlow on the bounty of the settlors: the current claim relates to the claim of the Plaintiff as the spouse of John, who was a beneficiary of the 1973 Settlement, and of the Settlement, in her own right.

...

(d) As to the assertion at paragraph 1(m)(iii) of the Defendant's Amended Further and Better Particulars of paragraph 5(5) it is denied that Arndilly took into account the desirability of apportioning funds between the two sides of the family in order to create certainty about the funds available to each side of the family. In fact, at the time of the Glenfinnan Restructuring, all parties understood that no decision had been made regarding the distribution of the assets of the Settlement, which, after all, were held on trusts ostensibly for the same beneficial class as that of the 1973 Settlement.

...

(f) As to the assertions at paragraphs 1(a) – (e) of the Defendant's Amended Further and Better Particulars of paragraph 5(5) under the words "Spey considered", for the reasons set out above it is denied that Spey considered the matters set out at paragraphs 1(e), (f), (h), (k), (l), (m)(iii), (o), (p), and (q) thereof. In fact, in the creation of the Settlement, Spey intended to – and achieved – a replication of the purported beneficial class of the 1973 Settlement, and in doing so it did not seek either to limit the purposes of the Settlement (so that it was primarily a trust for the future generations of George's family in the manner alleged), or to impose an overriding restriction on the rights of John or the Plaintiff as beneficiaries of the Settlement (i.e. that they would only be considered for benefit in "exceptional circumstances"). By effecting the 2006 and 2009 Appointments on the basis that this was the purpose and effect of the Settlement, the Defendant has taken into account an irrelevant consideration, and has thereby acted in breach of trust.

...

(7) As to paragraph 5(7):

(a) The Explanatory Memorandum referred to in paragraph 5(7) has no status as a trust document or as a letter of wishes in respect of the Settlement.

(b) In fact, it is clear from all of the surrounding circumstances that, in transferring assets into the Settlement, the directors of Spey intended to establish a trust for the benefit of the same class of beneficiaries as had been beneficiaries of the 1973 Settlement (as it understood it). Without prejudice to the question of the inclusion of adopted children, the

beneficiaries of both the 1973 Settlement, and the Settlement, included George and his spouse and issue, and John and his spouse (the Plaintiff) and issue.

(c) The Defendant's reference to the Settlement as being a "long term accumulating trust for benefit of next generation beneficiaries" is erroneous. This description does not appear anywhere in Spey's reasons for deciding to transfer funds onto the Settlement and is inconsistent with Spey's decision to replicate the beneficial class of the 1973 Settlement. The Defendant's reference quoted above demonstrates that, following the creation of the Settlement, the fiduciaries formed an erroneous and improper view that the Plaintiff was not a real beneficiary of the Settlement, notwithstanding that she was a member of the beneficial class and the widow of one of the principal beneficiaries of the 1973 Settlement. Insofar as the Defendant took into account the Explanatory Memorandum when exercising its discretion under the Settlement, it was wrong to do so.

(8) As to paragraph 5(8):

...

(b) It is admitted that John's adopted children were not direct beneficiaries of the Settlement, albeit it was the advice of Robert Walker QC that their not being beneficiaries of the 1973 Settlement would not in any way preclude an advance to John that conferred benefit on his adopted children, and the same logic applies mutatis mutandis to advances from the Settlement, such that the Defendant was capable of exercising its powers as trustee of the Settlement so as to benefit John's adopted children.

(c) As to John and the Plaintiff not being members of the "next generation of Viscount Carlow's descendants": it is denied that Mr Stanford-Tuck's Explanatory Memorandum overrides either the decision of Spey as settlor of the Settlement to replicate the beneficial class of the 1973 Settlement (under which John and the Plaintiff were each beneficiaries in their own right with a real and legitimate expectation of being considered for benefit) or the express beneficial class of the Settlement (of which both John and the Plaintiff were members with all the rights connected with that

status). The Defendant's reference to the Explanatory Memorandum as if it were a governing document vindicates one of the Plaintiff's central complaints: namely, that the Defendant unfairly discriminated against her by adopting a policy that she would not benefit from the Settlement, or applying a different standard to whether she ought to receive any benefit from the Settlement (namely, "exceptional circumstances" or severe financial hardship) which was not applied to the other beneficiaries. It also demonstrates that the Defendant effected the appointments in reliance on the views of the Trust Advisers, which were both hostile to the Plaintiff, and were in any event wrong for the reasons pleaded to above.

(9) As to paragraph 5(9):

(a) The Defendant's assertion that, by the Willards Settlement and other assets, John and the Plaintiff were "by any standards, exceptionally well provided for financially", and the implicit averment that this provided the Defendant with grounds for indirectly and improperly excluding the Plaintiff from any possibility of further benefit from the assets of the Settlement, demonstrates that the Defendant unfairly applied a different standard to the Plaintiff than was applied to the other beneficiaries of the Settlement: namely, a need to show severe financial hardship in order to justify any distribution to her.

(b) In fact, in establishing the Willards Settlement, Spey did not thereby intend to exclude John or the Plaintiff from benefit under the Settlement, and Spey's decision to replicate (so far as it was understood at that time) the beneficial class of the 1973 Settlement demonstrates that Spey viewed John and the Plaintiff as real beneficiaries of the Settlement, with a real expectation of benefit therefrom.

...

(10) As to paragraph 5(10), the Defendant's reference to the "blood descendants" of Lord Carlow, and its implicit averment it was the "blood descendants" of Lord Carlow only who had a real expectation of benefiting from the Settlement, demonstrates that the Defendant failed to treat the Plaintiff as a real beneficiary of the trust, and failed to act fairly and even-handedly towards her when considering her own

claims to be considered for benefit therefrom. For the avoidance of doubt, neither the terms of the Settlement, nor any action of Spey in settling the Settlement, nor any other matter, limits or is capable of limiting the beneficial class of the Settlement to the "blood descendants" of Lord Carlow, and in fact the beneficial class of the 1973 Settlement, which was replicated in the establishment of the Settlement, included both John and the Plaintiff as real beneficiaries of the Settlement.

...

6. As to paragraph 6:

...

(2) In any event, however, it is denied that the Plaintiff has failed to provide a "compelling reason" why the 2006 and 2009 Appointments should be declared void or set aside. In fact, there are at least five such "compelling reasons":

(a) Firstly, the averment that the purpose of the Settlement was to serve as an accumulation trust for the "next generation" of Lord Carlow's descendants is inconsistent with the founding intentions of the settlor of the Settlement (i.e. Spey) and the terms of the Settlement. The founding intention of Spey in creating the Settlement (as reflected by the terms of the Settlement) was to replicate the beneficial class of the 1973 Settlement (as it understood it to be), which included both John and the Plaintiff, and under both the 1973 Settlement and the Settlement the Plaintiff had a real expectation of receiving benefit. The Defendant's later imposition on the Settlement of the gloss that it would be for the benefit of the "next generation" of Lord Carlow's descendants, and would only be available for the Plaintiff in cases of severe financial hardship, was itself improper and constituted a failure to treat the beneficiaries of the Settlement fairly and even-handedly.

...

(c) Thirdly, and in that context, it is to be inferred that the real underlying purpose of the 2006 and 2009 Appointments was to remove from the Plaintiff her rights as a beneficiary of the Settlement. That was an ulterior and improper purpose, because it ran contrary to the purposes for which the Settlement was established; it defeated the settlor's intention in establishing the Settlement (which was to replicate the class of beneficiaries of the 1973 Settlement); it

denuded the Plaintiff of the real expectation that she had or ought to have had as John's widow and as a real beneficiary of the 1973 Settlement that she would be considered fairly for benefit from the assets of the Settlement; and it ran directly contrary to Sir Geoffrey's positive representation to the Plaintiff in his letter of 2 June 2004 that the trustee's then view that the Settlement should be treated as an accumulation trust for the benefit of future generations "has no effect on your legal rights under the settlement", that "The trustees have no power and no desire to prejudice the rights of beneficiaries" and that "we have no reason to and will not consider you differently or to the disadvantage of other beneficiaries". It is further averred that the said purpose was improper because it was motivated, at least in part, by the desire of the Defendant to prevent the Plaintiff from obtaining information regarding the affairs of the Settlement which she would have been entitled to seek as a beneficiary of the Settlement.

(d) Fourthly, as well as being in substance decisions taken for the improper and ulterior purpose of excluding the Plaintiff from any possibility of future benefit from the assets of the Settlement, the 2006 and 2009 Appointments also constituted an improper circumvention of the formal safeguards against improper exclusion in the trust deed of the Settlement: namely, that exclusion of a beneficiary required the Protector's consent. It is to be inferred that the Defendant chose to circumvent these formal safeguards so as to avoid the prospect of the Plaintiff becoming aware that it was taking steps to exclude her from benefit.

...

12. As to paragraph 12:

...

(2) The denial at paragraph 12(2) is noted. The Plaintiff repeats her averment at paragraph 25 of her Statement of Claim that, by August 2001, the fiduciaries had decided that the Plaintiff would not benefit from the Settlement, despite remaining as a member of the beneficial class. The Plaintiff alleges that one of the considerations that motivated the 2006 and 2009 Appointments was the Defendant's improper desire effectively to exclude the Plaintiff from benefit without respecting the safeguards provided under the terms of the Settlement in respect of a formal exclusion (including the

requirement to obtain Protector consent to an exclusion of the Plaintiff), and without appearing "provocative". The Plaintiff's case is that this ulterior purpose was improper, and constituted a breach of the Defendant's duties to the Plaintiff. Further, it is averred that this purpose was improper because it was motivated by an improper desire to prevent the Plaintiff from obtaining access to information which she would have been entitled to seek as a beneficiary of the Settlement.

...

14. As to paragraph 14:

(1) As to paragraph 14(1):

...

(b) As to the final part of paragraph 14(1), if and insofar as the Defendant's averment is that it has not exercised the express power to exclude the Plaintiff from the class of beneficiaries of the Settlement, conferred by clause 7 of the Settlement, it is embarrassing in that it pleads to an allegation that is not made in the Statement of Claim. In fact, the Plaintiff's allegation is that the Defendant ceased to treat the Plaintiff as a beneficiary of the Settlement; ceased to have regard to her status and to her needs and wishes as a beneficiary; exercised its dispositive powers without any reference to the Plaintiff; and effected the 2006 and 2009 Appointments for an ulterior and improper purpose, namely to effectively exclude the Plaintiff from benefiting from the assets of the Settlement without exercising the power of exclusion under clause [7] of the Settlement, which would have required Protector consent and which they believed would have been "provocative".

...

(3) Paragraph 14(3) is embarrassing in purporting to deny an allegation that is not made in the Statement of Claim: The Plaintiff does not allege that there was intended to be equality between the treatment of the descendants of George, on the one hand, and John, on the other hand. The Plaintiff's case is that she was and is a beneficiary of the Settlement, and that accordingly the Defendant was required, in the exercise of its dispositive discretions, to act fairly and even-handedly towards her, and to take into account her status as a beneficiary and her needs and wishes, but that – in breach of duty – the Defendant treated the Plaintiff as a non-beneficiary and made the 2006 and 2009 Appointments with the improper and ulterior purpose of

effectively excluding the Plaintiff from any consideration of benefit from the assets of the Settlement, thereby improperly circumventing the safeguards in respect of her formal exclusion as a beneficiary.

..."

[49.] Grampian issued a rejoinder which provided, in part:

"...

3. As to sub-paragraph 4(1)(b), the allegation that Grampian "consciously disregarded" the Plaintiff's interests has an uncertain meaning. Insofar as it means:
    a. That Grampian consciously made the 2006 and 2009 Appointments knowing that the Plaintiff would not benefit by them, it is admitted.
    b. That the 2006 and 2009 Appointments were made in breach of trust and Grampian knew this, it is denied as to both the alleged breach and Grampian's state of knowledge.
    c. That at the time of the 2006 and 2009 Appointments Grampian did not consider or closed its mind to the Plaintiff's interests, it is denied.

4. In the following parts of the Reply the Plaintiff mischaracterizes Grampian's policy in respect of the Glenfinnan Settlement:
    a. In sub-paragraphs 4(4)(a), 5(5)(f), 5(7)(c), 5(9)(a), 6(2)(a), 14(3) and 16(1) the Plaintiff alleges that Grampian restricted the exercise of its own discretion and unfairly discriminated against the Plaintiff by imposing a rule that she would not benefit other than in exceptional circumstances. The alleged restriction is variously described in the Reply as a "gloss", a "test", a "threshold", a "standard", an "overriding restriction", a "policy that she would not benefit" and an attitude on the part of Grampian that the Plaintiff was "not a real beneficiary" or was a "non-beneficiary" and that her rights in the Glenfinnan Settlement had been "effectively extinguished". These pleadings wrongly imply that Grampian fettered its discretion and/or that it singled out the Plaintiff for disadvantageous treatment and are denied. Grampian administered the Glenfinnan Settlement according to a policy, formulated in line with the purposes for which it was settled, that members of the Plaintiff's generation would not benefit other than in

exceptional circumstances. There is nothing improper about adopting such a policy and the policy applied equally to Lord and Lady Portarlington and John when they were also beneficiaries.

b. As to sub-paragraph 5(1)(b), Grampian did not treat the Glenfinnan Settlement "as being settled to provide benefits for one branch of the family only." As explained above, Grampian's policy at all times was to treat the Glenfinnan Settlement as being settled to provide benefits for younger generations. In practice this meant Lord Portarlington's children and remoter issue because the Plaintiff's adopted children are precluded from benefit.

5. In the following parts of the Reply the Plaintiff pleads inconsistently in relation to the need to treat beneficiaries of a discretionary settlement equally:

a. In sub-paragraph 4(3) the Plaintiff avers that "a duty of fair and even-handed consideration does not amount to a duty to distribute assets equally", which Grampian admits and avers.

b. In sub-paragraph 5(9)(c) the Plaintiff further avers that "the trustee of the Settlement was under no binding obligation to divide the assets derived from the 1973 Settlement equally between the two sons of Lord Carlow and their families", which Grampian admits and avers.

c. In sub-paragraph 5(5)(b) and contrary to the above averments, the Plaintiff advances a line of argument which she has earlier disavowed by suggesting that to defend the 2006 and 2009 Appointments Grampian must "justify the radical departure from the principle of broad equality between George and John that applied in respect of the 1973 Settlement." Grampian denies both the allegation and its premise. As trustee of the Glenfinnan Settlement, Grampian was not under a duty to treat Lord Portarlington and John or their families equally. Even if it had been, John's issue were not beneficiaries and so there was no possibility of their receiving equal benefit.

6. In sub-paragraph 4(5) the Plaintiff confirms that she does not allege that "no reasonable trustee could have made the 2006 and 2009 Appointments". It follows from this that the Plaintiff admits that a reasonable trustee could have made the 2006 and 2009 Appointments. This admission by the Plaintiff disposes of her case

(as pleaded at paragraph 20 of the Reply and paragraph 50 of the Statement of Claim) that, but for its unreasonable conduct, Grampian would or might not have made the 2006 and 2009 Appointments.

7. In sub-paragraphs 5(2)(b-c), 5(5)(c) and 5(8)(a) the Plaintiff mischaracterizes the advice given to Arndilly by Leading Counsel Robert Walker QC. To say that Mr Walker advised that the beneficial status of adopted children under the 1973 Settlement was "in doubt" is apt to mislead. Mr. Walker's advice was merely that it would require an application to court to put the matter beyond doubt, which may be said of any legal argument. The Plaintiff seeks to present Mr Walker's advice in this regard as equivocal and irresolute, which it was not. Grampian was, at all material times, entitled to proceed on the assumption that Mr Walker advised correctly.

8. In sub-paragraphs 5(10), 6(2)(b) and 6(2)(e) the Plaintiff mischaracterizes sub-paragraph 5(10) the Defence, in which Grampian pleads that "After the death of John there were no blood descendants of Viscount Carlow surviving apart from Lord Portarlington and his descendants." Grampian's pleading is factually accurate and the Plaintiff does not deny it. Instead, the Plaintiff alleges that the pleading amounts to an "implicit averment" by Grampian that the class of beneficiaries of the Glenfinnan Settlement was de facto limited to Viscount Carlow's blood descendants. But sub-paragraph 5(10) of the Defence contains no such averment, express or implied; it is a bland and uncontroversial pleading of fact. The sub-paragraph is not traversed in the Reply."

[50.] Ashley's surrejoinder provided in part as follows:

"...

4. As to paragraph 4:

4.1 As to paragraph 4(a), in respect of the Defendant's averral that it administered the Settlement according to a policy, formulated in line with the purposes for which it was settled, that members of the Plaintiff's generation would not benefit other than in exceptional circumstances:

(a) The Defendant is required to prove the circumstances in which it formulated, adopted and applied the alleged policy.

(b) Further, and in any event, it is denied that such a policy was a proper policy for the Defendant to adopt, because:

i. Applying any 'policy' of this nature was improper. The alleged policy is inconsistent with the express terms of the Settlement, pursuant to which the Plaintiff was at all material times a member of the class of beneficiaries, and to the founding purposes of the Settlement, which were, inter alia, to replicate the beneficial class of the 1973 Settlement, pursuant to which both John Dawson-Damer and the Plaintiff, as John Dawson-Damer's spouse, were real beneficiaries with an expectation of benefit that was in no way qualified by, or ought to have been qualified by, an "exceptional circumstances" threshold. Moreover, a trustee is under a duty to exercise the discretion conferred on it by reference to the facts and circumstances existing at the time of exercise and not by reference to a policy decided upon previously.

ii. In formulating or adopting the alleged policy, the Defendant failed to ascertain whether this would be an appropriate policy by having regard to the position of either John Dawson-Damer or the Plaintiff, specifically their circumstances or needs (whether present or future) which were relevant and important considerations to the question whether the alleged policy should be adopted.

iii. In the premises, if and to the extent that the Defendant did adopt and did take into account and apply the alleged policy in the exercise of its powers and discretions under the Settlement, and in particular when it effected the 2006 and 2009 Appointments, to that extent the Defendant took into account an irrelevant consideration, and thereby acted improperly and in breach of trust. The said breach of trust was in addition to the breaches particularized at paragraph 49 of the Plaintiff's Statement of Claim.

4.2 As to paragraph 4(b):

(a) The Defendant is required to prove that it formulated, adopted and applied a policy to provide benefit only for younger generations.

(b) Further and in any event, it is denied that such a policy was adopted with the concurrence of either John Dawson-Damer or the Plaintiff or that it was a proper policy for the Defendant to adopt, and paragraph 4.1 above is repeated.

(c) Further, it is averred that, in circumstances in which the Defendant believed that the Plaintiff's children were not amongst the beneficial class of the Settlement, the adoption by the Defendant of a policy to exercise its powers and discretions as trustee of the Settlement solely (save in exceptional circumstances) to benefit future generations amounted in substance to the adoption of a policy to benefit one branch of the family only, as the Defendant well knew. Given the terms of the Settlement and the circumstances in which the Settlement was created, it was improper and a breach of trust for the Defendant to adopt any such policy, the practical effect of which would be to exclude one branch of the Dawson-Damer family (including the Plaintiff) from any real prospect of benefiting from the assets of the Settlement."

D. Issues

[51.] The case, in its narrowest sense, involves a determination as to whether Grampian acted in breach of trust when the appointments were made in 2006 and 2009. In the broader sense, the general issues for which the court must determine, based upon the pleaded case, may be identified as the following:

a. What were Spey's wishes or intentions for Glenfinnan in 1992?
b. Whether Grampian was in breach of trust when making the 2006 and 2009 Appointments. Specifically:
    (1) Did Grampian treat Ashley fairly?; and/or Did Grampian act honestly and in good faith in making the 2006 and 2009 appointments, as it contends?
    (2) Were Grampian's deliberations when making the 2006 and 2009 appointments adequate? In the event there was something which was not considered, would/might it have made a difference to Grampian's decision in 2006 or 2009?

E. What were Spey's wishes or intentions for Glenfinnan in 1992?

[52.] The determination as to Spey's wishes and intentions for Glenfinnan in 1992 has been described by Grampian as being at the heart of this case. This is a valid description. Not only was Spey the settlor of Glenfinnan, making its intention vital to the trustee's deliberations, Grampian has pleaded that its actions were directed by, and in keeping with, a policy based upon Spey's intention for the fund.

[53.] In particular, Grampian says at paragraph 5 of the Defence:

> "5. At trial Grampian will adduce full evidence about the factual circumstances surrounding the creation of the Glenfinnan Settlement and the background to the 2006 and 2009 Appointments, but the following summary was and is relevant in considering whether or not Grampian exercised its powers of appointment validly.
>
> ...
>
> (5) At the time of the 1989–1992 Reconstruction there was full consideration by Arndilly and Spey of the claims of all the descendants of Viscount Carlow on the bounty of the settlors and on the fortune derived from G.S. Yuill; Lord Portarlington and John were given full opportunity to make representations about the proposed reconstruction; and the directors of Grampian were made aware of the considerations affecting the decisions of Arndilly and Spey.
>
> (6) Upon the completion of the 1989 – 1992 Reconstruction Mr Michael Stanford – Tuck (who was one of the initial protectors of the Glenfinnan Settlement and involved as a solicitor in the legal arrangements for carrying out the reconstruction) prepared an Explanatory Memorandum dated September 1992.
>
> (7) In the Explanatory Memorandum Mr Stanford-Tuck set out matters of past history, including the distributions of other funds to the separate Willards, Islay and Annan Settlements for the benefit of the generation of Viscount Carlow represented by (a) Lord Portarlington (and his wife Davina) and (b) John (and his wife the Plaintiff). The Explanatory Memorandum reflected the conclusions that had been reached by Spey on the making of the Glenfinnan, Willards, Islay and Annan Settlements as guidelines for their future administration. At page 8 of the Explanatory Memorandum the policy objects of the Glenfinnan Settlement are then described as follows:-
>
> "Long term accumulating trust for benefit of next generation beneficiaries" [meaning the next generation of Viscount

Carlow's descendants, not Lord Portarlington and John (and their wives)].

(8) John's adopted children were not beneficiaries of the 1973 Settlement or the Glenfinnan Settlement, and John and the Plaintiff were not members of the "next generation" of Viscount Carlow's descendants. The Explanatory Memorandum made clear it was not the general policy or object of the Glenfinnan Settlement that the 50% of the funds allocated to its trustee would go to John, the Plaintiff or their adopted children. "

[54.] In its Rejoinder at paragraph 4(a), Grampian pleaded:

> "[G]rampian administered the Glenfinnan Settlement according to a policy, formulated in line with the purposes for which it was settled, that members of the Plaintiff's generation would not benefit other than in exceptional circumstances. There is nothing improper about adopting such a policy and the policy applied equally to Lord and Lady Portarlington and John when they were also beneficiaries."

[55.] In short Grampian says that Spey's intention for Glenfinnan, as reflected in the Explanatory Memorandum, was for it to be a long term accumulating trust for the next generation of beneficiaries, in particular the generations following George and John and their wives. Ashley and her generation would not benefit other than in exceptional circumstances.

[56.] Ashley's pleaded case is that Grampian misunderstood Spey's wishes and intentions. She asserts that the 1992 Memorandum is mistaken. Her case is: -

i. Spey did not intend a permanent division of the trusts between the two branches in 1992;
ii. Spey did not intend to exclude John's adopted children from future indirect benefit from Glenfinnan;
iii. Spey did not intend Glenfinnan to be "a long term accumulating trust for next generation beneficiaries";

iv. Spey's true intention was to make an interim equal division of the trusts between John's branch and George's branch; and

v. Spey's true intention was that Glenfinnan should be available for a further division between John's branch and George's branch in a few years' time.

[57.] Grampian adequately summarizes the competing contentions as follows: Were Spey's intentions as stated in the quoted "objects" as Grampian contends? Or were Spey's intentions in 1992 to leave the Glenfinnan funds 'in the middle" between George, Davina and his descendants on the one hand, and John, Ashley and his children, on the other, and to return to the issue later without reference to the "objects" as Ashley contends?

[58.] Ashley says the Explanatory Memorandum ought not to be credited as a constitutional document of the trust and one which represents the expressed intentions of Spey. At paragraphs 302-306 of her written submissions, she says that:

> 302. By the rules of primary attribution, the Explanatory Memorandum is not a document produced by Spey. It is not the subject of any resolution of the board of directors of Spey, nor is it recorded as having been mentioned at any meeting of the board. Indeed, it is a document produced a number of months after the resolutions under which Glenfinnan was created and assets were transferred to Grampian to hold on its trusts, and there is no subsequent minute or resolution of the board of Spey adopting or approving the Explanatory Memorandum as the company's document.
> 303. Not only is there no evidence that the Explanatory Memorandum was authorised or approved by Spey, there is no evidence that the directors of Spey had any involvement in the preparation of the Explanatory Memorandum. Indeed, there is no evidence to suggest that the majority of Spey's directors (Mr Lowe and Mr Lobosky) ever even saw it. It is not recorded as having been sent to them. Consequently, there is no proper evidential basis for a finding that they were even aware of its contents, let alone approved them.
> 304. There is no factual dispute as to the authorship of the Explanatory Memorandum: it was produced by Michael Stanford-Tuck. But contrary to Grampian's opening submissions, it has been established that neither Mr Stanford-Tuck nor his firm ever acted for Spey, and there is no basis for

any finding that either of them did so. The Court may think it a matter of concern that the contrary has been asserted so definitively to the Court by a legal team of which that same firm is an integral part.

305. Thus, the Explanatory Memorandum (and its contents) cannot be attributed to Spey by means of the general rules of attribution referred to by Lord Hoffmann in *Meridian*, i.e. the principles of agency. Had the Explanatory Memorandum been prepared by Spey's lawyer, and on its instructions, there might have been an argument that it could be so attributed (although the absence of any minute or resolution giving instructions for its preparation and/or its contents being adopted or approved as an accurate expression of the company's intentions makes that doubtful). However Mr Stanford-Tuck's evidence was clear: he was not acting for Spey, and the Explanatory Memorandum had no relevance or legal significance to Spey.

306. Finally, there is no statutory principle requiring a special rule of attribution to be fashioned in this case. Indeed, it would be very surprising if any such rule existed: the issue is how a corporate settlor of a trust expresses wishes as to how the trust should be administered, and in that context the primary rules of attribution are entirely sufficient and appropriate to ascertain what the company did, and did not, express as its wishes.

[59.] For the several reasons stated by Ashley, I accept her submission that the Explanatory Memorandum could not be attributed to Spey as its document.

[60.] Stanford-Tuck described the Explanatory Memorandum as the Yuill Trust Bible. Whilst the document was prepared by Stanford-Tuck it was subject to considerable edition by Hamilton. There is no evidence however that it was prepared by Spey, as its creator Stanford-Tuck expressly stated that he was not instructed by Spey to prepare the document. Stanford-Tuck was acting for Arndilly and for Grampian. I do accept that Johnstone was a common director and the chairman of Spey and Arndilly and that the Explanatory Memorandum was widely distributed among the Family Advisers and the several beneficiaries. Notwithstanding these commonalities, it could not be established, on balance, that the Explanatory Memorandum should be attributed to Spey.

[61.] I am nonetheless required to determine what were the wishes that Spey, as settlor, had for Glenfinnan. The wishes of a settlor is an important element in the exercise of a trustee's discretionary power under a trust. According to the learned authors of ***Lewin on Trusts***:

> 29-045 In a conventional family trust the funds comprised in the settlement are the settlor's bounty. Except to the extent that he has reserved powers to himself or conferred them on third parties, the trustees are the means that he has chosen to benefit the beneficiaries out of property of his own. He could have done so by gifts made directly to them but instead has interposed a trust, so as to make continuing provision for them after his death or to give them the security of a proprietary interest, rather than a precarious dependency on him, or to take advantage of opportunities for tax planning or for a variety of other reasons. So far as the trustees are given dispositive powers, they are to make choices which the settlor could have made himself.
>
> 29-046 Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death. Letters or memoranda of wishes from the settlor are now commonplace; on occasion a precatory clause is inserted in the trust instrument, for example asking the trustees to consider someone as the primary beneficiary. The significance of the settlor's wishes has grown with the growth of wide discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed interests. Without some guidance from the settlor, trustees would often have difficulty in identifying who ought to benefit. "The settlor's wishes", the Supreme Court has held, "are always a material consideration in the exercise of fiduciary discretions". It was previously well established that the trustees are entitled to take serious account of the settlor's wishes and it is the better view that they are bound to do so; the notion that the trustees may be entitled to take it into account but not bound to do so is in our view wrong, for it is either a relevant consideration which in view of its importance ought to be taken into account or an irrelevant one which should not. Where trustees of a discretionary trust could not agree on the manner in which the fund should be distributed, the court took the view that the majority had departed too far from the settlor's wishes, first directing a reconsideration by the trustees and then exercising the powers itself. The trustees may properly be led by the settlor's wishes to take a decision which they would not otherwise have taken. Repeated compliance on the part of a trustee with a settlor's wishes is not indicative of an abdication of duty; it is equally consistent with a properly-administered trust where the trustees have in good faith considered each request of the settlor, concluded that it is reasonable and decided that it is proper to accede to such requests in the interests of one or more of the beneficiaries of the trust. The propriety of deference to the settlor's

> wishes is also reflected in the decisions on applications by beneficiaries for disclosure of letters or memoranda of wishes. Although such applications have met with varying degrees of success, no criticism is made in them of trustees who pay close attention to the settlor's wishes. In a different context, the court has treated it as a sufficient reason for overturning an appointment made by trustees that they believed that they were thereby giving effect to the settlor's wishes when in fact, through a misunderstanding, they were not.

[62.] It is accepted that no formality is required to convey or record a settlor's wishes. According to the learned authors of ***Lewin on Trusts*** at paragraph 29-047:

> 29-047 No particular formality is required to convey or record the settlor's wishes, though a written letter or memorandum is convenient for obvious reasons. His wishes are a material consideration for trustees even when the wishes are not formally recorded. Moreover, trustees are entitled to have regard to the settlor's wishes expressed contemporaneously with the creation of the trust.

In the absence of a formal letter of wishes or other memorandum by the settlor setting out its wishes for Glenfinnan, the Court could look to other material, such as the evidence of witnesses and contemporary documents to discern that intention.

[63.] Whilst the Explanatory Memorandum was not a document of Spey it was certainly a contemporaneous document to reflect what Stanford-Tuck (and those who edited it) understood the nature of the 1990-1992 restructuring, in which he was involved, to have been. I accept on the evidence, that all key players in the restructuring – Johnstone, Hamilton, Duff and Morrison received a copy of the Explanatory Memorandum. On my assessment of the evidence I am satisfied that John was aware of the memorandum and received a copy of it. I also accept that John did not complain or comment about the contents of the Explanatory Memorandum until 1999 when he sought another division.

[64.] Stanford-Tuck, Duff and Morrison, who were all involved in the Yuill Trusts and the 1992 Restructuring, gave evidence that their personal knowledge and understanding was that in 1992 the proposed intention for Glenfinnan was as described in the Explanatory Memorandum. Morrison also gave evidence that the Explanatory Memorandum was approved by Johnstone.

[65.] Dunkley, Deal and Burns all indicate that they learned second hand, that Glenfinnan was intended for future generations of beneficiaries. They all nonetheless accepted that John and Ashley continued to be members of the class of beneficiaries of Glenfinnan. Neither Ashley, nor any of the other witnesses called, could give first hand evidence of the restructuring, its aims and objectives and the plan for Glenfinnan.

[66.] The contemporary documents, in my view bear out that the purpose of the re-organization, and for which Spey and Glenfinnan were created is consistent with a finding that it was intended primarily for future generations of beneficiaries, but not that there had to exist exceptional circumstances for John's generation to benefit. In particular:

(1) Memorandum dated 29 January 1990 from Hamilton to Stanford-Tuck expressing the view that

> "it is right for half the funds [of the 1973 Settlement] to be allocated to the older generation of beneficiaries (George and John) and for the other half to be held for the next generation of beneficiaries (which does not include Piers and Adelicia as adopted children)".

There is a subsequent memorandum dated 16 February 1990 from Hamilton to Duff expressing a similar view, saying:

> "My feeling is that it is right for half the funds to be held for the next generation of beneficiaries (which does not include [John's]

adopted children) and for the other half to be allocated to the older generation of beneficiaries (and their families)".

(2) Aide-memoire of Hamilton dated 20 March 1990 headed, "For confidential discussion with Board of Arndilly" which records the *"intention ... that the 50% fund would be left untouched (i.e. no distributions of income or capital) for the foreseeable future. On that basis [George's] children would eventually take the lot, but this is not inevitable, because [John] and his wife would continue to be beneficiaries and further distributions could be made to them (or to settlements for them and their children's benefit) at some time in the future".*

(Emphasis added)

(3) Memorandum dated 20 March 1990 of Hamilton and Duff which records that:

"the capital of the 50% resettlement would be left untouched for some time and the income allowed to accumulate. It would be open to the trustees to pay either income or capital to the beneficiaries, but, as the basic purpose of the 50% resettlement would be to finance the younger generation of beneficiaries, it would be logical to finance the older generation out of the other trusts".

(4) Letter dated 8 October 1990 from Stanford-Tuck to Johnstone which refers to *"the long term proposal... that one half of the total fund would be held for the next generation".*

(5) Memorandum dated 7 December 1990 from Stanford-Tuck to Hamilton which contains the proposal:

"Assuming Spey Limited is fully funded by the end of March 1991, thought should be given by the Directors to the funding of a new series of settlements by Spey in say July/August 1991. In outline these may comprise:- (a) A long term discretionary settlement for

the benefit of next generation beneficiaries comprising those persons capable of benefitting under the 1973 Settlement".

(6) Memorandum dated 13 May 1991 of Stanford-Tuck outlining a recommendation that the 1973 Settlement and *"the 1991 Helmsdale Settlement"* (the then proposed name for Glenfinnan) *"should be preserved as long term vehicles for the benefit of George's descendants".*

(7) Stanford-Tuck's January 1992 programme for "Phase 3" of the 1990 - 1992 reorganisation addresses *"the factors that the Board of Spey Limited may wish to consider in arriving at a decision"*, notes that the *"quantum of distribution as between the two branches of the family or long term trusts for the next generation is a matter for the discretion of the Board [of Spey]"*, but he records the suggestion that the 1973 Settlement fund *"be notionally divided into two equal parts and that one equal part should be allocated for the long term benefit of the family on broadly similar trusts to those set out in the 1973 Settlement to include only legitimate descendants of the late Viscount Carlow".* Johnstone was sent a version of this document on 5 February 1992 in advance of the Spey meetings of 12 to 14 February 1992, at which Mr Stanford-Tuck was also present.

(8) Spey's minutes of the board meetings of 12 to 14 February 1992, when the directors decided to appoint funds to each of the Willards, Annan, Islay and Glenfinnan settlements, record at point 5 that: *"The Directors took the view that, after the distributions to the Australian Settlements mentioned in Minute 4 and the further distributions referred to in this Minute, sufficient provision would have been made for the adopted children of [John] and that their view on this should be made known to the Trustees of the 1973 Settlement [Arndilly] and the Glenfinnan Settlement [Grampian]".*

[67.] There is also some indicia following the establishment of Glenfinnan as to the intention of Spey and the object for which the trust has been established. Whilst I have considered this material, I have approached it with caution. I accepted that after the death of John ending his natural lineage, and because of the rift which developed between Ashley and Grampian, following the Willards extraction, there may have been the temptation to refocus the objective of Glenfinnan. This indicia included:

(1) Memorandum prepared by the Family Advisers for Ashley in August 2000 indicating that the division of funds in 1992 by Spey *"was intended to be a final decision on the basis that the quarter allocated to each of the two families made full provision for them and the other half should be held on accumulating trusts for future generations".*

(2) The minutes of Grampian's board meeting of 4 April 2001 record the directors' view that Glenfinnan was *"intended to be an accumulating trust for the upcoming and future members of the family".* Johnstone subsequently wrote to Carroll of 5 April 2001, indicating that a decision was taken in 1992 that Glenfinnan *"should be treated as an accumulating trust for the benefit of the younger (and unborn) beneficiaries".*

(3) Grampian, by board resolution dated 3 July 2003, resolved (a) to accumulate the assets of Glenfinnan for the next generation of beneficiaries and not to make any distributions of income or capital for the time being and (b) to keep under review the number and identity of beneficiaries, their needs and beneficial interests and the investment of the trust assets in order to minimise potential tax disadvantages for the beneficiaries in the UK and Australia.

(4) Johnstone's letter to Ashley dated 2 June 2004 told her that: *"In light of the division of the original trust into the several trusts, the trustees are of the view that adequate provision has been made for the first generation beneficiaries namely, George, Davina and you. Accordingly, the trustees are currently of the view that the Glenfinnan trust should be treated as an accumulation trust for the benefit of future generations".*

(5) In a fax to Duff dated 26 July 2004 Johnstone confirmed that Grampian was "treating the Glenfinnan Trust primarily as an accumulation trust for the benefit of the next generation".

[68.] The only real bit of evidence that Glenfinnan was not primarily for the next generation of beneficiaries, is John's letter of 6 July 1999 to Duff. In that letter he sought to advance a position that a further division be made between his family and George's, citing his understanding that such a further division was to occur in the future. John did not provide any support for this understanding other than his own belief. On balance, I did not accept John's position as to Spey's wishes of Glenfinnan. Firstly, in the letter John clearly recognised that there is an indication that the Glenfinnan 1992 Settlement is for the benefit of next generation beneficiaries. This likely comes from his reading of the Explanatory Memorandum which I accept he received. Secondly, having been in receipt of the Explanatory Memorandum since 1992, John made no complaints or inquiry as to the clearly stated indication that Glenfinnan was to be directed for the benefit of the next generation of beneficiaries. Thirdly, John was not the settlor, trustee or family adviser or involved in the mechanics of the 1992 Restructuring, other than in his capacity as a beneficiary. Finally, whilst it was clearly inappropriate for the Family Advisers to have withheld his complaint and request for a further division from Grampian, John does not rise to meet the Family Advisers' challenge to provide support for his view that there was to be a further division of Glenfinnan.

[69.] Having seen and heard the relevant witnesses and considered the evidence advanced at trial, notwithstanding my finding that the Explanatory Memorandum could not be attributed to Spey, I am nonetheless satisfied that its contents generally reflect the intention of Spey. I accept that the object of Glenfinnan was that it was to be a long term accumulating trust primarily for the benefit of next generation beneficiaries. Spey's intention was that the funds were to be

earmarked for the next generation of the heirs of Yuill. I am not persuaded however that it was intended to be as rigid as Grampian asserts, that the intention was such that John and George's generation were only to benefit in exceptional circumstances or "if the unimaginable happened and Ashley lost *all* her money". There is nothing to support this view that the situation would have to be so exceptional and bordering upon unimaginable circumstances.

[70.] I did not accept Ashley's submission that because Spey took the assets of the 1973 Settlement absolutely, the purpose of the restructuring was not highly relevant. Spey acted in respects as the architects of the 1992 Restructuring hoped and expected it to, notwithstanding the stated objective for the transaction not to appear pre-ordained to satisfy tax concerns. Spey established the 4 settlements, entirely in the manner proposed in the 1992 Restructuring, in particular as to the name of the Funds, the beneficiaries for each and the proportion of the total assets received. Whilst tax concerns directed an absolute taking of the assets and an independent exercise of the discretion to avoid the structure being perceived as pre-ordained, this could not, in my view, change what Spey intended for Glenfinnan.

F. Whether Grampian was in breach of trust

[71.] As between the parties there does not appear to be any meaningful dispute as to the nature of the duties of Grampian as trustee or the undoubted right of Ashley as a discretionary beneficiary. In ***Gartside v IRC [1968] AC 553, 617, Lord Wilberforce*** stated:

> *"No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion*

'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes".

Further, in the Privy Council decision in ***Schmidt v Rosewood Trust* [2003] 2 AC 709,** Lord Walker, having considered the decision of Lord Wilberforce in ***McPhail v Doulton* [1970] 2 WLR 1110** stated at paragraphs [40] and [41] as follows:

> *[40] This passage gives a very clear and eminently realistic account of both the points of difference and the similarities between a discretionary trust and a fiduciary dispositive power. The outstanding point of difference is of course that under a discretionary trust of income distribution of income (within a reasonable time) is mandatory, the trustees' discretion being limited to the choice of the recipients and the shares in which they are to take. If there is a small, closed class of discretionary objects who are all sui juris, their collective entitlement gives them a limited power of disposition over the income subject to the discretionary trust, as is illustrated by In re Smith [1928] Ch 915 and In re Nelson (1918) reported as a note to In re Smith. But the possibility of such a collective disposition will be rare, and on his own the object of a discretionary trust has no more of an assignable or transmissible interest than the object of a mere power.*
>
> *[41] Apart from the test for certainty being the same and the fact that an individual's interest or right is non-assignable, there are other practical similarities between the positions of the two types of object. Either has the negative power to block a family arrangement or similar transaction proposed to be effected under the rule in Saunders v Vautier (1841) 4 Beav 115 (unless in the case of a power the trustees are specially authorised to release, that is to say extinguish, it). Both have a right to have their claims properly considered by the trustees. But if the discretion is exercisable in favour of a very wide class the trustees need not survey mankind from China to Peru (as Harman J, echoing Dr Johnson, said in In re Gestetner Settlement [1953] Ch 672, 688-9) if it is clear who are the prime candidates for the exercise of the trustees' discretion.*

[72.] Ashley, as a discretionary beneficiary has no vested entitlement to or interest in the trust property. She is nonetheless imbued with the undoubted right to be properly considered for benefit from the trust property. In keeping with Ashley's right to be considered, Grampian has the concomitant duty to properly consider Ashley's claim on its bounty.

[73.] At the heart of this dispute is the allegation that Grampian has breached its duties as Trustee in failing to properly consider Ashley when it made the 2006 and 2009 Appointments. The specific allegations are contained in paragraph 49(a)-(j) of the Amended Statement of Claim.

[74.] According to Ashley, the primary relief sought by her is that *"the 2006 and 2009 Appointments be set aside and the assets of the recipient settlements (which are held by the Second Defendant Lyndhurst Limited as trustee of the 2006 Trusts, and by Grampian itself as trustee of Moray), be returned to Grampian as trustee of Glenfinnan. In this way, the process that should have happened in 2006 and 2009 (an exercise of the trustee's fiduciary dispositive powers, based on a fair and proper consideration of the claims of* <u>*all*</u> *beneficiaries, including Ashley) can now belatedly take place."* The central question to be determined therefore is whether Grampian breached its duty to Ashley as trustee. Her claims may be properly divided into two categories:

(1) Complaints levelled broadly as to Grampian's unfair treatment of her; and

(2) Allegations of inadequate deliberation on the part of Grampian in making the 2006 and 2009 appointments.

F1 Was there unfair treatment of Ashley by Grampian

[75.] Ashley alleges that she has been treated unfairly by Grampian in breach of its duty to act fairly and in good faith. She cites instances where she says Grampian's performance of the duty had fallen short in her treatment as a beneficiary[3]. The nature of that duty, of fair and reasonable treatment, has been

examined by the learned authors of ***Lewin on Trusts*** at paragraphs 29–034, 29-036 and 29-037.

> Duty of trustees (1)—to act responsibly and in good faith
>
> 29-034 It is said that trustees must act in good faith, though the term is so general as not to be useful without some explanation of the obligations implied in it. Here what is meant is that the trustees must give genuine and responsible consideration to the exercise of their powers.
>
> Rationality and reasonableness
>
> 29-036 A decision of trustees exercising a discretionary power is not to be upset on the ground that they have (in the opinion of the court) acted unreasonably. It is nonetheless quite common for a beneficiary to challenge a decision of trustees on the ground that it is unreasonable, though what is usually meant is that the beneficiary has, or considers that he has, reasonable claim to a decision more favourable to him than the trustees have in fact reached. Here it is useful to distinguish between rationality and reasonableness. The Supreme Court has said (in a different context):
>
>> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions, ... A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."
>
> Although those definitions have not yet been applied in the context of trusts, we consider that they are applicable and that they explain cases in which unreasonableness has been rejected as a ground for upsetting a decision of trustees. The settlor has entrusted the power to the trustees and not to the court. Their decision, it has been held, does not have to be reasonable in the sense that the court thinks it reasonable; in particular, it is not open to challenge merely because the court disagrees with it or the court would have exercised the power differently.
>
> 29-037 No doubt if trustees produce an absurd result or have an absurd reason for a decision it will be right to infer that they have not

[3] Section F of Ashley's Closing Submissions

given genuine and responsible consideration to the exercise of the power or that they have failed to take relevant matters, and only those matters, into account. Old decisions in which the court has interfered where there was an investment, or a failure to change an investment, on a security which was hazardous or insufficient can perhaps nowadays be brought under that head. The decision is vitiated if it was impossible for reasonable trustees to have reached it, a very stringent test derived from public law and there called "Wednesbury unreasonableness", though the usefulness of importing principles from public law has been doubted. Authorities on the similar but distinct question how far the court is able to interfere with a decision of trustees where they are required to form a judgment on a state of facts, though sometimes cited in this context, are not directly in point: the question whether a given state of facts exists is not a matter of discretion and it is much easier for the court to judge whether there was a rational basis for a decision on such a question than whether there was a rational basis for the exercise of a pure discretion.

[76.] Ashley's contention of unfairness surrounds what she describes as:

(1) Grampian's slavish adherence to the policy emanating from that Explanatory Memorandum according her unequal treatment as against the other beneficiaries; and,

(2) the effect and impact of the Family Advisers hostility.

[77.] Having found that the intention of Spey was indeed that Glenfinnan was principally for the next generation of beneficiaries, with the opportunity nonetheless for George and John's generation to benefit, I will focus on Ashley's contention that Grampian was motivated by the hostility of its directors and the Family Advisers against her. This hostility, Ashley says, influenced Grampian to make the 2006 and 2009 Appointments.[4] Remarkably, Ashley does not allege dishonesty on the part of Grampian[5] but complains that "Grampian "*took into*

[4] Amended Statement of Claim para 49(f); Reply para 4(2)

[5] Reply para 4(1)(b)

account the personal views of its directors and the Family Advisers towards Ashley (which were hostile) and allowed itself to be influenced thereby".

[78.] Ashley says that[6]:

(1) The hostility felt towards her by the Family Advisers – and in particular by Duff and Morrison, who were the driving force behind the 2006/2009 Appointments. The hostility was a significant (and improper) factor in the decisions taken in 2006.

(2) Whilst she does not allege that Dunkley or Deal were personally hostile towards her there is some evidence that Johnstone's views about her had been infected to some extent by Hamilton, Duff, and Morrison's aversion towards her. The negative and derogatory way in which the Family Advisers spoke and communicated with Johnstone about her is an obvious reason why his views would have been coloured accordingly.

(3) Stanford-Tuck and two of the Family Advisers had formed the view that she was "*making life difficult*". This she says was a material factor in the decisions that resulted in her exclusion from benefit in respect of 98% of Glenfinnan. She refers specifically to the cross-examination of Stanford-Tuck where he said:

> "*... let's be quite clear about this. I'm certainly of my own view that had Ashley not been making life difficult for everybody at the time, she would still be a beneficiary of the trust, no steps would ever have been taken to exclude her, nor would it even have been thought about.*"

(4) Even though Dunkley and Deal did not personally feel hostility towards her, the way in which the decision-making process occurred meant that the hostility that the Family Advisers felt towards her was a major and causative factor in Ashley's exclusion from benefit.

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[6] Paragraphs 374 et seq. of Ashley's Closing Submission

(5) It is wrong to suggest that the Family Advisers' obvious dislike of her and their negative feelings towards her were irrelevant. She says, because of that hostility, the Family Advisers not only formulated a plan to remove the "*problem*" they believed her to represent, they formulated a proposal intended to give effect to it and controlled the information available to Grampian when deciding whether to approve the proposal.

(6) The evidence at trial has established that there was a plan formulated by the Family Advisers to exclude her. The fact that they may have persuaded Grampian to implement it without making their purpose clear does not change that.

(7) Even if there were mixed motives, the test to be applied in this context is one of 'but for' causation. Based on the evidence of Mr Stanford-Tuck (and Messrs Morrison and Duff, who agreed with him) that test is obviously satisfied.

[79.] Grampian says that its directors were not influenced by the hostility of the Family Advisers and therefore those views are irrelevant; and that the hostility was a reaction to Ashley's conduct and therefore was not 'one-sided'.

[80.] On the evidence, the role of the Family Advisers, included the following:

1. To keep in close touch with the beneficiaries and advise Grampian of their interests and aspirations;
2. To advise Grampian on a wide range of matters concerning Glenfinnan relating to the structure and tax liabilities of the Trusts and for that purpose to take such legal and accounting advice as is necessary;
3. To liaise with Grampian's legal adviser, Stanford-Tuck, and other advisers and convey that advice to the board.
4. To gather and provide the information concerning the circumstances and aspirations of the beneficiaries.
5. To produce proposals and recommendations (such as those which were to become the 2006 and 2009 Appointments).
6. To take the steps for implementation of proposals.
7. Generally to advise the trustees on all matters affecting the trusts, the trust assets and the beneficiaries.

[81.] I accept on the evidence that there was some hostility and animosity towards Ashley by certain of the Family Advisers, particularly Hamilton and Duff. The language used to describe her and motives attributed to her were unfair, unprofessional and unfortunate. Ashley had been described as a problem, a contamination, and in other inappropriate language unbefitting a beneficiary. Certain of the Family Advisers treated Ashley as a threat to the trust structure and a problem to be solved, rather than as a true beneficiary. Even if Ashley bore some responsibility for the breakdown in the relationship due to her stance and actions with respect to the Willards extraction, any resultant hostility could not be justified.

[82.] Whilst I am satisfied that there was some hostility towards Ashley by certain of the Family Advisers (specifically Hamilton and Duff) there was no evidence that it was an attitude which was shared by all of them. Having seen and heard Morrison as he gave his evidence I did not find that he held any hostility towards her although he may have been party to discussions where others expressed animus towards her. Duff, who had been personally close to John, in my assessment, had a poor opinion of Ashley in the period immediately prior to John's death and thereafter. This opinion, fuelled by the acrimonious Willard's extraction, which affected him personally, may have influenced his view that Ashley's continuance as a beneficiary was a threat to the Yuill Structure. Hamilton did not give direct evidence, having died prior to the trial, but is attributed communication which bear the contemptuous language. Although involved in the earlier proposals to exclude Ashley which were rejected, Hamilton was no longer a Family Adviser at the time of the 2006 appointment, having retired in 2005. There was no evidence of any animus by Burns and/or Smith who were the promoters of 2009 appointment and who had never met Ashley.

[83.] Even if Johnstone had been swayed to assume the animus of Duff and Hamilton towards Ashley (which I do not find on the evidence), he was but one of three of the Directors of Grampian. Johnstone was not involved in the 2009 appointment, having already demitted office by that time. Ashley accepted that there was no hostility by Dunkley or Deal towards her and I am also not persuaded that Duff and Hamilton's' poor attitude towards Ashley infected Grampian's decision making process in any material way. On the evidence, it seems that:

(1) Efforts to exclude Ashley for benefit from Glenfinnan were rebuffed by Grampian in 2004 when the proposal was presented by the Family Advisers.

(2) Whilst the refusal to exclude Ashley nonetheless resulted in the resolution of July 2003 that resolution was reflective of what I found to have been the purpose and the initial resolution of Spey. It is a fact that, notwithstanding the possibility for Ashley to continue to receive a benefit, John's bloodline (and the production of future beneficiaries) came to an end upon his death. Whilst it was open to Ashley to prove, if she wished, that a Pilkington advance was appropriate, this didn't change the fact that Grampian considered that they were adequately provided for and John's branch of beneficiaries in Glenfinnan would end on her eventual passing.

(3) There were clear and enormous tax advantages to be gained for the beneficiaries resulting from the appointments. This was a loophole which may not have lasted into the foreseeable future.

[84.] It was open to Grampian, as the trustee of a discretionary trust, after due and proper consideration of all of the interests of the beneficiaries, to appoint all of Glenfinnan to one beneficiary or a group of beneficiaries. When the proposal, which was to lead to the 2009 appointment was advanced to Grampian, the directors did not blindly accept the proposal but determined that a greater sum should be reserved in the event a distribution was needed by Ashley. Albeit

Spey's wishes for Glenfinnan, as I have found, did not view Ashley as someone who should only benefit in exceptional circumstances, the sum reserved, now $11 million, did not, in my view, represent an unfair treatment of her.

[85.] In my view the 2009 appointment had a greater impact on Ashley's capacity to benefit in the future from Glenfinnan than the 2006 appointment. Following the 2006 appointment some 40% of the assets remained in Glenfinnan and available to Ashley to seek a distribution, however only 2% remained following the 2009 appointment. The proposal which resulted in the 2009 appointment could not properly have been said to have been the result of any Family Adviser hostility. The 2009 appointment demonstrates that the impact of any hostility upon the directors of Grampian could only be minimal and challenges any notion that the transactions were solely for the purpose of Ashley's exclusion. I find that the fact that neither Duff, Hamilton nor Johnstone had any influence on the Directors of Grampian at the time of the 2009 appointment diminishes the claim as to the effect and impact of any family adviser hostility.

[86.] Ultimately therefore, notwithstanding any Family Adviser hostility, I did not accept Ashley's assertion that Grampian's real purpose in making the 2006 and 2009 Appointments was to exclude her. I find that the motives upon which Grampian acted, in my view were noble namely the undeniable tax advantages and the repositioning of the assets for the emerging families representing George's branch of the family. On this complaint I am satisfied that Grampian acted fairly, honestly and in good faith in keeping with the settlor's wishes, as I have found them.

F2 Inadequate Deliberation

[87.] When exercising its discretionary fiduciary power, Grampian is duty bound to consider relevant matters and to disregard irrelevant matters. It is common

ground that Grampian knew Ashley was a beneficiary of Glenfinnan and did not consult her. Ashley contends that Grampian failed to understand, relying on its policy for Glenfinnan, that she was a "real" beneficiary with a "real expectation of benefit" from Glenfinnan.[7] Grampian says that, apart from Ashley's mistaken contentions that the funds in Glenfinnan were parked there to facilitate a further division between the two families, Ashley has pleaded no "relevant" but overlooked fact.

[88.] In considering Ashley, Grampian has a duty to consider relevant matters and to disregard irrelevant matters. According to the learned authors of ***Lewin*** at paragraph 29-041:

> "*The trustees are under a duty to take relevant matters into account and ignore irrelevant matters. The duty requires them to inform themselves, before taking a decision, of matters material to it…*".

[89.] Ashley accepts, in her submissions, that "not every failure to consider a relevant matter (or taking into account of an irrelevant matter) amounts to a breach of duty on the part of the trustee: the failure must be one that is sufficiently serious". Whilst Ashley also accepts that "it is impossible to compile a list of all relevant (and irrelevant) matters that will apply to every exercise of a trustee's discretion in all circumstances", she contends that "a properly-informed understanding of the beneficiaries' wishes and needs is central to the proper exercise of any fiduciary dispositive power by a trustee".

[90.] Ashley says that:

> In common with all discretionary beneficiaries under Glenfinnan, [she] was entitled to expect that when Grampian came to exercise its discretionary dispositive powers, it would do so in a manner that was fair and gave proper consideration to her rights and status as a beneficiary of the trust.

[7] Reply at paras 5(7)(c), 5(8)(c), 5(9)(b), 5(10), 6(2)(a))

Judged in the context of [Grampian's duties], it is clear that Grampian's conduct in making each of the 2006 and the 2009 Appointments fell well short of fair and proper consideration of Ashley and her position.

[91.] Ashley says that the evidence of Grampian's directors was that when making their decisions in 2006 and 2009, they believed they were giving effect to the '*objects*' of Glenfinnan set out in the Explanatory Memorandum. She contends Grampian committed a breach of duty in giving effect to the '*objects*' of Glenfinnan set out in the Explanatory Memorandum. She concludes that by having regard to the Explanatory Memorandum (which she says was neither produced by or on behalf of Spey and did not embody the intentions of Spey) Grampian took into account an irrelevant consideration.

[92.] In ***Abacus v Barr* [2003] 1 All ER 763**, a decision of the English High Court, the trustee of a settlement appointed 60% of the trust fund mistakenly believing that he acted in accordance with the wishes of the settlor. Those wishes however was for the appointment of 40% of the trust fund. The High Court, per ***Lightman J***, held the following:

> *What has to be established is that the Trustee in making his decision has (in the language of Warner J in Mettoy Pension Trustees Ltd v Evans [1991] 2 All ER 513, [1990] 1 WLR 1587) failed to consider what he was under a duty to consider. If the Trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the Trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. For example, if the Settlor had wished for an appointment of 40% of the Trust Fund in favour of the sons, but in a letter to the Trustee informing the Trustee of his wishes by reason of a slip by him or a clerical error by his secretary the settlor had stated that he wanted an appointment of 60% of the Trust Fund, and if the Trustee in*

accordance with that (erroneous) expression of wishes had made an appointment of 60%, neither could the Trustee be criticised nor could the appointment be challenged under the Rule. The Trustee took into account the relevant consideration (the wishes of the Settlor) and acted reasonably and properly in relying on the letter as the expression of those wishes. The fact that the Trustee misapprehended the Settlor's true intentions is irrelevant.

[93.] Ashley says that Grampian "did not simply consider the 'Policy' as but one factor to be weighed up by it amongst all of the relevant factors, but relied on it as a complete justification for not considering Ashley and her claims as a beneficiary in the same way as the other beneficiaries". There is some merit to this assertion. The advice from Simon Taube QC in 2006 was that there was a need to consider the claims of all beneficiaries, including Ashley's, and that Grampian needed to ensure that it had sufficient information in order to be able to do so. I agree with Ashley's assertion that this element of the advice given by him appears not to have been passed on to Grampian by either the Family Advisers present at the relevant consultation or by Stanford-Tuck.

[94.] The evidence, which I accepted, reflected a very cursory/curt assessment of Ashley's circumstances and fell short of what a prudent and diligent trustee ought to have conducted. In particular Grampian failed to *give any proper consideration of whether provision ought to be made for Ashley from Glenfinnan* in the context of a resettlement of assets onto new discretionary trusts. The appointments, which resulted in the resettlement were said to have been facilitated principally for tax advantages to Australian residents. Grampian gave no thought as to whether Ashley ought to have her position preserved as a beneficiary of the resettled trust considering that the evidence at trial was that the exclusion of Ashley from the new trusts was not necessary to achieve the advantages that was to justify the 2006 and 2009 Appointments. There was no consideration as to the real value of

the fund remaining (after tax considerations) which was said to have been retained particularly on account of Ashley.

[95.] I am not prepared to hold that there was a requirement for consultation as Ashley argues. (See ***Re Baden's Deed Trusts (No. 1) [1971] AC 424 (at 449), Re Hay's S.T. 1982] 1 WLR 202; Re Manisty's S.T. (above), X v A [2000] 1 All E.R. 490, Re R Trust [2019] SC (Bda) 36 Civ., and Lewin, 28–116.***). But notwithstanding the absence of an obligation to consult, it was accepted by both Ashley and Grampian that Grampian could only properly exercise its discretion if it had sufficient information relative to Ashley's circumstances. In my view Grampian failed to make adequate enquiries of Ashley as to her needs and wishes or to otherwise obtain such information prior to making a decision.

[96.] I did not find that Grampian made any real effort to obtain information on Ashley. The Family Advisers were the main conduit for information between the beneficiaries and Grampian. The relationship between them and Ashley broke down irretrievably in the early 2000s. Grampian knew that to be the case, yet did not establish any meaningful channel of communication directly or indirectly with Ashley as it did with the other beneficiaries. This is so bearing in mind the role of (and need for) the Family Advisers to bridge the connection to a Trustee located on the other side of the world. One would have expected Grampian *to make enquiries as to Ashley's needs and wishes or to otherwise obtain such information before making a decision.*

[97.] In correspondence in 2003 and 2004, Ashley expressed concerns about her position as a beneficiary under Glenfinnan, and in particular, how Grampian would obtain information about her wishes and circumstances. In response, Grampian told Ashley that the trust fund would be accumulated, but that she was free to approach them to make submissions about her "*conditions and needs*". Whilst there was no legitimate expectation that she be consulted, it would be unfair for Grampian to rely on Johnstone's admonition that Ashley contact them if her circumstances change. Instead Grampian proceeded on the basis of old

information from sources known to be adverse to Ashley who were themselves relying upon newspaper reports as to Ashley's circumstances. Grampian was also aware that, notwithstanding the Family Advisers did not act for Ashley, they were actively promoting her exclusion from Glenfinnan prior to proposing the appointments which would have that effect of excluding her from the benefit of the majority of the trust fund.

[98.] In the absence of updated information Grampian could not properly *take into account Ashley's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were being made.* Grampian says that it knew Ashley's position *"in broad terms"* and that position in 2009 was based, in part, on an assumption as to the performance of the Willards Trust.

[99.] Before leaving this issue I am compelled to make a brief comment. Although not a legal requirement, for a decision as momentous as the appointment of 98% of Glenfinnan, one would have expected that Grampian, as a prudent and cautious trustee, would have sought to have protected itself by seeking the blessing of the Court with respect to the decision. It could have likely have avoided this contentious litigation.

F3: Whether the appointments ought to be set aside having regard to any failings on the part of Grampian in making the 2006 and 2009 appointments.

[100.] Whilst I have identified these failings on behalf of Grampian I must now go on to determine whether these failings would amount to a breach of trust warranting setting aside of the appointments. I am satisfied that, for present purposes, the relevant law on the exercise of the courts discretion to set aside appointments made by a trustee, without proper consideration, is to be found in the UK Supreme Court decision in ***Pitt v Holt* [2013] 2 AC 108.**

[101.] In ***Pitt v Holt*** the UK Supreme Court sought to explain the so-called rule in *Hastings-Bass*, which concerned trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into consideration. The rule in Hastings-Bass was succinctly stated in ***Sieff v. Fox [2005] EWHC 1312 (Ch)*** as follows:

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.

[102.] ***Pitt v Holt*** concerned the joint appeal of Pitt v Holt and Futter v Futter. The short facts of the respective cases are as follows:

> **<u>Pitt v Holt</u>**: Mr. Pitt, was injured in a road traffic accident in 1990 ultimately resulting in his wife being appointed his receiver by the Court. She compromised his personal injury claim and received a lump sum payment and an annuity. Both the lump sum payment and the annuity were transferred into a discretionary trust, upon the advice of her professional advisers in 1994. In 2003 it was realised that the trust attracted inheritance tax charges. These charges could have been avoided as a disabled person trust, within the meaning of section 89 of the UK Inheritance Tax Act 1984. When Mr. Pitt died in 2007 his personal representatives contended that the settlement was void, or alternatively voidable, and should be set aside. The Personal representatives sought to rely on the Rule in Hastings-Bass and alternatively on the Court's equitable jurisdiction to set aside voluntary dispositions on the grounds of mistake.
> **<u>Futter v Futter</u>**: The assets of two offshore trusts, which had stockpiled capital gains, were transferred to beneficiaries. The trustee has been wrongly advised that the capital gains could be set against the losses of the beneficiaries. The trustees sought declarations that the transfers were void, or that they were voidable, and should be set aside. The trustees also relied on the Rule in Hastings-Bass.

[103.] The judgment in ***Pitt v Holt*** was authored by ***Lord Walker of Gestingthorpe*** and unanimously agreed by the other justices. Coincidently, as Robert Walker QC, ***Lord Walker*** was the then leading silk who advised Arndilly throughout the 1992 restructuring process. At paragraph [58] ***Lord Walker*** endorsed the distinction drawn by ***Lloyd LJ*** between errors by trustees in going beyond the scope of a power and errors in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (which he termed 'inadequate deliberation').

[104.] At paragraph [73] in ***Pitt v Holt, Lord Walker*** stated:

> **73** In my view Lightman J [*Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch)] was right to hold that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist: see para 64 above). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention.
>
> (emphasis added)

The primary take away here is that not every case of inadequate deliberation will warrant the intervention of the court and only where the inadequacy is sufficiently serious to amount to a breach of duty the court will interfere. That the trustees deliberations have fallen short of the highest possible standards, or that the court would have acted otherwise, is not the test to be applied._

[105.] As to the degree of materiality required before the court will intervene, ***Lord Walker*** stated at paragraphs 91 and 92 as follows:

> *Would or might?*
>
> [91] In his statement of the correct principle (para 127 of the judgment, set out in para 70 above) Lloyd LJ did not provide an answer to the "would or might?" debate. That was not, I think, an oversight. The *Hastings-Bass* rule is centered on the failure of trustees to perform their decision-making function. It is that which founds the court's jurisdiction to intervene if it thinks fit to do so. Whether the court will intervene is another matter. Buckley LJ's statement of principle in the *Hastings-Bass* case (para 24 above) cannot be regarded as clear and definitive guidance, since Buckley LJ was considering a different matter—the validity of a severed part of a disposition, the other part of which was void for perpetuity. In the *Mettoy* case [1990] 1 WLR 1587 itself the trustees had wholly failed to consider (or even to be aware of) an important change in the new rules (affecting the destination of surplus in a winding up of the scheme), at a time when winding up was a real possibility. But Warner J (applying Buckley LJ's "would not" formulation) declined to set aside the adoption of the new rules, because the power over surplus remained a fiduciary power.
>
> [92] It has been suggested (partly in order to accommodate the decision of the Court of Appeal in *Stannard v Fisons Pension Trust Ltd* [1991] Pen LR 225, para 34 above) that "would not" is the appropriate test for family trusts, but that a different "might not" test (stricter from the point of view of the trustees, less demanding for the beneficiaries) is appropriate for pensions trusts, since members of a pension scheme are not volunteers, but have contractual rights. That is an ingenious suggestion, and in practice the court may sometimes think it right to proceed in that way. But as a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. It is common ground that relief can be granted on terms. In some cases the court may wish to know what

further disposition the trustees would be minded to make, if relief is granted, and to require an undertaking to that effect: see *In Re Baden's Deed Trusts* [1971] AC 424, referred to in para 63 above. To lay down a rigid rule of either "would not" or "might not" would inhibit the court in seeking the best practical solution in the application of the *Hastings-Bass* rule in a variety of different factual situations.

[106.] ***Lord Walker*** did not settle on whether the appropriate test is would or might but determined that the choice of either would be fact specific and the court in the exercise of its discretion ought to determine the appropriate test to be applied. He found that the high degree of flexibility was necessary to allow the court to fashion the appropriate remedy in the range of the possible responses. To lay down a rigid rule of either 'would not' or 'might not', ***Lord Walker*** held, would inhibit the court in seeking the best practical solution in the application of the Hastings-Bass rule in a variety of different factual situations.

[107.] At paragraphs 93 and 94 ***Lord Walker*** stated:

> Void or voidable?
> [93] Counsel on both sides readily admitted that they had hesitated over this point, but in the end they were all in agreement that Lloyd LJ was right in holding (para 99) that,
>
> > "if an exercise by trustees of a discretionary power is within the terms of the power, but the trustees have in some way breached their duties in respect of that exercise, then (unless it is a case of a fraud on the power) the trustees' act is not void but it may be voidable at the instance of a beneficiary who is adversely affected."
>
> In my judgment that is plainly right, and in the absence of further argument on the point it is unnecessary to add much to it. The issue has been clouded, in the past, by the difficult case Cloutte v Storey [1911] 1 Ch 18, a case on appointments that are fraudulent in the equitable sense, that is made for a positively improper purpose. Here we are concerned not with equitable fraud, nor with dispositions which exceed the scope of the power, or infringe the general law (such as the rule against perpetuity). We are in an area in which the court has an equitable jurisdiction of a discretionary nature, although the discretion is not at large, but must be exercised in accordance with well-settled principles.

> [94] The working out of these principles will raise problems which must be dealt with on a case by case basis. The mistake claim in Pitt v Holt involves a problem of that sort. But it is unnecessary and inappropriate to prolong what is already a very long judgment by further discussion of problems that are not now before this court.

Lord Walker seems to endorse Lloyd LJ's view, in the court below, that if an exercise by trustees of a discretionary power is within the terms of the power, but the trustees have in some way breached their duties in respect of that exercise, then (unless it is a case of a fraud on the power) the trustees' act is not void but it may be voidable at the instance of a beneficiary who is adversely affected.

[108.] Finally, at paragraph [83] ***Lord Walker*** identified the policy behind the rule in Hastings-Bass, he said:

> But I would accept that there have been, and no doubt will be in the future, cases in which small variations in the facts lead to surprisingly different outcomes. That is inevitable in an area where the law has to balance the need to protect beneficiaries against aberrant conduct by trustees (the policy behind the *Hastings-Bass* rule) with the competing interests of legal certainty, and of not imposing too stringent a test in judging trustees' decision-making.

[109.] Not surprisingly Grampian says that the appropriate test is the "would not have" test whilst Ashley maintains that it is the less demanding test of "might have". Ashley's primary submission is that Grampian's inadequate deliberation was sufficiently serious to amount to a breach of duty on its part. She nonetheless says that a submission that Grampian would not have acted differently, if it had performed its duty to give fair and proper consideration to Ashley, is unsustainable on the law and on the facts. Grampian's primary submissions is that on the facts of this case, the distinction between "would not" and "might not" makes no difference to the outcome.

[110.] Ashley says at paragraphs 421-423 of her closing submissions:

421. In Gany Holdings (PTC) SA v Khan [2018] UKPC 21, the Privy Council (on appeal from the BVI) went further and held that showing that the trustee '*would*' or '*might*' have acted differently is "*relevant but not decisive*" and that the Court has a flexible discretion to exercise.

422. Thus, as a matter of law:

a. There is no separate requirement of showing that Grampian *would* or *might* have acted differently had it taken all relevant matters into account: that issue is merely one factor for the Court to consider in the exercise of its flexible discretion.

b. In so far as it is a relevant factor, the appropriate standard in the context of a failure to properly consider a beneficiary under a discretionary trust is *might* rather than *would*. The reason for this is that if the beneficiary's right is to be considered within a broad range of discretion, it will only be in the rarest of case where it can be shown that the trustee *would* have acted differently. Were that to be the threshold test, the duty of proper consideration would be robbed of any substance.

c. The test must be an objective one and not a subjective one: the question is not whether *Grampian* might have acted differently, but whether the *reasonable trustee* might have done so.

d. If a trustee were able to persuade the Court that a reasonable trustee could not have come to a different decision (that is, that there was only one possible outcome in the circumstances), then that would be an answer, but short of that, in circumstances where there is a real possibility that a trustee acting properly might have reached a different decision had a proper process been followed, a discretionary beneficiary's right to fair and proper consideration can only (and must) be given effect by the flawed exercise of discretion being set aside, so that that fair and proper consideration can be given by an independent and fair-minded trustee.

423. On the facts of this case, it is obvious that a reasonable trustee could easily have come to a different conclusion. The size of the trust fund was such that any manner of provision could have been made – it may have involved a capital distribution being made to Ashley, or including Ashley as a discretionary beneficiary under the new settlements (to which there was no objective impediment), such that – at the very least – the financial security she derived from being a discretionary beneficiary of Glenfinnan was preserved.

[111.] I do not accept a submission that there is no longer a causation factor in deciding whether to set aside the disposition as a result of the Privy Council decision in ***Gany v Khan***. I accept Grampian's submission that:

> In Gany, Lord Briggs said at para 54: "There is no dispute about the applicable legal principle ... they are now to be found in the judgment of the Supreme Court in Pitt v Holt ..." Accordingly, it is plain Lord Briggs was not intending to extend or depart from Pitt v. Holt. In para 92 of Pitt v Holt Lord Walker discussed obiter the causation requirement, but he did not dispute its existence; instead, he considered whether it was necessary to establish the trustee would, or might, have acted differently if properly informed. Lord Briggs' reference to this question being "relevant, but not decisive" merely means that, even if the causation requirement is satisfied, the Court still has a discretion to grant or refuse the remedy."

[112.] Grampian says at paragraphs 78 and 81 of its written submissions:

> [78] Following Pitt v. Holt, Grampian submits that where a beneficiary of a family trust seeks to set aside the trustee's exercise of a power of appointment, the law in England is now as follows:
>
> a. a trustee exercising a discretion has a duty to deliberate adequately – i.e. to consider relevant matters and to disregard irrelevant matters;
>
> b. where a trustee exercises a discretion having failed to deliberate adequately, the exercise will be voidable only if, absent the failure, the trustee would have acted differently;
>
> c. the Court will intervene only if the trustee's failure is sufficiently serious to amount to a breach of duty; so the duty, while rigorous, is not strict and not every inadequacy in a trustee's decision-making process will amount to a breach of the duty;.

d. the Court has a discretion in the matter, and may decide whether or not to let a voidable transaction stand.

...

[81.] A relevant consideration is one which a trustee should consider, not one which he merely might consider: see Sinclair v. Moss [2006] VSC 130 (at [17(3)]). This duty to consider relevant considerations imposed on the trustee is lenient. The trustee will not be taken to have breached its duty merely because its decision could have been better informed. [See Scott v National Trust [1998] 2 All ER 705, 717/8] The Court must find that the trustee's omission relates to a failure to consider a relevant matter which is so significant that it is irrational to fail to take it into account: see Lewin (at 29–042) - "[t]he duty to take relevant matters into consideration is in our view best regarded as an element in the duty to act responsibly, so that the trustees must have a rational basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational."

[113.] In the Cayman Islands case of ***Barclays Private Bank and Trust (Cayman) Ltd v. Chamberlain***[8], in the English case of ***Betafence Ltd v. Veys***[9] and (obiter) in the Jersey case of ***Re the Green GLG Trust***[10] the Courts have accepted and applied the "would not" test. I am satisfied that in the circumstances of this case the appropriate test to employ in determining whether any inadequacy in Grampian's deliberations was material (or serious) is the "would not" test as opposed to the "might not" test. Whilst I bear in mind Lord Walker's view that the "would not" test might sometimes be more appropriate in the context of the exercise of powers in family trust, I am also persuaded that it is appropriate having regard to my finding as to primary purpose of the Glenfinnan settlement. That primary purpose being primarily for the benefit of the next generations of beneficiaries.

[114.] On the evidence, I am not satisfied that Grampian or the reasonable trustee would not have made the appointments had it given adequate deliberation to Ashley's circumstances. On the evidence it is clear that Ashley, to use the phrase of Mr

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[8] [2004] ITELR 302
[9] [2006] EWHC 999 (Ch)
[10] [2002] 5 ITELR 590, at [29]

Rajah QC, is fabulously wealthy. At paragraph 26 of Grampian's skeleton argument, it accurately summarizes Ashley's financial position:

> 26. Ashley is financially very well off, as a result of the 1990 - 1992 distributions of $50 million to the Dawson-Damer 1990 Trust and the Willards Settlement, as well as the provision made for her from John's valuable free estate after his death. This is clear from Ashley's affirmation sworn on 9 November 2018. Under John's will Ashley, Piers and Adelicia were equally entitled to John's free estate, and Ashley's one third share amounted to over US$ 12.5 million. In 2001 she bought a house in Sydney for $2 million which in 2019 she said was worth $14 million. At the time of the 2006 and 2009 Appointments over US $100 million was held either by Ashley outright or in discretionary trusts of which she was a beneficiary (excluding Glenfinnan).

[115.] Grampian says at paragraphs 23 and 24 of its closing submissions:

> 23. Ever since John's death in June 2000, Ashley has been a very wealthy lady by any standards, as a result of the distributions made in 1990 – 1992 from the 1973 Settlement and John's estate. Para. 26 of Grampian's skeleton argument summarised the evidence showing that at all material times Ashley has been entitled to assets worth over $100 million either in her own right or as a beneficiary of the various Dawson-Damer and Willards settlements.
> 24. The directors of Grampian might not have known the precise figures relating to Ashley's wealth, but they knew sufficient information about John's estate and the settlements to be satisfied that Ashley was very wealthy. Sir Geoffrey had written to Ashley on 2 June 2004 to say that Grampian would proceed on the assumption that Ashley and the other first generation beneficiaries were adequately provided for, unless it heard from Ashley to the contrary. Since then, Ashley has never suggested to Grampian or the Court that she is not wealthy or financially secure.

[116.] Having regard to Ashley's considerable wealth, her fairly stable circumstances, her age at the time of the appointments, and the primary purpose of the fund (being for the next generation of Yuill descendants) I find that it could not be said that Grampian or a reasonable trustee would not have made the appointments had it given adequate deliberation to Ashley's circumstances. In which case, the inadequate deliberation was not sufficiently material to amount to a breach of trust on the part of Grampian.

Conclusion

[117.] In the circumstances therefore Ashley's claim is dismissed.

[118.] I will hear the parties as to costs, in the event something other than the usual order for costs following the event is being advanced.

[119.] I could not leave this matter without formally thanking counsel appearing for both Ashley and Grampian and their teams both locally and in London for their professionalism, industry and assistance provided during the course of this trial, which had to be conducted in less than ideal circumstances, during the Covid-19 pandemic.

Dated this 17th day of January 2022

Ian R. Winder

Justice