ENGLAND AND WALES / JUDGMENT

X v A & Ors

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Neutral Citation Number: [2005] EWHC 2706 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION Case No: HC04C00472 Royal Courts of Justice Strand, London, WC2A 2LL Date: 29/11/2005 Before : THE HON MR JUSTICE HART

- Between: X
- and - A and Others Claimants Defendants
- - - - - - - - - - - - - - - - - - - -
- Mr Nicholas Le Poidevin (instructed by Brabners Chaffe Street, of Liverpool) for the Claimants. The First Defendant appeared in person. Mr Mark Hubbard (instructed by Paris Smith & Randall LLP, of Southampton) for the Third to Seventh Defendants Hearing dates: 15th, 16th November 2005
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Judgment

Mr Justice Hart: 1. 2. 3. This is an application by trustees of a marriage settlement dated 31 st March 1964 for directions as to whether it is open to them to exercise their powers of revocation and re-appointment in such a way as to release a very substantial part of the trust capital to the life tenant who is the wife ("the wife") of the settlor for the purpose of enabling her to devote it to charitable causes, alternatively to appoint it direct to those causes, and at the same time to make out of the remaining fund provision for members of her family some of whom, for one reason or another, were not eligible to benefit under the settlement trusts as originally constituted. I directed the application to be heard in private without any objection from those who appeared before me. The evidence raised a number of issues concerning the family relationships and individual circumstances which merited that privacy. I propose to hand down this judgment in open court and have therefore anonymised all relevant references. The trusts of the marriage settlement were in a not uncommon form for the period. It identified as "Primary Beneficiaries" the wife, the children and the remoter issue of the then intended marriage, and their respective spouses widows and widowers. It identified as "Secondary Beneficiaries" any future wife or widow of the settlor and the children and remoter issue (and their spouses etc.) of the hypothetical second marriage. The Appointed Class, as defined, consisted of both these classes. 4. The trustees were given a general power of appointment exercisable during the trust period (defined by reference to royal lives) among the Appointed Class. The wording relevant for present

purposes directed them to hold capital and income " on such trusts for all or any to the exclusion of the others or other of the members of the Appointed Class...with such trusts for their respective benefit and such provisions for their respective... benefit...in such manner in all respects as the Trustees...in their absolute and uncontrolled discretion may at any time or times and from time to time....by deed or deeds revocable or irrevocable...." That power was then subject to restrictions in the case of the Secondary Beneficiaries which can be ignored for present purposes. 5. Subject thereto the wife had a life interest in income and after her death the capital and income was to be held for the children and remoter issue of the settlor and the wife as they or the survivor should by deed or will appoint and in default of such appointment for such of the children of the settlor and the wife as should attain the age of 21 if more than one in equal shares. 6. The current state of the family is as follows: Children 7. The settlor and his wife had two daughters A and B born respectively in 1965 and 1966 and in January 1969 adopted a son, C, who had been born in 1968. It is common ground that C does not fall within the class of Primary Beneficiaries. Grandchildren 8. 9. A has had one child, a son D, who was born in 1983 and is thus aged 22. It is common ground that D is not eligible to benefit as a Primary Beneficiary, his mother not having been married to his father. B has been married twice. She has three children by her first marriage (E, F & G) the oldest of whom is 17 and the youngest nearly 15, and two children by her second marriage (H & I), aged 4 and 2 respectively. By her second marriage (which has broken down since the inception of the proceedings) she also acquired a stepson, J, whom she wished to be treated equally with her own children so far as practicable. 10. C has had one child, a daughter K, who is aged 12. It is common ground that K is not eligible as a Primary Beneficiary. The 1984 Appointment 11. In 1984 the trustees made a revocable appointment, expressed to be for the benefit of the wife in assisting her to discharge the moral obligation she felt to provide for C (the adopted son) and D (the illegitimate grandson) on an equal footing with her other children and issue. That divided the trust fund into 2 moieties in relation to one of which the Discretionary Beneficiaries were defined as the Appointed Class (as defined in the settlement plus C and D and their respective children and issue (and spouses etc) and in relation to the other of which the Discretionary Beneficiaries were the Appointed Class. 12. The trusts then declared in relation to each moiety were

(1) a trust to pay the income to the wife "with power for the Trustees (being at least two in number) at any time or times during the life of [the wife] to pay transfer or apply the whole or any part or parts of the capital thereof to or for the benefit of [the wife] in such manner as they may from time to time in their discretion by resolution (and without the necessity for any deed or formal appointment) determine" 13. 14. 15.

(2) subject thereto the trustees had a power of appointment in favour of the Discretionary Beneficiaries in similar terms to that contained in the settlement and

(3) subject thereto a discretionary trust of income in favour of the Discretionary Beneficiaries with a power to accumulate during minorities. The value of the Trust Fund has increased very substantially over time no doubt in part as a result of the flotation of the family company from which the settlor's fortune largely originated. By October 2003 its value was

some £2.5m. In the intervening two years it has again grown substantially and is now worth some £3.21m. The trustees have previously exercised the power to advance capital to the wife conferred on them by the 1984 Appointment on two occasions, namely by advancing £350,000 in 1996 and a further £500,000 in 2000. In both cases the reason why the advance was requested seems to have been to enable the wife to give money to charity. At any rate that is the use she made of the advances. In 2001 the wife, who was at that time herself a trustee, requested that her co- trustee make an advance to her of the whole trust fund in order to enable her to make a gift of it to charity. Doubts as to the ability of the trustees to consider and make such an advance while she was herself a trustee led to her retiring as a trustee in December 2002 and the appointment in her place of the second claimant ("Mr Y"). She has since modified her original request so as now to propose that a fund of £750,000 be retained for the benefit of herself and a class of beneficiaries wide enough to include C, D and K. That is a proposal which the trustees wish to implement subject to this court being of the view that it is a course which they may properly take. 16. The particular vehicle by which charity is to be advanced is by advance into a charitable trust ("the Charity") originally established and funded by the settlor and wife and of which they are currently two out of the three trustees. It currently has assets of £4m or so, and operates by making annual grants out of income to other charities. No one has suggested that the causes thus supported are not thoroughly worthy of that support and will not remain such in the future. 17. The present trustees of the settlement are a solicitor Mr X and Mr Y, who is an accountant. In his witness statement in support of the application, Mr X deposes as follows The Settlor is in holy orders in the Church of England. "27. He and [the wife] are rich by most standards but, as Christians, believe that it is their moral obligation to use their wealth for the benefit of others. As a matter of choice they maintain a modest standard of living based upon a pension income received from the Church, the Settlor now being retired. They give effect to their beliefs principally through the Charity. [The wife] donates the predominant part of her income from the Settlement to the Charity." 18. He then describes the Charity, records the fact that the wife has free assets of some £1.1m and that the settlor and his wife own a home which cost £125,000 in 1997, and then goes on to describe the resources of the children and the reasons behind the present proposal in the following terms: "32. significant resources apart from the Settlement. The children of the Settlor and [the wife] have 33. The children are interested in various other settlements, under some of which they have fixed interests and under others of which they have discretionary interests. A list of those settlements appears in the exhibit (p.43-44). Each of the children is in receipt of income from the settlements of at least £50,000 a year after tax, as appears from a schedule of income payments for the year ended 5th April 2002 (p.45). The settlement described as [the settlor's] 1996 Children's Settlement, with assets of about £639,530 as at 30th January 2003, was created by the Settlor from his own free assets. 34. The Settlor has also made provision for the children through various endowment policies, a schedule of which and their future maturity values is included in the exhibit (p.46)." That exhibit shows that from those policies A and B can each expect about £130,000 in 2007, and C some £77,000. The Claimants believe that the interests of the children "35. of the Settlor and [the wife], and their issue are

generously catered for in those ways. That is a view shared by the Settlor and [the wife] themselves, who have said as much to me. As I have mentioned, however, in consequence of discussions between them and their daughter [B], they propose that a sum of £750,000 should remain in the Settlement with an extended class of beneficiaries who could benefit during [the wife's] lifetime or on her death through a discretionary trust. [B] has expressed a wish that [J], though her stepson, should be treated equally with her other children and [the wife] has therefore confirmed in the letter I have mentioned (p29-30) that she acknowledges an obligation to assist him. The sum of £750,000 has been fixed as sufficient to provide a substantial part of the cost (at current prices) of a three-bedrooomed terrace house or maisonette in the Portsmouth area for each grandchild. My co-Claimant has advised on the likely cost of such property (p.47-48). Although I and my co-Claimant will not be binding ourselves as to the future exercise of our discretions, we envisage that payments to the discretionary beneficiaries would only be made on a 'needs' basis and our present view is that both [K] and [D] are already more than adequately catered for as each is the only child of his or her respective parents. To the extent that moneys are not required they would be appointed to the Charity. Parties and consultation In view of the nature and the proposed exercise of the 36. power of advancement, I and my co-Claimant left it in the first instance to the Settlor and [the wife] to discuss it with their children. At the time of the original proposal, to appoint the whole of the capital under the settlement to the [the charity] with nothing available for other beneficiaries, we wrote to the three children, to inform them of it and invite their views. Copies of our letters to them and their replies are included in the exhibit (p.49-63). No reply was ever received from [C]. [B's] response was by email and refers to other issues [B] was dealing with at the time. At that stage the trust fund was valued at a little under £3m. 37. In light of the representations made by [B], the Settlor and [the wife] reviewed their initial proposal and proposed a sum of £750,000 should remain in the settlement as set out in paragraph 35." 19. 20. That remains the proposal save that it is not now proposed that [J] should be included as a beneficiary of the £750,000 fund, and there is to be no power to appoint capital out of that fund to the wife or to charity. The views of the settlor have since been amplified by a letter which he wrote to Mr X in January 2005 which contained the following observations: "The resources from which I created the Settlement were resources over which I had absolute control. You will recall that Mr Hubbard earlier asked whether these resources had been 'advanced to me from other settlements'. The circumstances in which I created the Settlement changed radically soon after I created it, in two respects. At the time of our marriage or very soon after, my father made very substantial provision both for [the wife] and for our children. His intentions were not known to me when I created the Settlement; had they been known to me, it is very doubtful that I would have created it. At the time I created the Settlement [the family company] was a private company. The event of it becoming a public company had major consequences affecting the fortunes of family members and the size of family trusts. I created the settlement understanding from the advice I received that the trustees' discretionary powers included the power to advance to my wife up to the whole of the capital; that the conditions in which they might do so were not defined; and that no potential beneficiary had a claim on the

Settlement as of right and could therefore challenge such a decision of the trustees. In our experience inherited wealth is liable to have many adverse consequences. It is likely to undermine the incentive to work and to gain qualifications for work; to result in hasty and unwise decisions; to affect the relationship between a husband and wife adversely where one partner has power and possessions which the other does not have. It may cause bad relationships between neighbours. We have experienced these and other adverse consequences of inherited wealth in our own family. Inherited wealth may also be a cause of bad relationships within families, as it is becoming increasingly difficult today to define who is a member of the family, and for grandparents to define who are their grandchildren. While [B] was married to [J's father] [J]... ... was our step grandchild. Now that marriage has ended, he has ceased to be our step grandchild. But he has grown up regarding us as grandparents and he continues to be a regular visitor to [B]'s home. It is therefore not only in light of the pressing needs of the world today, but also of what we believe to be in their own best interests, that we wish that the provision made for our grandchildren should not exceed three-fifths of the value of what we have termed an 'average house'. We would further stress that of our three children [A] and [C] are both in a position to make very substantial provision for their children, and [B] has not regarded it as a priority that she should make provision from her own resources for her children. ... We are wondering whether the judge would regard our wishes more sympathetically were we to designate the remaining fund not to [the charity] but to a specific cause, for example to reconstruction in areas of Asia devastated by the recent tsunami or to the relief of victims of AIDS in southern Africa?" 21. 22. 23. 24. Neither Mr Y (the accountant trustee) nor the wife has given direct evidence to the court. The views of B were expressed in a thoughtful, one might almost say model, way in a letter she wrote dated 1st March 2003 (before the original proposal had been modified) in which, after referring to the difficulties which her children had experienced as a result of her having suffered in the past from what appears to have been a severe depressive illness, she said: ".. I do not want the money for me. I would like some provision made for the children. I repeat, I am more than happy to amend my will in the way earlier suggested, so eventually the money will go to charity in line with my parents ...I wouldn't really like a court to over-rule what my parents wishes want anyway. It is their money..." By January this year, however, having learned more about the trust fund, she had become much less accommodating, and she queried how it could be right that funds be advanced out of the settlement for charity (putting her finger on the point as to whether it could really be said to be for her mother's benefit), querying why the earlier advances had been made without obtaining a ruling from the court, stating her view that it would be very unfair if C and D were not provided for out of the settlement, and making the points that speculation as to the average price of houses in the future was impossible and that "more concerning is that it is impossible to tell what the future holds for the children" (noting by way of example that one of her children had recently been diagnosed as dyspraxic and might not prove capable of living a financially wholly independent life). B did not herself appear before me, but her minor children did by their litigation friend, a solicitor, who instructed Mr Hubbard of Counsel on their behalf. A did appear before me. Her written evidence is less easy to

encapsulate by selective quotation than B's but she has in two lengthy and not very focused witness statements voiced various concerns. She accepts in principle the validity of her parent's views that inherited wealth can have its disadvantages, but also complains about her own upbringing having been disadvantaged by the educational choices made for her by her parents. While expressing her concern that her own trust income from other family trusts has in the recent past reduced substantially, the main point repeatedly made by her in her written evidence and her oral representations was that D's particular position has been misconstrued by the trustees who have overlooked the fact that he is unlikely ever to be as favourably treated financially as B's children given the terms of the other family trusts. She expressed the view also that a family discussion could have produced an agreed way forward. 25. 26. Neither D, C nor K have been made parties. Both D and C (and C's wife) were at a relatively late stage in the proceedings served with notices under CPR 19.8A which were in two respects defective. For reasons which I gave in a short judgment delivered on 16th November 2005, I waived those defects. Having since then inspected the court file, I have had doubts as to whether I was correct to do so in D's case since there is an unanswered letter on the court file from A, purportedly on his behalf, expressing a wish that he be joined. It is clear however that all these persons have been made aware of the hearing, and none has taken the opportunity to communicate any view to the court either in support of or in opposition to the proposals. Such evidence as has emanated from A and B has given me only a partial and far from perfect insight into some of the personalities and relationships in this family. Each of A and B has encountered difficulties in their personal lives. A appears on her own account to have difficulties in her relationship both with her parents and with B as well as some experience as a litigant in person against third parties. I refer to this only to record my own view that I do not think that the trustees or the settlor and the wife can be criticised for not having tried in some different way from that actually adopted to achieve a consensual solution. The jurisdiction 27. 28. The jurisdiction which the court is being asked to exercise straddles the first two heads of jurisdiction identified by Walker J. (as he then was) in the judgment from which I quoted in Public Trustee v. Cooper [2001] WTLR 901 at 922, that is to say

(1) the jurisdiction to decide questions of construction as to the ambit of trustees' powers, and (2) the jurisdiction to "bless" a particular transaction proposed by the trustees in relation to which they are not surrendering their discretion to the court. So far as the latter jurisdiction is concerned the task of the court is not to say how it would itself exercise the discretion but merely, in the formulation of Millett J. in Richard v. Mackay (1997) 11 Tru. L. I. 23 at 24: "... to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate."

29. Millett J. went on to add (at page 25) that: “It must be borne in mind that one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. Accordingly the court will act with caution in such a case...” 30. I would add that an additional reason for caution is that for procedural and other practical reasons the adversely affected beneficiaries are likely to be at a relevant disadvantage in such proceedings (assuming even that they have been made parties, which will not always be the case) as compared with the position they might be in if pursuing a hostile action after the event either against the trustees for breach of trust or designed simply to set aside the transaction as flawed. In particular the extent to which it is possible, or (while future discretions remain to be exercised) politic, to obtain full disclosure of all relevant deliberations of the trustees, or to subject evidence to cross-examination, is likely to differ in the two types of proceedings. The proposed transaction 31. 32. I have already briefly described this, but should say something about the way it is proposed to be done. There are two possible vehicles by which it might have been sought to carry it through. One is the power, contained in the 1984 appointment, to pay capital to or apply it for the “benefit” of the wife. The other is the power of appointment contained in the marriage settlement itself under which an appointment can be made for “the benefit” of the wife. The trustees in fact propose to go down the second route, i.e. by revoking the 1984 Appointment and re-appointing under the power contained in the settlement. So far as this case depends on whether the proposed transaction is for the benefit of the wife it has not been suggested that anything turns on which power is used. Two points may however be made. First, it has to be borne in mind that the beneficiaries under the 1984 appointment include C and his wife and issue (including K), and D, whereas those under the settlement do not. The point needs to be made lest it be thought there is any relevance in the fact of those persons not being beneficiaries under the settlement. The position is that, as matters currently stand under the 1984 appointment (which is of course revocable), they do have interests. The second point to note is that the power to benefit the wife under the 1984 appointment is not subject to any wording (such as is sometimes seen) making it clear that it can be exercised without regard to the interests of those entitled in reversion although it is contemplated that it can be exercised without the formality and solemnity of a deed. The power in the settlement can, by express words, be exercised in favour of one beneficiary to the exclusion of all the others but that does not mean (nor was it contended that it does) that in exercising the power the trustees are free to ignore their interests. Benefit 33. In Pilkington v. IRC [1964] AC 612 Lord Radcliffe, construing the phrase “advancement or benefit” in s.32 of the Trustee Act 1925, said (at page 635) that it covered: “any use of the money which will improve the material situation of the beneficiary.” 34. At first sight those words might be thought to be an obstacle to the advance which is here proposed since its purpose has nothing whatever to do with improving the wife’s material situation but rather the reverse. It is designed to enable her to deprive herself of the material benefit currently available to her in the form of income from the substantial assets which she now wishes should be devoted to charitable causes. The justification for nevertheless regarding that as a benefit to her is founded on a line of

cases of which the earliest (and closest to the present) is Re Clore's Settlement Trusts

[1966] 1 WLR 955. 35. In Clore the 21 year old beneficiary of a substantial trust fund had asked his trustees to apply for his benefit a sum (equal to about one-seventh of the fund) to a family charitable foundation. He was entitled to the capital of the fund contingently on attaining 30, in default of which the capital went to his issue if any and subject thereto to his sister and her family in trust. 36. In deciding that it was open in that case to the trustees to make the advance Pennycuick J. held: i) ii) that the improvement of the material situation of the beneficiary is not confined to his direct financial situation but could include the discharge of certain moral or social obligations particularly in relation to provision for family and dependants. that the court has always recognized that a wealthy person has a moral obligation to make appropriate charitable donations and that: "a beneficiary under a settlement may indeed in many cases be reasonably entitled to regard himself as under a moral obligation to make donations towards charity. The nature and amount of those donations must depend upon all the circumstances, including the position in life of the beneficiary, the amount of the fund and the amount of his other resources. Once that proposition is accepted, it seems to me that it must lie within the scope of a power such as that contained in clause 8 of this settlement for the trustees to raise capital for the purpose of relieving the beneficiary of his moral obligation towards whatever charity he may have in mind. If the obligation is not to be met out of the capital of the trust fund, he would have to meet it out of his own pocket, if at all. Accordingly, the discharge of the obligation out of the capital of the trust fund does improve his material situation. The precise amount which the trustees can in any given case apply for this purpose must depend, I think, on the particular circumstances, and in this respect quantum is a necessary ingredient in the proper exercise of the power. It is difficult, for example, to see how the trustees under a power such as that in clause 8 could validly pay over the whole authorized two-thirds to charitable purposes. On the other hand, it is certainly not for the court to say precisely where the line is to be drawn." iii) rejecting the argument that direct material advantage could only be shown if, for example, the beneficiary was under such pressure, public or otherwise, that it would be detrimental to his material position if the donation were not made, that that was: "too narrow a view of what represents a benefit in a material sense to the beneficiary. Once the beneficiary regards the payment as a moral obligation, then it may be for his benefit to be relieved of it." Those words echoed an earlier passage in his judgment in which he said: "Once he recognises this obligation the trustees may properly regard it as improving his material situation to discharge the obligation out of the trust fund, and as I have said, the proportion they propose to apply for this purpose is not excessive." 37. Subsequent cases have further illustrated the width of the word "benefit" in this context: Re C. L. [1969] 1 Ch. 587 (where the transaction involved the extinction of the beneficiary's interest in favour of her adopted children and a consequent saving of estate duty on her death with no real detriment to the material position of the beneficiary), Re Hampden's Settlement Trusts [1977] T. R. 177 (where it involved a settlement on the beneficiary's children relieving him of the "considerable obligation in respect of making

provision for their future" which he would otherwise have owed) and Re Leigh's Settlement Trusts decided in 1980 and now reported in (2005) 19 Tru. L. I. 109 (which concerned a substantial application to a charity founded to maintain the stately home the preservation of which within the family had been one of the stated motivations behind the discretionary settlement out of which the funds had been advanced). 38. It is unnecessary to discuss the facts in these cases in any greater detail. Hampden is, however, pertinent since it contains a useful summary of the propositions to be derived from the cases in the submissions there recorded as having been made by Mr. Browne-Wilkinson QC (as he then was) on behalf of the beneficiary, namely: i) ii) iii) that a power to apply capital for the benefit of somebody is the widest possible formulation of such power; that under such a power the trustees can deal with capital in any way which, viewed objectively, can fairly be regarded as being to the benefit of the object of the power, and subjectively they believe to be so; such benefit need not consist of a direct financial advantage to the person who is being benefited. It may be that he is benefited by benefiting a near relation or by relieving him of moral responsibilities. 39. Hampden is also pertinent since it contains a passage in the judgment of Walton J which seeks to indicate what is meant by "viewed objectively" in the second of the above propositions: "... the figures are such that it is quite possible to regard this provision for the children, although generous, as being for the benefit of [the beneficiary]. By way of reductio ad absurdum if [the beneficiary] had himself no resources whatever then I do not think it would be possible objectively to regard the making of a provision of half a million pounds or thereabouts for his children as realistically conferring a benefit upon him... here 40. 41. 42. he is himself... very well provided for, and that makes all the difference. In every case the question must be one of degree, but there are no such difficulties in this case." Building on those authorities, and in particular on Re Clore, Mr Le Poidevin submitted that the only questions to be answered were whether the wife was reasonably entitled to regard herself as being under a moral obligation to make or procure the making of the proposed gift to charity and whether she did in fact recognise the obligation. As to the latter it was plain on the evidence (he submitted) that she did recognise the obligation and, as to the former, that it was not for the trustees or the court to decide whether they would take the same view. It was enough, he submitted, that the wife's view was one she could reasonably take. It could not be said that her view of her moral obligations was unreasonable. Accordingly, the proposed transaction was capable of being viewed as being for her benefit within the meaning of the authorities, and the pre-conditions for the exercise of the power were therefore fulfilled. The question of the quantum of the proposed exercise of the power only arose, on this submission, at the second stage of the inquiry, namely as to whether the court should give its blessing to the particular exercise of the power which was proposed. In my judgment these submissions place a greater weight on the personal views of the beneficiary than is justified by the authorities. In Clore itself the references made in the judgment to the sense of obligation felt by the beneficiary himself are made with the view of imposing a requirement additional to the initial requirement that there should be an existing moral obligation capable of being recognised by the court. In Clore the court acknowledged that earlier

examples of charitable gifts had been on a very different scale from that proposed before it (Re Walker [1901] 1 Ch. 897 was referred to) but said that the question of the size of the particular gift must depend on: “all the circumstances including the position in life of the beneficiary, the amount of the fund and the amount of his other resources” and added: “If the obligation is not to be met out of the capital of the trust fund, he would have to meet it out of his own pocket, if at all. Accordingly, the discharge of the obligation out of the capital of the trust fund does improve his material situation” That passage emphasised the potentially limiting effect of the requirement (from which none of the authorities have departed) that there be some sense in which the beneficiary’s material situation can be said to be improved by the situation. The same point is made by Walton J’s reductio ad absurdum in Hampden (see para 39 above). In the present case I find it impossible to see how this requirement can be satisfied. It cannot be said that the proposed advance is relieving the wife of an obligation she would otherwise have to discharge out of her own resources if only because the amount proposed to be advanced exceeds the amount of her own free resources. In any event the court has no reason to suppose that, in relation to her free assets, she will regard the advance as having discharged her moral obligation. The moral 43. 44. 45. 46. imperative informing her request to the trustees might logically be thought to apply to her own assets regardless of whether or not an advance is made out of the trust fund. I entirely accept that in distinguishing between the objective existence of a moral obligation on the one hand and the beneficiary's own recognition of it on the other there is a danger of the court being cast adrift in an open sea. How, as Mr Le Poidevin asked rhetorically, can the court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary’s own views on the subject? That is certainly not a question to with the court can give an abstract answer, whether by reference to the Bible or to Bentham, to Kant or the Koran. The answer has to be found in the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth. No such case goes anywhere near recognising the existence of a moral obligation of the extent in question here. For those reasons I do not think that I can conclude that it is open to the trustees to make the proposed advance. In saying that I should not be taken as casting any doubt on the propriety of the earlier advances which were made to the wife in 1996 and 2000. I am conscious that, in so deciding, it may be said that I have confused the question whether the power is inherently capable of being exercised for a purpose such as that proposed with the question whether the extent to which in the instant case it is to be exercised is proper. The first question was described in argument as a question essentially of construction, and in one sense it is. But one must be careful to identify exactly what is being construed. If (in relation to a power such as that considered in Re Clore or contained in the 1984 Appointment), instead of focusing on the phrase “apply for the benefit”, one looks instead to the phrase “pay to” there is a sense in which that phrase raises no difficulty of construction at all. But, as Re Clore itself shows, the ability of the trustees to make a payment to the beneficiary is not decisive of the question whether a particular payment for a particular purpose is within the power. The two questions are inextricably

linked when the court is presented with a particular proposal. Lest there be any doubt on the subject my answer to the question whether the power can in principle (i.e. as a matter of construction) be exercised by advancing money to or for the benefit of the wife so that she may discharge a moral obligation to charity my answer is affirmative. To the question whether the exercise actually proposed can properly be said to be for her benefit the answer is negative. That approach to the matter is sufficient to dispose of this application but was not the only approach urged on me by Mr Hubbard on behalf of the minor defendants (B's children) whom he represented. He asserted various other grounds upon which I should decline to make the order sought by the trustees. These can, I think, be summarised as, first, that there was evidence that the reasons underlying the request had at least as much to do with a desire on the part of the settler and his wife to restrict the amount of funds devolving on their family as with the wife's desire to discharge her own moral obligations; and, secondly, that the decision of the trustees to comply with the wishes of the settler and his wife had been made without a proper consideration of the current situation, future needs and expectations of minors and unborn. The two points to some extent overlap. 47. 48. 49. So far as the first point is concerned, I have already quoted from the settlor's letter to the trustees, and can infer that it expresses a view about the dangers of inherited wealth which is shared by the wife (an inference which is supported if anything by her wish that her moral obligation be discharged in the first place from the trust). It is not clear whether or not it was a view adopted by the trustees in making their decision to accede to the wife's request, but nothing in their evidence serves to distance them from it. So far as the settlor and his wife are concerned it cannot by any stretch be described as an unreasonable one to hold, either as a matter of abstract theory or as a result of their own experience and knowledge of the effect of inherited wealth within their own family. For them the answer to the question whether it is better for the money to go to charity rather than to their children or grandchildren whom they view as already more comfortably off than is or has been really for their own good must present itself as a relatively simple one to answer. That would, however, have been the wrong question for the trustees to have asked themselves. Assuming (contrary to the view at which I have arrived) that it was in principle open to them to make the appointment proposed, the trustees should have asked themselves whether it was proper to make it given the fact that it would severely cut down (and as originally proposed extinguish) the interests of those entitled to capital under the settlement. In considering that question general views about the evils of inherited wealth would in my judgment have been irrelevant. I am not entirely satisfied that the trustees did, in their deliberations, properly discount this inadmissible consideration. I am also not entirely satisfied on the evidence that those deliberations gave as full a consideration as they should have done to the impact of the proposed exercise on the beneficiaries other than the wife herself. The trustees formed the view that the financial interests of those other beneficiaries were "generously catered for" by the interests and expectations they had under other family settlements (including, I would add, the one made by the settlor himself in 1996). The evidence before the trustees was that under those settlements A, B, and C each enjoyed life interests yielding each

approximately £50,000 per annum after tax. It is unclear on the evidence to what extent the trustees took into account the expected capital position of the grandchildren. A point made by B was that given her own relative youth her children were likely to have to wait a long time before coming into capital, and a point made on their behalf was that in any event in current values the amount of their capital entitlement from other sources was relatively modest. A point made by A was that D's position was, by virtue of his ineligibility under one of his grandfather's settlements, likely to be substantially worse off than his cousins. I do not think it necessary for the purposes of this judgment to go into all the evidence which was before the court as to the individual circumstances of the beneficiaries. Suffice to say that in the context of an exercise of a power in favour of one beneficiary which would confer no material benefit on her and her family, it behoved the trustees to look in a very detailed way into the individual circumstances of those in existence who would otherwise be entitled to consideration under the trusts and to consider what might be the potential future calls on the trust from them and those yet unborn. They may well have done so but I cannot be sure on the evidence before me that they did: it is notable that, despite the way in which the £750,000 had been calculated it was not thought appropriate to increase it following the birth of a further child to B. That may be explained by the decision to exclude J, but I cannot be sure. 50. 51. 52. Accordingly, even had I taken a different view as to the permissible ambit of the power vested in them, I would not, exercising the caution I consider appropriate in a case of this kind, have been satisfied that this was a case in which the trustees should be given the directions sought. If that sounds in any way critical of the conduct of the trustees, it is not intended as such. In the circumstances in which this extended family has found itself, and given some of the personalities involved, the trustees are themselves in the difficult position of having fiduciary discretions over a very large trust fund and no very obvious way in which those discretions can currently be exercised. I find it not at all surprising that they should in those circumstances have paid very close attention to the views of the settlor and have come to the conclusion that they should, if they properly could, comply with his wishes and those of his wife. Although I have concluded that the trustees cannot properly carry through the proposed transaction I think that this was a perfectly proper application to make. Accordingly, the order which I propose to make is that the trustees are not at liberty to enter into the proposed transaction, and that the trustees and the 3 rd to 7th defendants should be entitled to their costs out of the fund to be assessed on the indemnity basis. So far as A is concerned she also is entitled to her costs as a litigant in person (those costs consisting of her disbursements in respect of rail travel and a sum of £9.25 an hour in respect of time reasonably spent by her in connection with the proceedings). So far as any detailed assessment was concerned I indicated in the course of closing argument that I was content to dispense with that if agreement could be reached between those represented by Mr Le Poidevin and Mr Hubbard respectively. I overlooked that the litigation friend is a partner in the firm which instructed Mr Hubbard so that the consequence of the order so providing would be that the professionals in the case would be left to agree how much each should have from the fund. That exposes them to the

temptation to take a generous view in the case of doubt. I think this is undesirable. Unless anyone wishes to take the opportunity when this judgment is formally handed down to persuade me to the contrary I shall make an order which only allows detailed assessment to be dispensed with if the costs are not only agreed between the two sets of parties indicated but also by the wife.

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