

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0012

BETWEEN:

[1] YANG HSUEH CHI SERENA
[2] MONG SIEN YEE CYNTHIA
[3] MONG TAK YEUNG DAVID
[4] MONG WAI YEE VIOLA
[5] MONG TAK FUN STEPHEN
[6] MONG JO YEE JOSEPHINE

Appellants

and

[1] EQUITY TRUSTEE LIMITED
[2] WONG PUI FAN
[3] MONG PUI YEE PERLIE

Respondents

BEFORE:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Gerard St. C. Farara, QC
The Hon. Mde. Joyce Kentish-Egan

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Shân Warnock-Smith, QC, with her, Mr. Raymond Davern for the Appellants
Mr. David Brownbill, QC, with him, Mr. Mungo Lowe for the First Respondent
Mr. Nicholas Le Poidevin, QC, with him, Ms. Arabella di Iorio and Mr. Brian Lacy
for the Second and Third Respondents

2014: April 30;
September 29.

Commercial appeal – Trust fund – Entitlements of beneficiaries – Construction of provisions of trust deed – Whether trustee had power to effect variation of trust deed in accordance with wishes of settlor – First appellant removed from list of beneficiaries and entitlements of remaining beneficiaries altered by settlor – Whether ‘words of entitlement’ in annexure of trust deed by which appellants were initially made beneficiaries conveyed immediate, absolute and indefeasible interest in trust assets in favour of appellants –

Whether any power granted in deed to trustee to change beneficiaries and/or percentage entitlements rendered otiose

The first respondent, as trustee of a trust fund which was established by deed dated 20th November 1989 ("the Trust Deed"), brought a claim in the court below, seeking the court's assistance with the proper construction of certain provisions of the Trust Deed. The construction of these provisions would determine the validity of certain actions taken by the trustee which affected the entitlements of the six appellants to the trust's assets, the appellants being the initial, sole beneficiaries of the trust. The ultimate settlor of the trust was one Dr. William Mong (now deceased), who, at the time the Trust Deed was established, was married to the first appellant ("Madam Yang"). The second to sixth appellants are Dr. Mong's five surviving children from his marriage to Madam Yang. The appellants had been made beneficiaries of the trust by item (26) of Annexure I of the Trust Deed. This provision began with the wording 'The Specified Beneficiaries and their respective entitlements are: ...', and went on to list the six appellants along with their respective percentage entitlements to the trust's assets. It is the meaning of these initial words of item (26) that was at the core of the issues raised by the first respondent's claim in the court below.

Madam Yang filed for divorce in February 2001. A couple months later, on 11th April 2001, Dr. Mong, at a meeting with the first respondent, indicated his wish to remove Madam Yang as a Specified Beneficiary of the trust and to alter the percentage entitlements of the remaining five beneficiaries. The following day, the first respondent, by instrument in writing, removed Madam Yang altogether as one of the Specified Beneficiaries in item (26) of Annexure I of the Trust Deed, and deleted the original percentage entitlements of the remaining beneficiaries. These actions of the first respondent (among others) were called into question by letter dated 20th August 2010 from Hong Kong solicitors acting on behalf of the second to sixth appellants, about one month after Mr. Mong had passed away.

In making a determination on the issues raised by the first respondent in its claim brought in the court below, the learned judge, having examined various provisions of the Trust Deed, confirmed the validity of the first respondent's actions and held that on the true construction of the trust, the first respondent had the power to distribute the income and corpus of the trust in accordance with the wishes of the late Dr. Mong.

The appellants appealed, arguing that the initial wording of item (26) of Annexure I which included them in the class of 'Specified Beneficiaries', took precedence over all the other provisions of the Trust Deed, and vested in them, an immediate, absolute and indefeasible interest in and entitlement to the entirety of the assets of the trust, in the percentages stated opposite their names. The respondents argued that item (26) had the limited function of naming and describing the class of 'Specified Beneficiaries' and the first part of the provision, which included 'the words of entitlement' ('The Specified Beneficiaries and their respective entitlements ...'), were not intended to have any legal effect, but were merely a statement of the then 'wishes' of the settlor as to how trustees were to exercise their discretion under the trust.

Held: dismissing the appeal, and confirming the decision of the learned judge that the questions raised in the claim were to be answered in the affirmative, that:

1. The learned judge rightly held that 'the words of entitlement' in item (26) were incapable of being, and were not declaratory of, any trusts enforceable in law. While no particular form of words need be used to declare a trust, 'the words of entitlement' do not speak to a 'trust' being created or pretend to pertain or attach to any particular asset or property of the trust. In item (26), there was no mention of any property, like the corpus or income of the trust, to which other provisions of the Trust Deed expressly applied in declaring various trusts. 'The words of entitlement' were intended to and could only have been meant to operate to name the initial persons constituting the class of 'Specified Beneficiaries', as instructed by Dr. Mong, and the percentage opposite each name was not intended to confer on those persons a fixed and absolute interest in any specific trust property or assets.
2. The 'words of entitlement' fall to be construed by ascertaining what a reasonable person with all the relevant background knowledge at the time of execution of the Trust Deed, and construing the words in their natural and ordinary meaning within the overall context of the scheme of the trust, would conclude was the intention of the parties. The appellants sought to attach too much importance and significance to the natural and ordinary meaning of 'the words of entitlement' (particularly, the word 'entitlement') used in item (26). Their interpretation failed to attach enough weight or importance to the context in which those words were used, in a provision, which, pursuant to clause S(46), was clearly intended to provide a definition of the initial 'Specified Beneficiaries', and not to declare any new trusts which, on any construction, would be clearly in contradiction to and in derogation of the other trusts of the corpus and income declared elsewhere in the Trust Deed. Furthermore, the appellants' approach to the construction of 'the words of entitlement', disregards the second part of item (26), which clearly makes the constituting of the class of Specified Beneficiaries, subject to the powers granted to the trustee under clauses Q1 and Q5 of the Trust Deed, to add to or remove persons from that class. The entire provision at item (26) falls to be construed, and the second part cannot be disregarded.

Re Sigma Finance Corporation (in administrative receivership) [2010] 1 All ER 571 applied.

3. Where specific words are shown by evidence to have been inserted into what is otherwise a standard precedent or document, at the request or behest of one or more of the parties, then a court ought, as a means of determining the intention of the parties, to give some weight to the chosen words or provisions of the parties, especially where other 'standard' provisions may conflict with or be inconsistent with the chosen words or provisions, and, where appropriate, to accord precedence to those words. These are all relevant factors which form the factual and contextual background and, accordingly, fall to be taken into account by a court in construing the relevant provisions of the document.

Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12 considered.

JUDGMENT

[1] **FARARA JA [AG]:** This is an appeal from the judgment and decision of Bannister J delivered 19th June 2013 by which, based on his findings and conclusions therein, he answered in the affirmative the questions posed in the amended fixed date claim form dated and filed on 25th July 2011 (originally filed on 17th June 2011) by the first respondent, in claim no. BVIHC (COM) 0072 OF 2011. By the amended claim form, the first respondent, as Trustee of 'The Huge Surplus Trust', a trust established by deed dated 20th November 1989 and governed by the Laws of the Virgin Islands, sought the court's assistance with and answers to certain questions concerning the construction of certain provisions of the Trust Deed; and, accordingly, the validity of certain actions taken by the Trustee under the settlement, which actions were called into question by letter dated 20th August 2010 from the Hong Kong solicitors representing the second through sixth appellants.

[2] In particular, the first respondent, in its amended fixed date claim, posed the following questions for the determination of the court:

(1) Whether on the true construction of the settlement (the Trust) established pursuant to a deed made between International Holdings Corporation (as Settlor) and the Claimant (as trustee), the Claimant, as trustee of the Trust, had the power, whether by way of a removal from the class of Specified Beneficiaries under clause Q4 of the Trust deed, a variation under clause L1 of the Trust deed, or otherwise, to effect the deletions and variations contained in the Claimant's deed dated 12th April 2001, that is to say:

- (i) To delete Ms Yang Hsueh Chi from the class of Specified Beneficiaries (as defined in clause 26 of Annexure I to the Trust deed); and
- (ii) To delete from clause 26 of Annexure I to the Trust deed the "Percentage of Entitlement" noted opposite the names of the persons referred to in that clause.

(2) Whether on the true construction of the Trust the Claimant as trustee of the Trust has the power, whether in exercise of the powers in Schedules A, L, M and or Q of the Trust deed or otherwise, to distribute the income and corpus of the Trust in accordance with the wishes of the Late Dr. William Mong, as described in the Trustee's Memorandum of 18th May 2009.

[3] The learned judge answered all three questions in the affirmative. It is against these findings and determination of questions relating purely to a matter of the interpretation of certain provisions of an inter vivos settlement, that the appellants take issue in this appeal.

The Cast

[4] Although the Settlor of The Huge Surplus Trust ("the Trust") is stated in the deed as International Holdings Corporation, a company incorporated in Nauru, the ultimate 'settlor' was Dr. William Mong ("Dr. Mong") who was a very successful businessman in the electronics industry in Hong Kong.

[5] At the time of the settlement in 1989, Dr. Mong was married to Yang Hsueh Chi Serena ("Madam Yang"), the first appellant, with whom he had, at that time, five surviving children, namely, the second through sixth appellants, a sixth child having died earlier. Madam Yang and the five surviving children were all named as 'The Specified Beneficiaries' in item (26) of Annexure 1 to the Trust Deed. It is

the proper interpretation, meaning and effect of this provision that is at the core of the questions raised in the claim, and the issues in this appeal.

- [6] Madam Yang obtained a decree absolute of divorce from Dr. Mong on 28th January 2002. Dr. Mong subsequently remarried in August 2005, taking the second respondent, Wong Pui Fan, known as 'Helen', as his wife. The third respondent, Mong Pui Yee, known as 'Perlie', is their daughter. Dr. Mong died on 21st July 2010 leaving Helen as his widow.
- [7] The first respondent is the Trustee of 'The Huge Surplus Trust' and is a company incorporated and providing trustee services under the Laws of the Virgin Islands.

Background to the Trust Property

- [8] Between 1979 and 1989 Dr. Mong's very successful electronics business in Hong Kong was owned almost 100% through a Liberian company, Timmerton Co. Inc. ("Timmerton Liberia"), which held directly 99.8% of the shares in Shun Hing Holdings Co. Ltd ("Shun Hing"), a Hong Kong company and the sole shareholder of the underlying companies through which the electronics businesses were operated. Both Dr. Mong and Madam Yang then held 100 shares each in Shun Hing (accounting for the remaining issued and outstanding shares) in trust for the Liberian company. Under this structure, Timmerton Liberia owned 100% of Shun Hing and, indirectly, the electronic businesses. In turn, Dr. Mong and Madam Yang each held 20 of the 100 issued shares in Timmerton Liberia, with their two sons, David and Stephen, each holding 15 shares, and their three daughters, Cynthia, Viola and Josephine, 10 shares each.¹
- [9] From 1989 when The Huge Surplus Trust was established until 20th June 2001, various changes were made in the structure resulting in a substantial reduction in the holdings of Timmerton Liberia in Shun Hing. By these changes, 50% of the shareholding in Shun Hing (and hence the electronics businesses) was now held

¹ See Diagram 1 on p. 110 of Record of Appeal Vol. 1.

indirectly by The Huge Surplus Trust, as the ultimate beneficial owner of Huge Surplus Ltd., a BVI company. The other 50% of the shares in Shun Hing was held by Timmerton Liberia as to 49.85% directly and 0.1% of the remaining 0.15%, indirectly, through Dr. Mong and Madam Yang who continued to hold 100 shares each in trust for Timmerton Liberia.² During this period, Timmerton Liberia continued to be owned beneficially by Dr. Mong, Madam Yang and their five children, in the same proportions outlined at paragraph 8 above (set out in Diagram 1³). As such, the Trust Property held by and under the Huge Surplus Trust consisted of, not only the Initial Trust Property of USD\$10.00 but, as intended by Dr. Mong when setting up the Trust, a 50% beneficial interest in Shun Hing (and hence the electronics businesses). There were other investments made by Dr. Mong in equities, bonds, mutual funds and other securities, which also became part of the assets of the Trust.⁴

[10] From 20th June 2001, as a result of a further issue of share capital in Shun Hing, the interest or shareholding of Timmerton Liberia was reduced to 9.98% and a BVI company, Timmerton Co. Inc. ("Timmerton BVI"), was allotted 40% of the shares in Shun Hing. The Huge Surplus Trust continued to hold 50% interest in Shun Hing through Huge Surplus Ltd., and Dr. Mong continued to hold 100 shares in Shun Hing in trust for Timmerton Liberia. The other 100 shares, previously held by Madam Yang in trust for Timmerton Liberia, were transferred to the ownership of Timmerton Liberia. The combined effect of these changes and resulting new structure meant that, the third appellant, David, now owned indirectly and beneficially 40.01% of Shun Hing, directly, 0.01% of Shun Hing, and approximately 15% of Timmerton Liberia's 9.98% shareholding in Shun Hing.

[11] It can be seen from this overview, that the beneficial ownership of Dr. Mong's very successful electronics businesses in Hong Kong, was ultimately split 50/50 with

² See Diagram 2 on p. 111 of Record of Appeal Vol.1. The last 0.05% of the shareholding in Shun Hing was held by Dr. Mong's son David directly, since he also held 100 of the issued shares.

³ p. 110 of Record of Appeal Vol. 1.

⁴ See, for example, Trustee's Memorandum of meeting with Dr. Mong on 18th May 2009, Record of Appeal, Vol 1., p. 120.

50% being held under The Huge Surplus Trust, and the other 50% by the third appellant, David, his mother and other four siblings.

The Settlement

[12] The settlement was made by deed prepared at the Hong Kong offices of Ernst & Whinney, on the instructions or at the request of Dr. Mong. The deed was entered into on 20th November 1989 between International Holdings Corporation (a company incorporated under the laws of Nauru), as Settlor, and Equity Trustee Limited (first respondent), as the sole Trustee. It is accepted that the ultimate 'settlor' was Dr. Mong. The deed is a lengthy and comprehensive document, consisting of some 92 pages divided into three parts, all of which are expressly incorporated into and form part of the deed.

[13] The first part of the Trust Deed comprises some of the standard provisions to be found in trust instruments by which a trust of the corpus is declared, and provisions expressly incorporating into the deed the two other parts, providing for how its clauses are to be construed inter se and which are to be given precedence over others. The second part of the document consists of some 18 Schedules, A to S inclusive,⁵ covering a range of matters, including certain powers of the Trustees. Some of the Schedules are important to a consideration of the issues in this appeal, including the central issue of the interpretation and effect of seven words in item (26) of Annexure I. The third part of the Trust Deed is Annexure 1, which includes in item (26) the seven words referred to by the judge as 'the words of entitlement'. They are: 'The Specified Beneficiaries and their respective entitlements ...'. The appellants rely on these words to say that by this settlement they were given, ab initio, a fixed, absolute and indefeasible interest in and entitlement to the Trust Property and assets in the percentages specified in item (26), thereby rendering the Trustee powerless to make any changes or alterations to the class of 'Specified Beneficiaries' and their respective percentage entitlement to the Trust Property. Accordingly, the appellants contend in this appeal, as they

⁵ There was no "Schedule I" included in the Trust Deed.

did in the court below, that the questions posed at paragraphs 1 and 2 of the fixed date claim form ought to be answered in the negative. A proper consideration of these issues requires an examination of certain provisions in the Trust Deed.

Part 1 – The Deed

- [14] By clause 1, which expressly makes Schedules A to S and Annexure I part of the deed, the Trustee shall have the powers, rights and duties set out in the Schedules 'and this Deed is to be interpreted in accordance with the provisions of clause S1 of this Deed and the expressions therein defined are to be construed in accordance with the provisions of clause S1 of this Deed.' Accordingly, one is required to give effect to the definition of specific terms in Schedule S, when construing this Trust Deed.
- [15] Clause 2 is declaratory of the trusts of corpus and income established by this deed. It states:
- "The Trustees HEREBY DECLARE that they shall henceforth stand possessed of the corpus of this Trust upon trust to invest or apply the same under and with the powers set out in this Deed and that they shall henceforth stand possessed of the corpus of this Trust and the income of this Trust upon the trusts and with and subject to the powers and provisions expressed in this Deed concerning the same."
- [16] By clause S1(9), the corpus of the trust is defined to mean the 'Initial Trust Property' and any additions thereto. The Initial Trust Property was USD\$10.00 (Annexure I, item (5)). However, subsequently this included the 50% beneficial interest in Shun Hing and other investments and securities.
- [17] Clause 3 provides, in essence, that where there are 'Additional Clauses Paramount' stated in Annexure I, these clauses are to have and be given paramount effect and all other clauses are to be construed subject thereto, except clauses 4 and 12 upon which nothing turns in this matter. No clauses were listed in item 31 as being 'Additional Clauses Paramount', including item (26) upon which the appellants base their case.

- [18] Clause 4 deals with members of the 'Excluded Class', who cannot have any rights of participation in the corpus or the income of the Trust. Among those who are part of this class are the Settlor and the Trustees (Annexure I, item (24)). Again nothing in this appeal turns on this provision in the Trust Deed.
- [19] The proper law of the Trust is the laws of the British Virgin Islands (clause 9 and Annexure I, item (14)).
- [20] Interestingly, by clause 11, the Trustees may, but are not obliged, to notify any beneficiary that he/she is a beneficiary of this trust 'until such Beneficiary has become absolutely entitled to a vested indefeasible interest in the whole or part of the corpus of this Trust or the income of this Trust and shall then only be obliged to inform such Beneficiary of such interest.' This begs the question whether, upon the creation of the Trust in 1989, the Trustees were under an obligation to inform the persons listed in item (26), namely the appellants, that they were Specified Beneficiaries under the Trust who had become entitled to a fixed, absolute and indefeasible interest in the whole of the corpus or assets of the Trust, in the percentages stated in item (26), or whether no such obligation arose because, on a correct interpretation of the deed and 'the words of entitlement' in item (26), no such immediate and indefeasible interest or entitlement to the whole of the Trust Property in favour of the appellants arose? There is no evidence to suggest that the appellants asserted or claimed any such absolute entitlement to assets of the Trust until after the passing of Dr. Mong.
- [21] Clause 14 provides that the exercise by the Trustees of any power under the deed shall be subject to the provisions of clauses R1, R2, R3 and R4. Clause R1 gives the Trustees an 'absolute and uncontrolled discretion', when exercising any power given to them under the Trust Deed, but in the exercise of that power, they may 'consult the wishes of the Guardian (if any)'. Item (9) states there is no Guardian.

[22] I turn now to a consideration of certain of the Schedules to the Trust Deed, and to particular provisions therein, which have some relevance to the issue of construction, interpretation and entitlement in this appeal.

Part 2 – The Schedules

[23] Schedule A provides for the establishment of separate trusts as to income arising before or after the Vesting Day and as to corpus. As regards 'Free Net Income' of each Accounting Period arising prior to the Vesting Day, clause A1(5) is declaratory of the Trustee establishing 'separate trust funds' to be held upon trust absolutely for the same persons and in the same proportions as the Trustees hold the corpus of the Trust under clause A3(2). By clause A2, income of the Trust arising on or after the Vesting Day is to be held by the Trustee 'for the persons and in the shares for whom they then hold the corpus of this Trust absolutely'. As regards corpus, clause A3(1) provides for the Trustee to hold the corpus of the Trust 'subject to the trusts constituted by or under this Deed with the powers conferred on them by law and under this Deed'. And clause A3(2) empowers the Trustees, from the Vesting Day, to stand possessed of the corpus of the Trust, in trust for such of the Beneficiaries and in such proportions, and if more than one 'in such shares absolutely as the Trustees may by instrument in writing revocable or irrevocable before the Vesting day appoint ...'.

[24] Schedule L is important. It gives the Trustees the power to revoke, vary or add to the existing trusts and to declare new trusts concerning the assets of the Trust. By Schedule L1 the Trustees may, prior to the Vesting Day, by deed, revoke, add to or vary 'all or any of the trusts powers terms and conditions' contained in the Trust Deed, or any prior variations made thereto. This power extends to declaring 'any new or other trusts powers terms and conditions (whether of a beneficial or an administrative character) concerning the assets of this Trust or any of them'. It is by virtue of the power granted by clause L1, and clauses Q1 and Q4 to add and remove Specified Beneficiaries, that the Trustee made or purported to make, in response to the wishes of Dr. Mong, certain changes to item (26) in Annexure I, so

as to remove Madam Yang from the class of Specified Beneficiaries and to delete altogether the percentage entitlements in item (26).

[25] It is to be noted, that clause L1(3)(b) expressly provides that in so far any beneficial interests created by the Trust are revoked, added to, varied or affected by the Trustee exercising its powers under clause L1 , the exercise of any such power 'shall not affect the beneficial entitlement to any amount set aside or held for any Beneficiary absolutely or held as a separate trust fund under the provisions of clause O1 of this Deed prior to the time of the variation revocation or addition'; and clause L1(3)(c), while prohibiting the enlargement of any class of persons falling within the definition of 'Beneficiary' in clause S1(5), expressly states that this does not restrict any power to add Beneficiaries contained in clauses Q1 and Q2 of the Trust Deed.

[26] Can it be said that by the operation of 'the words of entitlement' in item (26), the appellants, as named 'Specified Beneficiaries', became entitled absolutely to the whole or entirety of the corpus or assets of this Trust, in the percentages therein stated opposite their respective names, so as to render, from the date of the Trust, the exercise by the first respondent, as Trustee, of the powers of revocation, addition and variation contained in clause L1, entirely otiose?

[27] Schedule O, relating to 'Separate Trust Funds', is also of some significance. Clause O1 provides, in part:

"Where any amount is directed or determined to be held as a separate trust fund in trust for any Beneficiary absolutely pursuant to any provision of this Deed such amount shall cease to form part of the assets of this Trust and upon becoming subject to such separate trust shall thenceforth be held by the Trustees on a separate trust for such Beneficiary absolutely ..."

[28] Can it be said that the legal effect of 'the words of entitlement' in item (26) was to 'direct or determine' that, from the date of the deed, the entirety of the assets of the Trust were to be held in separate trusts in favour or for the benefit of the

persons then named as 'the Specified Beneficiaries' absolutely, so that these assets would thereafter cease to form part of the assets of the Trust, within the meaning of clause O1, subject only to the power of investment granted to the Trustee by that clause? Ms. Warnock-Smith, QC for the appellants, in her argument before us, placed some reliance on clause O1 as a means of 'harmonising' any apparent inconsistencies between item (26) and other provisions in the deed. In doing so, counsel sought to persuade us that the learned judge had misconstrued clause O1 when, at paragraph 43 of his judgment, he found that clause O1 'could have no application to the supposed entitlements, which were not the result of any such direction or determination'. I will return to this aspect later on in the judgment.

- [29] Schedule Q grants to the Trustees the power to add and remove persons from the classes of Specified and General Beneficiaries. Specifically, by clause Q1, the Trustees may 'at any time or times and from time to time', by instrument in writing, add to the list of Specified Beneficiaries. Likewise, clause Q4 contains a power in the Trustees to 'declare ... that any Specified Beneficiary shall cease to be a Specified Beneficiary'. Similar powers are to be found in clauses Q2 and Q5 relative to the class of General Beneficiaries. It is in purported exercise of the power granted under clause Q4, that the Trustee removed Madam Yang as a Specified Beneficiary on 12th April 2001, (she having filed for divorce in February 2001), as was the expressed 'wish' of Dr. Mong. Her removal from this class of beneficiaries was effected by Deed of Deletion dated 12th April 2001 made under the hand of the Trustee. It is the contention of the appellants, that the power of removal under clause Q4, was not open to the Trustee, and the purported removal of Madam Yang as a Specified Beneficiary in item (26), was ultra vires and plainly wrong. This issue will be addressed more fully later in the judgment. However, it is important here to note that clause Q6 provides:

"The powers contained in clause Q3 clause Q4 and clause Q5 of this Deed cannot be exercised so as to derogate from any interest in the corpus of this Trust or the income of this Trust or in a separate trust fund to which any Beneficiary has previously become indefeasibly entitled whether in possession or in reversion or otherwise."

[30] The question therefore remains, notwithstanding the clear power of removal in clause Q4, did the appellants become entitled to a fixed, absolute and indefeasible interest in the entirety of the corpus and assets of the Trust, from the commencement of the Trust, by virtue of the language contained in the first part of item (26), and in the percentages therein stipulated, so as to render the prohibition in clause Q6 applicable.

[31] Schedule S sets out the definitions of certain key terms used in the Trust Deed. In many of the definitions, reference is made to Annexure I (see, for example: S1(11), (13), (18) to (21), (23), (25), (26), (28), (31), (35), (40) to (43), (45), (46), (48), (50) and (53)). Regarding the term 'Specified Beneficiaries', this is defined at clause S1(46) to mean, any of the persons named in the relevant item of Annexure I 'the Specified Beneficiaries are' and:

"any person who at the time when it is necessary to determine whether he is a Specified Beneficiary falls within the description of a person or class of persons described in that item in the Annexure whether in existence at the Date of this Deed or coming into existence thereafter ... and any person added as a Specified Beneficiary pursuant to clause Q1 of this Deed after he has been so added ..."

[32] It would seem, therefore, that, prima facie, the Trustee had the power under the Trust Deed, to add to or remove persons from the class of 'Specified Beneficiaries', and once added or removed, as the case may be, pursuant to this power, this step became effective in determining, at the relevant point in time, whether a particular person fell within the class of 'Specified Beneficiaries' for the purpose of entitlement to distribution or to share in the assets of the Trust upon the death of Dr. Mong. In other words, as this term is defined at clause S1(46), item (26) of the Annexure was intended, as the learned judge found, to name the 'initial' members of the class of 'Specified Beneficiaries', subject to the powers granted to the Trustees in clauses Q1 and Q4 of the deed to add or remove Specified Beneficiaries. In this way, the 'class' of 'Specified Beneficiaries', entitled to share in the corpus and assets of the Trust upon the death of Dr. Mong, may change from what was originally stated at item (26).

Part 3 – Annexure I

- [33] The appellants place much reliance on Annexure I. It is said, so the argument goes, to be that part of the precedent used to prepare the Trust Deed which, unlike the Schedules, did not comprise printed standard provisions but was a form with blank spaces to be filled in by the parties with the answers and information peculiar to the transaction. As such, the inserted provisions (the appellants contend) ought to be given precedence over any standard or ‘boiler plate’ provision, inconsistent with or contradictory of the words inserted into the Annexure by the parties. In this regard, the appellants call in aid what is known as the **Starsin** principle of interpretation of contracts. This will be considered in greater detail later.
- [34] It is in the Annexure that we find, for example, the name of the trust, its date, the name of the ‘settlor’ and Trustee, a statement of the Initial Trust Property, the Distribution Date and the choice of the proper law of the Trust. These and other statements provide for matters which are peculiar to this Trust. Also, many of the items listed in the Annexure end with the word ‘Nil’. The appellants contend it ought to be inferred that, in each instance, the word ‘Nil’ was inserted into the form by the parties.
- [35] However, certain provisions in the Annexure are more substantial, both in length and content, including item (26) and item (28). There was no evidence led as to how these provisions came to be included in the deed, but the learned judge was prepared to infer, at paragraph 38 of his judgment, that the Trust Deed used was a precedent ‘in which the draftsman filled in spaces, particularly in the Annexure, which required completion where necessary’. He was prepared to go so far as to accept as being ‘obvious’ that the names and figures found in the first part of item (26) must be unique to this Trust, and to ‘believe’ that ‘the words of entitlement’ were not in the precedent used to prepare the Trust. It seems to me that while the first of his inferences is obvious and therefore clearly made out, I confess to not having the same degree of comfort with the second, notwithstanding the reason

given by the learned judge for reaching this inference. It could, in my view, be just as plausible that 'the words of entitlement' ('The Specified Beneficiaries and their respective entitlements') were to be found in the precedent, and what was done to complete this provision, was to insert the names of the persons constituting that class and their respective percentage entitlements. This ought not to be a matter for speculation by the court.

Item (26)

[36] As mentioned, the appellants' case is rooted, almost entirely, on their interpretation of the first part of item (26), and especially 'the words of entitlement', as establishing an absolute and indefeasible interest in and entitlement to the assets of the Trust from its commencement. However, if that were correct, there exists a manifest contradiction and inconsistency within item (26) itself. The first part relied upon by the appellants, is followed by other words which, it is common ground, clearly provide for persons, other than those named initially as 'the Specified Beneficiaries', to be included in the class of Specified Beneficiaries pursuant to clause Q1; and for persons therein named (whether initially or subsequently) as Specified Beneficiaries, to be excluded from that class pursuant to the power granted to the Trustee by clause Q4 of the Deed. It is the appellants' case, that these latter words, being inconsistent with 'the words of entitlement', must be ignored. To the contrary, the respondents contend that the provision at item (26) must be construed in its entirety and, further, were the meaning contended for by the appellants' the intention of the parties, it would have been a simple matter to have deleted the second part of this provision.

[37] The full text of Item (26) reads:

“(26) The Specified Beneficiaries and their respective entitlements are:

| <u>Name</u> | <u>Address</u> | <u>Percentage of Entitlement</u> |
|----------------|---|----------------------------------|
| Yang Hsueh Chi | 6 Essex Crescent Kowloon Tong Kowloon | 20% |

Hong Kong

| | | |
|---------------------------|--------|-------|
| Mong Tak Yeung, David | - do - | 25% |
| Mong Tak Fun, Stephen | - do - | 25% |
| Mong Sien Yee, Cynthia | - do - | 10% |
| Mong Wai Yee, Viola | - do - | 10% |
| Mong Jo Yee, Josephine | - do - | 10% |
| | | <hr/> |
| | | 100% |
| | | <hr/> |

and any person declared in an instrument pursuant to clause Q1 of this Deed to be a Specified Beneficiary whilst such instrument is in effect provided that any person who has been excluded from being a Specified Beneficiary pursuant to the provisions of clause Q4 of this Deed shall not be a Specified Beneficiary from the date of such exclusion unless pursuant to some provision of this Deed he is later again expressly included as a Specified Beneficiary."

- [38] Item (26) must be read and construed having regard to the natural and ordinary meaning of the words used therein, in the context of the entire deed, and specifically clauses L1, Q1, Q4 and Q6 and S1(46).

Item (28)

- [39] Item (28) of the Annexure relative to the 'trusts as to corpus' must also be examined. The learned judge attached much importance to this provision in concluding, at paragraph 36, that the only trusts as to corpus 'constituted by' the deed are the trusts provided for in item (28). Further, (at paragraph 41) he was of the opinion that the meaning of item (26) contended for by the appellants was repugnant to the 'impeccably' drafted trusts in clause A and item (28); and (at paragraph 42) that item (28), as part of a 'fully comprehensive and exhaustive scheme' under the deed, provides for the initial existence of beneficial interests, and clause A3(2)(a) for future interests in the Trust.
- [40] Item (28) is expressly made subject to the trusts constituted by clauses A3(1) and A3(2)(a) of the deed, and concerns 'the trusts as to corpus'. In item (28) these are stated to be (i) trusts for the Specified Beneficiaries living at the Vesting Day, and

if more than one, then in common in equal shares; and (ii) as to any part of the corpus not disposed of under clauses A1 or A3(2)(a) or paragraph (i), upon trust for the General Beneficiaries. The Vesting Day is defined at clause A1(49) to mean the Distribution Date or an earlier date as the Trustees may appoint pursuant to clause S1(49)(a) or the date of expiry of the Perpetuity Period. However, nothing in this appeal turns on which limb of this definition is applicable.⁶

Letters of Wishes and Changes to Specified Beneficiaries and Percentages

[41] As mentioned previously, the Trust Deed is dated 20th November 1989. Around that time, as appears from the documentary evidence, Dr. Mong signed and delivered to the Trustee his first Letter of Wishes dated 4th January 1990.⁷ It commences with these words:

"With reference to the Settlement which has been created by International Holdings Corporation as settlor, I hereby declare that it is my wish that during my lifetime any benefits from the Trust shall be dependent upon my express written directions given to you from time to time.

It is my wish that, in the event of my death ..."

[42] Dr. Mong, in his first Letter of Wishes, names as persons who he would wish to be entitled to receive a distribution of the assets of the Trust upon his death, the same persons named at item (26) as constituting the class of 'Specified Beneficiaries', and with the same percentages. The words appearing at item (26): 'The Specified Beneficiaries and their respective entitlements are' were not included in the first Letter of Wishes. However, the purpose of his first Letter of Wishes was not to add or remove anyone from the class of 'Specified Beneficiaries' already listed at item (26), as was Dr. Mong's purpose in subsequent 'wishes'.

[43] On 11th April 2001, Dr. Mong, at a meeting with the Trustee, indicated his wish to remove Madam Yang (who had filed for divorce in February 2001) as a Specified Beneficiary of the Trust, and to make certain changes to the percentage

⁶ See item (6) – Distribution Date being 31st March 2065.

⁷ See p. 124 of Record of Appeal Vol 1.

entitlements set out in his 4th January 1990 Letter of Wishes, by increasing the entitlement of his son David to 60% and reducing those of the other four children (with Madam Yang) to 10%. These changes were made in manuscript by Dr. Mong on the page of his first Letter of Wishes and initialled by him. On 12th April 2001, the Trustee by instrument in writing,⁸ removed Madam Yang altogether as one of the Specified Beneficiaries in item (26) and deleted altogether the percentages entitlements therein, having resolved, the day before, to make these changes.

[44] By memorandum dated 10th April 2003 made by the Trustee and countersigned by Dr. Mong, the Trustee recorded Dr. Mong's wish that 50% of The Huge Surplus Trust's holding in Shun Hing be distributed upon his death to his son David Mong, and the other assets to various charities.⁹

[45] On 18th May 2009, at a meeting at the offices of the Trustee, Dr. Mong indicated his wish that, upon his death, the 50% interest held by the Huge Surplus Trust in Shun Hing be distributed as to half of that holding in certain proportions/percentages to his four children with Madam Yang, other than his son David, and the other half to his second wife Helen (30% of 50%) and to his daughter by Helen, namely Perlie (20% of 50%). The memoranda recording these wishes were countersigned by Dr. Mong.

[46] Dr. Mong died just over a year later on 21st July 2010.

[47] A letter dated 20th August 2010 (just shy of one month after his death) was sent by solicitors in Hong Kong representing the second to sixth appellants. They asserted, seemingly for the first time, that the Trustee had committed a breach of trust when it had removed the percentage entitlements in item (26) opposite the names of each of the Specified Beneficiaries, following the amended Letter of

⁸ See p. 20 of Record of Appeal Vol 1.

⁹ See p. 119 of Record of Appeal Vol 1.

Wishes dated 11th April 2001 (some 9 years earlier), and had, it was alleged, wrongly altered the fixed, absolute and indefeasible interests and entitlement of the said children to the assets of the Trust, thereby changing the Trust from a fixed trust into a discretionary trust.

- [48] This letter precipitated the proceedings before the High Court in the Virgin Islands, and the judgment the subject of this appeal.

The Issues for Determination

- [49] The central issue for determination in this appeal, as it was in the court below, is whether on a proper interpretation of 'the words of entitlement' in item (26) in Annexure I to the Trust Deed, the appellants (the first wife and surviving five children of Dr. Mong) as the persons named to the class of 'Specified Beneficiaries' when the Huge Surplus Trust was created on 20th November 1989, acquired an immediate, absolute and indefeasible interest in and entitlement to the entirety of the assets of the Trust, so as to render otiose any power granted in the deed to the Trustee to change the Specified Beneficiaries and/or the percentage entitlements set out in item (26), as the Trustee purported to do by Deed of Deletion made on 12th April 2001.
- [50] The learned judge found that the 'words of entitlement' did not have or convey any such interest. It is from this finding that the appellants have appealed.
- [51] Collateral to the central issue, is the question whether other provisions in the deed are inconsistent with or contradictory of item (26) and what precedence, if any, ought to be given to 'the words of entitlement', presumably inserted by the parties into item (26), and whether item (26) or the 'words of entitlement' therein, are to be ignored as being repugnant, as the learned judge found at paragraph 41, to the other provisions in the deed.

The Judgment

[52] The kernel of the learned judge's decision is to be found at paragraph 36 of his judgment:

"In my judgment, however, item (26) conferred upon the Specified Beneficiaries there mentioned no interest, absolute or otherwise, in the trust fund or in its income."

[53] The judge went on to give the reasons for this conclusion:

"The principal reason for this conclusion is that clause A3(1) directs the Trustee to hold the trust fund, until the Vesting Day, subject to the trusts constituted 'by or under' the deed. So far as corpus is concerned, the only trusts 'constituted by' the deed are the trusts set out in item (28) of the Annexure. Those trusts are liable to be defeated, *pro tanto*, by any appointments made by the Trustee 'under' clause A3(2)(a), by any applications of trust property made by the Trustee 'under' clause K2, by any advancements made by the Trustee 'under' clause M1, and by any permissible variations made by the Trustee to the classes of Specified and General Beneficiaries 'under' clauses Q5 or Q6, but, as I read the document, not otherwise. Those are the trusts of The Huge Surplus Trust constituted by, or capable of being constituted under, the trust deed. Those trusts cannot have been cut down by the inclusion, in a provision of the Annexure whose function, as set out in clause S1(46), was to *name* the initial members of the class of Specified Beneficiaries and to *describe* the class of Special Beneficiaries, of words which, if they have any meaning at all (see below), are wholly superfluous to that function."¹⁰

[54] At paragraph 37 of the judgment, after stating the principal submission upon which Ms. Warnock-Smith, QC relies for coming to the conclusion that the words of entitlement in item (26) take precedence over all the other provisions of the Trust Deed (with the possible exception of clause O1), the judge refers to her argument, based on a line of authority considered in **Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)**.¹¹ This line of authority relates to the approach to be adopted by a court when interpreting commercial contracts which make use of a printed standard or 'boiler plate' form of contract, and the precedence which ought to be accorded to words filled in or inserted by the parties in the blank spaces provided, so as to tailor the document for execution to the particulars of their

¹⁰ para. 36 of the judgment.

¹¹ [2003] UKHL 12.

transaction. The authority relied on by Ms. Warnock-Smith, QC is **The Starsin**. However, the learned judge sought to distinguish the 'printed' standard form document used in certain mercantile contracts, from the precedent used to produce the Trust Deed, in concluding that the **Starsin** principle of construction was not applicable when construing item (26). At paragraph 38 of the judgment he states:

"While it may be inferred that the basis for the trust deed as ultimately executed was a precedent then in use in the Hong Kong offices of Ernst & Whinney (who were responsible for setting up the trust), in which the draftsman filled in spaces, particularly in the Annexure, which required completion where necessary, it does not seem to me that this line of authority has any application to the proper construction of item (26) itself. While it is obvious that the names and figures occurring in item (26) must be unique to The Huge Surplus Trust and while there is good reason to believe that the words of entitlement are not to be found in the precedent (because they are outwith the meticulous description contained in clause S(46) of the contents and function of what turned out to be item (26)), it does not follow that the words of entitlement are to be accorded any special status or priority over any other provisions of the settlement."

[55] The learned judge advanced two reasons for his conclusion on this issue. Firstly, he found that the settlement document (Trust Deed) is not a standard commercial form in common use by merchants, but a precedent into which the draftsman made interpolations in order to produce the execution draft of the settlement. In other words, this was not dissimilar from the use by lawyers in their practice of certain precedent forms in order to draft a document or contract for their client, where changes are made to a precedent in order to produce the final version to be executed by the intended parties.

[56] It strikes me that the preparation by the draftsman of this Trust Deed for execution by the parties, did not accord fully with what the learned judge found was the way in which this document was produced for execution by the parties. It does not accord with the usual practice in the legal profession for drafting contracts and other legal documents, whereby standard precedents, to be found either in the precedent books or 'saved' by the lawyer for use in documenting similar transactions, are used to produce the final draft for execution. Invariably, this

practice involves the use of one or sometimes several precedents where, even standard provisions, may have to be tailored to suit the specifics or peculiarities of the particular transaction. The drafting process often involves the amalgamation into one document of provisions from several relevant or useful precedents. Here, it would appear that one trust precedent used for all persons and for all such purposes, and tailored to suit by completing certain parts of the Annexure, was used to produce this Deed. It comprised a number of printed provisions in Schedules which remained unchanged, and an annexure which required certain blank areas to be filled in or completed by the draftsman. Indeed, this was inferred by the judge at paragraph 38 of the judgment.

[57] The second reason advanced by the judge for his conclusion that the **Starsin** principle ought not to apply, was that '[i]t is not possible, by looking at the document, to infer that the settlor intended any one term or provision of it to override any other term or provision – which is the rationale behind the standard form cases.' While I agree that there is no provision in the Trust Deed which stipulates, or from which it can be inferred, that the settlor intended to accord precedence to item (26) or the 'words of entitlement' over other provisions in the deed, the applicability of the **Starsin** principle is not, as I understand it, dependent upon any such provision or inference. It is a tool or principle of construction applied by the courts, as a matter of common sense, when construing contracts used in mercantile transactions involving pre-printed terms, devised and designed over a period of time, to cover many situations, and to which the parties to the contract have never addressed their minds.¹² By contrast, in the lawyer's practice analogy, it is presumed that the parties addressed their minds to all provisions in the contract, even though in reality this is not always the case.

¹² *Homburg Houtimport BV v Agrostin Private Ltd (The Starsin)* [2003] UKHL 12 per Lord Bingham of Cornhill, para. 11.

[58] The learned judge, at paragraph 39, in rejecting the defendants'/appellants' submission that the words of entitlement trump all other provisions of the Trust Deed which are inconsistent with them, concludes as follows:

"The typed/printed distinction simply does not arise on the facts of this case. The mere fact that a draftsman may have elaborated upon a precedent cannot be an aid to the construction of the document as executed. The **Starsin** principle does not apply to the settlement."

[59] He then went on to consider what meaning and effect can properly be given to item (26), which he described as being 'internally nonsensical'. The learned judge posited that if this provision was given the meaning and effect contended for by Ms. Warnock-Smith, QC, it would be 'repugnant to the impeccably drafted trusts set out in clause A and in item (28), which itself is dependent upon clause A3(2)(b)'.¹³ In my opinion this is a correct deduction by the learned judge. Indeed, it accords with Ms. Warnock-Smith, QC's submission that, were she correct in her interpretation of 'the words of entitlement', all other provisions of the deed, with the possible exception of clause O1, must be completely disregarded. At paragraph 41 the learned judge concludes in these terms:

"I have no doubt that item (26) should be ignored as repugnant to the earlier terms of the settlement. No violence is done to the settlement as a result. It works perfectly well without it."

[60] This conclusion, to which counsel for the appellants take issue, was reached by the learned judge, it seems, having also concluded that the Trustee had ample power under clause Q1 of the Trust, at any time, to 'constitute a class of Specified Beneficiaries', as it purported to do on 12th April 2001 when it removed Madam Yang as a Specified Beneficiary and deleted altogether the percentage entitlements in item (26). The judge also found, in the alternative, that the words of entitlement should be ignored as being 'repugnant'.

[61] The learned judge considered whether the 'words of entitlement' were capable in law of conferring on the Specified Beneficiaries, as originally appearing in item

¹³ para. 41 of the judgment.

(26), an immediate, absolute and indefeasible interest in and entitlement to the entirety of the Trust assets. He concluded they were not capable of conferring, on the named beneficiaries, any interest let alone 'an immediate interest in possession' in the trust fund. In doing so, he surmised at paragraph 42:

"A description of persons in a definition clause as having 'entitlements,' in the air and unrelated to any particular property, cannot, against that background, be treated as declaratory of trusts of any sort. The words of entitlement can only be treated, in context, as some sort of interpolated reflection of the percentage interests which Dr Mong's January 1990 letter of wishes desired to be conferred upon the Specified Beneficiaries after his death (by which time, as we know, his wishes had in any event altered). They cannot, in my judgment, be read as words of grant."

[62] Finally, at paragraph 43, the learned judge, rejected Ms. Warnock-Smith, QC's argument that an acceptable rationale for the existence of the other provisions of the Deed could be found in clause O1, on the basis that clause O1 related only to a 'separate trust fund' established by virtue of a 'direction or determination' of the Trustee, and therefore could have no application to the 'supposed entitlements'. He opined: 'If the submissions of Mrs Warnock-Smith, QC were correct, therefore, the whole of the trust instrument other than the definition of the trust fund and the words of entitlement would have been otiose'. For my part, I do not consider clause O1 to be of any assistance to the appellants. It cannot be concluded, on a proper construction of this provision, that the fixed or bare trusts said to have been declared in item (26) in favour of the appellants, were as a result of a direction or determination by the Trustee.

Principles of Construction of Trusts

[63] A trust is a type of contract or instrument by which a settlor declares or establishes a trust or various trusts over certain property for the benefit of stated person(s) or a class of persons called beneficiaries, and may appoint or provide for the appointment of a trustee or trustees in whose possession the property is held, subject to terms of the trust and any powers granted to the trustee in the instrument or by law. There are several different types of trusts which may be established, including a bare or discretionary trust. Trusts may arise by virtue of a

written document or orally or by conduct or a combination of any of these. As a specie of contract, the principles of construction applicable to ordinary contracts, are equally applicable to the Trust Deed constituting The Huge Surplus Trust. It is common ground that these principles, which are well settled, are to be applied when construing item (26) and other relevant provisions of the deed.

[64] It is only regarding the applicability of the **Starsin** principle of construction, that the appellants and respondents differ. The appellants contend for its application mutatis mutandis to the Trust Deed. The respondents, on the other hand, argue that the scope of this principle is limited to 'commercial contracts' and a trust is not such a specie of contract. They agree with the learned judge's conclusion at paragraph 39 of the judgement that: 'The **Starsin** principle does not apply to the settlement'. First, as to the general principles of interpretation of contracts.

[65] The approach of the courts to the construction of contracts underwent, some years ago, what has been described as a 'fundamental change'. In **Investors Compensation Scheme Ltd. v West Bromwich Building Society**,¹⁴ Lord Hoffmann summarised the modern approach to and principles of construction of contracts.¹⁵ In doing so, he emphasised that this approach is to 'assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life'.¹⁶ Put differently, the words and provisions in a contract are to be construed in the factual and, where appropriate, commercial 'context' in which they were used or the contract was entered into, so as to ascertain the intention of the parties.

[66] The principles of interpretation of contracts, as reformulated by Lord Hoffmann in **Investors Compensation Scheme**, were recently approved by the English Court of Appeal in **Rainy Sky SA v Kookmin Bank**.¹⁷ In the judgment of Lord Clarke of

¹⁴ [1998] 1 WLR 896.

¹⁵ At pp. 912-913.

¹⁶ At p. 912G.

¹⁷ [2011] 1 WLR 2900.

Stone-cum-Ebony, it is stated that the 'ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used ...'.¹⁸

[67] This requires a court to ascertain what a 'reasonable person' would have understood the parties to have meant by the words used. That 'reasonable person', is one who has knowledge of all the relevant and admissible 'background' information at the time the contract was entered into, subject to the one exception that evidence of negotiations leading to the signing of the contract and of the parties' subjective intent, are not admissible as part of the relevant background knowledge. It must be emphasised that, in adopting this approach to construction, the court is not seeking simpliciter to find the dictionary or grammatical meaning of the words used in the relevant provision. The court is seeking to determine, as a matter of common sense, the intention of the parties from the meaning of the relevant words, as understood by the reasonable man having knowledge of the relevant background. This approach fundamentally involves a consideration of the words to be construed against the background of the entire document (or series of documents) relating to the particular transaction.

[68] As stated by Lord Neuberger in the very recent case of **Marley v Rawlings and Another**:¹⁹

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

[69] In keeping with the 'common sense approach', while a court will not readily accept that people make linguistic mistakes in preparing formal documents, where it is obvious from the 'background' or 'context' that the parties used the wrong or

¹⁸ At p. 2907.

¹⁹ [2014] UKSC 2, at para. 19.

incorrect language, the law will not attribute to the parties an intention which they plainly did not have.²⁰ Furthermore, in relation to commercial contracts, the courts will seek, as part of the background, to give commercial or business efficacy to its provisions.

The Starsin Principle

[70] Counsel for the appellants has placed much reliance on the approach to construction of certain 'printed' standard form commercial contracts, authoritatively stated in **The Starsin**. This case concerned a commercial transaction, comprising several contracts of carriage evidenced by a series of bills of lading. The central issue for the court's determination was with whom were these bills of lading made, whether with the shipper or the charterers of the vessel. It was clear on the face of the bills of lading that the contracting party was the charterer. The bills of lading consisted of a standard precedent which, on its face, contained boxes that were required to be filled in with certain information, and included a space for the signature of the contracting party. Into that box had been typed the words 'as agent for' and the name of the charterer, followed by two signatures. On the reverse side of the face of the documents, were the printed heading 'Company's Standard Conditions' followed by 35 standard conditions in two dense columns of very small print. Two of these conditions seem to provide for the shipper to be the contracting party.

[71] The House of Lords accepted that when construing a commercial contract in the ordinary way, the court is seeking to 'ascertain and give effect to the intentions of the contracting parties'. Lord Bingham set out four 'rules of construction'. The first is that business sense must be given to business contracts. Secondly, greater weight must be given to terms which the contracting parties have chosen to include in the contract over the standard pre-printed terms. Thirdly, seeking 'perfect consistency and economy of draftsmanship' in complex contracts 'is to

²⁰ See judgment of Lord Diplock in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] A.C. 191, 201.

pursue a chimera'. Fourthly, the main objective in mercantile transactions is certainty. The House came to the conclusion, that the charterer was the contracting party, since the bills of lading were clear and unambiguous on this issue from what had been inserted in the relevant box on the face of each bill of lading, notwithstanding contrary indications in standard conditions 33 and 35. Lord Bingham of Cornhill put it this way:

"But I have great difficulty in accepting that a shipper or transferee of a bill of lading would expect to have to resort to the detailed conditions on the reverse of the bill (and to persevere in trying to read the conditions until reaching conditions 33 and 35) in order to discover who he was contracting with. And I have even greater difficulty in accepting that he would expect to do so when the bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is."²¹

[72] Learned counsel for the appellants relies on the decision of the English Supreme Court in **Marley v Rawlings**, in support of her submission that the **Starsin** principle applies equally to the interpretation of item (26) of the Trust Deed. That case was not concerned with the interpretation of a settlement, but with rectification of certain provisions in a will. Lord Neuberger, delivering the opinion of the Supreme Court, brushed aside any suggestion that the courts ought to adopt a different approach when interpreting a will or any other 'single party' document, from that to be applied when construing a commercial contract. His Lordship stated:

"When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."²²

[73] Again, the central principle when construing legal documents of any kind is to ascertain what was the intention of the parties from the words used and the context in which they were used when the document was executed. Where, as in **The Starsin**, there is a standard printed document used in commercial or

²¹ At para. 15.

²² At para. 20.

mercantile transactions of a particular type, and the document makes provision for the parties to insert certain terms peculiar to the particular transaction, in order to complete the document for signature, then it seems to me, in keeping with the general principles of interpretation of contracts, the fact that the parties inserted those words constitutes an important part of the 'background' to or 'context' within which the document itself was executed and must be construed. Accordingly, the words or provisions inserted by the parties are to be accorded greater importance and, indeed, precedence, when construing specific words or provisions in the document, especially in circumstances of ambiguity and contradictions.

[74] I am of the opinion that generally, a trust deed used as a precedent for preparing trust instruments is not the same as a standard printed commercial or mercantile contract, where the parties fill in a form as part of the document in order to tailor it to their particular transaction. If this were the case, then most legal documents will have to be subjected to the **Starksin** principle of construction, where there exists some ambiguity or contradiction as between one provision and another. However, as I understand her submission, Ms. Warnock-Smith, QC is not basing her case on a general application of this principle to all trust instruments, but specifically this Trust Deed.

[75] Having said this, in my judgment, where, as concluded by the judge with regard to this Trust Deed, specific words are shown by evidence to have been inserted into what is otherwise a standard precedent or document, at the request or behest of one or more of the parties, then a court ought, as a means of determining the 'intention of the parties', to give some weight to the chosen words or provisions of the parties, especially where other 'standard' provisions may conflict with or be inconsistent with the chosen words or provisions; and, where appropriate, accord precedence to those words. In short, these are all relevant factors which form the factual and contextual background and, accordingly, fall to be taken into account by a court in construing the relevant provisions of the document.

Did the 'Words of Entitlement' Convey an Immediate, Fixed, Absolute and Indefeasible Interest in the Trust Assets in Favour of the Appellants in the Percentages stated in item (26)?

- [76] The appellants rely on seven words in the first part of item (26) of Annexure I as vesting in them, as the persons named in item (26) to the class of Specified Beneficiaries of The Huge Surplus Trust, an immediate, absolute and indefeasible interest in and entitlement to the entirety of the assets of the Trust, in the percentages stated opposite their names. As this submission goes, all the other provisions of the settlement, with the possible exception of clause O1, are to be completely disregarded as otiose and of no effect. This includes the second part or limb of item (26) itself, which clearly and unequivocally provides for persons to be added to or removed from the class of 'Specified Beneficiaries' in item (26), pursuant to the powers granted to the Trustees under clauses Q1 and Q4 of the Deed. In other words, (according to the appellants), the second part of item (26) is likewise to be disregarded as being inconsistent with, contradictory of and hence repugnant to the 'words of entitlement'. It would seem that also to be disregarded is clause 2 by which the trusts as to corpus was declared and, likewise, item (28) of the said Annexure.
- [77] The learned judge found at paragraph 36, that the words of entitlement 'conferred upon the 'Specified Beneficiaries' there mentioned no interest, absolute or otherwise in the trust fund or in its income.' His conclusion was based on certain reasons, the principal of which, as he stated, was that clause A3(1) directs the Trustee to hold the trust fund, until the Vesting Day, subject to the trusts constituted 'by or under' the deed; and, as regards the corpus of the trust, the only trusts 'constituted by' the deed are the trusts in item (28), which trusts are liable to be defeated based upon the application, in certain circumstances, of clauses A3(2)(a), K2, M1 and Q5 and Q6. He opined that these are the trusts constituted by, or capable of being constituted under the Trust Deed, and they could not have been defeated by words in item (26) whose function, as defined in clause S1(46), was to describe the 'initial' members of the class of 'Specified Beneficiaries'.

- [78] It is the appellants submission that the 'principal reason' proffered by the learned judge for coming to this conclusion on the 'central' issue, cannot justify his conclusion, as it assumes its truth. By this I understand learned counsel Ms. Warnock-Smith, QC to be saying that the judge, in reaching this conclusion, does not address the question whether the 'words of entitlement', which fall to be construed, do in fact declare bare trusts in favour of the appellants, and were that question to be answered in the positive, those trusts would be constituted 'by or under' the deed.
- [79] Mr. Brownbill, QC, learned counsel for the first respondent, on whose submissions Mr. Le Poidevin, QC for the second and third respondents expressly relies, submits that item (26) has the limited function of naming and describing the class of 'Specified Beneficiaries', and does not declare other trusts in contradiction to the trusts declared in other parts of the deed (identified by the judge at paragraph 36). He submits further that the first part of item (26), including 'the words of entitlement', were not intended to have any legal effect, but were merely a statement of the then 'wishes' of the settlor as to how the Trustees were to exercise their discretion under the Trust. In this context, he makes reference to the judge's statements at paragraph 42 of the judgment, where he characterised the words of entitlement 'as some sort of interpolated reflection of the percentage interests which [Dr. Mong, by his January 1990 letter of wishes] desired to be conferred upon the then Specified Beneficiaries ...'.
- [80] The Trust Deed declared several trusts. Specifically, by clause 2, the Trustees stand possessed of the corpus of the trusts upon trusts to invest and apply it subject to the provisions of the deed. By clause A1(2)(5) provision is made for the Trustees to hold as separate trust funds to which clause O1 applies, the free net income of each accounting period arising prior to the Vesting Day, in trust for the same persons as the corpus is held. Clause A2 speaks to income arising on or after the Vesting Day being held upon trusts for the same persons entitled to the corpus. Clause A3 provides that the Trustees are to hold the corpus until the

Vesting Day 'subject to the trusts constituted by or under this Deed'; and item (28) expressly declares the trust relating to corpus, which are made subject to clauses A3(1) and A3(2)(a).

- [81] Clause K2 gives certain power to the Trustees to give a 'benefit' to other trusts in which one or more of the Beneficiaries of this Trust are beneficiaries, even where the effect of this would be disadvantageous to this Trust or other Beneficiary thereunder. By clause M1 the trustees are given the power of advancement, whereby they may pay, convey or transfer the whole or part of the corpus of the trust to any Beneficiary for his/her benefit or apply the whole or any part of either the corpus or any income of the Trust for the maintenance education advancement or benefit of any Beneficiary.
- [82] Finally, the Trustee has certain powers under clauses Q1, Q2, Q4 and Q5 to add or remove persons from the classes of both Specified and General Beneficiaries and, in this way, to 'defeat' the expectation of any one of the persons named to this class before the Vesting Day. However, by clause Q6 these powers cannot be exercised to defeat an interest of a Beneficiary in the corpus which has become indefeasible.
- [83] While I agree with the learned judge that certain trusts are declared under the clauses listed above either immediately or in futuro, as it relates particularly to the corpus of the Trust and the declaration of 'separate trust funds', all of which may be defeated or limited by the exercise by the Trustee of certain powers, this does not definitively answer the question, central to this appeal, whether 'the words of entitlement' in item (26) simpliciter are declaratory in law of a trust in the assets of the Trust, so as to create an immediate, fixed, absolute and indefeasible interest in the entirety of the trust assets. If those words have this effect, then no power granted to the trustees to add to or remove persons from the class of 'Specified Beneficiaries' can operate to defeat those trusts.

[84] In my judgment item (26), upon a proper construction of ‘the words of entitlement’ therein, does not declare or create any trust in the assets of The Huge Surplus Trust. I do not come to this conclusion based on where in the document the words of entitlement were inserted by the parties or the drafter, although this may be of some consideration in determining the intention of the parties. The fact that they may have been included in an inappropriate or not the most ideal place in the deed, as a matter of forensic drafting, cannot be a basis for concluding that they were not intended to be declaratory of trusts. The words must be construed according to their natural and ordinary meaning within the context of the entire document and the relevant background, to determine whether they evince a clear declaration of trust; and, if so, in favour of whom, and what kind of trust, whether a bare trust or a discretionary trust. Furthermore, in coming to this conclusion on the central issue for determination, I do not accept, as did the learned judge, that the ‘words of entitlement’ are repugnant to the other carefully drafted provisions of the deed.

[85] It is trite law that no particular form of words need be used to ‘declare’ or constitute a trust in property. What is necessary is that the words used against the relevant factual background must evince a clear intention to declare or establish a trust over property in favour of a specified person or persons as beneficiaries.²³

[86] The ‘words of entitlement’ fall to be construed, by ascertaining what a reasonable person with all the relevant background knowledge at the time of execution of the Trust Deed, and construing the words in their natural and ordinary meaning within the overall context of the scheme of the trust, would conclude was the intention of the parties. In **Re Sigma Finance Corp (in administrative receivership)**²⁴ Lord Mance, having concluded that the judge below had attached too much weight to the natural meaning of the words used and not enough weight to the context in which they appear in the document, stated:

²³ Paul v Constance [1977] 1 WLR 527 per Scarman LJ at 531G.

²⁴ [2010] 1 All ER 571.

"Of much greater importance in my view, in the ascertainment of the meaning that the STD would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme. Ultimately, that is where I differ from the conclusion reached by the courts below. In my opinion, their conclusion elevates a subsidiary provision for the interim discharge of debts 'so far as possible' to a level of pre-dominance which it was not designed to have in a context where, if given that pre-dominance, it conflicts with the basic scheme of the STD."²⁵

[87] I am of the opinion that the appellants seek, in their argument before us, to attach too much importance and significance to the natural and ordinary meaning of 'the words of entitlement' (particularly, the word 'entitlement') used in item (26). The interpretation for which they contend, fails to attach enough weight or importance to the context in which those words were used, in a provision, which, pursuant to clause S(46), was clearly intended to provide a definition of the initial 'Specified Beneficiaries', and not to declare any new trusts which, on any construction, are clearly in contradiction to and in derogation of the other trusts of the corpus and income declared elsewhere in the Trust Deed. This approach by the appellants to the construction of 'the words of entitlement', disregards the second part of item (26), which clearly makes the constituting of the class of Specified Beneficiaries, subject to the powers granted to the Trustee under clauses Q1 and Q5 to add to or remove persons from that class. In my opinion, the entire provision at item (26) falls to be construed, and the second limb cannot be disregarded, as the appellants argue.

[88] To accept the interpretation and legal effect contended for by the appellants would be to do violence to or render 'barren' most, if not all, of the other provisions of the Trust Deed. In this regard, I agree with the learned judge's conclusion that 'the words of entitlement' were not intended by the parties, and did not result, in the grant of a fixed, absolute and indefeasible interest in all the assets of the Trust, in

²⁵ At p. 582.

favour of the then class of Specified Beneficiaries. In fact, no such trusts were declared by 'the words of entitlement' and that was not the intention of the parties.

[89] I come to this conclusion notwithstanding the use of the word 'entitlement'. In my opinion, this, in and of itself, is not, in the context of the overall scheme of this Trust, to be taken as declaratory of any trusts or intended to convey to the persons named a fix, absolute or indefeasible interest in any asset of the Trust, even where 'the words of entitlement' are to be accorded some precedence. I am satisfied that the word 'entitlement' was used, not to confer an absolute interest in the Trust Property, but merely to preface the statement of percentages in item (26) as being reflective of the then thinking and wishes of the de facto settlor Dr. Mong. Furthermore, there is no clear statement or certainty as to the nature of the 'entitlement'.

Are the Words of Entitlement Capable of declaring Trusts?

[90] I agree with the learned judge in his conclusion at paragraph 42 of the judgment, that 'the words of entitlement' in item (26) are incapable of being, and was not declaratory of, any trusts enforceable in law. While no particular form of words need be used to declare a trust, these words do not speak to a 'trust' being created or pretend to pertain or attach to any particular asset or property of the Trust. There is absolutely no mention of any property, not the corpus or income of the Trust, to which other provisions of the deed expressly apply in declaring various trusts. In my opinion 'the words of entitlement' were intended to and could only have been meant to operate to name the initial persons constituting the class of 'Specified Beneficiaries', as instructed by Dr. Mong, and the percentage opposite each name was not intended to confer on those persons a fixed and absolute interest in any specific trust property or assets.

Reconciling Inconsistency between 'Words of Entitlement' and Other Provisions – Clause O1

[91] As mentioned above, the appellants, in an attempt to reconcile the obvious inconsistencies between 'the words of entitlement' and other provisions of the Trust Deed which, but for 'the words of entitlement', would have had the effect of creating a discretionary trust of the corpus and income, call in aid clause O1 of the deed. As I understand this line of argument, the appellants contend that the court ought to infer, from 'the words of entitlement' being 'inserted' in the settlement, a matter on which I am not satisfied, and from the judge having found this to be in some way a reflection of the wishes of Dr. Mong, that their inclusion in the deed 'had the effect of controlling the exercise of the dispositive discretions conferred upon the trustee of the Trust'.²⁶

[92] This argument is proffered as a means of 'harmonising' the clauses of the Trust, so as to avoid the conclusion that the words of entitlement are contradictory of other provisions. In this regard, reliance was placed on this passage from **Lewison**²⁷ at paragraph 9.13:

"The court is reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses."

[93] Ms. Warnock-Smith, QC for the appellants submitted that the judge was wrong in concluding that Schedule O was of no assistance in bringing about the required 'harmonisation' of these provisions. At paragraph 43, the learned judge states in answer to learned counsel's submission on this aspect:

"The answer to the submission is that clause O1 provides only for what is to happen to a separate trust fund set aside as a result of a direction or determination of the Trustee. It could have no application to the supposed entitlements, which were not the result of any such direction or determination."

²⁶ See para. 29 of the Appellants' Skeleton Argument dated 17th February 2014.

²⁷ Sir Kim Lewison: *The Interpretation of Contracts* (5th edn.).

[94] I have already set out clause O1 at paragraph 27 above. It is Ms. Warnock-Smith, QC's contention that 'directions' regarding trusts under clause O1, were not required to be events in the life of the Trust, and a harmonious construction of the instrument as a whole can be achieved by regarding 'the words of entitlement' as a *direction* contained in the deed itself, 'to the effect that the respective percentage shares of the Trust corpus be held as separate trust funds for the respective Specified Beneficiaries absolutely'.²⁸

[95] This argument suffers from the obvious fallacy that clause O1 (even assuming that it somehow would be applicable and not rendered otiose based on the appellants' case, like other provisions in the deed), is intended to confer on the Trustee the power to 'direct or determine' that an 'amount' (sum of money) is to be held as a separate trust fund and for some 'directed or determined' beneficiary absolutely. This power cannot relate to a percentage of shares in Timmerton BVI, and by extension, in Shun Hing, as no 'separate trust fund' can be established for that specie of property under clause O1. Accordingly, the power granted does not and cannot relate to any trust or entitlement established ab initio at the commencement of The Huge Surplus Trust on 20th November 1989, which, as the judge found, were not established as a result of a 'direction' or 'determination' within the meaning of clause O1. In addition, the power granted to the Trustee is to establish 'separate trust funds' for the benefit of 'any Beneficiary', which includes both Specified and General Beneficiaries. I therefore reject any argument based on an application of clause O1 as a basis for attempting to 'harmonise' what is an implausible construction of 'the words of entitlement', rendering the meaning being attributed to those words by the appellant, wholly inconsistent with other provisions in the Trust Deed.

²⁸ See paras. 34 and 35 of the Appellants' Skeleton Argument dated 17th February 2014.

Conclusion

- [96] Having regard to the conclusions reached, I would dismiss this appeal and confirm the decision of the learned judge that the questions raised in the claim be answered in the affirmative.

Costs

- [97] In the court below, there was apparent agreement (whatever the outcome) on costs to the effect that the claimant (first respondent) would be entitled to be indemnified in respect of its costs of the claim out of the Trust, and the defendants (appellants) will have their costs of the claim paid out of the funds of the Trust, in sums to be agreed, and in the absence of agreement as may be determined by the court.²⁹
- [98] At the conclusion of the appeal hearing, an order was made, inter alia, for the respondents to file and serve submissions on costs in the appeal no later than 16th May 2014 and for the appellants, if necessary, to file and serve a reply to the respondents' submissions on costs no later than 26th May 2014. Only the first respondent has elected to file written submissions on costs in the appeal.
- [99] The first respondent submits, in circumstances where the appeal is dismissed, that the appellants ought to pay the respondents' costs of the appeal. They argue, based on the relevant principles and authorities in relation to costs in trust proceedings cited at paragraph 5 of the their Costs Skeleton, that the appellate round 'is to be approached differently from first instance where all parties are seeking the court's guidance in the administration of the trust fund, as distinct from their own interests'. However, once the guidance of the first instance court has been obtained, any appeal therefrom is not necessarily in the interest of the trust and the cost of the appellants should follow the event in the normal way unless, where the appeal is unsuccessful, they can show some exceptional circumstances pointing to their costs being paid out of the trust assets. Likewise, Counsel for the

²⁹ See Order made 24th January 2012 (Record of Appeal Volume 3, Tab 2, para. 13).

second and third respondents stoutly argued before us for the appellants to be ordered to pay the respondents costs of the appeal were it to be dismissed.

[100] The appellants, on the other hand, contend in oral submissions during the hearing of the appeal, that essentially the type of order agreed below, whereby the costs of all parties are to be paid out of the Trust, ought to apply on the determination of this appeal, regardless of the outcome. Having considered the submissions on this issue, I am persuaded to the position adopted by counsel for the first respondent in their written submissions on costs. While we are mindful that this is a matter concerning the interpretation of a trust deed, we have not differed from the learned judge in his determination of the central issue. No exceptional circumstances have been put before us as to why this court, having dismissed the appeal, ought to order that the appellants costs be paid out of the trust assets. Accordingly, I would order that the appellants pay the respondents costs in the appeal. In the case of the first respondent, Equity Trustee Limited, they are permitted to recover any difference between what is paid by the appellants and its actual costs from the assets of the Trust fund.

[101] I take pleasure in recording our indebtedness to counsel for all parties on their helpful submissions.

Gerard St.C. Farara, QC
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Joyce Kentish-Egan
Justice of Appeal [Ag.]