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

No. PT-2019-000875

Rolls Building  
Fetter Lane  
London, EC4A 1NL

5 December 2019

**Before:**

**HIS HONOUR JUDGE KEYSER QC**  
**Sitting as a Judge of the High Court**

**IN THE J C DRUCE SETTLEMENT DATED 10 DECEMBER 1959**

**Between:**

**(1) RICHARD EVERARD MONKCOM**  
**(2) STAWELL MARK SEARLE**

**(As Trustees of the JC Druce Settlement dated 10 December 1959)**

**Claimants**

\_\_\_\_\_  
**Henry Legge Q.C. and Eliza Eagling** (instructed by **Druces LLP**) for the **Claimants**

\_\_\_\_\_  
**JUDGMENT**

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## JUDGE KEYSER QC:

1 This claim is brought by the claimants as trustees of the JC Druce Settlement (“the Settlement”). On 28 October 2019, Deputy Master Linwood gave permission for the issue of the Part 8 claim form without naming defendants, and there are no parties other than the claimants. On 31 October 2019, Roth J ordered that the matter be expedited and that the claim be heard no later than this week, for reasons that will become apparent.

2 The claim, though unopposed and, indeed, in substance consented to by those affected by it, raises a number of interesting points, not least of which is that it is another illustration of how no area of the law of England and Wales, even the most seemingly traditional, is insulated from the effects of the Human Rights Act 1988 or the Convention to which it gives domestic effect.

3 The Settlement was made on 10 December 1959. The settlor, John Christopher Druce, who was a solicitor, died in 1972. Clause 1(a) of the Settlement defines “the Trustees” and clause 1(b) defines “the Trust Property”. The further provisions of clause 1 are as follows:

“(c) ‘The Beneficiaries’ means all the male descendants of the Settlor’s brothers and sisters Madeline Pothecary Charles Claridge Druce Winifred Lily Sayer and Alexander George Druce who are already in being or shall be born before the Vesting Day as hereinafter defined

(d) ‘The Vesting Day’ means the day on which shall expire the period of Sixty years from the execution of this deed or the day on which shall expire the period of Twenty one years after the death of the survivor of those of the Beneficiaries who are in existence at the time of execution of this deed whichever shall first occur”.

4 The evidence before me is that the Vesting Day will be Tuesday 10 December 2019, the sixtieth anniversary of the making of the Settlement, and that the current gross value of the trust fund before payment of tax and future costs is approximately £1,290,000. I ought perhaps to record that the settlor’s sister created a similar settlement for the unmarried female descendants of her father.

5 Clause 3 of the Settlement provides:

“The Trustees shall hold the Trust Property upon the following trusts—

(a) Until the Vesting Day the Trustees shall pay or apply the income and may in their absolute discretion from time to time pay or apply the whole or any part of the capital of the Trust Property for or towards the education or benefit of all or such one or more of the Beneficiaries for the time being living in such shares if more than one and in such manner as the Trustees shall in their absolute discretion think fit

(b) On the Vesting Day the Trustees shall hold the Trust Property or such part thereof as shall not have been paid transferred or applied under any trust or power herein contained upon trust for such of the Beneficiaries as are then living in such shares as the Trustees shall on or before the Vesting Day determine and in default of such determination in equal shares

(c) Subject as aforesaid the Trustees shall stand possessed of the Trust Property in trust for such of the nephews of the Settlor (the sons of the said Madeline Potheary and Winifred Lily Sayer) as are living at the date of this Settlement in equal shares absolutely”.

6 The issues in these proceedings concern identification of the members of the class of beneficiaries, both as a matter of construction of the Settlement and as a matter of fact. Somewhat surprisingly, the Settlement contains no exoneration clause. The trustees have proper concerns lest, by distributing to what might hereafter be said to be the wrong persons or failing to distribute to those who might hereafter be said to be within the class of beneficiaries, they should incur personal liability. They accordingly seek the court’s approval of their proposed course of action.

7 The difficulty in the case arises from the definition of “Beneficiaries” in clause 1(c) of the Settlement. At common law, “descendants” is confined to legitimate blood relations: see *Sydall v Castings Ltd* [1967] 1 QB 302. On what Mr Richard Monkcom, the first claimant, has called in his witness statement “a literal reading” of clause 1(c), certain of the potential members of the class of beneficiaries would be excluded, because either they or their parents were illegitimate or adopted. A different issue concerns a further potential beneficiary, an unborn male child whose birth is expected after the Vesting Day.

8 There is a helpful Schedule of Beneficiaries, which identifies five distinct categories. Category 1 comprises thirty males who are said to be clearly beneficiaries. The other categories comprise males whose status as beneficiaries is for differing reasons unclear: Category 2 comprises four persons (“the S Children”); Category 3 comprises one person (“LP”); Category 4 comprises one person (“RC”); Category 5 comprises the unborn child.

9 The principal head of relief claimed is under section 48 of the Administration of Justice Act 1985:

“(1) Where—

(a) any question of construction has arisen out of the terms of a will or a trust; and

(b) an opinion in writing given by a person who has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990, has been obtained on that question by the personal representatives or trustees under the will or trust,

the High Court may, on the application of the personal representatives or trustees and without hearing argument, make an order authorising those persons to take such steps in reliance on the said opinion as are specified in the order.

(2) The High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument.”

10 In the present case, no dispute exists, as I will mention more later.

11 The trustees have obtained three written opinions from Mr Henry Legge QC, who appears today with Miss Eliza Eagling. Mr Legge was called to the Bar in 1993, took Silk in 2012 and is a recognised specialist in trusts and estates. In summary, his opinion is that all seven

potentially excluded males in Categories 2, 3, 4 and 5 on the Schedule are within the class of beneficiaries of the Settlement. On the basis of his opinions, the trustees seek an order pursuant to section 48 of the 1985 Act.

- 12 Having read those opinions, I would have felt justified in granting the primary relief sought without hearing oral submissions. However, I have taken the opportunity to call on Mr Legge to explain some of the points that arise from his opinions, in particular where they involve some interplay between traditional Chancery practice and recent developments in the wider law. In the light of the written opinions and the oral submissions, I shall proceed to say something about each of the four disputed categories in the Schedule, although I am concerned not to determine the substantive issues but to decide whether to exercise my power under section 48.

*Category 2: Legitimacy*

- 13 Category 2 on the Schedule of Beneficiaries concerns four possible beneficiaries, the S Children, though the issue it raises also potentially concerns RC, who is shown in Category 4. Because at common law “descendants” refers only to legitimate blood relations, illegitimacy breaks the line of descent at common law. The S Children were born to parents who never married.

- 14 Section 1(1) of the Family Law Reform Act 1987 provides:

“In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.”

Section 19(1) provides in part:

“In the following dispositions, namely—

- (a) dispositions *inter vivos* made on or after the date on which this section comes into force [that is, 4 April 1988] ...

references (whether express or implied) to any relationship between two persons shall be construed in accordance with section 1 above.”

- 15 The effect of these provisions is that an illegitimate child is treated as a child in the same way as a legitimate child. However, according to their terms the provisions would not apply to the Settlement, because it was made before 4 April 1988. Nevertheless, Mr Legge’s written opinion, supported by his oral submissions, is that the provisions do apply to the Settlement.
- 16 Mr Legge relies on the decision of Rose J in *In re Hand’s Will Trust, Hand v George* [2017] EWHC 533 (Ch), [2017] Ch 449, which concerned the provisions of the Adoption Act 1976. (Those provisions arise directly for consideration under one of the other categories in the present case.) Section 39 of the 1976 Act provides in part:

“(1) An adopted child shall be treated in law—

(a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized);

(b) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

...

(6) Subject to the provisions of this Part, this section—

(a) applies for the construction of enactments or instruments passed or made before the adoption or later, and so applies subject to any contrary intention; and

(b) has effect as respects things done, or events occurring, after the adoption, or after 31<sup>st</sup> December 1975, whichever is the later.”

However, paragraph 6(1) of Schedule 2 to the Act provides:

“Section 39—

(a) does not apply to an existing instrument or enactment in so far as it contains a disposition of property, and

(b) does not apply to any public general Act in its application to any disposition of property in an existing instrument or enactment.”

17 Mr Legge proposes what I consider a convenient and helpful four-step analysis of Rose J’s reasoning in *Re Hand’s Will Trust*. First, the rights of the children in that case under the European Convention on Human Rights (“ECHR”) were engaged. The children were adopted children, and at common law they would not fall within the class of “children” in the clause of the will in that case and would accordingly be treated differently from natural children. Second, the effect of paragraph 6 of Schedule 2 to the Adoption Act 1976 was in breach of the Convention rights of the adopted children, because it preserved the common law position in a way that was discriminatory against them as adopted children. Third, the scheme of the 1976 Act allowed the transitional provisions in the Act to be “read down”, so that section 39 would be construed to apply to instruments made before 1976. Fourth, this “reading down” of the transitional provisions was not open to the objection that it involved an inappropriate retrospective application of the Human Rights Act 1998: although the interests under the will were “vested interests” before the Act came into effect, as that phrase is used as a term of art of inheritance law, they were not vested in the sense relevant to deciding whether application of the Act would cause unfairness.

18 Mr Legge opines, and now submits to me, that the reasoning in *Re Hand’s Will Trust* applies equally to the question of illegitimacy under the 1987 Act. He refers to the opinion expressed in *Lewin on Trusts* (19<sup>th</sup> edition, 2018, supplement) at paragraph 6-048B (citations omitted):

“The third question is whether it is possible for the legislation concerning adopted, illegitimate and legitimated children to be interpreted under section 3 of the 1998 Act so as to be compatible with Convention rights under section 3 of the 1998 Act, rather than for that legislation merely to be declared to be incompatible with the 1998 Act under section 4 of the 1998 Act. Although it has been recognised that, apart from the 1998 Act, there is no doubt how the legislation on adopted children operates by excluding, subject to an expression of a contrary intention, adopted children in instruments containing dispositions which pre-date the relevant legislation, and what was the purpose and intent of the legislation, it has been decided that, since section 3 of the 1998 Act is not limited to cases of ambiguity, it is possible to interpret the legislation in a compatible way by reading in wording which gives the legislation the opposite intent and effect to the effect and intent that it would have apart from the wording read into the legislation. Again, it is difficult to see how any different view could be taken of the legislation concerning legitimated children which is similarly expressed to that concerning adoption, nor to that concerning illegitimate children which, though not expressed in quite the same way, has a similar intent and effect. Accordingly, the Human Rights Act 1998, as the law now stands after the decision in *Re Hand Will Trust* severely restricts the extent to which effect is given to the statutory provisions limiting the property rights of adopted, illegitimate and legitimated children in relation to dispositions pre-dating the legislation concerned.”

19 The effect of applying sections 1 and 19 of the 1987 Act to the Category 2 potential beneficiaries would be that they would be descendants of the settlor’s siblings and therefore included in the class of beneficiaries. Two questions arise: first, whether the 1987 Act is amenable to reading down; second, whether reading down would result in inappropriate retrospectivity.

20 As regards reading down, in *Re Hand’s Will Trust* Rose J was not considering the 1987 Act; nevertheless, the *ratio* of her decision is binding on me insofar as it has application to the present case, unless it is plainly wrong. Rose J referred at some length to the speeches in *Ghaidan v Godin-Mendoza* [2004] 2 AC 577 and said:

“103 Lord Rodger’s concurring speech in *Ghaidan* refers to a distinction between judicial interpretation and judicial vandalism. The former can, in this context, include supplying additional words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights: ‘If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights’ (see paragraph 121 of *Ghaidan*).”

21 With that distinction in mind, Rose J turned to her analysis of the issue before her, noting the fundamental difference between the scheme of the Adoption Act 1976 and the Adoption of Children Act 1926:

“104 If the 1926 Act remained in effect today in its original form, there would be considerable difficulties in using section 3(1) of the HRA simply to reverse the interpretative force of the last lines of section 5(2) of the 1926

Act. That is because the scheme of that legislation was that adopted children remained the children of their natural parents as a matter of law and did not become the children of their adoptive parents. To revise one aspect of that scheme could well be described as going against the grain of the legislation or being inconsistent with a fundamental feature of the 1926 Act. But the 1926 Act is not still in force and the scheme of the 1976 Act is entirely the opposite. It affirms that adopted children are in all respects to be treated as the children of, and only of, their adoptive parents. It is not going against the grain of that legislation to remove perhaps the last legacy of the old 1926 Act approach. In my judgment, it is well within the court's power to read down paragraph 6 of Schedule 2 to make it compliant with the claimants' Convention rights.

105 Mr Miller proposed some wording to show how a Convention-compliant version of paragraph 6 would read. He draws on the reference in Lord Rodger's speech in *Wilson* [2004] 1 AC 816 to the fact that vested rights which are not to be changed even by the prospective application of revising law are only those which have been acted upon: see paragraph 196 of Lord Rodger's speech cited in paragraph 92, above. His suggestion is that once read down, paragraph 6 of Schedule 2 would look like this:

'Section 39—(a) does not apply to an existing instrument or enactment in so far as (i) it contains a disposition of property, and (ii) the beneficiary of the disposition has done something to avail himself or herself of the property right in question before the coming into force of the Human Rights Act 1998'.

106 I agree that for present purposes, that wording is effective to bring the 1976 Act into compliance with the claimants' Convention rights. It does not go against the grain of the 1976 Act or have practical repercussions that the court cannot evaluate. I therefore read down paragraph 6 so that section 39(1), (5) and (6) of the 1976 Act now mean that the reference in Henry Hand's will to the child or children of his children includes any adopted grandchild and so includes the claimants."

22 That is a striking result, and Rose J's bold approach has not yet been tested in the Court of Appeal. However, I see no proper basis on which I ought to decline to follow that approach, particularly when I am considering the exercise of my jurisdiction to give relief on the basis of counsel's opinion under section 48. Indeed, I should not wish to imply any disagreement with the carefully considered approach taken by Rose J. In agreement with Mr Legge and with the editors of *Lewin on Trusts*, I see no reason why that approach, when applied to the 1987 Act, should not be capable of importing into section 19 words that, though altering its effect to make it compliant with Convention rights, were nevertheless consistent with the scheme of the Act and did not go against its grain.

23 As regards retrospectivity, in *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 816, [2004] 1 AC 816, Lord Nicholls of Birkenhead, at paragraph 19, identified "the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests"; he cited the dictum of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724:

“[T]he true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

24 In *Re Hand's Will Trust* Rose J considered the question of retrospectivity at length. Having referred to Lord Rodger's discussion of the matter in *Wilson*, she said:

“92 ... This indicates that in order for a right to be ‘vested’ in the sense that is meant when considering the presumption against vested rights being altered by subsequent legislation, ‘the particular beneficiary of the right must have done something to avail himself of it before the law is changed’. It is not suggested by the defendants in the present case that they have done anything to avail themselves of the rights that they had under Henry Hand's will.

93 In my judgment, even though the defendants' interests in Henry Hand's estate may have been vested interests in the sense that that phrase is used as a term of art of inheritance law, their interests were not vested in the sense that Lord Rodger was using it, namely that it would be unfair to apply revising legislation in a way which reduces the value of that interest because of the happening of a post-Act event.

94 I therefore hold that it is not a retrospective application of the HRA to apply it to determine whether on the proper construction of the Henry Hand will, Kenneth is to be treated as having died in 2008 with two children or without any children. The only point in time at which that question falls to be asked is when Kenneth dies. The change in the claimants' rights brought about by the coming into effect of the claimants' right to equal treatment in October 2000 is not so unfair as to lead to a presumption that Parliament did not intend them to be affected in the manner for which the claimants contend. As Lord Rodger says in paragraph 192 of *Wilson*:

‘Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future. ... As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.’”

25 In my judgment, the Human Rights Act 1988 could not bring about a retroactive alteration of the identity of the beneficiaries at a past point in time. However, I agree with Mr Legge's opinion, and with his submissions to me, that the effect of the Act is capable of changing the contents of the class of beneficiary during the period in which duties fall to be performed or powers fall to be exercised under the Settlement. The fact that someone was not a beneficiary when a power fell to be exercised or a duty to be performed at such-and-such a past date does not mean that that person cannot be, by reason of the Human Rights Act, a beneficiary when a power or duty falls to be exercised or performed now. Thus, whereas on



the facts in *Wilson* the Act could not operate retrospectively so as to alter the rights and obligations under a consumer credit agreement that had come to an end before the Act came into force, Lord Rodger observed that the coming into force of the Act might affect the relationship between existing parties under a long lease, the term of which extended both before and after the date of the coming into force. The present case is in my view analogous. Distributions under the Settlement before the Act came into force would be unaffected by the Act, but after the Act has come into force it will potentially apply to further distributions. I do not consider that retrospectivity presents a problem in this case.

### *Category 3: Overseas Adoption*

26 Category 3 concerns LP. If he is a “descendant” for the purposes of the Settlement, it is through his mother, Sarah. She, however, was an adopted child. The starting point, again, is that “descendants” is confined at common law to legitimate blood relations. Sarah was not a blood relation. It would follow that LP, as the child of an adopted mother, would not be considered at common law a descendant and would not therefore be a beneficiary.

27 The decision of Rose J in *Re Hand’s Will Trust* is directly in point, subject to two matters.

28 First, Sarah was not adopted in England but on two occasions abroad: first in Hong Kong, second in Bermuda; therefore the adoption was an overseas adoption for the purposes of sections 38(1) and 72(2) of the Adoption Act 1976. Mr Legge addressed this point in paragraphs 5 to 9 of his third opinion. It is unnecessary for me to set out the contents of the discussion there. Suffice it to say that the fact that the adoption was an overseas adoption makes no difference to the analysis. The case is the same as if the adoption were an adoption under English law.

29 Second, LP himself is not adopted; it is his mother who was adopted. Therefore the issue in the present case does not concern discrimination against a potential beneficiary because he is adopted, but discrimination against him because his mother was adopted. In my judgment, this does not take the case outside the proper scope of the principles underlying Rose J’s decision in *Re Hand’s Will Trust*. The matter can be put in two ways, both identified by Mr Legge, though they come to the same thing in the end. The first analysis is in terms of direct discrimination. Rose J drew on recent jurisprudence from the European Court of Human Rights concerning article 14 of the Convention, which reads:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Mr Legge submitted that, if it is impermissible for legislation to discriminate on the grounds that a child is adopted, it must be impermissible, and contrary to article 14, to discriminate against a child on the grounds that the child’s mother was adopted. I consider that submission to be unanswerable, although of course I have not heard anyone to answer it, and am entirely content to proceed on the basis of Mr Legge’s written opinion expressing the same conclusion.

30 In the alternative, however, if it were felt necessary to rely on a protected characteristic of LP’s mother, namely the fact that she was adopted, it would in my judgment be likely that LP could rely on what Mr Legge has referred to as relational discrimination. Support for this is found in the decision dated 19 December 2018 of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Sali v Greece* (2019) 69 EHRR 2. The applicant and her husband were Greek citizens and members of the Thrace Muslim

community. The husband died, having left his estate to the applicant by a will made under the Greek Civil Code. The husband's sisters challenged the will, on the ground that, as he was a member of the Thrace Muslim community, questions of inheritance were subject to Sharia law. The Greek court upheld the challenge. However, the ECtHR held that there had been discrimination against the applicant, in violation of article 14. Its decision rested on the husband's protected characteristic, namely that of being of Muslim faith. The ECtHR said:

“134 [N]ot every difference in treatment will amount to a violation of Article 14. Only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián*, cited above, § 113 and the references therein). In this context, the Court reiterates that the words ‘other status’ have generally been given a wide meaning in its case-law (see *Carson and Others*, cited above, §70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v United Kingdom*, no. 7205/07, §§56-59, 13 July 2010). For example, a discrimination issue arose in cases where the applicants’ status, which served as the alleged basis for discriminatory treatment, was determined in relation to their family situation, such as their children’s place of residence (see *Efe v Austria*, no. 9134/06, §48, 8 January 2013). It thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics (see *Guberina v Croatia*, no. 23682/13, §78, ECHR 2016, and *Škorjanec v Croatia*, no. 25536/14, §55, 28 March 2017, and also *Weller v Hungary*, no. 44399/05, §37, 31 March 2009).

...

161 In conclusion, having regard to the foregoing considerations, the Court finds that the difference of treatment suffered by the applicant, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification.

162 In the light of the foregoing, the Court dismisses the Government’s objection as to the applicant’s lack of victim status, and finds that there has been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention.”

#### *Category 4: Legitimation*

31 The fourth category concerns only one person, RC. Because of my conclusions as to Category 2, it is strictly unnecessary to consider his case separately and I shall comment only briefly. RC was born in 1982 in South Africa to unmarried parents. His parents subsequently married in 1985 in England. The evidence is that his father was domiciled in New Zealand both at the date of RC’s birth and at the date of the father’s marriage to RC’s mother. The question under Category 4 is whether RC is legitimated. If he were not, he would fall to be treated under Category 2.

- 32 In his opinions and submissions, Mr Legge has referred to a number of authorities, including the decision of Sterling J in *Re Grey's Trusts* [1892] 3 Ch 88. The point is stated shortly in the headnote of the case report:

“*Held*, that a child of the son, born out of wedlock, but legitimated according to the law of the son’s domicile, by the subsequent marriage of its parents, was entitled to share with a child born after the marriage in both the realty and personalty.”

Sterling J explained the matter at page 92:

“The *ratio decidendi* [of the decision of Kay J in *In re Andros* 24 Ch. D. 637] appears from the following passage at 639: ‘A bequest in an English will to the children of A means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined. That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A’s legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children? How can the rule of construction answer that?’ Then after considering the authorities, he says at 642: ‘The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father’s domicile. Thus *ante nati* whose father was domiciled in *Guernsey* at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of *Guernsey*, are recognised as legitimate by the law of this country, and can take under such a gift.’”

- 33 Accordingly, the question whether RC is legitimated by common law turns on the domicile of his father, which was New Zealand. New Zealand law recognises legitimation by marriage. Therefore RC was legitimated by common law and on that ground is included in the class of descendants and as such a beneficiary.

#### *Category 5: an Unborn Child*

- 34 Category 5 concerns an unborn male child. Under clause 1(c) of the Settlement, the class of beneficiaries includes only male descendants “who are already in being [that is, at the date of the Settlement] or shall be born before the Vesting Day”. Barring a miracle or unforeseen mishap, the unborn child will not be born before the Vesting Day; he is expected to be born in March 2020. Accordingly, normal English usage would not regard him as a child born before the Vesting Day. Nothing daunted, English common law has adopted a different policy. In *Trower v Butts* (1823) 1 Sim. & St. 181, the Vice-Chancellor, Sir John Leach, explained with great clarity at 184 – 185:

“It is now fully settled that a child *in ventre sa mere* is within the intention of a gift to children *living* at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered

as answering the description of a child living; but because the potential existence of such a child places it plainly within the reason and motive of the gift.

In the case of *Whitelock v Hodgson*, the words were ‘Sons begotten and born’; and the difference between the expression ‘living at the death’ and ‘born in the lifetime’ was not even hinted at in the argument of the judgment; and a child *in ventre sa mere* was there held to take. In *Lancashire v Lancashire*, a child *in ventre sa mere* was considered as born, so as to satisfy the rule of presumption of revocation of a will from subsequent marriage and birth of a child. In that case, one of the Judges referred to a maxim of the civil law, that when the birth of a child happens after the death of a parent, it is, by fiction of law, referred back to his lifetime.

Upon the whole I am of the opinion that, inasmuch as it is adopted as a rule of construction, that a child *in ventre sa mere* is within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift; so a child *in ventre sa mere* is to be considered within the intention of a gift to children born in the lifetime of a testator, because it is equally within the reason and motive of the gift.”

- 35 Surprising though this approach to construction might perhaps appear, it is well- and long-established and I have no reason to suppose that the Settlor was not aware of it. (Indeed, the terms of clause 3(b) of the Settlement pick up the language in *Trower v Butts* and later authorities.) The result, at all events, is that the unborn child is to be construed as a beneficiary within the meaning of the Settlement.

### *Conclusion*

- 36 In those circumstances, I am content to give the primary relief sought, as to construction of the Settlement, on the basis of counsel’s opinion; though, as I have made clear, I have made efforts in the course of this hearing to satisfy myself as to the correctness of that opinion.
- 37 The second head of relief sought is a so-called Benjamin order: that the claimants be given permission to distribute the fund on the footing that the members of the class of beneficiaries are those persons identified in the Schedule. This gives effect to the primary relief, but it does so on the basis of facts that the claimants are permitted to assume to be true. Mr Monkcom’s statement sets out in some detail the very significant steps that the trustees have taken to try to find precisely who is within the class of beneficiaries. It is clear that the trustees have taken great pains to investigate as fully as they possibly can what is a difficult matter, where assurance is hard to come by. The effect of the order sought would be to grant them the security of knowing that they could distribute on the basis of the Schedule without risk of personal liability. Having regard to the evidence before me, I am content to make such an order.
- 38 I ought to mention that the trustees, having identified all those persons who might reasonably be considered as beneficiaries, disclosed to the adult beneficiaries Mr Legge’s opinions on the various issues and sought their consent to the distribution that they proposed. The trustees also brought to the attention of the adult beneficiaries that some distributions previously made under clause 3(a) of the Settlement might be open to objection, because information relevant to the legitimacy or illegitimacy of certain persons had not then come to light. In short, the trustees have made full and frank disclosure of all

relevant matters to the beneficiaries. All the adult beneficiaries have expressly stated their agreement with the course proposed by the trustees.

- 39 In paragraph 3 of the draft order, the claimants seek permission to pay the share of a minor to that minor's parents in satisfaction of the minor's interest. That is because the Settlement contains no provision in that regard and, without such a provision in the order, the trustees are liable to be put to both expense and delay in effecting payments to the minors. Having regard to the number of beneficiaries and to the relatively modest size of the payments that will be made to any of them, it is desirable to avoid additional expense, if possible. I shall make the order sought.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**This transcript** has been approved by the Judge.