

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **FSD CAUSE NO: 43 OF 2011 (PCJ)**

4 The Hon. Mr. Justice Peter Cresswell
5 In Open Court
6 3rd and 4th February 2014

7
8 **IN THE MATTER OF** a Deed of Trust between Shiu Pak Nin and HSBC International Trustee
9 Limited, dated 10 March 1998 known as the Shiu Pak Nin Discretionary Trust
10 **AND IN THE MATTER of** the Trusts Law (2011 Revision)

11

12 **Appearances:** Mr Colin McKie, QC and Miss Lara Kuehl of Maples and Calder for the Trustee,
13 HSBC International Trustee Limited

14

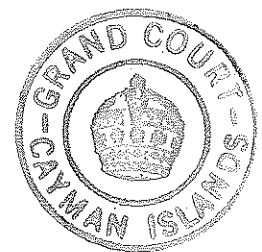
15 Mr Kenneth Farrow, QC of HSM Chambers as Amicus Curiae

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JUDGMENT

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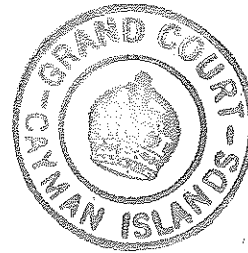
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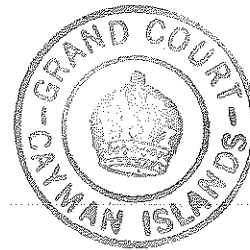
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1. INTRODUCTION

1 HSBC International Trustee Limited (the "Trustee") is the trustee of the Shiu Pak Nin
2 Discretionary Trust (the "Discretionary Trust") dated 10 March 1998 (the "Discretionary
3 Trust Deed") of which the settlor was Mr Shiu Pak Nin (the "Settlor"). By its Ex Parte
4 Originating Summons dated 14 March 2011 (since amended), (the "Originating
5 Summons"), the Trustee applies for certain declarations and directions pursuant to s.48 of
6 the Trusts Law (2011 Revision) and/or GCR Order 85 and/or the inherent jurisdiction of
7 the court with respect to the administration of the Discretionary Trust.
8

9 2 The court requested the Attorney General to appoint an Amicus Curiae. The Attorney
10 General appointed Mr Kenneth Farrow QC as Amicus Curiae. The primary purpose of
11 the appointment of an Amicus Curiae is to ensure that, in a case which is complex and
12 where none of the interested parties, other than the Trustee, is currently represented by
13 Cayman Islands attorneys, the merits and demerits of the Trustee's application are
14 properly tested. Mr Farrow QC has been appointed to assist the court. He is completely
15 independent of the Trustee and the interested parties. Since the Trustee's application does
16 not raise any issue of public interest, the court does not consider that the burden of any
17 part of Mr Farrow QC's fees for acting as Amicus Curiae should fall on the public purse
18 and has accordingly ordered that those fees be indemnified out of the trust fund of the
19 Discretionary Trust.

20 3 The Trustee is represented in this application by Messrs Maples and Calder, Cayman
21 Islands attorneys.

22 4 The substantive evidence before the court comprises:

23 4.1 The Affidavit of Patrick Love dated 18 March 2011 ("Mr Love's Affidavit")
24 sworn on behalf of the Trustee;

25 4.2 The Affirmation of Shiu Yuen Chit dated 24 September 2013 ("Mr Shiu Yuen
26 Chit's Affirmation");

27 4.3 The Affirmation of Shiu Wan Ying dated 11 June 2012 ("Mrs Shiu Wan Ying's



- 1 Affirmation");
- 2 4.4 The First Affidavit of Shek Yuet Min Jacqueline dated 7 May 2013 ("Ms Shek's
3 First Affidavit") sworn on behalf of the Trustee;
- 4 4.5 The Second Affidavit of Shek Yuet Min Jacqueline dated 26 September 2013
5 ("Ms Shek's Second Affidavit") sworn on behalf of the Trustee; and
- 6 4.6 The Third Affidavit of Shek Yuen Min Jacqueline dated 17 December 2013 ("Ms
7 Shek's Third Affidavit") sworn on behalf of the Trustee.
- 8 4.7 The Supplemental Affirmation of Shiu Yuen Chit of 13 January 2014
- 9 4.8 The First Affidavit of Shiu Wan Yee Francis sworn 20 January 2014
- 10 5 Mr Love's Affidavit sets out the background to these proceedings. In particular, he:
- 11 5.1 describes the members of the Settlor's "family tree", to the extent known by the
12 Trustee at that time;
- 13 5.2 summarises the relevant terms of the Discretionary Trust Deed and the
14 contemporaneous Trustee Memorandum (the "Trustee Memorandum");
- 15 5.3 summarises relevant matters relating to other instruments executed on or shortly
16 before 10 March 1998; and
- 17 5.4 summarises three sets of related proceedings commenced in 1998, 1999 and 2003
18 in Hong Kong (the "1998 Hong Kong Proceedings", the "1999 Hong Kong
19 Proceedings", the "2003 Hong Kong proceedings", collectively the "Hong Kong
20 Proceedings").
- 21 6 Mr Shiu Yuen Chit's Affirmation provides some details concerning the Settlor's residence
22 prior to settling in Hong Kong in or after 1946. He also gives details of the marriage of
23 the Settlor to Madam Law Wan Yuk and their children, and Mr Shiu Yuen Chit's own
24 marriage, children and grandchildren.

1 7 On 11 June 2012 Mrs Shiu Wan Ying swore her Affirmation on her own behalf and on
2 behalf of Shiu Wan Mei. She exhibits her birth certificate.

3 7a On 20 January 2014 Mrs Shiu Wan Yee Francis swore an affidavit in which she set out
4 her contentions as to legitimacy and descent of herself and her brother Shiu Yuen Chi.
5 She exhibited their respective birth certificates.

6 8 Ms Shek's First Affidavit summarises the work performed by the Trustee and its service
7 providers from the commencement of this matter on 18 March 1998 until 31 January
8 2013. The Affidavit is in support of the Trustee's application under paragraph 8 of the
9 Originating Summons, as amended, for an order to approve the Trustee's costs and those
10 incurred by its service providers during that period. Ms Shek's Second Affidavit provides
11 an update as to matters that took place between 31 January 2013 and 26 September 2013,
12 in particular:

13 8.1 the status of the Hong Kong Court's taxation of costs (the "Hong Kong Taxation")
14 due to the Trustee in the 1998 Hong Kong Proceedings;

15 8.2 the deaths of Shiu Yuen Lim and Siu Yuen Shing, and the consequences of their
16 deaths in the context of these proceedings; and

17 8.3 steps taken by the Trustee to address certain points of evidence raised by Mr
18 Farrow QC.

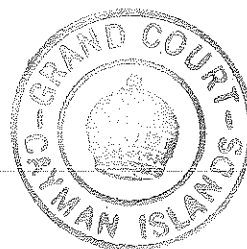
19 9 Ms Shek's Third Affidavit provides:

20 9.1 a further update as to the status of the Hong Kong Taxation; and

21 9.2 evidence in respect of the Trustee's costs and expenses between 1 February 2013
22 and 30 November 2013.

23
24 **2. OVERVIEW**

25 10 The Settlor was a successful businessman. On 10 March 1998 he settled certain of his



1 assets upon the Trustee on the terms of two trusts: the Discretionary Trust and the Fixed
2 Trust. The Discretionary Trust is constituted by the Discretionary Trust Deed. The
3 Discretionary Trust Deed is governed by Cayman Islands law. No issues arise under the
4 Fixed Trust for determination by the court, although the terms of the deed constituting the
5 Fixed Trust (according to the Trustee) form part of the relevant background to the
6 Discretionary Trust, including the identity of the beneficiaries of the Fixed Trust and the
7 proportions of the assets of the Fixed Trust trust fund that each of those beneficiaries
8 received.

9 11 The assets of the Discretionary Trust comprise cash deposits of approximately HK\$62.5
10 million (approximately US\$8 million) plus the amount receivable pursuant to the costs
11 order of the Hong Kong Court dated 12 August 2011 (and amended on 1 November
12 2011) in the 1998 Hong Kong Proceedings, which is currently the subject of an ongoing
13 taxation in Hong Kong.

14 12 The "*Eligible Beneficiaries*" under Clause 1(e) of the Discretionary Trust Deed are the
15 Settlor; and:

16 "*all such issue of the Settlor as shall be born prior to the Perpetuity Date*" (emphasis added).

17 Clause 1(k) defines "*issue*" as:

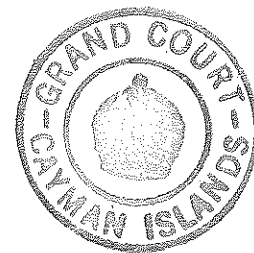
18 "*all lineal descendants male and female and any person legally adopted shall be treated as*
19 *the child of their adoptive parents whether such adoption shall occur on or before or after*
20 *[10 March 1998] and any reference to the issue of any person shall include the children and*
21 *remoter issue of such persons through all degrees*".

22 Clause 1(b) defines "*child*" and "*children*" to include:

23 "*a child or children legally adopted whether before or after [10 March 1998]*".

24 As far as the Trustee is aware no relevant person has been adopted.

25 13 At or about the time that the Settlor executed the Discretionary Trust Deed, the Trustee
26 memorialised in the Trustee Memorandum the Settlor's wishes with respect to how, after



1 the Settlor's death, the Trustee should exercise its powers of appointment under the
2 Discretionary Trust Deed.

3 14 Clause 2 of the Trustee Memorandum names eleven persons, each of whom would
4 receive 1/12 of the entire trust fund, and two others who would each receive 1/24 of the
5 entire trust fund. Together these people are referred to herein as the "Original Named
6 Persons".

7 15 Clause 3 of the Trustee Memorandum provides that if any of these Original Named
8 Persons should not survive the Settlor or should die before his or her share is distributed
9 but leaves "issue", subject to any contrary request that may be given by the deceased
10 Original Named Person during his / her lifetime, such issue shall stand in place of the
11 deceased Original Named Person and take their deceased parent's share (per stirpes and
12 equally if more than one).

13 16 The relevant terms of the Discretionary Trust Deed and the Trustee Memorandum are
14 summarised below.

15 17 The Settlor died on 26 March 2008. Following his death, the Trustee had proposed
16 simply to distribute the assets of the Discretionary Trust to the Original Named Persons
17 in the shares set out in the Trustee Memorandum. However, such information and
18 evidence as is available to the Trustee contains a number of inconsistencies that are not
19 readily reconcilable and which throw doubt as to which, if any, of the Original Named
20 Persons is in fact the Settlor's "issue" within the meaning of Clause 1(e) of the
21 Discretionary Trust Deed, and therefore within the definition of Eligible Beneficiaries.
22 Two of the Original Named Persons (Shiu Yuen Lim and Siu Yuen Shing) are now
23 known by the Trustee to have died since the death of the Settlor. Any of the Original
24 Named Persons who have now died are referred to hereafter as "Deceased Named
25 Persons."

26 18 The Trustee proposes the following practical solution.

27 (On the assumption that the court holds that (i) the true construction of "issue" in the
28 Discretionary Trust Deed excludes illegitimate children; and (ii) on the evidence before

1 the court, only the Settlor's children and grandchildren through Madam Law have
2 established that they are legitimate), the Trustee proposes to exercise the Power of
3 Addition to add all other living children, grandchildren and great-grandchildren of the
4 Settlor from his relationships with Madam Lai, Madam Yeung, Madam Wu, Madam
5 Kwok and the Second Madam Yeung (as well as Leung Kay Ling).

6 19 Thus the Trustee proposes to exercise its Power of Addition in the Trust Deed to add as
7 Eligible Beneficiaries (to the extent that they are not already Eligible Beneficiaries):

8 each of the surviving Original Named Persons (the surviving Original Named
9 Persons are hereinafter referred to as the "Surviving Named Persons"); and

10 each of the surviving children of the Deceased Named Persons

11 (and the other grandchildren and great-grandchildren listed in Schedule 1 to the
12 Order I propose to make).

13
14 The Trustee then proposes to appoint the entire remaining trust fund of the Discretionary Trust in
15 accordance with the terms and proportions set out in Clauses 2 and 3 of the Trustee
16 Memorandum.

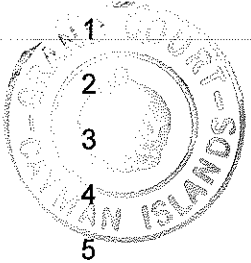
17
18 It is in respect of the proposed exercise of these Powers of Addition and Appointment that the
19 Trustee seeks the direction of the court

20
21 Procedural History

22 20 On 14 March 2011 the Trustee issued an Originating Summons (since amended, re-
23 amended and re-re-amended) seeking the following relief:

24 20.1 A declaration that the Trustee has the general liberty to carry into effect its
25 proposal to exercise its power under Clause 26 of the Trust Deed of the
26 Discretionary Trust, to add certain persons referred to in the Trustee
27 Memorandum (the "Additional Beneficiaries") to the class of "Eligible





1 Beneficiaries" of the Discretionary Trust (the "Power of Addition"), and
2 subsequently to exercise its power under Clause 4(a) of the Trust Deed to appoint
3 out the entirety of the Trust Fund (the "Power of Appointment") to those members
4 of the expanded class of "Eligible Beneficiaries" referred to in the Trustee
5 Memorandum.

6 20.2 In addition and/or in the alternative, that the court may direct whether, on the
7 proper construction of Trust Deed, the scope of the Power of Addition as
8 contained in Clause 26 of the Trust Deed encompasses the Trustee's proposal to
9 add the Additional Beneficiaries to the class of "Eligible Beneficiaries".

10 20.3 Directions as to what inquiries, if any, should be undertaken to determine the
11 membership of the current class of "Eligible Beneficiaries" of the Discretionary
12 Trust.

13 20.4 Directions and orders as to whom should be served with, or notified of, these
14 proceedings and how such service or notification may be effected, including any
15 orders for substituted service.

16 20.5 If required, an order granting leave to serve the Originating Summons herein or
17 notice of the same out of the jurisdiction.

18 21 The application is supported by Mr Love's Affidavit. Given the uncertainty surrounding
19 the identity of the Eligible Beneficiaries (and corresponding uncertainty as to who is
20 entitled to be heard in respect of the application) the application was brought by way of
21 ex parte Originating Summons.

22 22 The first hearing of the Originating Summons took place on 4 May 2011. The court made
23 various orders including:

24 pursuant to GCR O. 15, r. 13A and O. 65, r. 5, the Trustee was ordered to serve
25 notice of these proceedings on the Original Named Persons and Po Leung Kuk;

26 the time for acknowledging service was fixed as 28 days from the respective dates
27 of service; and

1 22.1 the Trustee was granted permission to make certain minor amendments to the
2 Originating Summons.

3 23 Counsel for the Trustee submitted (and the court accepted) that leave was not required to
4 serve notice of the proceedings out of the jurisdiction on the Original Named Persons or
5 Po Leung Kuk.

6 24 Between 4 May 2011 and 4 November 2011, Messrs Maples and Calder served the
7 Notice of Proceedings (attaching the Originating Summons) upon all of the Original
8 Named Persons.

9 24.1 On 25 September 2013 Messrs Hau Lau Li & Yeung, acting on behalf of Mr Shiu
10 Yuen Chit, provided Messrs Maples and Calder with a copy of a note from Mr
11 Shiu Yuen Chit. In that note, Shiu Yuen Chit:

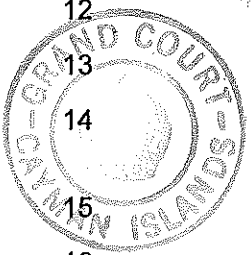
12 (a) sought to apply for an order that his legal costs of instructing Cayman
13 Islands attorneys in these proceedings be borne by the trust fund of the
14 Discretionary Trust;

15 (b) stated that he intended to represent, in addition to himself, his two
16 daughters (Shiu Wai Kun and Shiu Wing Kan), his grandson (Li Hei
17 Shun), and his granddaughter (Li Hei Yee); and

18 (c) if his costs were to be borne by the Discretionary Trust, he set out a series
19 of points that he would wish to refer to his Cayman Islands attorneys for
20 consideration.

21 25 At the pre-trial review on 7 October 2013, the court indicated that:

22 25.1 If Mr Shiu Yuen Chit wished the court to make an order for costs or a
23 representation order or any other form of order in his favour prior to the
24 trial of this matter, he should (either acting in person or through Cayman
25 Islands attorneys) make the appropriate application in accordance with the
26 Grand Court Rules; and



1 25.2 If Mr Shiu Yuen Chit did intend to participate in these proceedings, it
2 would be helpful if he would instruct Cayman Islands attorneys to appear
3 on his behalf.

4 26 Messrs Maples and Calder wrote to Mr Shiu Yuen Chit's Hong Kong counsel, Hau, Lau,
5 Li & Yeung on 11 October 2013 to inform them of the above indications given by the
6 court. No response has been received to this letter.

7 27 The Trustee became aware of the death of Shiu Yuen Lim, one of the Original Named
8 Persons, in about the beginning of 2013. As a result of its searches of public records,
9 including the Hong Kong Deaths Registry on 29 April 2013 and the Hong Kong Land
10 Registry on 3 September 2013, the Trustee understands that:

11 27.1 Shiu Yuen Lim died intestate on 25 February 2011 in Hong Kong;

12 27.2 on 20 February 2012 the Hong Kong Court granted letters of administration to
13 Shiu Yuen Lim's two sons Mr Shiu Hak Kan and Mr Shiu Oi Kan; and

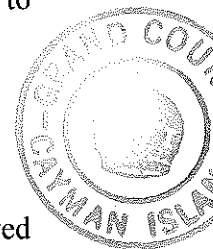
14 27.3 as far as the Trustee is aware, Shiu Yuen Lim did not have any other children.

15 28 The fact that Shiu Yuen Lim had died before the Originating Summons had been served
16 on him means that service of the notice of these proceedings was never effective.

17 29 By letter dated 19 September 2013 from Maples and Calder, the Trustee provided the
18 administrators of Shiu Yuen Lim's estate with all correspondence and court documents
19 previously sent by the Trustee to Shiu Yuen Lim, including the notice of proceedings. In
20 the letter, the Trustee asked the administrators to indicate whether or not they agreed with
21 the Trustee's proposals.

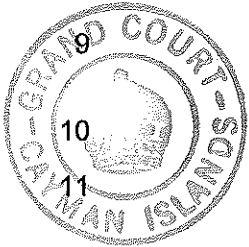
22 30 The Trustee also explained in the letter how the death of Shiu Yuen Lim might affect the
23 Trustee's proposal for the distribution of the trust fund of the Discretionary Trust.

24 31 The Trustee proposes that the distribution that would otherwise have been distributed to
25 Shiu Yuen Lim be distributed in equal shares to his sons Shiu Hak Kan and Shiu Oi Kan.



1 32 On or around 26 August 2013, the Trustee became aware that another of the Original
2 Named Persons, Siu Yuen Shing, had died in Hong Kong on 4 May 2012.

3 33 On 26 August 2013, the daughter of Siu Yuen Shing, Siu Wing Fai, wrote to the Trustee
4 notifying it of his death. The Trustee subsequently contacted Siu Yuen Shing's widow,
5 Pun Wai Ping, on 27 August 2013 by telephone to confirm his death and request details
6 of his estate and the identities of his surviving issue. The Trustee also contacted Siu
7 Wing Fai on 28 and 29 August 2013 to request contact information regarding the
8 surviving issue. As a result of these inquiries, the Trustee was informed that:



9 Siu Yuen Shing died in Hong Kong on 4 May 2012;

10 on 6 August 2012 the Hong Kong Court granted letters of administration to Pun
11 Wai Ping, Siu Yuen Shing's widow; and

12 Siu Yuen Shing had a son (Siu Chun Hei) and a daughter (Siu Wing Fai). As far
13 as the Trustee is aware, Siu Yuen Shing did not have any other children.

14 34 In order to ensure that Pun Wai Ping, as administrator of Siu Yuen Shing's estate, is in
15 fact on notice of these proceedings, on 25 September 2013 the Trustee (via Messrs
16 Maples and Calder) wrote to her and provided her with copies of all the correspondence
17 and court documents that the Trustee had previously sent to Siu Yuen Shing, including
18 the notice of proceedings.

19 The Trustee proposes that the distribution that would otherwise have been distributed to
20 Siu Yuen Shing be distributed in equal shares to his son Siu Chun Hei and his daughter
21 Siu Wing Fai.

22 35 The only parties to provide Acknowledgments of Service are Shao Yuan Liang and Shao
23 Yuan Mou (PRC Residents), Dr Shiu Wan Ying, Shiu Wan Mei and Shiu Yuen Chit and
24 Shiu Wan Yee Francis (as recently as 22.1.14). Pursuant to GCR O. 15, r. 13A(4) those
25 persons who have provided Acknowledgments of Service are now to be treated as parties
26 to these proceedings, and those who have not will be bound by any judgment given in the
27 proceedings as though they were parties to these proceedings.

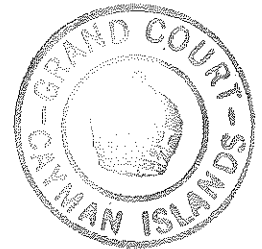
1 This matter was due to be heard on 22 and 23 January 2014. Because of the late indication by
2 Shiu Wan Yee Francis that she wished the court to admit her affidavit, the hearing of the Re-Re-
3 Amended Originating Summons had to be adjourned to 3 February 2014.

4 Directions were given on 22 January with a view to ensuring that all interested persons had
5 notice of the new material (if Shiu Wan Yee filed an acknowledgement of service, which she
6 did).

7 I refer to the first affidavit of Derek Anthony Larmer which explains the problems created by a
8 computer failure at BDO. Maples and Calder have received emails from BDO confirming that
9 they have been in contact with Shiu Yuen Chit, Shiu Wan Mei and Dr Shiu Wan Ying and each
10 of those three have confirmed to BDO that they have all the documents served on BDO from
11 time to time. However those same enquires made by BDO of Shao Yuan Liang and Shao Yuan
12 Mou have not elicited any response.

13

14 3. **THE DISCRETIONARY TRUST DEED AND THE TRUSTEE**
15 **MEMORANDUM.**



16 The Discretionary Trust Deed

17 36 The Discretionary Trust Deed was executed on 10 March 1998. In July 1998
18 proceedings were commenced in Hong Kong (the 1998 Hong Kong Proceedings) in
19 which, among other matters, the validity of the Discretionary Trust Deed was challenged
20 on the grounds that the Settlor did not approve its contents; and/or lacked the requisite
21 mental capacity to understand it; and/or that the Discretionary Trust Deed was procured
22 by undue influence. The Discretionary Trustee was made a defendant to those
23 proceedings.

24 37 On 26 April 1999 the Trustee applied to the Grand Court for *Beddoe* relief in respect of
25 the 1998 Hong Kong proceedings. Several of the Original Named Persons were
26 represented in the *Beddoe* Proceedings. The Trustee was directed to serve a neutral
27 defence but take no further part in those proceedings.

1 38 On 7 January 2008, the 1998 Hong Kong Proceedings were dismissed by an order of the
2 Hong Kong Court. As a matter of Hong Kong law the order dismissing the 1998 Hong
3 Kong Proceedings creates a res judicata between the parties to those proceedings.
4 Accordingly, the Trustee now proceeds on the basis that the Discretionary Trust Deed is
5 valid.

6 39 The provisions of the Discretionary Trust Deed that are, or may be, relevant to this
7 application are as follows.

8 40 Clause 30 states that the Discretionary Trust Deed is governed by Cayman Islands law.

9 41 Clause 1 of the Discretionary Trust Deed contains various definitions. Each relevant
10 definition is summarised below, together with any clauses related to such definitions
11 which are relevant to the application.

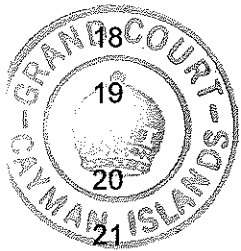
12 42 Clause 2 relates to the office of the Appointor. Clause 1(a) defines "the Appointor" as:
13 the Settlor, Shiu Yuen Chi (a.k.a. Larry Shiu), Wan Yee Shiu Francis, Flora Shiu, and
14 Shiu Yuen Lim, or such other persons who may be appointed to the office of the
15 Appointor in accordance with the provisions of Clause 2.

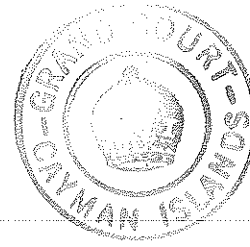
16 42.1 Clause 2(a) makes provision for the appointment of a successor, substitute or
17 addition to the office of Appointor.

18 42.2 Clauses 2(b) and (c) make provision for the resignation or renunciation of the
19 office of Appointor.

20 42.3 Clause 2(d) provides that there shall not be less than four persons to act as
21 Appointor and that they shall act jointly. (Upon the death of the Settlor the
22 number of persons holding the office of Appointor was four.)

23 42.4 Clauses 2(e) and (f) make provision for the appointment of persons to the office
24 of Appointor where the death, liquidation or dissolution of an Appointor causes
25 the number of Appointors to fall below four. Where the Appointor is a natural
26 person (in the present case, they are all natural persons) the legal personal
27 representatives of such deceased natural person shall take over the office of





1 Appointor.

2 42.5 Clause 2(g) makes provision for the renunciation, release or restriction of powers
3 conferred on the Appointor.

4 42.6 Clause 2(i) states that the Appointor is not acting in a fiduciary capacity and shall
5 not have the duties and liabilities of a fiduciary.

6 As far as the Trustee is aware, to date none of the provisions in Clause 2(a), (b), (c), (f) or (g)
7 have been exercised. However, due to the fact that one of the four Appointors, Shiu Yuen
8 Lim, died intestate following the death of the Settlor, the administrators of Shiu Yuen Lim's
9 estate (being his sons, Shiu Hak Kan and Shiu Oi Kan) are now Appointors pursuant to
10 Clause 2(e).

11 43 Clauses 3 to 7 constitute discretionary powers and trusts over the capital and income of
12 the trust fund, exercisable by the Trustee in favour of a class of beneficiaries (strictly,
13 objects of the Power of Appointment) defined by Clause 1(e) as "Eligible Beneficiaries".
14 The original Eligible Beneficiaries are the Settlor and:

15 "*all such issue of the Settlor as shall be born prior to the Perpetuity Date*" (emphasis added).

16 Clause 1(k) defines "issue" as:

17 "*all lineal descendants male and female and any person legally adopted shall be treated as*
18 *the child of their adoptive parents whether such adoption shall occur on or before or after*
19 *[10 March 1998] and any reference to the issue of any person shall include the children and*
20 *remoter issue of such persons through all degrees*".

21 Clause 1(b) defines "child" and "children" to include:

22 "*a child or children legally adopted whether before or after [10 March 1998]*".

23 44 Clause 4(a) confers on the Trustee the Power of Appointment. It gives the Trustee the
24 power to appoint the whole or any part of the capital and/or income of the trust fund to
25 one or more Eligible Beneficiaries in such shares or proportions as the Trustee may

1 determine. The Trustee has not exercised this power save for making the following
2 payments to the Official Solicitor as Committee of the Estate of the Settlor and for his
3 benefit, pursuant to an order of the Hong Kong Court dated 10 March 2003:

4 44.1 HK\$1.5m on 16 April 2003 plus HK\$100,000 per month from April 2003 to
5 March 2004, totalling HK\$2.7m for the financial year ended 31 March 2004;

6 44.2 HK\$1.5m on 7 January 2005 and HK\$100,000 per month from April 2004 to
7 March 2005, totalling HK\$2.7m for the financial year ended 31 March 2005;

8 44.3 HK\$1.5m on 6 January 2006 plus HK\$100,000 per month from April 2005 to
9 March 2006 totalling HK\$2.7m for the financial year ended 31 March 2006;

10 44.4 HK\$1.5m on 1 November 2006 plus HK\$100,000 per month from April 2006 to
11 March 2007, totalling HK\$2.7m for the financial year ended 31 March 2007; and

12 44.5 HK\$1m on 25 June 2007 and HK\$1.5m on 7 March 2008, plus HK\$100,000 per
13 month for the period April 2007 to March 2008, totalling HK\$3.7m for the
14 financial year ended 31 March 2008 (less a refund of HK\$100,000 made by the
15 Official Solicitor on 31 March 2010 after the death of the Settlor in respect of the
16 final monthly payment made).

17 45 Clause 26 confers a power on the Trustee to add to the class of Eligible Beneficiaries any
18 individual who is not or corporation which is not a member of the Excluded Class (the
19 "Power of Addition"). The "Excluded Class", is defined in Clause 1(h). Clause 28
20 confers a power on the Trustee to add individuals, corporations or the trustees of any trust
21 to the Excluded Class. Clause 27 confers on the Trustee the power to remove
22 individuals, corporations or the trustees of any Eligible Trust from the class of Eligible
23 Beneficiaries. To date, the Trustee has not exercised the powers under clauses 26, 27 or
24 28.

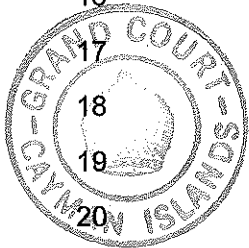
25 46 Clause 24 confers on the Trustee a power to revoke, add to or vary the terms of the
26 Discretionary Trust Deed. The Trustee may only exercise this power if, in its opinion,
27 any such addition, variation or revocation is for the benefit of all, or any one or more of

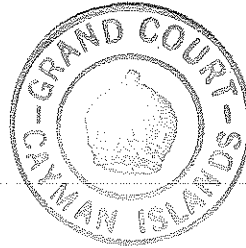
1 the Eligible Beneficiaries. The Trustee may not exercise this power if the addition,
2 variation or revocation is in favour of or results in any benefit to any member of the
3 Excluded Class, nor may it exercise this power if it has the effect of enlarging the class of
4 persons within the definition of Eligible Beneficiaries. To date, the Trustee has not
5 exercised this power.

6 47 Clause 25(a) provides that in considering the exercise of its powers, the Trustee should
7 not have regard to the interests of the Final Repository and that the Trustee may exercise
8 its powers to exclude the Final Repository from any benefit it may otherwise have under
9 the Trust. The Final Repository is defined in clause 1(j) as Po Leung Kuk.

10 48 Clause 29 restricts many of the powers conferred on the Trustee, including the Power of
11 Addition and the Power of Appointment conferred by Clauses 26 and Clause 4(a)
12 respectively, so that 21 days' written notice of the Trustee's intended exercise of any such
13 powers is to be given to the Appointors. During such 21-day period, the Trustee may not
14 exercise the power specified in the notices without the written consent of the Appointors.
15 After the 21-day period has expired, the Trustee may exercise the powers specified in the
16 notice. However, if the Trustee has not exercised a power within 90 days from the date
17 of the expiry of the 21-day period, then the Trustee may not exercise it without giving the
18 Appointors fresh written notice. Clause 29 does not provide that the consent of the
19 Appointors is required before the Trustee may exercise any of the specified powers,
20 merely that 21 days' notice of the same must first be provided. However, it would be
21 open to the Appointors, should they not approve of the Trustee's proposed exercise of a
22 power, to exercise the powers conferred on them under Clause 18 to remove the Trustee
23 from its office and appoint a new trustee, and thereby effectively prevent the (former)
24 trustee from exercising its powers in the manner proposed.

25 49 Insofar as the trust fund of the Discretionary Trust and its income is not otherwise
26 disposed of pursuant to the powers and provisions described above, then by Clauses 5(f)
27 and 6, the fund is to be held in trust for the Final Repository.





1 The Trustee Memorandum

2 50 At or about the same time as the execution of the Discretionary Trust Deed, the Trustee
3 prepared (and its representatives executed) the Trustee Memorandum setting out what it
4 understood (and still understands) to be the wishes of the Settlor with respect to the
5 administration of the Trust.

6 51 Later, in early 1999 Ms Pinky Lam and Ms Doris Lau (both of whom were, but no longer
7 are employees of the Trustee) were asked to set out their recollections of the facts and
8 matters concerning the drafting and execution of the Trust Deed and a number of other
9 related documents.

10 52 In summary, the Trustee Memorandum provides as follows:

11 52.1 By clause 1, during the Settlor's lifetime, the Trustee would give consideration to
12 the recommendations and suggestions of the Settlor, as agreed by a majority of
13 Shiu Wan Yee Francis, Flora Shiu, Shiu Yuen Chi and Shiu Yuen Lim (i.e., the
14 Original Appointors) in relation to the exercise of its powers and duties.

15 52.2 By clause 2, upon the death of the Settlor, the Trustee would divide the whole of
16 the trust fund of the Discretionary Trust into 24 equal parts and hold:

17 (a) 1/12 for eleven Original Named Persons; and

18 (b) 1/24 for each of Leung Kay Ling and Shiu Yui Kun,

19 (the persons for whose benefit the trust fund was to be held under this clause are together all
20 of the thirteen Original Named Persons).

21 52.3 Clauses 3 and 4 make certain provisions for the distribution of the trust fund of
22 the Discretionary Trust in case any of the Original Named Persons should pre-
23 decessate the Settlor or die before the Trustee distributes the share to him/her.

24 Clause 3 addresses the situation where the Deceased Named Person leaves issue;
25 Clause 4 where the Deceased Named Person does not leave issue. Two of the
26 Original Named Persons, Shiu Yuen Lim and Siu Yuen Shing, are now deceased;

1 both are survived by their children. Clause 3 reads as follows:

2 "In the event that any of the [Original Named Persons] shall not survive the Settlor or die
3 before his or her share of the Trust Fund is distributed to him or her but leaving issue and
4 subject to any contrary request that may be given by him or her to the Trustee during his or
5 her lifetime, such issue shall stand in his or her place and take per stirpes and equally
6 between them if more than one the share of the Trust Fund which his her or their deceased
7 parent would have otherwise taken."

8 52.4 No contrary requests were received by the Trustee from Shiu Yuen Lim and Siu
9 Yuen Shing, before their deaths.

10 52.5 The effect of applying Clause 3 of the Trustee Memorandum would be that
11 following the deaths of Shiu Yuen Lim and Siu Yuen Shing their surviving
12 children would stand in their place and take per stirpes in respect of any share of
13 the Trust Fund that the deceased parent would otherwise have taken.

14 52.6 Clause 5 provides that after the death of the Settlor, the Trustee should consider
15 the wishes of the Original Named Persons as to whether or not to continue or
16 determine the Discretionary Trust and the exercise of the Trustee's powers and
17 duties insofar as it relates to their shares in the trust fund of the Discretionary
18 Trust.

19 53 Notwithstanding the terms of the Trustee Memorandum, the Trustee is unable to exercise
20 the Power of Appointment to appoint out any portion of the trust fund of the
21 Discretionary Trust to any of the individuals named in the Trustee Memorandum unless
22 (s)he qualifies as an "Eligible Beneficiary".

23 54 Clause 1(e)(iii) of the Trust Deed provides that "Eligible Beneficiaries" means, subject to
24 certain excluded persons:

25 54.1 "all such issue" of the Settlor (emphasis added) born prior to the perpetuity date
26 (which period has not yet expired);

27 54.2 such persons who may be added to the class of beneficiaries pursuant to Clause

1 26; and

2 54.3 any "*Eligible Corporation*" and the trustees of any "*Eligible Trust*" (neither of
3 which is relevant).

4 55 The term "*issue*" is defined in Clause 1(k) of the Trust Deed as follows:

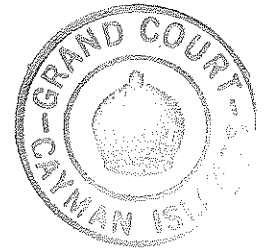
5 "*issue*' includes and means all lineal descending male and female and any person legally
6 adopted shall be treated as the child of their adoptive parents whether such adoption shall
7 occur on or before [10 March 1998] and any reference to the issue of any persons shall
8 include the children and remoter issue of such persons through all degrees." (Emphasis
9 added)

10
11 4. **SUMMARY OF THE SETTLOR'S FAMILY TREE**

12 56 What follows is the Trustee's knowledge and information about those persons who may
13 be descendants of the Settlor. However, the Trustee's knowledge is limited to the
14 information contained in the documents exhibited to Mr Lane's Affidavit and Ms Shek's
15 Second Affidavit, and the Affirmations of Mr Shiu Yuen Chit and Mrs Shiu Wan Ying
16 and the Affidavit of Shiu Wan Yee Francis. The Trustee has not independently verified
17 the accuracy or completeness of any of this information. Therefore, the use (by way of
18 convenience only) of everyday terms of familial descent, such as "son" and "daughter",
19 with respect to various persons is not to be construed as an admission by the Trustee that
20 any such persons are or are not the legitimate (or illegitimate) descendants of the Settlor.
21 It follows that such terms should be understood to be qualified by the word "alleged".

22 57 It appears that the Settlor was born on 19 January 1914 in mainland China. The Settlor
23 died in Hong Kong on 26 March 2008.

24 58 The only evidence as to the Settlor's early life is to be found in Mr Shiu Yuen Chit's
25 Affirmation. It appears that the Settlor originally lived in Guangzhou, China. As a result
26 of the Japanese invasion of China, the Settlor moved first from Guangzhou to Hong Kong



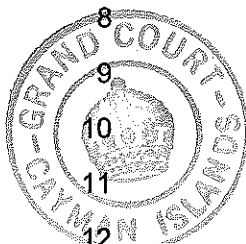
1 (in 1938), and then to Cham Kong, Guangzhou, and various other places in China before
2 settling in Guangzhou again. He returned to Hong Kong in 1946, although he spent time
3 in Guangzhou. It appears that from 1946 to his death, the Settlor was resident in Hong
4 Kong.

5 59 Such information that the Trustee has concerning the unions of the Settlor, his children
6 and the remoter descendants, is set out below. The Trustee acknowledges that the
7 information is on any view incomplete and may not be accurate or up to date. In
8 particular, save where indicated, the Trustee has no information as to whether or not the
9 unions referred to below comprised lawful marriages, when and where any such
10 marriages took place, or when and where any of the persons referred to below were born
11 or were domiciled at the relevant times, or whether there are any other descendants of the
12 Settlor. Some of the information provided to the Trustee is hard to reconcile.

13 60 To the Trustee's knowledge, during his lifetime the Settlor had unions with six different
14 women (the "Unions"). The Trustee does not have the full names of four of the women
15 and knows them only as Madam Law Wan Yuk ("Madam Law"), Madam Lai ("Madam
16 Lai"), Madam Yeung (the "First Madam Yeung"), Madam Wu ("Madam Wu"), Madam
17 Kwok Chi Ling ("Madam Kwok") and Madam Yeung (the "Second Madam Yeung"). As
18 far as the Trustee is aware, the Unions produced 14 children of whom eleven survived the
19 Settlor and of whom nine remain alive (the "Surviving Children").

20 61 Mr Love sets out the Trustee's knowledge of the Settlor's family as at March 2011. The
21 Trustee has since received some further information from Shiu Yuen Chit (in his
22 Affirmation) and from Shiu Wan Ying (in her Affirmation). However, the detailed
23 information in those affirmations is limited to Madam Law's branch of the Settlor's
24 family. The Trustee has also recently received further information from Shiu Wan Yee
25 Francis in her affidavit which relates to Madam Kwok's branch of the Settlor's family.

26 62 The Settlor's descendants appear to comprise the following. For ease of reference, the
27 Original Named Persons are identified in bold type followed by the number assigned to
28 them in paragraph 2 of the Trustee Memorandum. Save as expressly stated, all
29 descendants are assumed to be alive.



1 62.1 Through Madam Law (date of birth 30 May 1914, date of death 18 February
2 2000):

3 (a) Children –

- 4 (i) **Shiu Yuen Chit (1)** (son, born on 4 January 1935);
5 (ii) **Shiu Wan Mei, Millicent (2)** (daughter, born in 1936);
6 (iii) **Shiu Wan Ying (3)** (daughter, born on 3 October 1938);
7 (iv) Shiu Yuen Shun (son, born in 1939, died in June 1994);
8 (v) Shiu Yuen Lai (son, born in 1941, died March 1973); and
9 (vi) an unidentified child (deceased).

10 (b) Grandchildren, being Shiu Yuen Chit's children -

- 11 (i) Shiu Wai Kun, Wendy (daughter, born on 4 July 1966); and
12 (ii) Shiu Wing Kan, Ivy (daughter, born on 25 June 1968).

13 (c) Grandchildren, being Shiu Wan Mei, Millicent's children -

- 14 (i) None known.

15 (d) Grandchildren, being Shiu Wan Ying's children –

- 16 (i) None known.

17 (e) Grandchildren, being Shiu Yuen Shun's children with **Leung Kay Ling**
18 **(12)** -

- 19 (i) **Shiu Yui Kun, Hilda (13)** (no information).

20 (f) Grandchildren, being Shiu Yuen Lai's children -

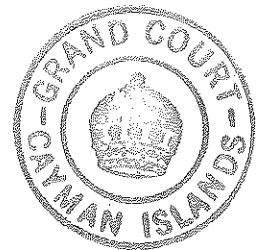
- 21 (i) None known.

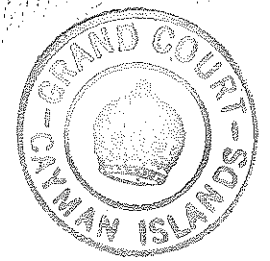
22 (g) Grandchildren, being the children of the Settlor's unidentified child –

- 23 (i) None known.

24 (h) Great-grandchildren, being Shiu Wai Kun, Wendy's children –

- 25 (i) None known.





- 1 (i) Great-grandchildren, being Shiu Wai Kan, Ivy's children –
- 2 (i) Li Hei Shun (son, born on 10 November 2001); and
- 3 (ii) Li Hei Yee, Angelina (daughter, born on 29 June 2005).
- 4 (j) Great-grandchildren, being Shiu Yui Kun, Hilda's children
- 5 (i) None known.
- 6 62.2 Through Madam Lai (died at some point before April 1999):
- 7 (a) Children –
- 8 (i) **Shiu Wan Hing (4)** (daughter).
- 9 (b) Grandchildren, being Shiu Wan Hing's children –
- 10 (i) Mok Yuen Man (daughter, born 28 August 1966);
- 11 (ii) Mok Yuen Yee (daughter, born 8 August 1968); and
- 12 (iii) Mok Yuen Wai (daughter, born 18 September 1970).
- 13 (c) Great Grandchildren, being Mok Yuen Man's child-
- 14 (i) Yim Zi Wai (daughter, born approximately 1993).
- 15 (d) Great Grand Children, being Mok Yuen Wai's child (from her union with
- 16 Tam Yin Shek) -
- 17 (i) Tam Shing Tsun, (son, born on 15 February 2005).
- 18 62.3 Through First Madam Yeung, (died at some point before April 1999):
- 19 (a) Children –
- 20 (i) **Shiu Yuen Lim (5)** (son, died 25 February 2011).
- 21 (b) Grandchildren -
- 22 (i) Shiu Hak Kan (son, born on 10 December 1967); and
- 23 (ii) Shiu Oi Kan, (son, born on 13 January 1973).

1 (c) Great Grandchildren, being the children of Shiu Hak Kan -

2 (i) Shiu Cheuk Tung (daughter, born 19 February 2002).

3 62.4 Through Madam Wu (died at some point before April 1999):

4 (a) Children:

5 (i) **Shao Yuan Liang (6/7)** (son, also known as Shao Yuen Liang or
6 Siu Yuen Leung);

7 (ii) **Shao Yuan Mou (6/7)** (also known as Siu Yuen Mao); and

8 (iii) **Siu Yuen Shing (8)** (son, died on 4 May 2012).

9 (b) Grandchildren, being Shao Yuan Liang's children -

10 (i) Shiu Yat Ming (son, born 5 January 1974); and

11 (ii) Shao Yi Fei (daughter 28 January 1967).

12 (c) Great Grandchildren, being Shiu Yat Ming's children -

13 (i) Shiu Sheung Tsuen (son, born December 2002).

14 (d) Great Grandchildren being Shao Yi Fei's child -

15 (i) Jennifer Jiang (daughter, born June 2000).

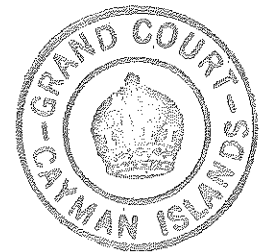
16 (e) Grandchildren, being Shao Yuan Mou's child -

17 (i) Shao Fei Betty, (daughter, born 1 June 1974).

18 (f) Grandchildren, being Siu Yuen Shing's children -

19 (i) Siu Wing Fai (daughter, born 9 December 1976); and

20 (ii) Siu Chun Hei (son, born 12 June 1978).



22 62.5 Through Madam Kwok:

23 (a) Children -

1 (i) **Shiu Wan Yee Francis (9)** (also known as Wanyee Shiu Francis)

2 (daughter born 19 September 1951); and

3 (ii) **Shiu Yuen Chi (10)** (son born 1 May 1953).

4 (b) Grandchildren, being Shiu Wan Yee Francis' child –

5 (i) Alexander Victorovich Babitsky (son, born 22 January 1996).

6 (c) Grandchildren, being Shiu Yuen Chi's children -

7 (i) Tanya Shiu (daughter, born 13 January 1991); and

8 (ii) Ming Shiu, (daughter, born 27 October 1998).



9 62.6 Through Second Madam Yeung (died before April 1999):

10 (a) Children –

11 (i) **Shiu Wan Tik Flora (11)** (also known as Flora Shiu) (daughter,
12 born approximately 1957).

13 **Rival contentions of descent and legitimacy**

14 63 The relevant evidence available is very limited. The only such evidence filed in these
15 proceedings comprises the Affidavits and Affirmations of Mr Love, Shiu Yuen Chit and
16 Shiu Wan Ying and Shiu Wan Yee Francis.

17 Mr Love's Affidavit

18 64 Mr Love is only able to inform the court that at various times certain of the Original
19 Named Persons and various descendants of the Settlor have alleged or have appeared to
20 allege (in documents filed in the Hong Kong Proceedings, or in the previous Cayman
21 Islands proceedings in 1999, or in correspondence) that they are legitimate descendants
22 of the Settlor.

23 65 The documents filed in these earlier proceedings (to the extent known to the Trustee) and
24 the correspondence contain a multitude of allegations and counter-allegations. The
25 allegations and counter-allegations are almost invariably poorly particularised. In any

1 event, few underlying documents have been produced to the Trustee to support any such
2 allegations.

3 66 Mr Love's account of the allegations is necessarily limited because the Trustee has no
4 direct knowledge of any of these matters and because it was not a party to the 1999 or
5 2003 Hong Kong Proceedings and its role in the 1998 Hong Kong Proceedings was
6 limited.

7 Mr Shiu Yuen Chit's Affirmation

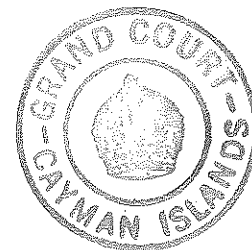
8 67 In his Affirmation (repeated in his Re-Affirmed Affirmation) Shiu Yuen Chit generally
9 repeats much of what he has alleged previously. He has provided some details of the
10 marriage of the Settlor to Madam Law, but he has not provided any birth or marriage
11 certificates (even his own or of his children), identity cards, passports etc. Further there
12 are inconsistencies between the information contained in his Affirmation and what he has
13 previously claimed: for instance, he does not refer at all to his niece Shiu Yui Kun, Hilda.
14 Shiu Yuen Chit offers no explanation why, if any of the other surviving children of the
15 Settlor are not in fact the biological children of the Settlor, the Settlor sought to benefit
16 them.

17 The following written submissions have been received from Shiu Yuen Chit.

18 The Initial Submissions dated 23 December 2013 (hereinafter referred to as the "Initial
19 Submissions");

20 the Additional Submissions of early January 2014; and

21 the Second Additional Submissions of 28 January 2014.



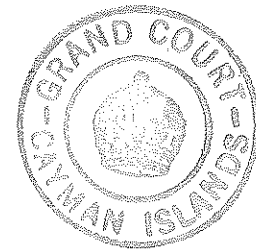
1 Mrs Shiu Wan Ying's Affirmation

2 68 Mrs Shiu Wan Ying's Affirmation provides very little information. It exhibits a
3 document Mrs Shiu Wan Ying alleges is her birth certificate, but the exhibited birth
4 certificate states the name of her father to be Shiu Shau Man. None of the other available
5 information or evidence (in these proceedings or in the earlier proceedings, including her
6 own affirmation in the 2003 Hong Kong Proceedings dated 3 December 2003) suggests
7 that the Settlor ever used this alias.

8 69a Shiu Wan Yee Francis' affidavit

9 Shiu Wan Yee Francis' affidavit was sworn 20 January 2014 and her initial submissions
10 are dated 3 February 2014. In her affidavit she deposes to a common law marriage of her
11 mother to the Settlor and the latter's participation in the amendment to her and her
12 brother's birth certificates.

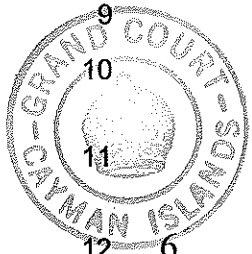
13
14 5. **ISSUES TO BE DETERMINED BY THE COURT**



- 15 (1) Does the word "issue" include illegitimate issue?
- 16 (2) Is the Trustee's view that the only issue of the Settlor who have established their claim to
17 legitimacy are his issue by Madam Law, a view that a reasonable and prudent trustee
18 could properly come to?
- 19 (3) Is the Trustee's view that the Trustee Memorandum accurately reflects the Settlor's
20 wishes as to the distribution of the Trust Fund after his death, a view that a reasonable
21 and prudent trustee could properly come to?
- 22 (4) Should the Trustee have regard to the Settlor's wishes as expressed in the Trustee
23 Memorandum?
- 24 (5) Is the Power of Addition contained in clause 26 valid?

1 (6) If it is valid and if the Trustee's view that the Trustee Memorandum accurately reflects
2 the Settlor's wishes is a view that a reasonable and prudent trustee could properly come
3 to, could the Trustee properly form the view that its proposed exercise of that power
4 (namely, by adding the persons named or identified in the Memorandum other than those
5 who are already members of the class) is within the intended scope or object of that
6 power?

7 (7) If it is permissible to add those persons, is the Trustee's view that its proposed exercise of
8 the power of appointment (namely, in favour of those named or identified in the
9 Memorandum and in the same proportions), a view that a reasonable and prudent trustee
10 could properly come to?
11



12 6. **THE 1998 HONG KONG PROCEEDINGS AND THE PROPOSED**
13 **RESERVE**

14 69 As explained in Ms Shek's Second Affidavit, the 1998 Hong Kong Proceedings were
15 dismissed by the Hong Kong Court on or about 7 January 2008. There is no appeal, or
16 application for permission to appeal, against the dismissal; the only extant issue is the
17 question of costs due to the Trustee from the Settlor's estate.

18 70 Ms Shek's Second Affidavit describes the negotiations between the Trustee and the
19 Settlor's estate (represented by the Official Solicitor as his executor) as to the level of
20 costs to be paid by the Settlor's estate. Such negotiations have been unsuccessful, and the
21 Trustee has instructed its Hong Kong solicitors to proceed to formal taxation in relation
22 to both of its bills of costs.

23 71 As explained in Ms Shek's Third Affidavit, on 4 October 2013 the Trustee's Hong Kong
24 solicitors filed and served its notices of commencement of taxation and bill of costs
25 incurred prior to 31 January 2002 and costs incurred after 31 January 2002 on the Hong
26 Kong Court and the Official Solicitor. The Official Solicitor has subsequently served its
27 lists of objections to both bills. On 26 November 2013, the Trustee's Hong Kong

1 solicitors filed and served applications to set both bills down for taxation. The Trustee
2 has been advised by its Hong Kong solicitors that due to a busy court diary the taxation
3 of the bills (on the papers, without an oral hearing) could take six months from the filing
4 of the notice of commencement of taxation, two months longer than previously set out in
5 Ms Shek's Second Affidavit.

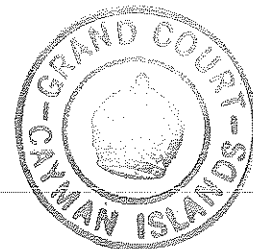
6 72 On 26 November 2013, the Trustee's Hong Kong solicitors received a letter from the
7 Official Solicitor confirming that the estate of Mr Shiu Pak Nin is insolvent and that an
8 application for court directions and administration will be made within 6 weeks. On 6
9 December 2013 the Official Solicitor issued an originating summons in the Hong Kong
10 Court, by which the Official Solicitor applied for leave to apply for further administration
11 of the Estate to be made on the basis of an insolvent estate. As a result, it is now
12 uncertain when the Trustee will be able to recover its outstanding costs in the 1998 Hong
13 Kong Proceedings and how much the Trustee will eventually recover from the Settlor's
14 estate.

15 73 In light of the uncertainty in the timing and estimated costs of recovering the Trustee's
16 costs in the 1998 Hong Kong proceedings, the insolvency of the Settlor's estate and the
17 application filed by the Official Solicitor in relation thereto, the Trustee no longer
18 considers it appropriate to appoint the entirety of the trust assets less a reserve for the
19 estimated costs and administration fees of the taxation process. The Trustee considers
20 that it would be in the best interests of the beneficiaries to make a distribution of
21 HK\$55,000,000 and then to retain a balance in the Discretionary Trusts to meet future
22 costs and expenses in connection with the Discretionary Trusts, including the taxation of
23 the costs in the 1998 Hong Kong proceedings and any steps the Trustee may be required
24 to take as a result of the Official Solicitor's application.

25
26 **7. THE TRUSTEE'S SUBMISSIONS**

27 Mr Colin McKie QC for the Trustee submitted as follows.

28 74 Following the Settlor's death, the Trustee had proposed to distribute the assets of the



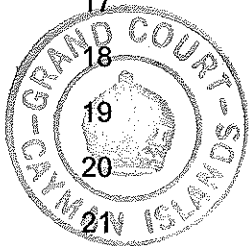
1 Discretionary Trust to the Original Named Persons in the shares set out in the Trustee
2 Memorandum. However:

3 74.1 The relevant class of "Eligible Beneficiaries" under the Discretionary Trust Deed
4 is defined to include: (i) the Settlor; (ii) "*all such issue of [the Settlor] as shall be*
5 *born prior to the 'Perpetuity Date'*"; and (iii) such individuals and corporations as
6 shall be appointed additional members of the class pursuant to clause 26 of the
7 Discretionary Trust Deed. It is not clear to the Trustee whether, on the true
8 construction of the Discretionary Trust Deed, the term "issue" is limited to
9 legitimate descendants of the Settlor (i.e., persons born in wedlock or
10 subsequently legitimated), or should also include illegitimate descendants (i.e.,
11 persons not so born or legitimated).

12 74.2 The Trustee does not consider it possible, from the evidence presently available to
13 the Trustee, to establish with any certainty which (if any) of the Original Persons
14 are in fact: (i) the Settlor's biological descendants; and (ii) legitimate.

15 74.3 Further, two of the Original Named Persons (Shiu Yuen Lim and Siu Yuen Shing)
16 have died since the death of the Settlor. The Trustee Memorandum states that the
17 Settlor wished for the children of any Original Named Persons who died before
18 appointment of the Discretionary Trust assets to receive their parent's share.
19 However, if either the deceased Original Named Person or any of their children
20 are not legitimate descendants of the Settlor then the Trustee is faced with the
21 same problem, namely whether or not they are members of the class of "Eligible
22 Beneficiaries".

23 75 In the circumstances, the Trustee proposes to exercise the power of addition conferred
24 upon it by clause 26 of the Discretionary Trust Deed (the "Power of Addition") to add to
25 the class of Eligible Beneficiaries (to the extent that they are not already members of the
26 class) each of the surviving Original Named Persons and the surviving children of Shiu
27 Yuen Lim and Siu Yuen Shing (and as a precaution the other grandchildren and great
28 grandchildren listed in Schedule 1).



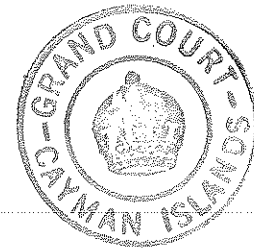
1 76 Before the court could consider the proposed exercise of the Power of Addition, the
2 Trustee considers that it is necessary first to determine (to the extent possible) the present
3 membership of the class of Eligible Beneficiaries (or, at any rate, to understand what
4 characteristics a person must possess to be a member of the class), so that the interests of
5 the existing class are properly considered when deciding whether and how to exercise the
6 Power of Addition.

7 77 In order to determine the present membership/characteristics of the relevant class, the
8 Trustee seeks declarations/directions from the court: (i) in respect of the legal
9 construction of the Discretionary Trust Deed; and (ii) as to what (if any) factual inquiries
10 the Trustee should undertake to determine whether any person is (biologically) descended
11 from the Settlor and/or is legitimate.

12 78 If the court is satisfied that the Power of Addition can validly be exercised in the manner
13 proposed by the Trustee (and that the Trustee is not required to undertake further
14 inquiries), the Trustee asks the court to confirm that the Power of Appointment under
15 clause 4(a) of the Discretionary Trust Deed may validly be exercised in the manner
16 proposed by the Trustee (i.e., in accordance with the Trustee Memorandum) or,
17 alternatively, to declare that it would be more appropriate for the Trustee to exercise the
18 Power of Appointment in some other manner.

19 79 Before these proceedings were issued, three sets of related proceedings were commenced
20 in the Hong Kong courts in 1998, 1999 and 2003. A detailed summary of the background
21 to and determination of these proceedings can be found at paragraphs 55 to 86 of Mr
22 Love's affidavit.

23 In the 1998 HK Proceedings, the validity of the Discretionary Trust Deed (among other
24 instruments) was challenged on the grounds that the Settlor did not approve its contents
25 and/or lacked the necessary mental capacity and/or was acting under undue influence.
26 On 7 January 2008, the Hong Kong Court dismissed the 1998 HK Proceedings, albeit that
27 the Trustee concedes that this was not a dismissal on the merits. Nevertheless, as a
28 matter of Hong Kong law, the parties to the 1998 HK Proceedings and their privies are
29 precluded from challenging the validity of the Discretionary Trust Deed, i.e. the dismissal



1 created a *res judicata* and/or they are otherwise estopped.

2 On 27 March 2000, in the context of the 1999 HK Proceedings, the Hong Kong Court
3 determined that the Settlor was of unsound mind and incapable of managing his own affairs (at
4 least for certain purposes) and appointed the Hong Kong Official Solicitor ("HK O/S") to
5 manage his affairs, which she continued to do until his death in 2008. The Trustee contends that
6 Hong Kong Court's declaration concerning the Settlor's mental capacity (to whatever degree) as
7 at 27 March 2000 was not determinative of the validity or effectiveness of the Discretionary
8 Trust Deed, executed two years prior on 10 March 1998. (Because the Hong Kong Court did not
9 invalidate the Discretionary Trust Deed – one of the claims in the 1998 HK Proceedings - it may
10 be inferred that the Hong Kong Court reached the same conclusion.)

11 In an Opinion dated 30 July 2009 Anderson Chow SC was asked to advise whether the Deed of
12 Confirmation (executed pursuant to the order of Lam J dated 16 May 2007) confirmed the
13 Discretionary Trust with effect from the date on which it was originally executed, and whether
14 such execution was likely to preclude the Trustee from relying on the Trustee Memorandum.

15 His Opinion was as follows:-

16 "... the effect of the Order made by Lam J. dated 16 May 2007 and the Deed of Confirmation
17 executed by the Official Solicitor as the Committee of the Estate of the Settlor appointed under
18 the Mental Health Ordinance, Cap.136 ("the Ordinance"), dated 9 January 2008 is clear. By the
19 Deed of Confirmation, the Discretionary Trust has been confirmed to be valid as if the Settlor
20 had been of sound mind and full capacity at the material time and that the title of the Trustee
21 shall cease to be voidable at the instance of the Confirmor or his heirs or successors or assigns on
22 the ground of undue influence, and further that the Discretionary Trust shall take effect from the
23 date when it was originally executed by the Settlor.

24 ... As to the question of whether the Deed of Confirmation would have the effect of overriding
25 the Trustee Memorandum and whether it is likely to preclude the Trustee from relying on the
26 Trustee Memorandum, from what I understand of the background leading to the execution of the
27 Deed of Confirmation it was never intended to affect the Trustee Memorandum, which in any
28 event is not a binding document... the Deed of Confirmation was intended to address the two

1 alleged grounds of invalidity of, inter alia, the Discretionary Trust raised in HCA-11070 of 1998.
2 It makes no mention of the Trustee Memorandum whatsoever, and I fail to see how it can be said
3 that it has the effect of overriding the Trustee Memorandum. The effect of the Deed of
4 Confirmation is to confirm, inter alia, that the Discretionary Trust is a valid instrument and takes
5 effect from the date of execution, and it has no impact on the Trustee Memorandum. I see no
6 reason why the Trustee can no longer rely on the Trustee Memorandum, in the sense of referring
7 to the proposal therein contained as a non-binding guideline only, after the execution of the Deed
8 of Confirmation by the Official Solicitor.

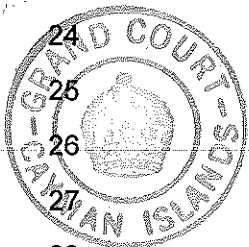
9 This having been said, the Trustee Memorandum (a non binding document) is, and has always
10 been, subject to the express terms of the trust instrument. To the extent that the Trustee
11 Memorandum is inconsistent with the terms of the Discretionary Trust, the latter prevail. In this
12 sense, the Discretionary Trust overrides the Trust Memorandum, but this has always been the
13 position, whether before or after the execution of the Deed of Confirmation.

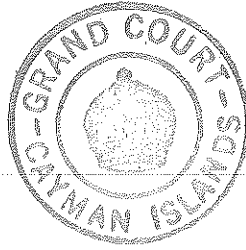
14 Lastly, whatever may be the effect of the Deed of Confirmation on the Trustee Memorandum, I
15 understand that the Trustee's intention is to act in accordance with the directions of the Cayman
16 Court. If the Cayman Court should sanction the Trustee's proposed application to add to the list
17 of beneficiaries and to distribute the assets, there will be no basis to contend that there is any
18 "fraud on the power" as alleged by Hau, Lau, Li & Yeung."

19 All of the actual or alleged descendants of the Settlor were party to the proceedings before Lam
20 J.

21 The court should proceed on the basis that the Discretionary Trust Deed is valid and effective.

22 79.1 The Trustee has the benefit of the 1998 HK Costs Order. The quantum of the
23 estate's liability under that costs order is the subject of the HK Taxation. Further,
24 it now appears that the Settlor's estate is insolvent and therefore there is no
25 certainty, upon completion of taxation, what amount, if any, the Trustee will
26 actually receive or when it will receive it. At present, there is also uncertainty as
27 to the likely costs of the Trustee (*qua* creditor) in the administration of the
28 Settlor's insolvent estate.





1 Law

2 80 The principles of construction applicable to a trust deed are the same as those applicable
3 to any other instrument or utterance. See, e.g., *Lemos v. Coutts & Co. (Cayman) Ltd*
4 [2003] CILR 381 (GC) and on appeal [2004-05] CILR 77; *Chartbrook v Persimmon*
5 [2009] AC 1101 at 1112 per Lord Hoffman; *Marley v Rawlings* 2014 UKSC 2. Those
6 principles were summarised in Lord Hoffman's speech in *Investors Compensation*
7 *Scheme v West Bromwich BS* [1998] 1 All ER at 114-115:

8 *"...(1) Interpretation is the ascertainment of the meaning which the document*
9 *would convey to a reasonable person having all the background knowledge which*
10 *would reasonably have been available to the parties in the situation in which they*
11 *were at the time of the contract.*

12 *(2) The background was famously referred to by Lord Wilberforce as the "matrix*
13 *of fact", but this phrase is, if anything, an understated description of what the*
14 *background may include. Subject to the requirement that it should have been*
15 *reasonably available to the parties and to the exception to be mentioned next, it*
16 *includes absolutely anything which would have affected the way in which the*
17 *language of the document would have been understood by a reasonable man.*

18 *(3) The law excludes from the admissible background the previous negotiations of*
19 *the parties and their declarations of subjective intent. They are admissible only in*
20 *an action for rectification. The law makes this distinction for reasons of practical*
21 *policy and, in this respect only, legal interpretation differs from the way we would*
22 *interpret utterances in ordinary life. The boundaries of this exception are in some*
23 *respects unclear. But this is not the occasion on which to explore them.*

24 *(4) The meaning which a document (or any other utterance) would convey to a*
25 *reasonable man is not the same thing as the meaning of its words. The meaning*
26 *of words is a matter of dictionaries and grammars; the meaning of the document*
27 *is what the parties using those words against the relevant background would*
28 *reasonably have been understood to mean. The background may not merely*
29 *enable the reasonable man to choose between the possible meanings of words*
30 *which are ambiguous but even (as occasionally happens in ordinary life) to*
31 *conclude that the parties must, for whatever reason, have used the wrongs words*
32 *or syntax (see *Mannai Investment Co Ltd. v Eagle Star Life Assurance Co Ltd.**
33 *[[1997] AC 749]).*

34 *(5) The "rule" that words should be given their "natural and ordinary meaning"*
35 *reflects the common sense proposition that we do not easily accept that people*
36 *have made linguistic mistakes, particularly in formal documents. On the other*
37 *hand, if one would nevertheless conclude from the background that something*

1 *must have gone wrong with the language, the law does not require judges to*
2 *attribute to the parties an intention which they plainly could not have had. Lord*
3 *Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA**
4 *v *Salen Rederierna AB, The Antaios* [1985] AC 191 at 201:*

5 *"...if detailed semantic and syntactical analysis of words in a commercial*
6 *contract is going to lead to a conclusion that flouts business common*
7 *sense, it must be made to yield to business common sense."*

8 81 Lord Hoffman subsequently clarified the second of the above principles in *BCCI v AI*
9 [2001] ICR 337 at 351C-F:

10 *...when, in [ICS], I said that the admissible background included "absolutely*
11 *anything which would have affected the way in which the language of the*
12 *document would have been understood by a reasonable man", I did not think it*
13 *necessary to emphasise that I meant anything which a reasonable man would*
14 *have regarded as relevant. I was merely saying that there is no conceptual limit*
15 *to what can be regarded as background. It is not, for example, confined to the*
16 *factual background but can include the state of the law (as in cases in which one*
17 *takes into account that the parties are unlikely to have intended to agree to*
18 *something unlawful or legally ineffective) or proved common assumptions which*
19 *were in fact quite mistaken. But the primary source for understanding what the*
20 *parties meant is their language interpreted in accordance with conventional*
21 *usage: "we do not easily accept that people have made linguistic mistakes,*
22 *particularly in formal documents". I was certainly not encouraging a trawl*
23 *through "background" which could not have made a reasonable person think that*
24 *the parties must have departed from conventional usage." [original emphasis].*

25 82 In addition to the principles above, where the same words or provisions have for many
26 years received a particular judicial interpretation, and where the document has been
27 professionally drawn, the courts presume that the draftsman had in mind such judicial
28 meaning and that he intended that the words in the document should continue to have the
29 same meaning. See, e.g. *The Kleovoulos of Rhodes* [2003] 1 All ER (Comm.) 586 at
30 paragraph 28.

31 83 A presumption in favour of an established judicial meaning can be rebutted: for example,
32 in *Wickman v Schuler* [1974] AC 235 (by a majority of 4:1, Lord Wilberforce dissenting)
33 the House of Lords held that a construction of the contractual clause before them on the
34 basis of the established judicial meaning would lead to absurd and unreasonable results
35 and that such judicial meaning should therefore be rejected in favour of the popular
36 sense.

1 In the case of this Discretionary Trust Deed the true meaning and effect of the word 'issue' is
2 fundamental to understanding the meaning and effect of the instrument as a whole. Therefore
3 the burden of rebutting the established judicial meaning of the word 'issue' is much higher than
4 it was in *Wickman v Schuler*.

5 *Factual matrix*

6 84 Where a series of documents in substance form part of the same transaction and are
7 contemporaneously executed, they may be relied upon as an aid to the construction of
8 each other such document forming part of the transaction. The justification for this
9 principle is that each document within the transaction is executed on the faith of all the
10 others also being executed: they must therefore be treated as one deed contained in
11 several documents.

12 85 The following instruments, being instruments executed by the Settlor on 10 March 1998
13 – i.e., contemporaneously with the Discretionary Trust Deed – with respect to substantial
14 dispositions of his property form part of the same "transaction" as the Discretionary Trust
15 Deed and therefore may be relied upon as an aid to construction:

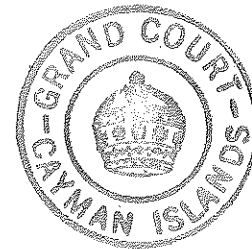
16 85.1 The Fixed Trust Deed.

17 85.2 The Last Will and Testament dated 10 March 1998.

18 85.3 The Third Deed of Gift.

19 86 It is less clear what, if any, weight the court may place on the Trustee Memorandum in
20 construing the Discretionary Trust Deed. There are two main difficulties in relying on
21 this document, the first factual and the second legal.

22 87 First, the court must decide whether, as a matter of fact, the Settlor did agree to the
23 contents of the Trustee Memorandum at the same time as the Discretionary Trust Deed.
24 The only evidence before the court that the Trustee in fact approved the contents of the
25 Trustee Memorandum are the Lam/Lau Notes. The Lam/Lau Notes are therefore, at their
26 highest, untested, unsworn, third-hand hearsay evidence of a third party's impressions of
27 the Settlor's intentions (itself hearsay evidence). In the circumstances, the Trustee



1 suggests that the court give the Lam/Lau Notes whatever weight the court considers
2 appropriate. The court is required as a matter of policy to exclude declarations of
3 subjective intent from the admissible background for the purposes of the construction of
4 the Discretionary Trust Deed: this seems to be plain from the third principle expressed in
5 *ICS*.

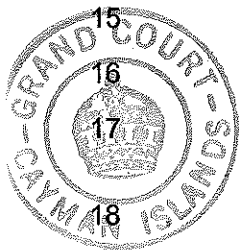
6 88 If the court concludes that the Settlor did (factually) approve the contents of the Trustee
7 Memorandum and that he did so at the same time as executing the Discretionary Trust
8 Deed, the Trustee submits that the Trustee Memorandum should be treated as equivalent
9 to a "letter of wishes" from the Settlor setting out his intentions with respect to the
10 discretionary trust. However, the further question then arises of whether, as a matter of
11 law, a document such as a letter of wishes which expresses the Settlor's subjective
12 intentions is either: (i) admissible; or (ii) relevant to the court's task in construing the
13 Discretionary Trust Deed.

14 89 Secondly, the Trustee submits that, as this is not an action in which fraud is alleged or
15 rectification is sought, documents such as letters of wishes (in this case, the Trustee
16 Memorandum, if it is to be treated as analogous to a letter of wishes) are declarations of
17 subjective intent and should therefore be excluded.

18 *The judicial meaning of "issue"*

19 90 As at 10 March 1998, the settled common law position in the Cayman Islands was that,
20 *prima facie*, the meaning of the word "issue" meant "legitimate issue", i.e., those born or
21 conceived in wedlock or subsequently legitimated and did not include within its meaning
22 "illegitimate issue", i.e., those not so born or subsequently legitimated. See the decisions
23 of Cayman Islands courts in *Watson-Morgan v Grant* [1990-91] CILR 81 (CA), *RHB v*
24 *Butlin* [1992-93] CILR 219, *Re B* [1999] CILR 460, and *Ebanks v Llewelyn*. [2003] CILR
25 N3.

26 The existence of this common law rule of construction has been confirmed by section 3(3) of the
27 Status of Children Law 2003. (“(3) The rule of construction whereby in any instrument words of
28 relationship signify only legitimate relationship in the absence of a contrary expression of
29 intention is hereby abolished.”)



1 91 *RHB v Butlin* is of particular relevance to the instant case because it related to the
2 construction of family settlements (rather than of statutes). In *RHB v Butlin*, Harre J held
3 that it would be wrong for the court to direct that, in the context of a family settlement,
4 the words "child" and "issue" did not under Cayman Islands law have their *prima facie*
5 meaning at common law, given that: "[i]t is a matter of common knowledge that settlors
6 from other parts of the world have established family trusts in the Cayman Islands, and it
7 cannot be assumed by any means all of those families live under a social system which
8 embodies the approach which England has adopted in the Family Law Reform Act 1969".
9 This appears to have been the policy reason underlying the decision.

10 92 The common law position in England was, before the entry in entry into the force of
11 English Family Law Reform Act 1969, the same as that in the Cayman Islands as at 10
12 March 1998. See, for example, *Hill v Crook* (1873) LR 6 HL 265 and *Dorin v Dorin*
13 (1874) LR 7 HL 568. See also Lewin on Trusts (18th ed., 2008) at ¶6-¶14 and Williams
14 on Wills (9th ed., 2008) at ¶72.2 ff.

15 93 This rule of construction applied to all expressions denoting family relationships
16 (children, nephews, nieces, cousins, relations etc.). The English Family Law Reform Act
17 1969 modified the application of the common law rule in England. No equivalent statute
18 was introduced in the Cayman Islands until the entry into force of the Status of Children
19 Law 2003 ("SOFL 2003"). However, SOFL 2003 does not have retrospective effect,
20 therefore if a presumption applies in these circumstances that the draftsman intended
21 "issue" to have its judicially interpreted meaning under Cayman Islands law, the relevant
22 judicial meaning is that which prevailed in the Cayman Islands courts at the time the
23 Discretionary Trust Deed was executed. The established rule of judicial construction
24 under Cayman Islands law at that time was that, in the absence of clear evidence to the
25 contrary, the meaning of a term of familial relationship, such as "issue"/"child" did not
26 include illegitimate persons.

27 In *Sydall v Castings Ltd* [1967] QB 302 the majority of the Court of Appeal (Lord Denning
28 dissenting) held that the word 'descendant' was limited to legitimate descendants.

1 Should the presumption apply; is the presumption rebutted on the evidence?

2 94 As to whether the presumption should apply in the present circumstances:

3 94.1 The Discretionary Trust Deed, on its face, indicates that it was drafted by Johnson
4 Stokes & Master ("JSM"), a prominent Hong Kong firm of solicitors. It was
5 therefore "professionally drawn".

6 94.2 The only basis upon which it could be suggested that the presumption would not
7 apply in these circumstances is that JSM were not, and are not, Cayman Islands
8 attorneys and therefore they may not in fact have known how "issue" was
9 judicially interpreted in the Cayman Islands. Nevertheless, advice may have been
10 obtained from Cayman Islands counsel on the judicial meaning of "issue" (it
11 certainly appears that US law advice may have been sought). The Trustee
12 submits that this is mere speculation and no conclusions can be drawn about
13 whether JSM were or were not aware of the judicial meaning under Cayman
14 Islands law, even assuming that the actual knowledge which JSM had of Cayman
15 Islands law is relevant to whether they should be presumed to have such
16 knowledge.

17 94.3 The Trustee has no actual knowledge of the facts and matters considered by JSM
18 when preparing the Discretionary Trust Deed and there is no evidence before the
19 court of the same (apart from a passing reference in the Lam/Lau Notes
20 (themselves of questionable evidential value)) to US law advice having been
21 obtained).

22 94.4 Moreover, the Trustee is unaware of any authority to the effect that the
23 presumption in favour of the judicial meaning should not apply where a lawyer
24 drafts a document governed by the law of a different jurisdiction from that in
25 which he practises. As a matter of principle it would be wrong to have such an
26 exception to the presumption, for the same reason that a negligent lawyer's
27 subjective lack of knowledge of the law would not affect the construction of a
28 document (although it might allow for the document to be rectified).

1 95 If the court concludes that the presumption applies, the next question is whether the
2 presumption is rebutted in the instant case. There does not appear to the Trustee to be
3 anything within the Discretionary Trust Deed itself or in the factual matrix which could
4 (even arguably) provide the type of clear evidence necessary to rebut the presumption:

5 95.1 Within the Discretionary Trust Deed:

6 (a) "issue" is defined as:

7 *"includes and means all lineal descendants male and female and any*
8 *person legally adopted shall be treated as the child of their adoptive*
9 *parents whether such adoption shall occur on or before or after the date*
10 *of this Deed and any reference to the issue of any person shall include the*
11 *children and remoter issue of any person through all degrees";*

12 (b) "child" or "children" is defined as:

13 *"includes a child or children legally adopted whether before or after the*
14 *execution of this Deed";*

15 (c) Both "issue" and "children" have been judicially construed to require
16 legitimacy. If the court considers that either "issue" or "children" mean
17 "legitimate or illegitimate" [issue/children]" then illegitimate children will
18 come within the class of Eligible Beneficiaries, as issue is defined to
19 include children. Both definitions are drafted very broadly and care has
20 been taken to include both genders, adopted children and remoter issue.
21 The fact that both definitions are phrased to "include" the matters set out
22 in the definition may perhaps suggest that the draftsman (objectively) did
23 not intend the definitions to be exhaustive.

24 (d) Apart from the definitions of "issue" and children" there does not appear
25 to be anything within the Discretionary Trust Deed itself which could
26 provide any guidance as to the construction of those terms.

27 95.2 As for the factual matrix: the Fixed Trust Deed and the Third Deed of Gift both
28 provide for all the same persons named in the Trustee Memorandum (i.e., the
29 Original Named Persons) to receive sums of money in the same proportions as

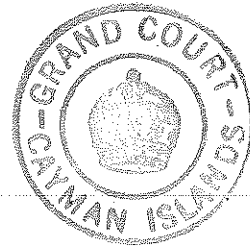
1 suggested in the Trustee Memorandum. It appears possible that some of the
2 Original Named Persons are illegitimate. The fact that the Settlor by these two
3 other instruments benefitted his illegitimate as well as legitimate issue cuts both
4 ways:

5 (a) On the one hand, it could be said that the Settlor must (objectively) have
6 intended for the Fixed Trust Deed, the Third Deed of Gift and the
7 Discretionary Trust Deed (all executed as part of the same transaction) to
8 benefit the same persons in the same proportions and those persons
9 included illegitimate as well as legitimate issue, therefore "issue" in the
10 Discretionary Trust Deed must be taken to mean both legitimate and
11 illegitimate issue (if the Trustee Memorandum were admissible as
12 evidence of such intention then the Trustee submits that this point could be
13 persuasive).

14 (b) On the other hand (if the Trustee Memorandum cannot be relied upon to
15 aid construction), it is equally possible that the Settlor (objectively)
16 intended that only the Fixed Trust and Third Deed of Gift would provide
17 any benefit to his illegitimate children, but (having provided in those
18 documents for his illegitimate issue) the Discretionary Trust was only
19 intended to benefit the Settlor's legitimate issue.

20 (c) Accordingly, the Trustee submits that no assistance is to be gained from
21 the Fixed Trust Deed or the Third Deed of Gift in this respect.

22 96 The consequences of applying the judicial meaning of "issue" are not inherently absurd or
23 unreasonable (as was held, in relation to the contract under consideration in *Wickman v*
24 *Schuler*). Unless evidence of the Settlor's subjective intentions (i.e. the Trustee
25 Memorandum) is admissible, it is entirely possible and plausible that the Settlor only
26 intended to benefit his legitimate issue and there is nothing within the Discretionary Trust
27 Deed itself or the admissible factual matrix which points the other way.



1 Plain and ordinary meaning

2 97 The Shorter Oxford English Dictionary (1970) contains the following relevant definition
3 of "issue":

4 "*Offspring; a child or children; a descendant or descendants. Now chiefly in legal use.*"

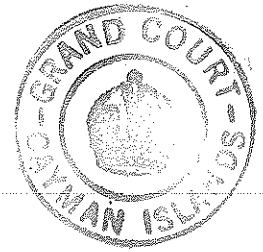
5 98 The plain and ordinary meaning of "issue" in everyday language is biological offspring,
6 progeny, children etc., without any requirement of legal "legitimacy".

7 99 If the court decides that no presumption applies in these circumstances in favour of the
8 established judicial meaning or alternatively, decides that such presumption is rebutted in
9 the present case, then, subject to anything in the context / factual matrix which gives rise
10 to a special construction, the plain and ordinary (non-judicial) meaning is to be preferred,
11 i.e., "issue" and/or "children" should be taken to include illegitimate issue/children.

12 For the same reasons that there is no clear evidence which would rebut the 'judicial
13 meaning presumption', there is equally nothing in the same factual matrix which would
14 disapply the plain and ordinary meaning and require a special meaning (a requirement of
15 legitimacy) to be applied, given that all the admissible background documents are
16 ambivalent as to whether "issue" should or should not be interpreted to include
17 "illegitimate issue".

18
19 Rectification / Correction by construction/Implied terms

20 100 For completeness, the Trustee has considered whether it would be appropriate to apply to
21 the court for rectification of the Discretionary Trust Deed such that the term "issue"
22 would expressly include illegitimate children of the Settlor. (No such application is
23 made). Further the Trustee does not consider there is a case for implying into the
24 Discretionary Trust Deed a term to the effect that illegitimate descendants should be
25 included within the class of Eligible Beneficiaries.



1 Determining the membership of the class of "Eligible Beneficiaries"

2 101 A discretionary trust is valid if it can be said with certainty that any given individual (any
3 "given postulant") is a member of the class: it is not necessary for the trustee of a
4 discretionary trust to be able to compile a complete list of all the members of the class.

5 102 In the present case, once its true construction has been established, there is no conceptual
6 uncertainty about the term "issue". There is, however, likely to be considerable
7 evidential uncertainty as to whether any person does or does not fall within the definition
8 (once such definition has been construed by the court). There are two possible ways of
9 dealing with such evidential uncertainty:

10 102.1 The court can order the Trustee to carry out a kin inquiry. The Trustee submits
11 that this would be disproportionate/ineffective on the present facts); or

12 102.2 The court can authorise the Trustee to proceed on a "footing", regardless of the
13 true facts (a *Benjamin* order).

14 "Kin inquiries"

15 103 A "kin inquiry" usually arises in the context of the administration of an estate, when it
16 may become necessary for the court to determine questions concerning the composition
17 of the class of persons having a claim against an estate. The court may, among other
18 things, direct that advertisements be placed for the kin or class in question and adjudicate
19 upon the claim of any person answering such advertisement.

20 104 In the present case, in the context of a trust fund of this size (approximately US\$8million)
21 it would be disproportionate to carry out a kin inquiry to establish whether all the persons
22 who appear in the Family Tree to be the Settlor's descendants are: (i) biologically related
23 to him; and (ii) legitimate. The question of any person's legitimacy (or otherwise) is
24 likely to be particularly difficult and expensive to investigate where many relevant
25 underlying events took place in Mainland China in the 1930s – 1950s.

26 105 Under the conflict of law rules applicable in the Cayman Islands, a person's legitimacy
27 must be determined by the country of their domicile of origin (being the country in which

1 the person's parents were domiciled at the time of their birth). Children of a polygamous
2 marriage are legitimate if they are so by the law of their domicile.

3 106 English Courts have long recognised as legitimate a person who has been legitimated (i.e.
4 someone who was illegitimate at the time of their birth but subsequently became
5 legitimate under the law of the place where his father was domiciled at the time of his
6 birth and his parents' subsequent marriage).

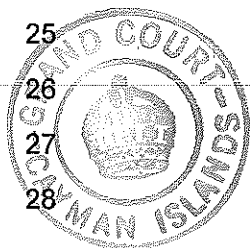
7 Available evidence

8 107 As a starting point, establishing where the Settlor and each of the women with whom the
9 Trustee believes the Settlor had relationships were domiciled at the dates upon which all
10 of the Settlor's purported children were born is likely to be a complex and expensive
11 exercise. The Trustee believes that the Settlor lived in Mainland China for part of his
12 life, and in Hong Kong for part of his life, but has no knowledge or evidence as to the
13 exact dates of such residence or whether the Settlor lived in any other countries during
14 his lifetime.

15 108 At present, the Trustee only knows the full names of 2 of the 6 women, and has very
16 limited information as to where they lived. It has been suggested by Shiu Yuen Chit's
17 Hong Kong solicitors that some of the women (other than Madam Law) may have been
18 married to other men. Shiu Wan Lee Francis in her affidavit denies that her mother ever
19 married anyone else. If that is correct, then, even if the Trustee were able to establish
20 whether the Settlor did marry any of the other women, the Trustee would also need to
21 investigate whether any previous marriages of those women had first been dissolved.

22 109 The evidence which the Trustee has seen is sparse:

23 109.1 Shiu Yuen Chit and Shiu Wan Ying (both being Madam Law's children) have
24 given evidence in these proceedings. Shiu Yuen Chit has provided, as
25 documentary evidence of his parents' marriage, a photograph which he says is of
26 their wedding and a certificate dated 19 May 1998 which states that Shiu Pak Nin
27 and Law Wan Yuk were "*married in the Registrar's Office according to the*
28 *provisions of the Marriage Ordinance before me*" and that the "*same parties*

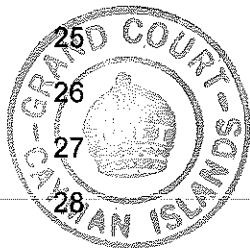


1 *previously went through a form of marriage on 23 March 1934 in China". It is*
2 unclear what the Registrar meant by describing the previous marriage as "a form
3 of marriage". This would on its face appear to suggest that this was not a valid
4 marriage in China. If, under the laws of Shiu Pak Nin's domicile at the times of
5 birth of Madam Law's children, and Hong Kong law on 19 May 1998 such
6 subsequent marriage on 19 May 1998 would have had the result of legitimating
7 such children, then the court should recognise those children as legitimated (see
8 Dicey and Morris volume 2 Rule 116). However, apart from anything else, the
9 Trustee cannot be certain (even with sight of this marriage certificate) whether the
10 Settlor's marriage/remarriage of 19 May 1998 was legally valid in Hong Kong as,
11 if the Settlor had married any of the other women with whom he had relationships
12 and those marriages had not been dissolved, this subsequent marriage/remarriage
13 to Madam Law may have been bigamous/polygamous (which the Trustee is
14 advised would have made it unlawful under Hong Kong law). Further there is no
15 evidence as to the laws of Shiu Pak Nin's domiciles at the relevant times.

16 109.2 Shiu Wan Ying only exhibits her birth certificate as evidence of her legitimacy,
17 which document names "Shiu Shau Man" as her father. The Trustee has not seen
18 any documentary evidence (apart from Shiu Wan Ying's own statement to that
19 effect) that Shiu Pak Nin was also known as Shiu Shau Man. If the Settlor did
20 indeed have other aliases, the Trustee's ability to investigate whether any person
21 is/was the Settlor's legitimate issue is made even more difficult.

22 109.3 Poon & Ho, the Hong Kong law firm acting for Shiu Wan Ying and Shiu Wan
23 Mei, have stated in correspondence that "*[w]ith the passage of over 70 years, the*
24 *death many decades ago of witnesses to the 1934 marriage, the Settlor having*
25 *been declared a mental patient by the Hong Kong High Court in 1999 and*
26 *Madam Law having predeceased the Settlor in 2000, our clients do not have the*
27 *documentary proof and testimony from the witnesses to their parents' previous*
28 *customary marriage in 1934 except the 19 May 1998 marriage certificate".*

29 109.4 In the HK Proceedings, the assistant to the HK O/S stated that "[Shiu Pak Nin] is



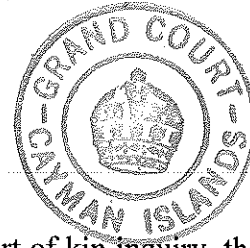
1 *the father of 3 sons (including Shiu Yuen Chit...) and 2 daughters by his wife*
2 *Madam Law and 8 other children by 5 other women".* No evidence is provided in
3 support of the statement that Madam Law was Shiu Pak Nin's wife or the
4 (implied) suggestion that the other 5 women referred to were not his wives.

5 109.5 Also within the HK Proceedings, Shiu Wan Ying swore an affirmation stating that
6 she was "*the natural and legitimate daughter of Mr Shiu Pak Nin*", but did not
7 provide any documentary evidence in support of that statement.

8 109.6 Separately, in correspondence with the Trustee, Shiu Wan Yee Francis has stated
9 that, under Hong Kong law, the Settlor and Madam Law were not married until
10 May 1998 (i.e., that their first marriage in China was not recognised) and that
11 "*[o]ne could say none of the children was legitimate in the eyes of the Cayman*
12 *Islands court in March 1998*".

13 109.7 Shiu Wan Yee Francis in her affidavit exhibits the Hong Kong birth certificates of
14 herself and her brother Shui Yuen Chi. In her birth certificate her father is stated
15 as Siu Pak Nin. In her affidavit she says that on 19 July 1967 Shiu Pak Nin
16 accompanied her to the Hong Kong Registrar of Births to correct the misspelling
17 of his surname. The Registrar annotated the birth certificate on 19 July 1967
18 correcting Siu Pak Nin to Shiu Pak Nin. Shiu Wan Yee Francis has asserted in
19 her affidavit that the actions of the Registrar and Shiu Pak Nin on that date
20 amounted to a declaration that she was his daughter (the Trustee does not dispute
21 this) and that Shiu Pak Nin acknowledged her legitimacy. However, Shiu Wan
22 Yee Francis has not provided any evidence that would show that by those actions
23 Shiu Pak Nin was acknowledging her legitimacy. Shiu Wan Yee Francis also
24 exhibits a copy of the birth certificate of her brother with a similar correction, and
25 makes a similar assertion of legitimacy.

26 110 The above is the entirety of the evidence that the Trustee has seen demonstrating any
27 person's biological relationship to the Settlor and/or legitimacy (or otherwise).



1 Enquiry likely to be disproportionate/fruitless

2 111 If the court were to require the Trustee to carry out some sort of kin inquiry, the Trustee
3 would need to find out (at least):

4 111.1 The countries in which the Settlor lived during his lifetime and the dates of such
5 residence.

6 111.2 Whether such residence was sufficient in nature to result in the Settlor
7 being/becoming domiciled in those countries.

8 111.3 Whether, under the laws of any of the countries in which the Settlor was
9 domiciled, the Settlor was married to any one or more of the women with whom
10 he bore children.

11 111.4 If he was married to more than one woman, whether there was any overlap in the
12 timing of such marriages which resulted in the subsequent marriage(s) being
13 invalid. The Trustee would also need to find out whether any of the women were
14 married to anyone else at the same time.

15 111.5 Whether the children of any of the relationships were legitimate under the laws of
16 the relevant jurisdiction (of Shiu Pak Nin's domicile at the relevant time) or have
17 subsequently become "legitimated" under the laws of that jurisdiction.

18 112 The cost of obtaining advice on the laws concerning domicile/marriage/legitimacy in
19 each relevant jurisdiction as at the relevant dates is likely to be significant. In particular,
20 in the case of the Republic of China (subsequently the People's Republic of China), the
21 system of laws is likely to have undergone a significant change between 1934 (when the
22 Settlor is said to have married Madam Law for the first time) and 1949 (when the
23 People's Republic of China was proclaimed as such by the communist party). The legal
24 analysis required to advise on the necessary issues is likely to be complex and therefore
25 expensive.

26 113 Further, given the likely effect of the Sino-Japanese War (1937-1945) and the Chinese
27 Civil War (1927-1950) during which there was also the Japanese occupation (1941-1945)

1 it is unlikely that public records will be available of births and marriages during the
2 relevant period. Similar concerns may apply in Hong Kong.

3 114 It may be the case that, given the sparsity of documents which the potential beneficiaries
4 have themselves been able to put forward, to support their claims of legitimacy, few
5 documents remain in existence (or can easily be located).

6 115 To carry out an investigation in the nature of a kin inquiry in these circumstances is likely
7 to be disproportionately expensive and may not produce much more evidence than is
8 currently available (with the result that it would be necessary for the court eventually to
9 make a *Benjamin* Order).

10 116 In the interests of conserving the assets of the Discretionary Trust for the benefit of the
11 beneficiaries, it would be appropriate in this case for the court to make a *Benjamin* Order
12 at the outset based on the available evidence, rather than requiring the Trustee first to
13 carry out a kin inquiry.

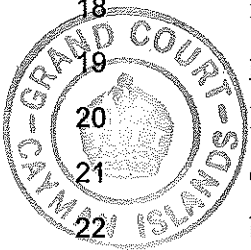
14 *Benjamin Orders*

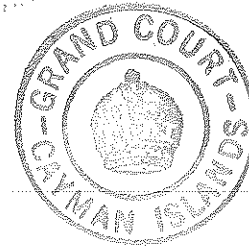
15 117 *Benjamin* Orders are employed by the court in circumstances in which, for example,
16 evidence of a fact or facts relevant to the identification of a class is inconclusive or where
17 the trustees cannot be certain that they have identified every member of a class. The aim
18 is to balance any unfairness to persons prejudiced by such order against the unfairness of
19 postponing a distribution indefinitely. By such an order, the court gives trustees the
20 liberty to distribute on a particular footing (the court does not decide that particular facts
21 exist: such an order addresses the problem that the facts cannot be (or cannot practically
22 be) established).

23 *The Trustee's View*

24 118 On the basis of the material before the court it is the Trustee's view that the only issue of
25 the Settlor who have established their claim to legitimacy are his issue by Madam Law.

26 The Trustee invites the court to say that this is a view that a reasonable and prudent
27 trustee could properly come to.





1 Approval of the proposed exercise of powers

2 Law

3 119 The Trustee seeks the court's approval of the manner in which it proposes to exercise its
4 Power of Addition and Power of Appointment. The Trustee does not seek to surrender its
5 discretion to the court (such that the court would discharge this function, rather than the
6 Trustee). The court's function (where a trustee retains its discretion), is relatively limited.
7 The court is concerned to see that the proposed exercise of the power is lawful, within the
8 scope of the power and accords with the actions of ordinary reasonable and prudent
9 trustees ignoring irrelevant, improper or irrational factors: in essence, the court requires
10 only to be satisfied that a trustee can properly form the view that the proposed transaction
11 is for the benefit of the beneficiaries or the trust estate and that it has in fact formed that
12 view.

13 120 As to the latter part of this test: the court is concerned with rationality and honesty; the
14 question is not how the court would have chosen to exercise the power in the Trustee's
15 shoes.

16 121 Given that the consequence of such authorisation is to deprive the beneficiaries of the
17 opportunity of complaining about such exercise of power, the court should act with
18 caution.

19 122 Commentators have suggested that the reasons and relevant considerations for the
20 proposed exercise of the power are "*necessarily material to the court's assessments of the*
21 *proposed exercise*" and should therefore be put before the court in any application for
22 approval.

23 123 Accordingly, there are two basic elements to be considered by the court in the present
24 case in determining whether the proposed exercises by the Trustee of its powers are
25 appropriate:

26 123.1 First, whether the disposition is within the scope of the power of the donee. This
27 is a relatively straightforward question of construction of the express and implied

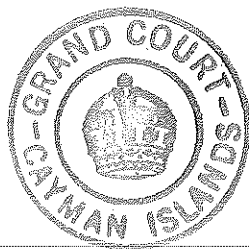
1 terms of the instrument creating the relevant power.

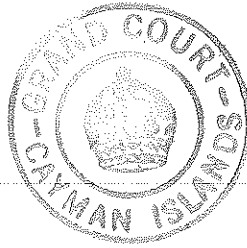
2 123.2 Secondly, whether the Trustee can properly form and has formed the view that the
3 proposed transaction is for the benefit of the beneficiaries or the trust estate. In
4 deciding whether the Trustee can properly form such a view, the court must
5 decide whether the Trustee's reasons for wishing to exercise the power in the
6 manner proposed are rational and honest.

7 124 The second question to be considered by the court (the rationality and honesty of the
8 reasons for the exercise of the power) is potentially more complicated than the first
9 question (the scope of the power). "Honesty" in this context relates to whether the power
10 is being exercised in accordance with the purpose for which it was conferred by the
11 donor.

12 125 The starting point for ascertaining the intention of the donor is the interpretation of the
13 terms of the instrument creating the power. There is some uncertainty about whether
14 extrinsic evidence is admissible to supplement the terms of the instrument creating the
15 power: it appears likely that a letter of wishes may be admissible to supplement the terms
16 of a power, but not to contradict them.

17 126 The Trustee submits that, unlike in relation to the task of construing the terms "issue" and
18 "children" (above), it is appropriate for the court to consider, as an aid to construction of
19 the Powers of Addition and Appointment, the Trustee Memorandum (if the court is
20 prepared to treat the Trustee Memorandum as being equivalent to a letter of wishes).





1 Power of Addition

2 127 The Trustee's Power of Addition is created by clause 26 of the Discretionary Trust Deed,
3 which provides:

4 "*...Subject always to the provisions of Clause 29 hereof, the Trustee may at any*
5 *time or times and from time to time before the Perpetuity Date appoint by deed*
6 *any individual or corporation not being a member of the Excluded Class to be*
7 *from the date of such appointment or any subsequent date specified in such deed*
8 *an Eligible Beneficiary for the purposes of this Deed and from the date of such*
9 *appointment or such later date as may therein be specified the expression*
10 *"Eligible Beneficiaries" in this Deed shall include the individual or the*
11 *corporation so appointed and the Trustee shall endorse on or annex to this Deed*
12 *a memorandum of such deed."*

13 128 (On the assumption that the court holds that (i) the true construction of "issue" in the
14 Discretionary Trust Deed excludes illegitimate children; and (ii) on the evidence before
15 the court, only the Settlor's children and grandchildren through Madam Law have
16 established that they are legitimate), the Trustee proposes to exercise the Power of
17 Addition to add all other living children, grandchildren and great-grandchildren of the
18 Settlor from his relationships with Madam Lai, Madam Yeung, Madam Wu, Madam
19 Kwok and the Second Madam Yeung (as well as Leung Kay Ling).

20 129 The Trustee submits that the scope of the power created by the language of Clause 26 is,
21 on its plain wording, broad enough to encompass the Trustee's proposals as above: the
22 only limitation expressed in that clause upon the Trustee's power is that members of the
23 "Excluded Class" are not to be added as Eligible Beneficiaries (and none of the persons
24 referred to in the Trustee's proposals are members of the "Excluded Class").

25 130 As can be seen from the draft deed, the Trustee's proposed exercises of the Power of
26 Addition aims to expand the class of Eligible Beneficiaries to include all of the Settlor's
27 issues (legitimate and illegitimate) and Leung Kay Ling. This reflects what the Trustee
28 believes to have been the Settlor's intentions as expressed in the Trustee Memorandum.

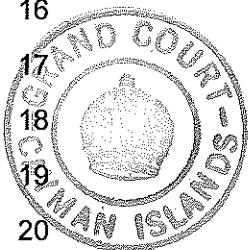
29 131 The proposal to add additional grandchildren and great-grandchildren (beyond those
30 named as Original Named Persons) aims to address a concern on the part of the Trustee
31 that, given the age of some of the Original Named Persons (e.g., the eldest, Shiu Yuen

1 Chit is nearly 79 years old), they may not survive long enough for the Trustee to appoint
2 any share of the Discretionary Trust assets in their favour. In those circumstances, the
3 Trustee believes that the intention of the Settlor in conferring the Power of Addition was
4 to allow for the children/grandchildren of any deceased Original Named Persons to be
5 added to the class of Eligible Beneficiaries.

6 132 However, while the Settlor's subjective intentions are relatively clear from the Trustee
7 Memorandum, it is still possible that, if the court holds that "issue" and "children" are
8 limited to "legitimate [issue/children]", the exercise of the Power of Addition to add
9 illegitimate issue/children could arguably be a fraud on the power. The Trustee
10 nevertheless submits that the proposed exercise of the Power of Addition is not a fraud on
11 the power.

12 132.1 Given the Trustee owes fiduciary duties to the existing class of Eligible
13 Beneficiaries, it is necessary for the court to consider whether the proposed
14 exercise of the Power of Addition would be a breach of such fiduciary duties.
15 Plainly, the exercise of a power of addition will, by definition, never be in the
16 interests of an existing beneficial class (as their beneficial interest will be diluted).
17 However, the dilution/potential dilution of the interests of the existing beneficial
18 class will not, of itself, mean that the exercise of a power of addition is a fraud on
19 the power, otherwise it would never be possible for such a power to be exercised
20 or to be valid in a trust context (when there is authority establishing that it is
21 possible).

22 If the court decides that "issue"/"children" mean "legitimate [issue/children]",
23 then a possible narrower construction of the Power of Addition would be that the
24 objective intention expressed in the Discretionary Trust Deed (i.e., to benefit only
25 legitimate issue) is to add persons such as Leung Kay Ling, who (not being
26 biologically descended from the Settlor) does not fall within the definition of
27 "issue" or "children" but nevertheless, being the widow of a legitimate son of the
28 Settlor (Shiu Yuen Shun) could be seen as being part of the legitimate branch of
29 the family and therefore within the objective contemplation of the donor of the



1 power. The Trustee submits that such construction would in all the circumstances
2 be too narrow and would preclude the Trustee from giving effect to the wishes of
3 the Settlor set out in the Trustee Memorandum.

4 Power of Appointment

5 133 The Trustee's Power of Appointment arises under clause 4(a) of the Discretionary Trust
6 Deed, which provides:

7 *"...Subject to the provisions of Clause 29, the Trustee shall stand possessed of the*
8 *Trust Fund and the income thereof in trust for all or such one or more exclusively*
9 *of the others or other of the Eligible Beneficiaries in such shares or proportions*
10 *as the Trustee shall revocably or irrevocably from time to time and at any time or*
11 *times before the Perpetuity Date appoint by instrument in writing and at such age*
12 *or time or respective ages or times and with such trusts for their respective*
13 *advancement maintenance education or benefit as the Trustee shall stipulate in*
14 *such instrument. Any appointment pursuant to this Clause 4(a) may relate to the*
15 *whole or part of the Trust Fund and/or the income thereof in so far as it has not*
16 *already been paid or applied under Clause 5 hereof but no appointment*
17 *hereunder shall be made so as to create a Perpetuity".*

18 134 As in relation to the Power of Addition, the Trustee considers that the express terms of
19 the Power of Appointment are broad enough to encompass its proposals, i.e., it may
20 appoint to any member/members of the class of Eligible Beneficiaries.

21 135 The Trustee's proposal in respect of the exercise of its Power of Appointment would be
22 to appoint to all surviving Original Named Persons and the children of the two deceased
23 Original Named Persons in the shares suggested by the Trustee Memorandum (*per*
24 *stirpes*/equally in the case of the children of the deceased Original Named Persons), so as
25 to give effect to the Settlor's stated wishes.

26 The HK Taxation/consequences

27 136 As it now appears that the Settlor's estate is insolvent, there is considerable uncertainty as
28 to the amounts which the Trustee is likely to receive from the taxation of its costs in the
29 HK Proceedings.

30 137 The Trustee therefore proposes to appoint all the assets of the Discretionary Fund at this
31 stage, save for a reserve of HK\$7,632,408 (being the maximum amount receivable in

1 respect of the order for costs in the 1998 HK Proceedings) to cater for the future costs
2 and expenses in connection with the Discretionary Trust, namely the HK Taxation and
3 any steps the Trustee may be required to take as a result of the HK O/S' application for
4 the Settlor's estate to be administered as an insolvent estate.

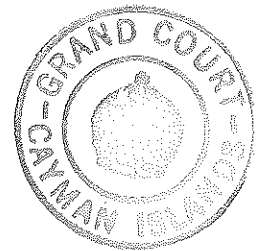
5 138 The Trustee proposes that any amounts remaining from such reserve continue to be held
6 on the terms of the Discretionary Trust, to be appointed out at some future date, together
7 with any amounts received, once the HK Taxation is complete and any sums owed to the
8 Trustee have been paid by the administrator of the Settlor's estate. Given that the
9 definition of the class of Eligible Beneficiaries should be clear as a result of these
10 proceedings and as the Trustee will already have appointed out the vast majority of the
11 Discretionary Trust assets, the Trustee does not anticipate the need to return to court for
12 approval of its exercise of discretion at such future date.

13
14 8. **THE SUBMISSIONS OF THE AMICUS CURIAE**

15 Mr Kenneth Farrow QC as Amicus Curiae submitted as follows.

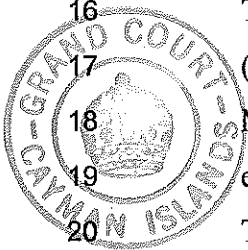
16 The nature of the exercise

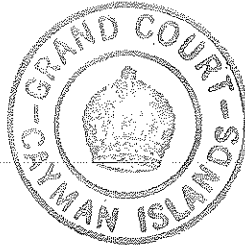
17 139 The Trustee wishes now to distribute substantially the whole of the funds subject to the
18 trusts and powers of the Discretionary Trust Deed. That can be achieved by it exercising
19 the Power of Appointment or a combination of the Power of Addition and the Power of
20 Appointment. Both of these powers, being vested in the Trustee, are obviously fiduciary
21 with the consequence that the Trustee is obliged to consider their exercise from time to
22 time. However, the Power of Appointment, unlike the Power of Addition, is a trust power
23 since there is no gift over in default of selection. The Final Repository, Po Leung Kuk,
24 only takes on total failure of the class of Eligible Beneficiaries. The consequence of this
25 is that the Trustee has only a power of selection amongst the Eligible Beneficiaries which
26 it is bound to exercise by the Perpetuity Date: if it fails to do so, the court will exercise it
27 in a way which will not necessarily involve distribution to the Eligible Beneficiaries in



1 equal shares. In this case, even apart from the reference to the death of the Settlor which
2 introduces clause 2 of the Trustee Memorandum, nothing is to be gained and much may
3 be lost by further delay. Nothing is to be gained since it is extremely unlikely that the
4 making of further enquiries would elicit any further relevant information, that is,
5 information which is likely to influence the Trustee in the formulation or re-formulation
6 of its proposals. Much may be lost since, again leaving aside the Trustee Memorandum,
7 the most obvious recipients of the Settlor's bounty are his children (however defined).
8 Two of them have died since the date of the Discretionary Trust Deed and the eldest of
9 those surviving, the children of Madam Law, are all in their 70s. Further deaths will not
10 only deprive the Settlor's deceased children of enjoyment of any distribution but may
11 well make the task of distributing to their children more difficult.

12 140 The Trustee, now wishing to discharge its duty of exercising the Power of Appointment
13 (with or without a prior exercise of the Power of Addition), is faced with legal and factual
14 difficulties as trustees of wide discretionary powers frequently are. The legal difficulty
15 relates to the construction of the word "issue" in clause 1(e),(ii) of the Discretionary
16 Trust Deed. The factual difficulties relate to the legitimacy of the Settlor's issue
17 (assuming "issue" is limited to legitimate issue) and to the question whether the Trustee
18 Memorandum accurately reflects the Settlor's wishes. Trustees are frequently faced with
19 establishing facts which may be relevant to the exercise of their discretionary powers.
20 They are, of course, under a duty to make appropriate enquiries but they could not be
21 expected to hold some kind of "mini-trial" admitting only evidence which would be
22 admissible in the trial of a writ action. Sometimes, trustees just have to do the best they
23 can. In this case, the Trustee has sought the court's approval to its proposed course of
24 action partly because of the difficulties referred to above and partly because it is indeed a
25 "momentous" decision involving as it does the distribution of substantially the whole of a
26 sizeable trust fund. Nevertheless, this is not the trial of a writ action but an example of the
27 court's exercise of its domestic and supervisory jurisdiction over trusts. If the court
28 considers the trustees have made insufficient enquiries it can direct them to make more,
29 but if a stage is reached where further enquiries are impracticable or uneconomic, a
30 decision has to be made in the light of the available information. In the circumstances of
31 this case, not exercising the Trustee's discretionary powers, in some way or another, is





1 not an option.

2 The Trustee's proposal

3 141 The Trustee's current proposal is that all of the assets of the Discretionary Fund –
4 approximately HK\$62.4 million plus any amounts recoverable in the HK Taxation - save
5 for a reserve of HK\$7,632,408 should be distributed to such of the Original Named
6 Persons who survive the date of distribution and the children of those who do not survive
7 all in accordance with, and in the proportions set out, in paragraphs 2 and 3 of the Trustee
8 Memorandum. The rationale of the proposal is that it gives effect to the Settlor's wishes
9 as recorded in the Trustee Memorandum at the time of the Discretionary Trust Deed and
10 that nothing has occurred in the period since then, other than as contemplated in
11 paragraph 3 of the Trustee Memorandum, which would justify a scheme of distribution
12 which departed from those wishes. Questions obviously arise as to whether the Trustee
13 can properly exercise its discretionary powers to give effect to the proposed distribution
14 and, if so, how that is to be achieved. In particular, there is a question as to the respective
15 roles of the Power of Addition and the Power of Appointment in effecting the
16 distribution. Two prior questions arise, namely, first, assuming that the Trustee
17 Memorandum does accurately reflect the Settlor's wishes, what weight, if any, should the
18 Trustee attach to those wishes in deciding whether, and, if so, how, to exercise its
19 discretionary powers and, secondly, does the Trustee Memorandum in fact express the
20 Settlor's wishes?

21 The Settlor's wishes: Relevance

22 142 Although the authorities are by no means consistent, there is no doubt that trustees are
23 entitled to take account of the settlor's wishes and what Lewin on Trusts describes as "the
24 better view" is that they are bound to do so. This is particularly so where the class of
25 eligible beneficiaries is wide: it may be said that the wider the class, the more significant
26 is the expression of the settlor's wishes. Many of the cases concern attempts by
27 beneficiaries to obtain copies of letters of wishes. One such case is the Privy Council
28 decision in *Schmidt v Rosewood Trust Ltd* [2003] 3 All ER 76, PC which departed from
29 the previously held view that the right of a beneficiary to copies of trust documents was

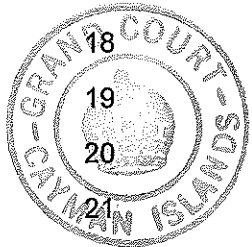
1 proprietary in nature as opposed to, as the Board held, an aspect of the court's general
2 supervisory jurisdiction over the administration of trusts. The Board allowed the appeal
3 and remitted the matter to the High Court of the Isle of Man for further consideration in
4 the light of the Board's judgment. In summarising the Board's views, the judgment
5 (delivered by Lord Walker) referred to one of the trusts concerned, the Everest Trust, in
6 respect of which the appellant, Mr Schmidt, was a possible object of a wide power of
7 addition and with reference to whom the settlor, his father, had written to the trustee
8 expressing the wish that if he, the father, died before the termination of the Everest Trust,
9 his share of the trust property should go to the appellant. The Board concluded that the
10 appellant was "an object who may be regarded (especially in view of the Everest letter)
11 as having exceptionally strong claims to be considered". It is of considerable significance
12 that the appellant was not one of the initial beneficiaries: his only entitlement to be
13 considered was as a possible object of the power of addition.

14 The Settlor's wishes: Evidence

15 143 The shortcomings of the Lam/Lau Notes as evidence that the Trustee Memorandum
16 accurately reflected the wishes of the Settlor at the time of the Discretionary Trust Deed
17 are pointed out in the Trustee's Submissions ("the Submissions"). The Initial
18 Submissions (of Shiu Yuen Chit) mount a frontal attack on the proposition that the
19 Trustee Memorandum accurately reflects the Settlor's wishes at the time it was executed
20 on behalf of the Trustee. The Lam/Lau Notes are dated 29 February 1999. Subsequent to
21 that a questionnaire was produced by the Trustee's Hong Kong Solicitors, Baker &
22 McKenzie, directed at Pinky Lam and Doris Lau, a meeting was held on 29 March 1999
23 and their responses to the questionnaire were reduced to writing. Despite what is
24 suggested in paragraph 6 of the Initial Submissions, a comparison of the respective
25 computer directory entries for the Discretionary Trust Deed and the Trustee
26 Memorandum suggests that both drafts were prepared by JSM.

27 144 Mr Farrow referred to those parts of the Lam/Lau Notes and the responses to the
28 questionnaire which are relevant.

29 145 It appears that the difficulties of the Trustee in obtaining direct evidence as to what



1 happened over the period, 3 February 1998 to 10 March 1998, have been exacerbated by
2 the fact that Pinky Lam and Doris Lau are no longer employed by the Trustee – Mr Love,
3 in paragraph 19 of his First Affidavit, describes them as “my former colleagues” – and by
4 the non-cooperation of JSM. These difficulties go some, but not all of the, way to
5 explaining the Submissions’ reservations as to the evidential weight to be attached to the
6 Lam/Lau Notes. However, it should be noted that, notwithstanding these reservations, the
7 Trustee still considers that the Trustee Memorandum accurately reflects the Settlor’s
8 wishes.

9 146 As to the criticisms which the Initial Submissions make of the Trustee Memorandum,
10 some of those criticisms appear to proceed on the basis that there is some conflict
11 between the Discretionary Trust Deed and the Trustee Memorandum. There is no such
12 conflict because the respective functions of the Discretionary Trust Deed and the Trustee
13 Memorandum are different. Where a settlor expresses his wishes he is simply indicating
14 to the trustees the manner in which he would like them to exercise their discretionary
15 dispositive powers. Nor is it accurate to say that the only Eligible Beneficiaries are the
16 legitimate issue of the Settlor. That may be the present position but the class of Eligible
17 Beneficiaries also includes those added pursuant to clause 26, the power to add being a
18 fiduciary one the exercise of which the Trustee is obliged to consider from time to time.
19 In so far as that on-going duty is concerned, the clock has not yet stopped running. The
20 Initial Submissions mischaracterise the “claim” of the illegitimate children – assuming
21 that they are indeed illegitimate. It is not a claim “to be treated as if they were Eligible
22 Beneficiaries” but a claim to be considered as objects of the power of addition the
23 exercise of which in their favour will bring them into the class of Eligible Beneficiaries.
24 Their claim to be considered relies heavily on their inclusion in the Trustee Memorandum
25 as persons the Settlor wished to benefit. If the Trustee Memorandum can be taken as an
26 accurate reflection of the Settlor’s wishes, they are in a similar position to the appellant in
27 Schmidt v Rosewood Trust Ltd supra.

28 147 The principal criticisms made of the Trustee Memorandum are basically the same as
29 those made in the HK Proceedings, namely, want of knowledge and approval, lack of
30 capacity and undue influence. In so far as the validity of the Discretionary Trust Deed

1 and the Fixed Trust Deed are concerned, those issues have been put to rest by the HK
2 Order dated 7 January 2008 and the HK Deed of Confirmation dated 9 January 2008. The
3 Trustee has no choice but to proceed on the basis that the Discretionary Trust Deed is a
4 valid instrument. The Trustee Memorandum is in a different position since the dismissal
5 of the HK Proceedings was not on the merits and, in any event, the question as to whether
6 the Trustee Memorandum accurately reflected the Settlor's wishes was not an issue in the
7 HK Proceedings. Accordingly it is open to Mr. Shiu Yuen Chit to criticise the Trustee
8 Memorandum on the grounds referred to above. The difficulty in commenting on this
9 aspect of the Initial Submissions is that they do not focus on the Trustee Memorandum,
10 but range broadly over the whole field of factual enquiry which might have been relevant
11 to the HK Proceedings, most of which is not relevant to the Trustee's present application.
12 However, there is this difference between evidence directed at the validity of the
13 Discretionary Trust Deed and the Fixed Trust Deed and that directed to the question
14 whether the Trustee Memorandum was an accurate reflection of the Settlor's wishes. The
15 formal transactions effected on the 10 March 1998 were not particularly straight-forward
16 involving as they did both the Fixed Trust Deed, the Discretionary Trust Deed, the inter-
17 connection of those Deeds and the methods by which each was to be funded. On the other
18 hand, paragraphs 2 and 3 of the Trustee Memorandum were straight-forward. They
19 required the Settlor to answer one relatively simple question: how do you want the assets
20 eventually to be distributed?

21 148 The suggestion that the Settlor lacked knowledge and approval of the terms of the Trustee
22 Memorandum or that he was unduly influenced in assenting to its terms rely heavily on
23 what the Initial Submissions refers to as his "declining mental powers". After the
24 commencement of the 1998 HK Proceedings, the Settlor was subjected to a number of
25 psychiatric examinations the respective conclusions of which were by no means
26 consistent with each other or with Dr Desmond Fung's letter to JSM dated 10 March
27 1998 written after his examination of the Settlor immediately preceding the execution of
28 the relevant instruments. The probability is that the Settlor was in the early stages of
29 dementia at that time. However, the impact that that might have on a person's decision
30 making process will obviously vary with the nature of the decision. Two pieces of
31 evidence are important in this respect. First, the reports of Professor Dr. C K Wong

1 indicate that although, in his view, the Settlor was incapable of understanding the
2 instruments which he executed on 10 March 1998, he retained sufficient capacity for less
3 complicated decisions. In his Report dated 2 July 1998, at paragraph 90, he states as
4 follows:

5 “Mr Shiu retains a fair degree of ability to remember, to think, to feel, to do simple
6 calculations and to make simple decisions. Although he has patchy loss of long term
7 memory, he retains fairly extensive memory about his family. I am thus of the
8 opinion that Mr Shiu retains mental capacity to make simple decisions based on his
9 wish such as to revoke the documents dated 10 March, 1998”.

10
11 Dr Wong examined the Settlor again on 8, 10 and 11 December 1998 for the purpose
12 of determining whether he had the necessary capacity to make a will. In his report
13 dated 1 April 1999, having referred to paragraph 90 of his earlier Report dated 2 July
14 1998, he states, at paragraph 6, as follows:

15
16 “My recent examinations on Mr Shiu focused mainly on his mental capacity in
17 relation to making a will. I came to the conclusion that Mr Shiu understood the nature
18 of a will, the extent of his property to be disposed of and the claims of other people
19 upon it. He was not under the effects of any delusions or hallucinations. He was also
20 not under the undue influence of any other person”.

21
22
23 In his Will dated 10 December 1998, the Settlor appointed his son, Shiu Yuen Chit, sole executor
24 and divided his estate between Madam Law and his children by Madam Law and their children.
25 It does not appear from Dr Wong’s Report whether “the property to be disposed of” assumed that
26 the 1998 HK Proceedings would be successful and that the Discretionary Trust Deed and the
27 Fixed Trust Deed would be set aside.

28
29 149 The second piece of evidence is the HK Official Solicitor’s Report dated 23 July 1999
30 based on two interviews with the Settlor which took place on 7 and 14 July 1999 at his
31 home no other persons being present at the time of the interviews. The constant refrain is,
32 first, that he wanted his money back – see, for example, pages 9-10 - and, secondly, that
33 he loved all his children equally. (It is clear from page 10 of the Report that he was
34 referring to all his children not just those he had had by Madam Law.) This former
35 comment was understandable because substantially the whole of his assets went into the
36 Fixed Trust or the Discretionary Trust or were disposed of by the Third Deed of Gift and,

1 although provision was made for the Settlor (and therefore indirectly for Madam Law)
2 during his lifetime, no provision was made for Madam Law should she survive him.
3 (Happily from this point of view, she did not survive him.) But his expression of love for
4 all his children, an expression which can be regarded as transcending mental fragility and
5 is perfectly consistent with Dr Wong's earlier Reports, is the strongest evidence that,
6 subject to proper provision being made for the Settlor and Madam Law during the
7 remainder of their lives, the Settlor wanted his estate to be divided equally between all his
8 children. The Initial Submissions assert that it can be safely inferred from the Official
9 Solicitor's Report "that the Settlor would definitely not have agreed to the Discretionary
10 Trust being "reformed" to include the illegitimate children". Apart from the fact that that
11 is not the right question, the court might reasonably conclude, to put it at its lowest, that
12 there is nothing in the Report which supports this assertion. His love for all his children,
13 which should be taken to be a genuine expression of his feelings, would more naturally
14 give rise to an inference that he wanted all of them to be treated equally.

15 150 Although criticisms can be made of the way in which matters were handled on 10 March
16 1998 and during the preceding weeks, the considerations discussed above justify the
17 Trustee's continued belief that the Trustee Memorandum accurately reflects the wishes of
18 the Settlor. In particular, if the Settlor was capable of making a will in December 1998, it
19 is difficult to see why he should be regarded as incapable of giving non-binding
20 directions concerning the ultimate destination of the Discretionary Trust Fund to the
21 Trustee some nine months earlier.

22 "Issue"

23 151 In an instrument, whether a deed or a will, a gift to "issue", like a gift to "children",
24 prima facie denotes legitimate issue. These, and cognate expressions describing family
25 relationships, have at common law long been regarded as terms of art – see *Sydall v*
26 *Castings Ltd* at 313D, 314F, 316D-G. There are two, and only two, exceptions to the
27 prima facie rule. The first is where the objective facts are such that the reference can
28 only be to illegitimate children, for example, a testamentary gift "to the children of my
29 daughter, A", A having predeceased the testator leaving only illegitimate children. It is

1 not sufficient that the objective facts make it more likely than not that the settlor or
2 testator intended to refer to illegitimate issue or children. The second exception is where
3 it is apparent from the instrument itself that illegitimate issue are intended to take. For the
4 purposes of this exception, it is not permissible to introduce extraneous evidence, whether
5 written or otherwise, as an aid to the construction of the instrument in question. This
6 statement of the relevant principles were first formulated by the House of Lords in Hill v
7 Crook, (1873) LR 6HL 265 Lord Cairns delivering what has subsequently come to be
8 recognised as the leading judgment, and followed two years later by another House of
9 Lord's decision, Dorin v Dorin, (1875) LR 7HL 568 Lord Cairns LC presiding: see also
10 Re Pearce [1911-13] All ER Rep. 1067, CA. These principles have been applied in
11 numerous subsequent cases in the UK and other common law jurisdictions (including the
12 Cayman Islands) becoming so firmly entrenched that they had to be overturned (although
13 not retrospectively) by legislation. There are also a number of Privy Council decisions,
14 binding on the Grand Court, which, although they do not refer to Hill v Crook and the
15 English cases referred to above, implicitly accept the prima facie rule. One example is
16 Bangbose v Daniel [1954] AC 107 PC, on appeal from Nigeria, which concerned the
17 right of children of a polygamous marriage to inherit under an intestacy governed by the
18 English Statute of Distributions, 1670. It was held that they were entitled to inherit since
19 they were legitimate children by the law of their domicile which recognized polygamous
20 marriages. But for the prima facie rule – which also applied to the construction of
21 legislation – this decision could have been put on the ground that the children's
22 legitimacy or otherwise was irrelevant.

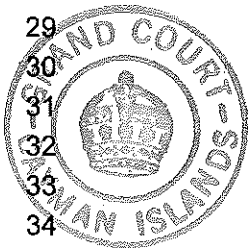
23 152 None of the authorities or considerations justifies a departure from the prima facie rule or
24 comes within either exception to it.

25 (1) The principles of construction summarised by Lord Hoffman in Investors
26 Compensation Scheme v West Bromwich BS and applied in subsequent cases have
27 not had the effect of overruling such cases as those cited above nor were they
28 intended to do so. None of those earlier cases are even referred to in the ICS line
29 of cases. Had the House of Lords been minded to overrule the earlier House of
30 Lords cases one might have expected it to sit *en banc*. Although those principles
31 may apply equally to trust deeds as they do to contracts, they operate in a
32 commercial context and are designed to avoid a situation where a literal or
33 grammatical reading leads to an absurd or unreasonable result which the parties

1 could not have intended. Of the Cayman Islands' authorities referred to in the
2 Submissions, only one, *Lemos v Coutts & Co (Cayman) Ltd* [2003] CILR 381
3 concerned a family trust deed where the investment duties and powers of the
4 Trustee fell to be construed, that is, the context was commercial. The origins of
5 the prima facie rule are totally different from the former literal rules of
6 construction. The prima facie rule exists – or existed – not necessarily because the
7 plain and ordinary meaning of the words “issue” or “children” does not include
8 illegitimates but because at some time past, when religion played a greater part in
9 peoples' lives than it does today, a policy decision was made that the children and
10 issue of a sinful relationship should not be treated in the same way as those born
11 in lawful wedlock. At common law, an illegitimate child was “*filius nullius*”.

12 (2) There is no question of the first exception to the prima facie rule applying. There
13 is evidence that enables the court to conclude that the Settlor's children by
14 Madam Law were legitimate and, even if none of his children were legitimate, he
15 was still in theory capable of fathering legitimate children.

16 (3) Nor is there any question of referring to the Fixed Trust Deed, the Trustee
17 Memorandum, the Third Deed of Gift or the Will dated 10 March 1998 as an aid
18 to the construction of the Discretionary Trust Deed since, although the Fixed
19 Trust Deed refers to the Discretionary Trust Deed, the reverse is not the case. The
20 probative value of these other instruments is that they show the Settlor using such
21 expressions as “my son”, “my daughter”, without reference to the identity of their
22 respective mothers, in other words, he is treating all his biological children
23 equally. But *Hill v Crook* and the cases which have followed it are quite clear in
24 this, namely, that if the prima facie rule is to be departed from not because of the
25 objective facts but because of the words used by the settlor or testator, those
26 words must appear in the relevant instrument and not be derived from even
27 contemporaneous instruments of similar effect. In this context, it is doubtful
28 whether any of the above documents, together with the Discretionary Trust Deed,
29 can be treated as part of a single transaction so as to permit them to be treated for
30 the purposes of construction as one document. The Trustee Memorandum and the
31 Will are clearly documents of a different nature, neither of them being irrevocable
32 or dispositive. All one can say of the three remaining documents, the Fixed Trust
33 Deed, the Third Deed of Gift and the Discretionary Trust Deed itself is that they
34 were executed on the same day by the same person and involve dispositions of
35 various assets belonging to the Settlor in favour of, in the case of the Fixed Trust
36 Deed and the Third Deed of Gift, his biological children and, in the case of the
37 Discretionary Trust Deed, a class which may or may not include all his biological
38 children. Even if, in other circumstances, it would be possible to read the three
39 documents as one, it is not open to the court effectively to extend the exceptions
40 to the prima facie rule by doing so.



1 (4) If the court applies the prima facie rule and accepts that neither of the exceptions
2 apply, the question of the plain and ordinary meaning of the words does not arise.
3 The difficulty about searching for such a meaning is that it may differ as between
4 persons of different countries or cultures and, possibly, even between persons of
5 the same country or culture. A dictionary definition may not assist. The
6 Discretionary Trust Deed is not only governed by the laws of the Cayman Islands
7 but “the construction and effect of each and every provision hereof shall be
8 subject to such laws”: see clause 30. It is not entirely clear that in 1998 a
9 reasonably intelligent resident of the Islands would have regarded the word
10 “child” as including an illegitimate child. His or her answer might well have
11 depended upon whether the child and his or her biological parents were living
12 together as one family, an answer which does not assist.

13 (5) In any event, for a number of reasons, the court should resist the temptation to
14 depart from the prima facie rule or to extend the exceptions to it. First, if the court
15 accepts that the Trustee Memorandum accurately reflects the Settlor’s wishes, it is
16 possible for those wishes to be implemented by the Trustee without undermining
17 the prima facie rule. Secondly, in the Cayman Islands, the rule is now only
18 relevant in respect of dispositions made before the commencement of the Status
19 of Children Law, 2003. Pre-2003 dispositions which require consideration are
20 likely to be fewer and fewer as the years pass. Thirdly, departing from the rule
21 might invite an appeal.



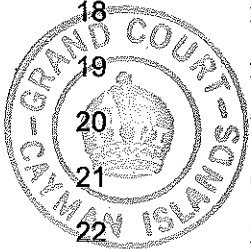
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25 The legitimate children

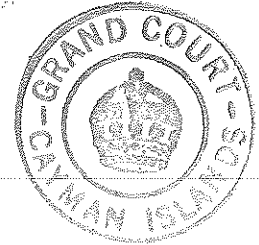
26 153 The court should have no difficulty in concluding that the Trustee’s view based on the
27 existing evidence that the only persons who have established that they are the legitimate
28 children of the Settlor are his children by Madam Law is a view which a reasonable and
29 prudent trustee could properly come to. The court now has some independent evidence,
30 albeit hearsay, that the Settlor and Madam Law were married at a ceremony which took
31 place in Guangzhou, China, on 22 or 23 March 1934. The Hong Kong Marriage
32 Certificate dated 19 May 1998 is of limited evidential value since it reflects information
33 given to the Registrar by the Settlor or Madam Law. Although it appears that one of the
34 witnesses to the 1998 wedding was a fellow student of the Settlor who is said also to have
35 attended the 1934 wedding, namely, Mr. Leung Hong-Tam, there is no evidence that he
36 was asked to, or did, confirm the fact of the previous ceremony. Nor is it possible to
37 determine whether the 1934 ceremony was, as Mr Shiu Yuen Chit asserts, appropriate

1 only for a monogamous marriage. In addition to evidence of the 1934 ceremony, there is
2 evidence that the Settlor and Madam Law lived together as man and wife for most of the
3 time from 1934 until Madam Law's death in 2000.

4 154 Even if there is no evidence of a ceremony ever having taken place, where the man and
5 the woman have cohabited for such a period of time as to have acquired the reputation of
6 being husband and wife, a lawful marriage will be presumed. If there is evidence of a
7 ceremony followed by a lengthy period of cohabitation, the validity of the ceremony,
8 both as to form and substance, will be presumed. These presumptions are particularly
9 strong where the relevant facts have occurred outside the jurisdiction: see Halsbury's
10 Laws, 5th Edition, Matrimonial and Civil Partnership Law, Volume 72, paragraphs 6-7;
11 Re Taylor [1961] 1 All ER 55, CA; Mahadervan v Mahadervan [1962] 3 All ER 1108.

12 155 An issue arises as to whether the Settlor's youngest daughter by Madam Law, Shiu Yan
13 Ling, is the biological child of the Settlor. This issue arises because her birth certificate
14 gives the name of her father as Shiu Shau Man rather than Shiu Pak Nin. Establishing
15 paternity is simply a question of fact unaffected by the prima facie rule, but assisted by
16 the presumption of legitimacy. Although the Status of Children Law, 2003 is not
17 retrospective in so far as the construction of dispositions is concerned, it is retrospective
18 for the purposes of establishing paternity. Section 6 provides that "this Law applies in
19 respect of every person, whether born before or after the commencement of this Law, and
20 whether born in the Islands or not, and whether or not his father or mother has ever been
21 domiciled in the Islands". Section 7 goes on to list a number of circumstances in which a
22 male person is presumed to be the father of the child in question "unless the contrary is
23 proven on a balance of probabilities". The two circumstances most relevant to the
24 paternity of Shiu Wan Ying are that the person, that is, the male person referred to, "was
25 married to the mother of the child at the time of its birth" or "was cohabiting with the
26 mother of the child in a relationship of some permanence at the time of the birth of the
27 child": see section 7(1)(a),(d). There is no evidence to rebut the presumption thus created.
28 Such evidence as there is supports it. The father named had the same surname as the
29 Settlor and the birth took place at 56 Kennedy Road, Hong Kong, which according to Mr
30 Shiu Yuen Chit, was the family home of the Settlor at the time. There is also evidence as



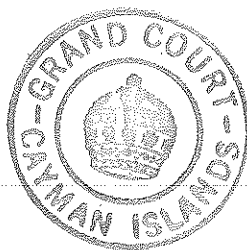


1 to the use of more than one name by persons of the Settlor's generation.

2 156 On the other hand, the Settlor's other children, that is, other than his children by Madam
3 Law, have simply failed to make out a case for their legitimacy. It is for persons who
4 claim to be members of a class to establish that they are indeed members of that class.
5 They need not necessarily do that by formal evidence, but at least they must provide to
6 the trustees information and/or documents which enable the trustees to adjudicate their
7 claim.

8 157 The first affidavit of Shiu Wan Yee Francis (admitted at a very late stage) suggests that
9 she and her brother are the legitimate children of the Settlor by their mother Madam
10 Kwok. This claim for legitimacy appears to rest on two grounds. First that their parents
11 were married in a common law ceremony. Second that their father the Settlor by
12 registering an amendment to their respective birth certificate recognised their legitimacy.
13 As to the first there is no evidence as to where the deponent's parents were married or as
14 to whether the place of marriage or the domicile of the parties recognised a common law
15 marriage. The evidence of cohabitation of the parents is sparse. As to the second there is
16 no evidence that the law of Hong Kong recognises legitimacy by paternal recognition or
17 that the amendments to the birth certificates would have such effect.

18 158 The claims of the remaining children, as advanced by Shiu Wan Tik Flora, consist of
19 little more than bald assertions which do not assist either the Trustee or the court. There
20 is no information as to the circumstances of their birth, including where they were born.
21 It is not therefore possible to identify the law which would govern their legitimacy. Nor is
22 there any information as to the relationship between the Settlor and their respective
23 mothers at the time of their birth, although it seems tolerably clear from the Affirmation
24 of Shiu Yuen Chit that none of them could have been living with the Settlor in a settled
25 relationship at the time of their birth. Thus the presumption of marriage can have no
26 application. Nor is there any evidence from which the court can infer that these other
27 children were the products of marital unions whether monogamous or polygamous. If
28 they are to benefit at all, that must be because they are added to the class of Eligible
29 Beneficiaries by the exercise of the Power of Addition.



1 The Power of Addition: Validity

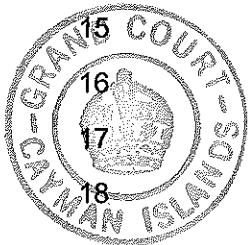
2 159 The Initial Submissions seek to question the validity of the power of addition conferred
3 upon the Trustee by clause 26 of the Discretionary Trust Deed. It is far too late to mount
4 such a challenge. Despite what is said in the Initial Submissions, *Blausten v Inland*
5 *Revenue Commissioners* [1971] 3 All ER 1085, CA did not decide that a similar power
6 was invalid. The comments of Buckley LJ were, as he accepted in the last paragraph of
7 his judgment, not necessary for the decision of the Court of Appeal and were treated as
8 obiter by Templeman J (as he then was) in *Re Manisty's Settlement* [19974] Ch 17. In *Re*
9 *Hay's Settlement Trusts* [1981] 3 All 786, Sir Robert Megarry V-C declined to follow
10 Buckley LJ. In *Schmidt v Rosewood Trust Ltd* supra, a decision of the Privy Council
11 binding on the Grand Court, there was no suggestion that the wide power of addition was
12 invalid. There is no significant difference between clause 26 and the powers considered
13 in the cases just referred to. They all concern what are described as intermediate powers,
14 that is, discretionary dispositive powers, whether of appointment or of addition, the
15 beneficiaries or objects of which comprise the whole world with specified exceptions.
16 The fact that, had the Trustee not been a member of the Excluded Class, any exercise of
17 the Power of Addition in its own favour might offend the self-dealing rule is not to the
18 point. Any attempt to add the Trustee pursuant to clause 26 would be invalid not because
19 of the self-dealing rule but because it might be possible to conclude as a matter of
20 construction that the Trustee was not an object of the power, in which case adding the
21 Trustee would be an excessive exercise of the power. The Excluded Class includes
22 not only the Trustee and related entities but also any person, etc., who is added to the
23 Excluded Class by the Trustee pursuant to clause 28 of the Discretionary Trust Deed. In
24 any event, the suggestion in the Initial Submissions that there is no one in the Excluded
25 Class pre-supposes that a discretionary trust or power exercisable in favour of the whole
26 world without (express) exception would be invalid. In *Re Beatty's Will Trusts* [1990] 3
27 All ER 844 all counsel accepted that a power of addition exercisable in favour of anyone
28 in the world would be valid if appearing in an inter vivos trust deed. Hoffman J did not
29 question what counsel had agreed. No sensible distinction can be drawn between a
30 power to add anyone in the world except X and a power to add anyone in the world.

1 160 For some considerable time now, wide powers of addition have been a common feature
2 of discretionary settlements. They are a reflection of the fact that even with a special
3 power of appointment exercisable in favour of a wide class, it is not possible to anticipate
4 and legislate for all contingencies. The possibility that such powers of addition have been
5 exercised and appointments then made in favour of the added beneficiaries is a real
6 possibility even in the case of settlements governed by Cayman Islands law. The
7 settlements will have been drafted, and the powers of addition and appointment
8 exercised, on the faith of their validity as established by the cases referred to above.

9 The Power of Addition: Proposed exercise

10 161 There can be no doubt that the proposed exercise of the Power of Addition is, as a matter
11 of construction, within the scope of clause 26 of the Discretionary Trust Deed. Every
12 person in the world, natural or legal, is a possible object of the Power of Addition save
13 for members of the Excluded Class. However, the Submissions raise a concern that the
14 exercise of the Power of Addition to include illegitimate children or issue, it having been
15 determined that such children or issue are not within the existing class of Eligible
16 Beneficiaries, might constitute a fraud on the power, that is, the power is being exercised
17 for a purpose for which it was not intended to be exercised. The court should conclude
18 that such concern is unfounded.

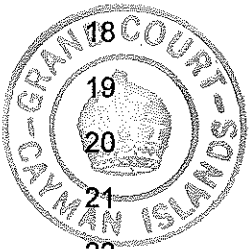
19 162 The difficulty is that there is nothing in the Discretionary Trust Deed or in the
20 surrounding circumstances which assist in determining for what purpose the Power of
21 Addition was included. The usual purpose is to cover unforeseen contingencies, for
22 example, the long-serving housekeeper or medical attendant to whom the settlor,
23 subsequent to the settlement, becomes beholden. That does not arise here. Nor, treating
24 the Trustee Memorandum as equivalent to a letter of wishes and accepting its
25 admissibility for this purpose, does it assist in resolving the intended purpose of the
26 Power of Addition. That is because the terms of the Trustee Memorandum and the
27 circumstances in which it came into existence strongly suggest that the Settlor would
28 have assumed, if he thought about the matter at all, that all his children, legitimate or
29 illegitimate, were initially included as members of the class of Eligible Beneficiaries. The



1 usual purpose of a letter of wishes, particularly one which is contemporaneous with the
2 establishment of the discretionary settlement, is to identify which members of a wide
3 class of discretionary objects of a power of appointment the settlor wishes to benefit.
4 Such letters are not usually directed at the exercise of powers of addition although there
5 is no reason why they should not be. The Trustee Memorandum is more properly
6 regarded as directed at the Power of Appointment rather than the Power of Addition.

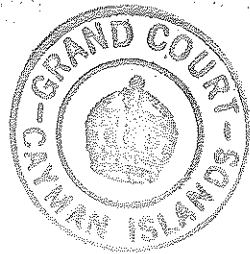
7 163 The court should ask itself whether there is any reason why the Trustee should not
8 exercise its power of addition to add any of the persons referred to on the assumption that
9 the factual situation is as follows. The Trustee Memorandum accurately reflects the
10 Settlor's wishes as at the time the Discretionary Trust Deed is executed. Both the Settlor
11 and those responsible for the drafting of the Trustee Memorandum believed, mistakenly,
12 that the persons named are within the initial class of Eligible Beneficiaries such that,
13 absent some unforeseen change of circumstances, the Settlor's wishes can be
14 implemented by an appropriate exercise of the power of appointment. The mistaken
15 belief is subsequently discovered and it is appreciated that the Settlor's wishes can only
16 be implemented by first exercising the power of addition in some way or another (*cf B.S.*
17 *Briggs v Integritas Trust Management (Cayman) Ltd, G Briggs and C. Briggs* 1988-89
18 CILR 456 Schofield J). Had the mistaken belief been pointed out prior to 10 March 1998,
19 it would have been corrected and the exercise of the power of addition (save in the case
20 of Leung Kay Ling) would not have been necessary. Alternatively, had the mistake been
21 discovered while the Settlor was alive and in reasonable mental health, he could have
22 expressed revised wishes to the Trustee specifically directed at the exercise of the Power
23 of Addition. The court is entitled to take the view that the use of a Power of Addition to
24 correct past mistakes which, if allowed to stand uncorrected, would defeat the intentions
25 of the Settlor is not of itself a fraud on the power. Put slightly differently, where there is
26 no internal or external evidence which enables the court to identify the intended purpose
27 of a power of addition, it should be allowed to operate to its full width circumscribed
28 only by any relevant expression of the settlor's wishes.

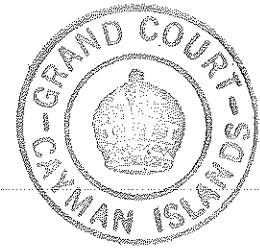
29 164 The Initial Submissions also question the proposed exercise of the Power of Addition to
30 the extent that it is exercised in favour of the children and issue of the Settlor other than



1 his children and issue by Madam Law. However, the two principal reasons advanced in
2 the Initial Submissions are unsatisfactory. First, the relationship between the Power of
3 Appointment and the Power of Addition is not correctly stated. If the Power of Addition
4 in clause 26 is to be read subject to the limitation to legitimate issue in the definition of
5 the Eligible Class, the Power of Addition could never be exercised. Secondly, it is
6 impossible to conclude from a fair reading of the Official Solicitor's Report that "the
7 Settlor would definitely not have approved of what the Trustee is now seeking to do".

8 165 The court can conclude that the proposed exercise of the Power of Addition by the
9 Trustee is a proper exercise of the Power.





1 **9. ANALYSIS AND CONCLUSIONS**

2
3 Before I turn to consider the issues to be determined (see 5 above) it is necessary to address the
4 following general matters.

5
6 **Applications for directions by trustees**

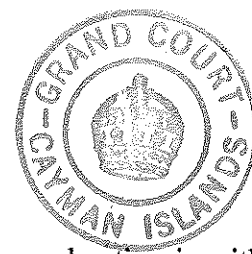
7
8 **When a court has to adjudicate on a course of action proposed or actually taken by trustees**
9 **there are at least four distinct situations.**

10
11 In *The Public Trustee and another v Paul Cooper and others* [2001] WTLR 901 the late Mr
12 Justice Hart said at page 922:-

13
14 [Counsel] submitted,... that the act of seeking directions necessarily involved the trustee in... a
15 surrender of discretion. I do not agree. Applications for directions by trustees are a commonplace
16 phenomenon. The ability of trustees to make such applications derives from the peculiar
17 relationship of trusts to the court of Chancery and is no doubt founded in the jurisdiction of this
18 court in an appropriate case itself to execute a trust. Such applications have generally been heard
19 in Chambers and there are consequently few reported cases in which the nature of the
20 jurisdiction has called for detailed analysis.

21
22 On the particular point made by [Counsel], I had the advantage of having available to me a
23 judgment of Robert Walker J. (as he then was) given in chambers in 1995. Since it was given in
24 chambers, it is inappropriate for me to say more about it, save that it concerned the question
25 whether the court in authorising trustees to pursue litigation was necessarily exercising its own
26 discretion or was simply protecting the trustees in an exercise of their own. The relevant passage
27 in the judgment is in the following terms:

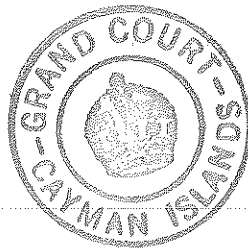
28
29 “At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that,
30 when the court has to adjudicate on a course of action proposed or actually taken by trustees,
31 there are at least four distinct situations (and there are no doubt numerous variations of those as
32 well).



1 (1) The first category is where the issue is whether some proposed action is within the
2 trustees' powers. That is ultimately a question of construction of the trust instrument or a statute
3 or both. The practice of the Chancery Division is that a question of that sort must be decided in
4 open court and only after hearing argument from both sides. It is not always easy to distinguish
5 that situation from the second situation that I am coming to ... [He then gave an example].
6

7 (2) The second category is where the issue is whether the proposed course of action is a
8 proper exercise of the trustees' powers where there is no real doubt as to the nature of the
9 trustees' powers and the trustees have decided how they want to exercise them but, because the
10 decision is particularly momentous, the trustees wish to obtain the blessing of the court for the
11 action on which they have resolved and which is within their powers. Obvious examples of that,
12 which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate
13 or to sell a controlling holding in a family company. In such circumstances there is no doubt at
14 all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do
15 but they think it prudent, and the court will give them their costs of doing so, to obtain the court's
16 blessing on a momentous decision. In a case like that, there is no question of surrender of
17 discretion and indeed it is most unlikely that the court will be persuaded in the absence of special
18 circumstances to accept the surrender of discretion on a question of that sort, where the trustees
19 are prima facie in a much better position than the court to know what is in the best interests of
20 the beneficiaries.
21

22 (3) The third category is that of surrender of discretion properly so called. There the court
23 will only accept a surrender of discretion for a good reason, the most obvious good reasons being
24 either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be
25 resolved by removing one trustee rather than another) or because the trustees are disabled as a
26 result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both
27 domestic proceedings traditionally heard in Chambers in which adversarial argument is not
28 essential though it sometimes occurs. It may be that ultimately all will agree on some particular
29 course of action or, at any rate, will not violently oppose some particular course of action. The
30 difference between category (2) and category (3) is simply as to whether the court is (under
31 category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising



1 its own discretion.

2
3 (4) The fourth category is where trustees have actually taken action, and that action is
4 attacked as being either outside their powers or an improper exercise of their powers. Cases of
5 that sort are hostile litigation to be heard and decided in open court. I mention that fourth
6 category, obvious though it is, for a reason which will appear in a moment.”

7
8 The learned judge then cited the passage which I have already quoted from the opinion of Lord
9 Oliver in *Marley* ([1991] 3 All ER 198) and continued:

10
11 “It is not clear from the report in the *Marley* case whether the original decision of the judge
12 sitting in chambers in Jamaica had been an approval of the exercise by fiduciaries of their
13 discretion (that is a category (2) case) or an exercise of the judge's own discretion after accepting
14 a surrender (that is a category (3) case).

15
16 “I would comment that it is not always as clear in practice as it is theory which jurisdiction is
17 being exercised. That is particularly true, I believe, on *Beddoe* applications (see *Re Beddoe*
18 [1893] 1 Ch. 547). It is to be noted that in *Marley* no authorities at all seem to have been cited to
19 the Privy Council; at any rate, none was referred to by them. The whole thrust of Lord Oliver's
20 speech, as appears in particular at p.202, was to distinguish the cases of the court approving a
21 proposed exercise of the trustee's powers, whether in category (2) or in category (3), from a case
22 in category (4). The error which the courts below had made was to assume that, once the
23 fiduciaries had laid the matter before the court, the court should bless the fiduciaries' proposal
24 unless it could be shown positively to be a breach of trust. That was the context in which the
25 passage that I have read from the speech is to be found.

26
27 “I cannot think that the Privy Council in that case was intending to decide, apparently without
28 argument or citation on the point, that what I have called category (2), which is familiar to all
29 Chancery practitioners on the private client side, does not really exist as a category at all.”

30
31 I would add to that the following observations. First, the judgment was itself given in chambers.

1 It is not possible to tell to what extent the point at issue had been the subject of argument or
2 citation of authority beyond the decision in Marley itself.

3
4 Secondly, I would draw attention to the paradigm nature of the classification suggested by
5 Walker J. There may be variations within each category; and a particular application may
6 straddle more than one category. Moreover, some caution needs to be exercised before assuming
7 that there is always a bright-line distinction between the case where trustees surrender their
8 discretion and a case where they do not....”

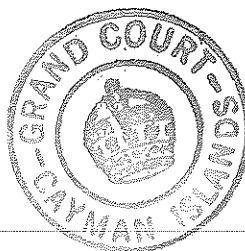
9
10 I will return to the four categories set out above later.

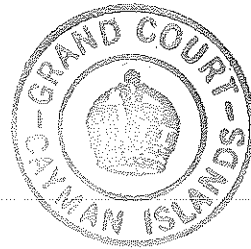
11 12 **Discretionary Trusts**

13 Lewin on Trusts 18th edition (“Lewin”) at 1-33 distinguishes between fixed and discretionary
14 trusts and powers as follows:

15
16 “Fixed and discretionary trusts and powers

17
18 Special trusts may be subdivided into fixed trusts, where the objects are identified, and
19 discretionary trusts, where their choice is left to the trustee. A trust for A for life with remainder
20 to his children, or to B, is a fixed trust. A trust to divide the income among such of A’s children
21 and in such shares as the trustees think fit is a discretionary trust. To be distinguished is a power,
22 where the trustees are authorised, but not directed, to distribute. What at first sight appears a
23 power may impose a duty to distribute, requiring the trustees to choose the recipients...”





1 **The relevant principles of construction.**

2
3 In *Marley v Rawlings and another* [2014] UKSC 2 Lord Neuberger considered the legal
4 principles applicable to the interpretation of wills. He said:-

5
6 "Interpretation of wills

7
8 17. Until relatively recently, there were no statutory provisions relating to the proper
9 approach to the interpretation of wills. The interpretation of wills was a matter for the
10 courts, who, as is so often the way, tended (at least until very recently) to approach the
11 issue detached from, and potentially differently from, the approach adopted to the
12 interpretation of other documents.

13
14 18. During the past forty years, the House of Lords and Supreme Court have laid down the
15 correct approach to the interpretation, or construction, of commercial contracts in a
16 number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in
17 *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

18
19 19. When interpreting a contract, the court is concerned to find the intention of the party or
20 parties, and it does this by identifying the meaning of the relevant words, (a) in the light
21 of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the
22 document, (iii) any other provisions of the document, (iv) the facts known or assumed by
23 the parties at the time that the document was executed, and (v) common sense, but (b)
24 ignoring subjective evidence of any party's intentions. In this connection, see *Prenn* at
25 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per
26 Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC
27 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*,
28 per Lord Clarke at paras 21-30.

29
30 20. When it comes to interpreting wills, it seems to me that the approach should be the same.
31 Whether the document in question is a commercial contract or a will, the aim is to



1 identify the intention of the party or parties to the document by interpreting the words
2 used in their documentary, factual and commercial context. As Lord Hoffmann said in
3 *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, “No one
4 has ever made an a contextual statement. There is always some context to any utterance,
5 however meagre.” To the same effect, Sir Thomas Bingham MR said in *Arbutnott v*
6 *Fagan* [1995] CLC 1396, that “[c]ourts will never construe words in a vacuum”.

7
8 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a
9 single party. However, that distinction is an unconvincing reason for adopting a different
10 approach in principle to interpretation of wills: it is merely one of the contextual
11 circumstances which has to be borne in mind when interpreting the document concerned.
12 Thus, the court takes the same approach to interpretation of unilateral notices as it takes
13 to interpretation of contracts – see *Mannai Investment Co Ltd v Eagle Star Life Assurance*
14 *Co Ltd* [1997] AC 749, per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H-
15 780F.

16
17 22. Another example of a unilateral document which is interpreted in the same way as a
18 contract is a patent – see the approach adopted by Lord Diplock in *Catnic Components*
19 *Ltd v Hill & Smith Ltd* [1982] RPC 183, 243, cited with approval, expanded, and applied
20 in *Kirin-Amgen* at paras 27-32 by Lord Hoffmann. A notice and a patent are both
21 documents intended by its originator to convey information, and so, too, is a will.

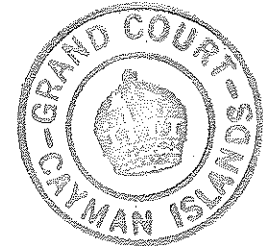
22
23 23. In my view, at least subject to any statutory provision to the contrary, the approach to the
24 interpretation of contracts as set out in the cases discussed in para 19 above is therefore
25 just as appropriate for wills as it is for other unilateral documents. This may well not be a
26 particularly revolutionary conclusion in the light of the currently understood approach to
27 the interpretation of wills (see eg *Theobald on Wills*, 17th edition, chapter 15 and the
28 recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2011] 1
29 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v*
30 *Cook* (1880) 14 Ch D 53, 56, that, when interpreting a will, the court should “place
31 [itself] in [the testator’s] arm-chair”, is consistent with the approach of interpretation by

1 reference to the factual context...”

2
3 In my opinion similar principles apply to the interpretation of fixed and discretionary trusts. (See
4 generally Lewin chapter 6 – Interpretation of Express Trusts).

5
6 **Settlors’ wishes expressed in letters or memoranda.**

7
8 The relevant principles are conveniently summarised in Lewin at 29-149



9
10 “Settlor’s wishes

11 In a conventional family trust the funds comprised in the settlement are the settlor’s bounty.
12 Except to the extent that he has reserved powers to himself or conferred them on third parties, the
13 trustees are the means that he has chosen to benefit the beneficiaries out of property of his own.
14 He could have done so by gifts made directly to them but instead has interposed a trust, so as to
15 make continuing provision for them after his death or to give them the security of a proprietary
16 interest, rather than a precarious dependency on him, or to take advantage of opportunities for
17 tax planning or for a variety of other reasons. So far as the trustees are given dispositive powers,
18 they are to make choices which the settlor could have made himself.

19
20 Trustees therefore rightly give great weight to the settlor’s wishes, either expressed from time to
21 time during his lifetime or recorded, usually in documentary form, before his death. Letters or
22 memoranda of wishes from the settlor are now commonplace; on occasion a precatory clause is
23 inserted in the trust instrument, for example asking the trustees to consider someone as the
24 primary beneficiary. The significance of the settlor’s wishes has grown with the growth of wide
25 discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed
26 interests. It is well established that the trustees are entitled to take serious account of the settlor’s
27 wishes and it is the better view that they are bound to do so, the notion that the trustees may be
28 entitled to take it into account but not bound to do so is in our view wrong, for it is either a
29 relevant consideration which ought to be take into account or an irrelevant one which should not.

1 The trustees may properly be led by the settlor's wishes to take a decision which they would not
2 otherwise have taken. The propriety of defence to the settlor's wishes is also reflected in the
3 decisions on applications by beneficiaries for disclosure of letters or memoranda of wishes.
4 Although such applications have met with varying degrees of success, no criticism is made in
5 them of trustees who pay close attention to the settlor's wishes. In a different context, the court
6 has treated it as a sufficient reason for overturning an appointment made by trustees that they
7 believed that they were thereby giving effect to the settlor's wishes when in fact, through a
8 misunderstanding, they were not..."

9
10 I refer to Schmidt v Rosewood Trust Ltd supra at paragraph 20 for an example of a letter of
11 wishes considered by the Privy Council.

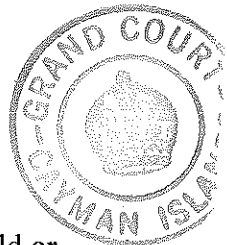
12 13 **Power of Addition**

14
15 A power of addition is usually exercisable in favour of a wide class, often anyone in the world or
16 anyone with defined exceptions. Even when conferred on trustees, such a power does not offend
17 any rule against delegation or the rule requiring certainty and it is perfectly valid. (See Lewin 30-
18 46).

19
20 In Schmidt v Rosewood Trust Ltd supra clause 3.3 of the Everest Trust conferred on the trustees
21 power exercisable by written instrument during the trust period to add to the class of
22 beneficiaries 'any person or persons or class or classes of person (including an individual then
23 unborn) or charity' other than a current trustee or (while the trustees are resident in the Isle of
24 Man) any Isle of Man resident. (para [16]).

25
26 The letter of 31 October 1995 from Mr. Schmidt in respect of his son Vadim Schmidt was as
27 follows "The Everest Trust. While I recognise the discretionary powers vested in you as
28 Trustees of the above Trust, it would be my wish if I were to die prior to the termination of the
29 Trust that my share of the trust property be given to Vadim Schmidt." (para [20]).

30
31 Lord Walker said (at para [33])



1 "In relation to the Everest Trust the appellant in his personal capacity is no more than a possible
2 object of the very wide power to add beneficiaries conferred by cl 3.3. The Everest letter
3 provides clear evidence of Mr Schmidt's wishes and confirms (as would in any case be fairly
4 evident) that the appellant may have a particularly strong claim on the trustees' discretion. But
5 neither the Everest letter nor any other document put in evidence had any further effect on his
6 status as a possible beneficiary, and ultimately Mr Steinfeld did not contend otherwise..."

7
8 At paragraph 68 Lord Walker concluded:-

9
10 "...But their Lordships can, without trespassing on the High Court's discretion, summarise their
11 views on the different components of the appellant's claims..."

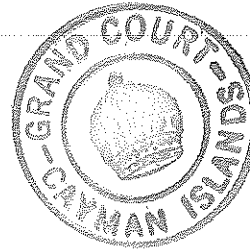
12
13 (4) As regards the Everest Trust, the appellant is a possible object of the very wide power in cl
14 3.3 (see [33], above, but an object who may be regarded (especially in view of the Everest letter)
15 as having exceptionally strong claims to be considered..."

16
17 **Further investigations or a kin inquiry?**

18
19 I accept the Trustee's submissions that carrying out an investigation in the nature of a kin inquiry
20 in the circumstances of this case is likely to be disproportionately expensive and may not
21 produce much more evidence than is currently available.

22
23 As Mr Farrow QC pointed out nothing is to be gained and much may be lost by further delay.
24 Nothing is to be gained since, it is extremely unlikely that the making of further enquiries would
25 elicit any further relevant information, that is, information which is likely to influence the
26 Trustee in the formulation or re-formulation of its proposals. Much may be lost since, again
27 leaving aside the Trustee Memorandum, the most obvious recipients of the Settlor's bounty are
28 his children (however defined). Two of them have died since the date of the Discretionary Trust
29 Deed and the eldest of those surviving, the children of Madam Law, are all in their 70s. Further
30 deaths will not only deprive the Settlor's deceased children of enjoyment of any distribution but
31 may well make the task of distributing to their children more difficult.





1 I turn to consider the Issues to be determined by the Court.

2
3 **Issues to be determined by the Court**

4
5 (1) **Does the word "issue" include illegitimate issue?**

6
7 I will refer to the categories set out in *The Public Trustee and another v Paul Cooper and others*
8 supra as "first category" or "second category" issues.

9
10 Issue (1) is a first category issue – a question of construction of the Discretionary Trust Deed.

11
12 The relevant legal principles as to the construction of the Discretionary Trust Deed are set out
13 above. I apply those principles.

14
15 The relevant provisions of the Discretionary Trust Deed are as follows.

16 Clauses 3 to 7 constitute discretionary powers and trusts over the capital and income of the trust
17 fund, exercisable by the Trustee in favour of a class of beneficiaries (strictly, objects of the
18 Power of Appointment) defined by Clause 1(e) as "Eligible Beneficiaries". The original Eligible
19 Beneficiaries are the Settlor and:

20 *"all such issue of the Settlor as shall be born prior to the Perpetuity Date"* (emphasis added).

21 *"all lineal descendants male and female and any person legally adopted shall be treated as*
22 *the child of their adoptive parents whether such adoption shall occur on or before or after*
23 *[10 March 1998] and any reference to the issue of any person shall include the children and*
24 *remoter issue of such persons through all degrees".*

25 Clause 1(b) defines "child" and "children" to include:

26 *"a child or children legally adopted whether before or after [10 March 1998]"*.

1 It is clear from section 3(3) of the Status of Children Law that the rule of construction in March
2 1998 was that "... in any instrument words of relationship signify only legitimate relationship in
3 the absence of a contrary expression of intention".

4
5 In *Sydall v Castings Ltd* supra the majority of English Court of Appeal held in 1966 that the
6 illegitimate child did not qualify as a descendant. The word "descendant" embodied in the
7 definition of "relations" in a legal document which conferred property rights on relations, must
8 be construed as a term of art. So construed, its prima facie meaning indicated blood relationship
9 in the legitimate line, and nothing in the context of the scheme displaced that prima facie
10 meaning.

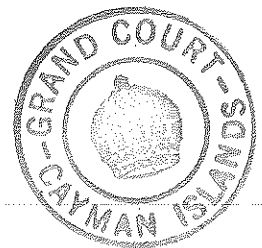
11
12 Lewin at paragraph 6-14 states:



13
14 "Construction of gifts to children at common law

15
16 At common law, the expression "children" in relation to a disposition of property was construed
17 *prima facie* as meaning legitimate children, that is those born or conceived in wedlock, and this
18 rule of construction applied to all expressions denoting family relationships. In order to displace
19 the rule, it was, in general, necessary to show either that it was apparent from the language used
20 by the settlor or testator that a gift in favour of children was not intended to be for, or to be
21 confined to, legitimate children, or alternatively that it was impossible from the surrounding
22 circumstances for a legitimate child to take. The rule has been modified by a number of statutes
23 and is now almost wholly abrogated. The modifying statutes have, in general, no retrospective
24 effect, so with most of them it is necessary to see whether they were in effect when the
25 instrument containing the gift to a child was made."

26
27 Both Mr McKie QC and Mr Kenneth Farrow QC submitted that the intention of the Settlor by
28 identifying the meaning of the relevant words ((a) in the light of (i) the natural and ordinary
29 meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the
30 document, (iv) the facts known or assumed by the Settlor at the time that the document was
31 executed, and (v) common sense, but (b) ignoring subjective evidence of the Settlor's intentions)



1 was that Eligible Beneficiaries were confined to legitimate issue of the Settlor.

2
3 Faced with the unanimous submissions (set out above) of two very experienced leading counsel
4 in the field of trusts, I am persuaded that I should construe the Discretionary Trust Deed in this
5 limited sense. I reach this conclusion with considerable hesitation and reluctance.

6
7 **(2) Is the Trustee's view that the only issue of the Settlor who have established their**
8 **claim to legitimacy are his issue by Madam Law, a view that a reasonable and**
9 **prudent trustee could properly come to?**

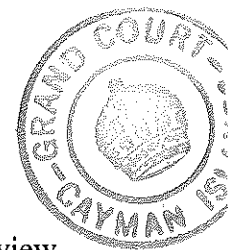
10
11 Issue (2) is a second category issue.

12
13 On the basis of the material before the court it is the Trustee's view that the only issue of the
14 Settlor who have established their claim to legitimacy are his issue by Madam Law. The Trustee
15 invites the court to say that this is a view that a reasonable and prudent trustee could properly
16 come to.

17
18 It is most important that all persons who are members of the Settlor's Family Tree should
19 understand that I am not asked to decide (and do not decide) that his children from his
20 relationships with Madam Lai, Madam Yeung, Madam Wu, Madam Kwok and the Second
21 Madam Yeung were illegitimate.

22
23 My task is much more limited.

24
25 Issue (2) is an issue as to whether the proposed course of action by the Trustee is a proper
26 exercise of the Trustees' powers. There is no real doubt as to the nature of the Trustee's powers
27 and the Trustee has decided how it wants to exercise them. Because the decision is particularly
28 momentous, the Trustee wishes to obtain the blessing of the court for the action on which it has
29 resolved and which is within its powers. There is no question of surrender of discretion and
30 indeed it is most unlikely that the court would be persuaded, in the absence of special
31 circumstances, to accept the surrender of discretion on a question of this sort.



1 Thus the question for the court is whether on the material before the court, the Trustee's view
2 that the only issue of the Settlor who have established their claim to legitimacy are his issue by
3 Madam Law, is a view that a reasonable and prudent trustee could properly come to?

4 I answer this question in the affirmative broadly for the reasons advanced by Mr Farrow QC.

5 There is some independent evidence that the Settlor and Madam Law were married at a
6 ceremony which took place in Guangzhou, China, on 22 or 23 March 1934. The Hong Kong
7 Marriage Certificate dated 19 May 1998 is of limited evidential value. In addition to evidence of
8 the 1934 ceremony, there is evidence that the Settlor and Madam Law lived together as man and
9 wife for at least a considerable period of time from 1934 until Madam Law's death in 2000.

10

11 For the avoidance of doubt in my opinion the Trustee's view that the Settlor's youngest daughter
12 by Madam Law, Shiu Wan Ying, is the biological child of the Settlor, is a view that a reasonable
13 and prudent trustee could properly come to.

14

15 On the other hand the Trustee's view that the Settlor's children, (other than his children by
16 Madam Law) have not made out a case for their legitimacy is in my opinion a view that a
17 reasonable and prudent trustee could properly come to. It is for persons who claim to be
18 members of a class to establish that they are indeed members of that class. They need not
19 necessarily do that by formal evidence, but at least they must provide to the Trustee information
20 and/or documents which enable the Trustee to adjudicate their claim.

21

22 As to first affidavit of Shiu Wan Yee Francis (admitted at a very late stage) it is unclear where
23 the deponent's parents were married or as to whether the place of marriage or the domicile of the
24 parties recognised a common law marriage. The evidence of cohabitation of the parents is
25 sparse. Further there is no evidence that the law of Hong Kong recognises legitimacy by
26 paternal recognition or that the amendments to the birth certificates would have such effect.

27

28 The claims of the remaining children, as advanced by Shiu Wan Tik Flora, consist of little more
29 than bald assertions which do not assist the Trustee. There is no information as to the
30 circumstances of their birth, including where they were born. It is not therefore possible to

1 identify the law which would govern their legitimacy. Nor is there any information as to the
2 relationship between the Settlor and their respective mothers at the time of their birth. The
3 Affirmation of Shiu Yuen Chit suggests that none of them could have been living with the Settlor
4 in a settled relationship at the time of their birth. Thus the presumption of marriage can have no
5 application. Nor is there any evidence that these other children were the products of marital
6 unions whether monogamous or polygamous.

7
8 **(3) Is the Trustee's view that the Trustee Memorandum accurately reflects the Settlor's**
9 **wishes as to the distribution of the Trust Fund after his death, a view that a**
10 **reasonable and prudent trustee could properly come to?**

11
12 Issue (3) is a second category issue.

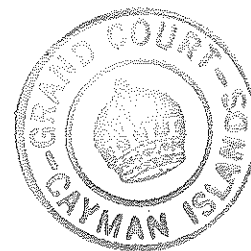
13
14 I answer this question in the affirmative for the following principal reasons.

15
16 The Lam/Lam Notes and the responses to the questionnaire in early 1999 include the following.

17
18 (1) It appears from the Lam/Lau Notes that the second meeting – the first
19 attended by the Settlor – took place at the offices of JSM on 9 February 1998
20 and was attended by the Settlor, five of his children (but not by any of his
21 children by Madam Law), Anita Lee of JSM and Nelson Yu, a solicitor and a
22 Shiu family friend or acquaintance. The following exchange is recorded at
23 page 3:

24 "Waynee [one of the Settlor's daughters] asked Mr Shiu how he would
25 like to divide the trust fund amongst all his children and asked him
26 whether he would agree to divide it into equal shares amongst his children.
27 Again, Mr Shiu agreed by nodding and said "yes, fine"."

28 (2) It further appears from the Lam/Lau Notes that the final meeting, described as
29 the "Execution Meeting", took place at JSM's offices on 10 March 1998 and
30 was attended by the persons listed on page 5. The following exchange is
31 recorded:



1 "Doris [Lau] started with explaining in Cantonese to Mr Shiu who was
2 sitting opposite to her the trust arrangements under the fixed settlement
3 and the discretionary trust to meet his requirements. When asked by Doris
4 whether he understood what she was saying, Mr Shiu answered nodded
5 and answered "yes".

6 Doris then explained in Cantonese to Mr Shiu the Trustee Memorandum in
7 respect of the administration guidelines of the discretionary trust and confirmed
8 with him whether the contents met with his intention. Mr Shiu confirmed by
9 saying "yes".

10 (3) In paragraph 38 of the written answers to the questionnaire – although it appears
11 to be a response to both paragraphs 38 and 39 in the questionnaire – the following
12 appears:

13 "Details. DL explained in Cantonese the essence of the trust
14 memorandum.

15 Confirmed each name and share

16 Mr. Shiu nodded after each name

17 Explained these were the guidelines for trustees.

18 Specifically asked Mr Shiu "is this what you want?" – Mr Shiu answered
19 yes in Cantonese."
20

21 I refer to the opinion of Anderson Chow SC which was as follows. The effect of the Order dated
22 16 May 2007 made by Lam J. in the Hong Kong proceedings and the Deed of Confirmation
23 executed by the Official Solicitor, dated 9 January 2008, is clear. By the Deed of Confirmation,
24 the Discretionary Trust Deed has been confirmed to be valid as if the Settlor had been of sound
25 mind and full capacity at the material time and that the title of the Trustee shall cease to be
26 voidable at the instance of the Confirmor or his heirs or successors or assigns on the ground of
27 undue influence. The Discretionary Trust Deed has effect from the date when it was originally
28 executed by the Settlor. The execution of the Deed of Confirmation was never intended to affect
29 the Trustee Memorandum. The Deed of Confirmation was intended to address the two alleged
30 grounds of invalidity of, inter alia, the Discretionary Trust Deed raised in HCA 11070 of 1998.

1 The effect of the Deed of Confirmation is to confirm, inter alia, that the Discretionary Trust Deed
2 is a valid instrument and takes effect from the date of execution, and it has no impact on the
3 Trustee Memorandum.

4 The Trustee Memorandum bears the same date as the Discretionary Trust Deed. If the
5 Discretionary Trust Deed is a valid instrument the overwhelming probability is that the Trustee
6 Memorandum completed on the same day accurately reflects the Settlor's wishes as to the
7 distribution of the Trust Fund. If the Settlor had the necessary sound mind and full capacity to
8 sign the Discretionary Trust Deed the overwhelming probability is that he was of sound mind
9 and full capacity (free from undue influence) when on the same day he confirmed his wishes as
10 to the distribution of the Trust Fund after his death.

11

12 (4) **Should the Trustee have regard to the Settlor's wishes as expressed in the Trustee**
13 **Memorandum?**

14 Issue (4) is a first category issue.

15 I answer this question in the affirmative.

16 I have set out the relevant principles above under the heading 'Settlor's wishes expressed in
17 letters or memoranda'. The significance of the settlor's wishes has grown with the growth of
18 wide discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed
19 interests. It is well established that the Trustee is entitled to take serious account of the settlor's
20 wishes and it is (according to Lewin) the better view that they are bound to do so.

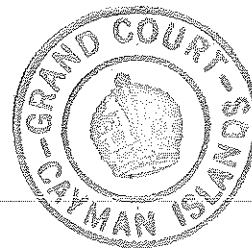
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22 (5) **Is the Power of Addition contained in clause 26 valid?**

23 Issue (5) is a first category issue.

24 I answer this question in the affirmative.

25 I refer to what I have set out above under the heading 'Power of Addition'.



1 The Trustee's Power of Addition is created by clause 26 of the Discretionary Trust Deed,
2 which provides:

3 *"...Subject always to the provisions of Clause 29 hereof, the Trustee may at any*
4 *time or times and from time to time before the Perpetuity Date appoint by deed*
5 *any individual or corporation not being a member of the Excluded Class to be*
6 *from the date of such appointment or any subsequent date specified in such deed*
7 *an Eligible Beneficiary for the purposes of this Deed and from the date of such*
8 *appointment or such later date as may therein be specified the expression*
9 *"Eligible Beneficiaries" in this Deed shall include the individual or the*
10 *corporation so appointed and the Trustee shall endorse on or annex to this Deed*
11 *a memorandum of such deed."*

12
13 Schmidt v Rosewood Trust Ltd supra is authority (binding on me) that the Power of Addition is
14 valid.

15
16 **(6) If the Power of Addition is valid and if the Trustee's view that the Trustee**
17 **Memorandum accurately reflects the Settlor's wishes is a view that a reasonable and**
18 **prudent trustee could properly come to, could the Trustee properly form the view**
19 **that its proposed exercise of that power (namely, by adding the persons named or**
20 **identified in the Memorandum other than those who are already members of the**
21 **class) is within the intended scope or object of that power?**

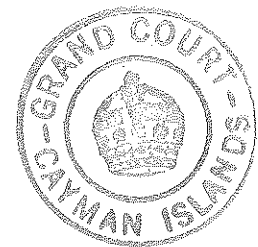
22 Issue (6) straddles categories 1 and 2.

23 I repeat my answers to issues (3), (4) and (5) above.

24 In my opinion the Trustee can properly form the view that its proposed exercise of the Power of
25 Addition (namely, by adding the persons named or identified in the Memorandum other than
26 those who are already members of the class) is within the intended scope or object of that power.

27 For the avoidance of doubt this answer extends to all the persons listed in Schedule 1 to the order
28 I propose to make.

29 The Power of Addition is exercisable in favour of a wide class. It is perfectly valid. In the



1 present case the Trustee has taken care to obtain a proper record of the Settlor's wishes as to the
2 distribution of the Trust Fund after his death. To give effect to those wishes in the manner
3 proposed is not a fraud on the Power of Addition or a breach of fiduciary duty or otherwise open
4 to challenge.

5
6 **(7) If it is permissible to add those persons, is the Trustee's view that its proposed**
7 **exercise of the power of appointment (namely, in favour of those named or**
8 **identified in the Memorandum and in the same proportions), a view that a**
9 **reasonable and prudent trustee could properly come to?**

10 Issue (7) is a second category issue.

11 I answer this question in the affirmative. The Trustee by the Power of Appointment proposes to
12 give effect to the Settlor's wishes.

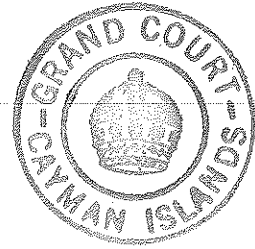
13 The Trustee's Power of Appointment arises under clause 4(a) of the Discretionary Trust Deed,
14 which provides:

15 *"...Subject to the provisions of Clause 29, the Trustee shall stand possessed of the Trust*
16 *Fund and the income thereof in trust for all or such one or more exclusively of the others*
17 *or other of the Eligible Beneficiaries in such shares or proportions as the Trustee shall*
18 *revocably or irrevocably from time to time and at any time or times before the Perpetuity*
19 *Date appoint by instrument in writing and at such age or time or respective ages or times*
20 *and with such trusts for their respective advancement maintenance education or benefit*
21 *as the Trustee shall stipulate in such instrument. Any appointment pursuant to this*
22 *Clause 4(a) may relate to the whole or part of the Trust Fund and/or the income thereof*
23 *in so far as it has not already been paid or applied under Clause 5 hereof but no*
24 *appointment hereunder shall be made so as to create a Perpetuity".*

25 It follows from my earlier answer that the proposed exercise of the power of appointment is not a
26 fraud on the Power of Appointment or breach of fiduciary duty or otherwise open to challenge.

27 I express my gratitude to Mr McKie QC for the exemplary manner in which this complex matter
28 has been conducted, and to Mr Kenneth Farrow QC for his very considerable assistance as
29 Amicus.





1 I have approved the Trustee's costs and expenses.

2 **Conclusion**

3 The Order that I propose to make will include the following

4 IT IS DECLARED THAT:

5 1 Upon the true construction of the trust deed dated 10 March 1998 ("the Trust Deed")
6 which constitutes the Shiu Pak Nin discretionary trust ("the Trust"), the term "issue"
7 within clauses 1(e)(ii) and 1(k) of the Trust Deed means "legitimate issue".

8 2 The Trustee be at liberty to exercise the power of addition conferred upon the Trustee by
9 clause 26 of the Trust Deed to add to the class of "Eligible Beneficiaries" as defined in
10 clause 1(e) of the Trust Deed any or all of the persons listed in Schedule 1 hereto.

11 3 The Trustee be at liberty to exercise the power of appointment conferred upon the Trustee
12 by clause 4(a) of the Trust Deed:

13 3.1 on the footing that all the persons listed in Schedule 2 hereto are (or were, where
14 deceased) the biological issue of Mr Shiu Pak Nin ("the Settlor") and that those
15 persons are (or were, where deceased) legitimate; and

16 3.2 in accordance with the draft deed of appointment which includes Schedule 3
17 hereto.

18 *JK*
19 Dated *11* day of February 2014

20

21

22

Cresswell J

23 **The Hon Mr Justice Peter Cresswell**

24 **JUDGE OF THE GRAND COURT**

1

2

SCHEDULE 1

3

4

5

1. Leung Kay Ling

6

7

2. Shiu Wan Hing

8

3. Mok Yuen Man

9

4. Mok Yuen Yee

10

5. Mok Yuen Wai

11

6. Yim Zi Wai

12

7. Tam Shing Tsun

13

14

8. Shiu Hak Kan

15

9. Shiu Oi Kan

16

10. Shiu Cheuk Tung

17

18

11. Shao Yuan Liang

19

12. Shao Yuan Mou

20

13. Shao Yi Fei

21

14. Shiu Yat Ming

22

15. Shao Fei

23

16. Siu Wing Fai

24

17. Siu Chun Hei

25

18. Jennifer Jiang

26

19. Shiu Sheung Tsuen

27

28

20. Shiu Wan Yee Francis

29

21. Shiu Yuen Chi (Larry Shiu)

30

22. A V Babitsky

31

23. Tanya Shiu

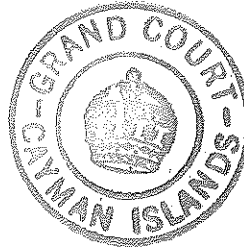
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24. Ming Shiu

33

34

25. Shiu Wan Tik Flora



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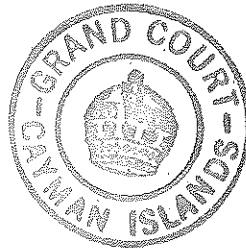
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SCHEDULE 2

3

4

- 5 1. Shiu Yuen Chit
- 6 2. Shiu Wan Mei
- 7 3. Shiu Wan Ying
- 8 4. Shiu Yuen Shun
- 9 5. Shiu Yui Kun
- 10 6. Shiu Wai Kun
- 11 7. Shiu Wing Kan
- 12 8. Li Hei Shun
- 13 9. Li Hei Yee



me

1

2

SCHEDULE 3

3

4

5

THE SCHEDULE [to the Deed of Appointment]

6

The Beneficiaries

7

8

Name of Beneficiary

Share of Appointed Funds

9

10

Shiu Yuen Chit

1/12

11

Shiu Wan Mei

1/12

12

Shiu Wan Ying

1/12

13

Shiu Wan Hing

1/12

14

Shiu Hak Kan

1/24

15

Shiu Oi Kan

1/24

16

Shao Yuan Liang

1/12

17

Shao Yuan Mou

1/12

18

Siu Wing Fai

1/24

19

Siu Chun Hei

1/24

20

Shiu Wan Yee (aka Wanyee Shiu Francis)

1/12

21

Shiu Yuen Chi

1/12

22

Shiu Wan Tik (aka Flora Shiu)

1/12

23

Leung Kay Ling

1/24

24

Shiu Yui Kun

1/24



PK