Neutral Citation Number: [2026] EWHC 1045 (Ch)

Case No: PT-2026-BRS-000006

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 7 May 2026

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) ALBEMARLE JOHN CATOR **(2) JAMES FELTON SOMERS HERVEY-BATHURST CBE DL** **(3) ANTHONY HENRY WESTROPP**	**Claimants**
- and -	
(1) CEAWLIN HENRY LAZLO THYNN, MARQUESS OF BATH **(2) CAROLINE JANE MILLER**	**Defendants**

- -
- -

Henry Legge KC (instructed by **Boodle Hatfield LLP**) for the **Claimants**
The First Defendant did not appear and was not represented
Alexander Learmonth KC (instructed by **Wedlake Bell LLP**) for the **Second Defendant**

Hearing dates: 16 April 2026

- -

This judgment was handed down remotely at 10:30 am on 7 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archive.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the disposal of a claim under CPR Part 8, by which the trustees of certain trusts seek the court's "blessing" under CPR rule 64.2(a) for their proposed exercise of a power of advancement in favour of the first defendant, who is the life tenant of the trusts. It follows a successful earlier application to me by the claimant trustees to join Caroline Jane Miller as the second defendant to the claim, to represent various beneficiaries of the trusts who would or might be prejudiced by the proposed exercise of power (see the judgment at [2026] EWHC 209 (Ch)). Before me, Henry Legge KC appeared for the claimants, and Alexander Learmonth KC appeared for the second defendant, Caroline Miller. The first defendant did not appear and was not represented, having previously written to the court out of courtesy to explain that he agreed with the approach of the claimants, and saw no need to add anything of his own by taking part.

The trusts

2. In my judgment on the earlier application, I described the trusts concerned in these brief terms:

> "2. The family trusts concerned in this claim are three. The first is known as the Longleat House and Chattels Settlement. It was created in 2004, following the amalgamation of two earlier settlements established in 1993 by the Seventh Marquess. The second is known as Lord Bath's Own Longleat Settlement. It was created in 1987 by the Seventh Marquess before he succeeded to that title, when he was known as Viscount Weymouth. The third is known as Lord Bath's Longleat Settlement (Ceawlin's Fund). This also was created in 1987 by Viscount Weymouth, later the Seventh Marquess. By virtue of the working out of provisions in the first and second settlements, the assets of those settlements are now held on the trusts of the third settlement. The first defendant is the life tenant of the third settlement."

The substantive claim

3. I went on to describe the substantive claim in these terms:

> "3. The substantive claim itself is one under the first and/or second head of the well-known *Public Trustee v Cooper* [2001] WTLR 901 jurisdiction. In cases under the first head, as Hart J said in his decision (at 923),
>
> > "the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides."
>
> In cases under the second head,
>
> > "the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees'

> powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers".
>
> 4. In the present case, the claim is for the court's approval of the claimants' decision to exercise a power of advancement for the benefit of the first defendant in the family trusts so as to make potential provision for the first defendant's second son, Henry (who is currently a minor). This is because Henry, although genetically the son of the first defendant and his wife, was born to a surrogate mother, in America. The family trusts expressly retain the pre-1970, common law, meanings of descriptions of family relationships, such as child, grandchild and issue. These expressions are construed to mean persons who are themselves legitimate, and so far as necessary trace their relationship through other persons who are also all legitimate: see *eg Sydall v Castings* [1967] 1 QB 302, CA.
>
> 5. There is therefore uncertainty as to whether Henry falls at present within the class of beneficiaries or discretionary objects of those settlements. The first defendant and his wife consider it would be unfair and unfortunate if their second son and his issue were excluded from benefit. The claimants as trustees of those settlements wish to confer power upon the first defendant to add Henry and his issue to the class of beneficiaries, on the basis that this would be for the benefit of the first defendant (for whose benefit the power of advancement can undoubtedly be exercised). At this stage the intention is simply to confer *power* to add Henry to the class, but not yet to exercise it. This is to avoid any problems with US tax, as he was born in America to an American surrogate mother. A decision can then be taken at a later stage, in the light of appropriate advice, whether to exercise the power to add him.
>
> 6. The proposed method of conferring this power is to exercise the power of advancement in the trusts of the third settlement referred to above, 'for the benefit of' the first defendant, by way of an advancement of the trust assets on trusts which mirror the existing trusts, but which include the power to add Henry and any of his issue and their respective spouses, widows or widowers, to the class of beneficiaries."

The evidence

4. The evidence in support of the claim in contained in a witness statement of the second claimant, Mr Hervey-Bathurst, dated 14 November 2025, to which a bundle of documents has been exhibited. There was no suggestion that he should be cross-examined on his witness statement, and therefore I heard no live evidence. That limits my ability to disbelieve any of the written evidence (see *eg Coyne v DRC Distribution Limited* [2008] EWCA Civ 488, [58]), but, happily, that is not a question which arises here. I will come back shortly to the substance of the evidence filed.

The parties

5. As I have said, the second defendant was joined in order to represent the various beneficiaries of the trusts who would or might be prejudiced by the proposed exercise of power by the trustees. It was her role to put forward the arguments for saying that

the court should not give its blessing to that proposed exercise. Mr Learmonth KC accordingly advanced those arguments before me (and really said everything that could properly be said for those that he represents). This means that my decision has been the subject of adversarial argument between opposing parties, and hence (to the extent that that were necessary) an issue estoppel can arise in relation to the decision which I make as between the various parties (and those they represent). I record here that I understand that the second defendant once joined made no request of the claimants for disclosure of further documentation beyond that already disclosed by them. Certainly, no application was made to the court for a disclosure order.

The position of Henry

6. It is however important to note that the first defendant's second son, Henry, is not a party to these proceedings, and he therefore cannot be bound by my decision. For this reason alone (though there are others) I was asked not to try to answer the question whether Henry was indeed excluded from the class of objects of the trusts in question. That would require consideration of matters which, so far as I am aware, have never been decided in English law. This is the status *at common law* of the child the product of the egg of a married woman fertilised by her own husband but actually born of another woman, a surrogate mother, in whom the fertilised egg was implanted and brought to term.

7. The question could not have arisen in practice until the egg extraction technology was developed which led to the birth of Louise Brown in this country in 1978. It is highly unlikely therefore that there can be any binding authority on the point. The trustees have been advised that it is at least doubtful that Henry is within the class of beneficiaries. I proceed therefore on the basis that Henry *is* excluded, and that the trustees wish to exercise their power of advancement in favour of the first defendant so as to confer upon him a power in effect to add Henry to the class of objects of the trusts.

The evidence

8. The written evidence of the second claimant includes the following:

> "6. … the trustees understand (and have been advised) that the LBLC settlement is drafted in such a way that Henry would not be entitled to benefit as Lord Bath's son, while the settlement remains in its current form. Put another way, although Henry is Lord and Lady Bath's biological child and is to all intents and purposes a child of their marriage, the fact that he was carried to term by a surrogate mother means that he is treated differently under the LBLC settlement from his elder brother John, born in October 2014, who was carried to term by Lady Bath.
>
> 7. The trustees consider this inequitable to Lord Bath and to Henry. We have given careful consideration as to how best to deal with this issue, including the attitude we should be taking to the possibility that the assets of the settlement will become separated from the title of Marquess of Bath. We are advised by Leading Counsel (in respect of which legal advice privilege is not waived) that the terms of the settlement confer on us power to make an advancement for the benefit of Lord Bath, which could be used to insert Henry and his issue at some stage as beneficiaries in the line of succession after John should it prove desirable to do

so. We have canvassed with Lord Bath the possibility of using this power in that way and Lord Bath has confirmed to us that he considers the proposal to provide a benefit to him.

8. We therefore wish to exercise the power so as to bring about this effect and a draft deed is annexed to the draft order presented with the Claim Form (and is exhibited at page 872). However, we recognise that this is a momentous decision and request the court to approve the decision we have made in principle to execute the deed. I deal below with the details of the way in which we propose to exercise the power.

[…]

18. Critically, the trusts of LBLC include a power at clause 9 of the May 1996 Deed for the trustees to pay transfer or apply capital for the benefit of the life tenant for the time being – i.e. currently Lord Bath. I understand that the trustees therefore have power to apply the capital of the LBLC Fund for Lord Bath's benefit. I understand that this power is of sufficient breadth to enable the trustees to use the power in the manner contemplated below, provided that the trustees reasonably take the view that to do so would be for Lord Bath's benefit.

[…]

20. … The trustees have been advised that the effect of clause 1(f) of the LBLC settlement deed is that Henry would not be treated as a son of Lord Bath for the purposes of clause 6(b) of the May 1996 Deed and/or as issue of the Sixth Marquess for the purposes of the definition of the appointable class at clause 1(c) of the settlement deed …

21. Upon receiving this advice, the trustees considered whether it would be appropriate for them to exercise their power to apply capital for the benefit of Lord Bath in such a way as to allow the inclusion of Henry within the appointable class of beneficiaries. The trustees have considered the matter and take the view that this is a course of action they would wish to adopt.

22. In reaching this decision, three points seemed of particular weight to us.

23. First, Henry is the son of Lord and Lady Bath. Not only is he treated by them and will be treated by the world in general as a child of Lord and Lady Bath's marriage, but he is also their genetic child. It would be unfair on Lord Bath and on Henry to treat Henry as if he were not Lord Bath's son.

24. Second, although these trusts have clearly been historically connected with the title of Marquess of Bath, that does not seem to us to be a reason why Henry should not be included within the appointable class of beneficiaries. This is for two reasons … [not necessary to be set out]

25. Third, for the reasons which we describe below what is proposed is merely a first step towards including Henry within the line of succession to the trust property. At this stage, all that is proposed is that Lord Bath is given the power to add Henry to the class of prospective beneficiaries of the trusts. In fact, the most

> likely outcome must be that any exercise of this power will not come into effect until after Lord Bath's death.
>
> […]
>
> 31. In the circumstances, it does seem to me and to my fellow trustees that exercising the power in this way is the right thing for the trustees to do.
>
> 32. I should say that the trustees are not family members or potential beneficiaries of the LBLC settlement, or any other of the Longleat settlements. I am not aware of any actual or potential conflict of interest that exists in the matters which are the subject of this application.
>
> […]"

9. None of the evidence given seemed to me implausible or contradictory. On the contrary, it seemed highly credible to me, and I accept it all.

The relevant terms of the trusts

10. As the evidence quoted above makes clear, the terms of the trusts relied on in this case are to be found in a deed of appointment dated 29 May 1996 and made between the then trustees and the then Marquess of Bath (the first defendant's father), under powers conferred by Lord Bath's Longleat Settlement (Ceawlin's Fund), the third of the three settlements referred to above. In this deed, the first defendant (then known as Viscount Weymouth) is referred to as "Ceawlin". Clauses 1, 5, 6 and 9 of this deed relevantly provide:

> "1. In this Deed where the context so admits the following expressions shall bear the following meanings that is to say:
>
> > […]
> >
> > (d) 'the Restricted Appointable Class' shall have the meaning given to the same in Clause 1(1) of the Deed of Restriction
> >
> > […]
> >
> > (f) expressions descriptive of relationship shall be construed in accordance with the general law in force before 1970
>
> […]
>
> 5. The LBLC Trust Fund and the income thereof shall be held on such trusts in favour or for the benefit of all or such one or more of the Restricted Appointable Class exclusive of the other or others of them at such age or time or respective ages or times and if more than one in such shares or proportions and with and subject to such powers and provisions for their respective maintenance education and other benefit (including if thought fit powers and provisions of an administrative nature and also discretionary trusts and powers to be executed or exercised by any person or persons and so that the exercise of this power of appointment may be delegated to any extent) and in such manner generally as the

> LBLC Trustees may from time to time before the perpetuity date by any deed or deeds revocable not later than the perpetuity date or irrevocable in their absolute discretion appoint
>
> Provided That
>
> > […]
> >
> > (b) No such appointment shall be made without the prior written consent of Lord Bath during his lifetime and no such appointment shall be made after his death without the prior written consent of Ceawlin during his lifetime
> >
> > […]
>
> 6. Until and subject to and in default of any exercise of the power of appointment conferred by Clause 5 above the LBLC Trust Fund and the income thereof shall be held in trust as follows.
>
> > (a) In trust for Ceawlin during his life without impeachment of waste if he attains the age of 25 years with remainder
> >
> > (b) In trust for the first and other sons of Ceawlin successively in order of seniority in tail male with remainder
> >
> > (c) In trust for the second and other sons of Lord Bath successively in order of seniority in tail male
>
> […]
>
> 9. The LBLC Trustees shall have power exercisable at their discretion from time to time during the subsistence of any life interest in possession in the LBLC Trust Fund … to pay transfer or apply the whole or any part or parts of the capital of the LBLC Trust Fund to or for the benefit of the life tenant or (as the case may be) the tenant in tail in possession Provided That if in exercise of this power capital is applied for the benefit of a person who has not attained the age of 25 years in such a way that the capital so applied is to remain in trust the trusts of that capital shall be such that that person will become entitled to or to an interest in possession in the same on or before attaining the age of 25 years and that the income thereof is in the meantime to be accumulated so far as not applied for his maintenance education or benefit".

11. By virtue of a recital at the beginning of the Deed, the expression "the Deed of Restriction", referred to in clause 1(d) of the Deed, is a reference to a deed of restriction dated 24 May 1993, also made by the then Lord Bath and the then trustees. In that earlier deed it was relevantly provided that

> "1. In this deed the following expressions shall bear the following meanings that is to say:
>
> > (1) 'the Restricted Appointable Class' means:

(i) Ceawlin and all other grandchildren and issue remoter than grandchildren of the Sixth Marquess and

(ii) The respective husbands wives widows and widowers of the Sixth Marquess's said grandchildren and remoter issue

(2) expressions descriptive of relationship shall be construed in accordance with the general law in force before 1970".

The proposed exercise of the power of advancement

12. The proposed exercise of the power of advancement (which is expressed not to affect the first defendant's life interest or certain other interests in income) is this:

> "In exercise of the Powers of Advancement and any other powers them enabling and subject to any further exercise of the Powers of Advancement, the Trustees declare that the trusts applicable to the LBLC Trust Fund, the LBOL Fund and the LHCS Fund shall henceforth take effect as if clause 1(d) of the May 1996 Appointment had read as follows:
>
> '1(d) "the Restricted Appointable Class" means:
>
> (i) Ceawlin and all other grandchildren and issue remoter than grandchildren of the Sixth Marquess
>
> (ii) The respective husbands wives widows and widowers of the Sixth Marquess's said grandchildren and remoter issue
>
> (iii) Such of the Additional Beneficiaries as Ceawlin may by deed (whether irrevocable or revocable before the perpetuity date) executed with the consent of the Trustees during Ceawlin's lifetime, or by will, or codicil without the consent of the Trustees appoint
>
> 1(da) 'the Additional Beneficiaries' means:
>
> (i) Henry Thynn
>
> (ii) any child or remoter issue of Henry Thynn
>
> (iii) the respective husbands wives widows and widowers of Henry Thynn his children and remoter issue'."

13. It will be seen that this does not purport to alter the substance of the dispositive trusts. Instead, it extends the definition of "the Restricted Appointable Class" to include further members to be appointed by the first defendant.

Do the trustees have power at all?

The question of "benefit"

14. Before considering the main issue in this case, I must consider the threshold question whether the trustees actually have the power to make the proposed advancement.

Since the whole point of the exercise of the power of advancement is to confer on the first defendant a power to add his son Henry to the class of appointable beneficiaries, the question must be whether this is indeed for the first defendant's "benefit". In this context, the term "benefit" is construed widely. An early decision was that in *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452. A marriage settlement conferred power on trustees to advance capital on a son of the marriage

> "for placing or establishing him in any business, profession, or employment, or otherwise for [his] advancement or preferment in the world … "

The son had married two years before, without a marriage settlement, and neither he nor his wife had any income-producing property. The son was studying to become a barrister. Lord Romilly MR declined to sanction an outright advance to the son ("he may put [it] in his pocket"), but *did* sanction an advance into a settlement for the son for life, then for the wife for life, then on trust for such of the issue as might be appointed, with remainders over.

15. Again, in *Re Halsted's WT* [1937] 2 All ER 570, for example, a power of advancement of capital in favour of a son of the testator "for the purpose of establishing him in business or otherwise for his benefit or advancement in life" was held to be capable of being exercised so as to give the son a life interest, with remainder to his wife for her life and thereafter absolutely to his children, in circumstances where he was otherwise unable to provide for them.

16. The judge, Farwell J, said (at 571G):

> "I have to consider whether a settlement made for the benefit of the plaintiff's wife and child would be for his benefit. To some extent it would be to benefit objects other than objects of the power, because the wife and children might be the persons to benefit. But I cannot doubt that it would be for the plaintiff's benefit that some provision should be made for them. The plaintiff and his wife are not in a position to make provision for the future. That a man should be married and have a family and have no means of making any sort of provision in the event of his death is a prospect that, to many of us, would be so appalling, that some provision for the man's wife and children would seem to be for the benefit of that man, because he would be relieved from what would be a very anxious position so long as no provision was made. Having regard to the very wide terms in which the word 'benefit' has been construed in the past, I consider that the trustees may, under this power, raise a part not exceeding one half, and have the part so raised settled for the benefit of the plaintiff, his wife, and his children. I think that, in any settlement which was proposed for that purpose, the only persons who could properly be included would be the plaintiff's wife and children, and any ultimate trust would, in my view, have to be for the ultimate residue of the testator's estate. Subject to that, I declare that the trustees have power to make an advancement for this purpose, if they think fit. I leave it to the trustees to say whether they will exercise the power, and on what terms."

17. In *Pilkington v. IRC* [1964] AC 612 Lord Radcliffe, construing the phrase 'advancement or benefit' in section 32 of the Trustee Act 1925, said (at 635) that it covered "any use of the money which will improve the material situation of the beneficiary." In *Re Halsted's WT* the object of the power was made materially better

off because he could satisfy his moral obligation to provide for his family at no cost to himself. But that does not mean that *only* material improvements can constitute "benefit" for this purpose. Nor does it mean that persons not in the class may not benefit. As Lord Radcliffe said (at 636):

> " … if the disposition itself, by which I mean the whole provision made, is for [the beneficiary's] benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise."

18. Thus, in *Re Remnant's ST* [1970] Ch 560, a will provided for two funds to be settled on his two daughters and their issue, with remainders over. But the trusts of each contained a forfeiture clause in case any of the issue should be or become a Roman Catholic or marry or live with a Roman Catholic. The daughters sought the removal of the forfeiture provisions, saying that they would create hard choices for their issue and could cause dissension in the family and that therefore it was a benefit for them to avoid these difficulties. They proposed an arrangement under the Variation of Trusts Act 1958, under which the trusts would be varied so as to remove the forfeiture provisions. Pennycuick J had to consider whether the arrangement was for the benefit of the non-adult beneficiaries on whose behalf he could approve it.

19. The judge said (at 566F-H):

> "I have not found this an easy point, but I think I am entitled to take a broad view of what is meant by 'benefit,' and so taking it, I think this arrangement can fairly be said to be for their benefit.
>
> On that last point I was referred to *In re Weston's Settlements* [1969] 1 Ch. 223, where Lord Denning M.R. said, at p. 245:
>
> > 'But I think it necessary to add this third proposition: (iii) The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit.
>
> I do not think Lord Denning intended to use the words 'educational' and 'social' in any restrictive sense. I think the court is entitled and bound to consider not merely financial benefit but benefit of any other kind."

20. The limits to that approach are illustrated by the decision of Hart J in *X v A* [2006] 1 WLR 741. In this case trustees of a marriage settlement sought directions as to whether it was open to them to exercise their powers of appointment in such a way as to release substantial trust capital to the life tenant (the wife of the settlor) for the purpose of enabling her to devote it to charitable causes, and also for members of her family who were not eligible to benefit under the settlement trusts as originally constituted. The life tenant and the settlor considered that they already had enough to live on, that other beneficiaries of the marriage settlement had access to other funds, and that they (the life tenant and the settlor) had a moral obligation to use their wealth for the benefit of others. Two of their children (who were remaindermen) were unhappy about the proposal. Hart J declined to "bless" the proposed appointments.

21. He referred to a passage in the judgment of Pennycuick J in *Re Clore's Settlement Trusts* [1966] 1 WLR 955, and then said:

> "42. That passage emphasised the potentially limiting effect of the requirement (from which none of the authorities have departed) that there be some sense in which the beneficiary's material situation can be said to be improved by the situation. The same point is made by Walton J's reductio ad absurdum in *Hampden*[1] (see para 39 above). In the present case I find it impossible to see how this requirement can be satisfied. It cannot be said that the proposed advance is relieving the wife of an obligation she would otherwise have to discharge out of her own resources if only because the amount proposed to be advanced exceeds the amount of her own free resources. In any event the court has no reason to suppose that, in relation to her free assets, she will regard the advance as having discharged her moral obligation. The moral imperative informing her request to the trustees might logically be thought to apply to her own assets regardless of whether or not an advance is made out of the trust fund.
>
> 43. I entirely accept that in distinguishing between the objective existence of a moral obligation on the one hand and the beneficiary's own recognition of it on the other there is a danger of the court being cast adrift in an open sea. How, as Mr Le Poidevin asked rhetorically, can the court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary's own views on the subject? That is certainly not a question to with [sic] the court can give an abstract answer, whether by reference to the Bible or to Bentham, to Kant or the Koran. The answer has to be found in the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth. No such case goes anywhere near recognising the existence of a moral obligation of the extent in question here.
>
> 44. For those reasons I do not think that I can conclude that it is open to the trustees to make the proposed advance … "

22. More recently, *Holden-Hindley v Holden-Hindley* [2013] EWHC 3053 (Ch) was a case where the object of a power of advancement under certain trusts of valuable property had an illegitimate child, who could not benefit under those trusts. The trustees wished to exercise the power of advancement in favour of the mother, so as to enable her child to benefit. Roth J referred to *Halsted*, and said:

> "11. … As Farwell J observed some 75 years ago, for a man to have no means of making effective provision for his children puts him in an anxious position. Exactly the same observation may be made as regards a mother who may lack the ability to make the sort of provision for the child that she has had as is made for a legitimate child, or will be made should she have another legitimate child, and therefore, give rise to inequality as between her children."

23. In the present case, the first defendant has two sons, both the genetic progeny of himself and his wife, although the second son was actually born of a surrogate mother. The first son (John) is unarguably within the class of beneficiaries. The doubt arises in relation to the second (Henry). Mr Legge KC accepts that there is inherent inequality in the family trusts already. Primogeniture is built in. There are dynastic considerations. Nevertheless, he says that Henry could reasonably expect to inherit

[1] *Re Hampden's Settlement Trusts* [1977] TR 177, subsequently also reported at [2001] WTLR 195.

after his elder brother and his issue, in the same way as any future legitimate naturally born sibling. He could also reasonably expect to take priority over any such subsequently born sibling. A certain amount of equality can nevertheless be attained. The first defendant would like that to be done. The present proposed advance on new trusts will achieve that object, and will be a material benefit to the first defendant as the father of both boys, who will not have to make provision for Henry out of his own resources. Mr Legge says that the trustees are certainly entitled to form that view, and that they have done so.

24. Mr Learmonth KC says that the concept of benefit is primarily objective, and, in so far as it is subjective, it is the trustees' view that counts, not the first defendant's. The trustees, rather than the first defendant, must genuinely believe that the advancement will be for the benefit of the first defendant. Mr Learmonth says that the first defendant gains no material benefit from the proposed advancement. The persons who *can* gain materially from it are Henry and his issue, but they are not members of the class. Moreover, the first defendant is not suggested to be in the same position as the son in *Halsted*, who could not afford to provide for his family out of his own resources. Worse, says Mr Learmonth, what is being conferred on the first defendant is a *fiduciary* power, which he cannot exercise for his own benefit anyway, but even if exercised would still leave the decision as to whether to confer any financial benefit on Henry *in the hands of the trustees*, so the first defendant has no ability of his own to secure the very thing which is said to be a benefit to him. In addition, the likelihood is that any material benefit to Henry would be conferred only after the first defendant's death. Yet the power is one to benefit the life tenant.

25. Mr Learmonth went on to submit that it was at least arguable that moral issues were not within the scope of the power, and referred not only to what Lord Radcliffe said in *Re Pilkington's Trusts* (cited above), but also to a decision of my own, *Smith v Michelmores Trust Corporation Ltd* [2021] EWHC 1425 (Ch), in which I cited from the decisions of the Royal Court of Jersey and the Court of Appeal of Jersey in *Re Esteem Settlement* 2001 JLR 7, 540.

26. *Esteem* was a case where a defendant (Sheikh Fahad) had been sued to judgment in England by his former employer (Grupo Torras, or "GT") for a sum of about US$687 million in respect of the sheikh's embezzlement of the employer's assets. The Jersey trustee of a fund of about US$18 million, settled by the sheikh *before* the embezzlement (of which the sheikh and his immediate family were the objects), surrendered its discretion to the court on the question whether (as the employer sought) it ought to advance the whole trust fund by way of partial payment of the judgment debt, on the basis that this would be a benefit to the sheikh, both in reducing his debt and in enabling him to "confront his dishonesty".

27. The Royal Court had said:

> "48. … the word 'benefit' is to be construed widely and goes beyond mere financial benefit. It encompasses all sorts of ways in which a beneficiary's position can be made better. Nevertheless, it is not open-ended … Most importantly, the question of benefit is to be considered in a realistic and commonsense manner rather than in a theoretical or academic way."

It held that the partial payment of the judgment debt was too small to constitute any kind of real benefit to the sheikh.

28. The Court of Appeal agreed. It said:

> "40. The Royal Court was also entitled, in my view, to reject GT's contention that the so-called improvement in Sheikh Fahad's moral or ethical position, which, GT said, would be brought about by having the victim of his fraud at least pro tanto compensated and by Sheikh Fahad *'confronting his dishonesty'*, would be a real and discernible benefit to Sheikh Fahad. It may be that the law generally approves and reinforces what is generally accepted as good moral behaviour in the society in which it operates and disapproves and penalizes what is regarded as bad moral behaviour, such as dishonesty and unfair dealing … However, even accepting that the power to advance or apply capital is regarded as a paternal one, and that a trustee has power to make a payment to reduce the debts of a beneficiary's creditors without his consent, where the trustee considers it for the beneficiary's benefit to do so, nonetheless I agree with the Royal Court's conclusion that, *'in the circumstances of this case'*, the Trustee (and therefore the Court) cannot properly regard the so-called moral benefit of confronting his fraud as the type of benefit that will *'improve the material situation'* of Sheikh Fahad, to use Lord Radcliffe's words."

29. *Smith* was a case where a son, John, had been engaged in litigation with the executors of his mother's estate over a partnership between the son and his mother. John lost, and was ordered to pay significant costs. When he did not do so, the executors made him bankrupt. The trustees of a discretionary trust (constituted under his late mother's will) proposed to make an appointment in favour of John. At the time of the claim by the trustees for approval of their proposed appointment, he was still an undischarged bankrupt, but his automatic one-year discharge would take place on the day after the hearing of the application. The sum to be appointed to John was less than 11% of the outstanding debt to the mother's estate. I refused to approve the appointment.

30. I said:

> "57. So the appointment proposed by the trustees would not put more money into John's pocket, and would not enable more than a fraction of his bankruptcy debts to be paid. There is no suggestion that any other indirect benefit would accrue as a result to John, *eg* the ability to carry on a new trade, to become a member of a club he wished to join, or to live a new life of some kind. Yet, the very next day, he would be discharged from both his bankruptcy and these debts, and any subsequent appointment in his favour would flow *directly to him*. In my judgment, it was impossible to say that the proposed appointment was for John's benefit. It would not have objectively benefited him, and I have great difficulty in seeing how the trustees could subjectively have thought that it did, as opposed to benefiting the testatrix's estate, which the first claimant represented. So, in my judgment it was not within the scope of the power at all. Accordingly, the claim failed at the first hurdle."

31. Having considered the comprehensive submissions of Mr Learmonth on this first point, I have reached the following conclusions. For my part I am satisfied that the first defendant will gain materially by not needing to provide for Henry, or not so

much, because the family trusts will probably provide. He can spend his saved resources on other things, for which the family trusts will not provide. As for the power to be conferred on the first defendant being a fiduciary power, I have considerable doubts about that. It was formerly common for a testator to confer upon his widow not only a life interest but also a power of appointment amongst their children, so that the widow had some part of the parental power that the testator enjoyed during his lifetime, and this would normally have been treated as a personal rather than a fiduciary power. In any event, Mr Legge confirmed that, if the court approved the proposed exercise, the drafting would make clear that the power *was* a personal power.

32. Mr Learmonth's point about the decision to confer benefit being in the hands of the trustees rather than the first defendant in my judgment rather misses the point. The trustees ultimately control all the benefits that follow after the first defendant's death. What the first defendant desires is that Henry may be treated in a similar way to existing beneficiaries. The first defendant is to be given a power to place Henry *in that position*, not actually to confer the benefits himself. And it does not matter that the actual conferring of benefits takes place (if it does) only after the first defendant's death. A considerable part of the benefit to the first defendant is *knowing* that Henry is one of the beneficiaries who may benefit in future.

33. Lastly, the authorities are clear that moral as well as material matters can constitute a benefit to the object of a power of advancement. It is harder to assess the benefit where moral matters are concerned, but it can be done. It is not *necessary* that the object recognise a moral obligation, but, if the object does not (or cannot) do so, then it is harder still to be satisfied that there is a benefit being conferred. Here the first defendant recognises his moral obligation towards his son, and there is no problem. It is not just a question of provision for Henry, but also of not allowing avoidable inequalities of treatment between children to cause difficulties in their relationships as they grow up.

34. I have no doubt that it is for the first defendant's benefit that a power should be conferred upon him, if he should so decide in the future, to include his second son in the class of objects of the family trusts, so that his second son is not automatically excluded from benefits available to his other naturally born children. In my judgment, at least in circumstances where there is a reasonable doubt as to whether Henry falls within the class of beneficiaries already, and subject to the "improper purpose" rule discussed next, the trustees do have the power to make the advancement that they propose.

Improper purpose?

35. A second argument put forward by Mr Learmonth is that the proposed exercise of the power of advancement would be beyond the trustee's powers as for an improper purpose (what we used to call a "fraud on the power"): see *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47, 25 ITELR 630, [56]-[62]. If so, the purported exercise of the power, being an equitable power, would be void, and not merely voidable: *Cloutte v Storey* [1911] 1 Ch 18, CA. What Mr Learmonth says is this:

> "43. Here, the beneficiaries of the Longleat Settlements, both under the default trusts in clause 6 of the 1996 Deed and as objects of the power of appointment,

> are expressly confined to the *legitimate* issue of the Sixth Marquess (and their spouses etc.). The deliberate inclusion of the restricted definition as to how terms of relation are construed, so as to exclude adopted and illegitimate children has been a consistent conscious decision throughout the relevant history of these trusts, not only in the 1987, 1993 and 1996 Deeds, but elsewhere … "

36. Mr Learmonth goes on to say that the tenor of the evidence is how the trustees can somehow arrange for Henry, though not a beneficiary, to be included as a beneficiary. So, he submits that the *true* purpose is to allow benefit to be conferred on Henry in due course. This is also shown by the fact that Henry is not to be added immediately, to avoid current US tax concerns. It is therefore *Henry* that is the object of the intended benefit, not the first defendant.

37. The problem with these submissions is that the same could be said of the proposed appointments in *Halsted*, and in *Holden-Hindley*. Yet no-one then, or indeed thereafter, suggested that they were for an improper purpose. The answer to those submissions is that it is precisely *the adding of Henry to the class* that is the benefit to the first defendant, both materially and morally, just as the provision for the son's wife and children *was* the benefit to the son in *Halsted*, and the provision for the illegitimate child *was* the benefit to the daughter in *Holden-Hindley*. And, if that is the benefit to the first defendant, there is every reason why it should be done in a tax efficient way, rather than in a way that causes avoidable tax problems for the existing trusts. In my judgment, this power is not being exercised for an improper purpose.

Is the proposed exercise a proper one?

38. As I have already said, in *Public Trustee v Cooper* [2001] WTLR 901, Hart J distinguished between an application to establish the existence of a trustee's power which was in doubt (category (1)) and an application to decide whether the exercise of a power the existence of which was not in doubt was proper in the circumstances (category (2)). He also went on (as I did not say earlier) to mention two other categories of application, the first of which was an application by trustees who wished to surrender their discretion to the court (category (3)). I make clear that this is not a category (3) case. The present trustees do not seek to surrender their discretion and ask the court to decide. On the contrary, the trustees have decided what they would like to do, and ask the court whether it is proper for them to exercise the power in that way.

39. Having decided that the trustees do indeed have the power to do what they propose, this is therefore a category (2) rather than a category (3) case. In relation to this category, Hart J said (at 923):

> "What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case. In the present case, before the court can give general liberty to the … trustees to carry into effect the decision made by them on 20th October to accept the bid, *ie* to grant the declaration sought, it must be satisfied, after a scrupulous consideration of the evidence before it, of at least three matters.
>
> First, that the … trustees have in fact formed the opinion that special circumstances exist which render it desirable that they accept the bid; first and

> foremost it is their opinion which counts. This is one of those cases where the governing instrument plainly constitutes the trustees as the forum to determine the precipitating event. As to this, while some attempt was made by [counsel opposing the application] to suggest that the … trustees had not ever formed an opinion on the question, it was clear that, insofar as the evidence did not already formally cover the point, the … trustees stood ready to attest that they had, and, in the event, I permitted them to adduce a further witness statement from [a solicitor on behalf of the trustees] dealing with this point and which I accept.
>
> Secondly, was the opinion which the … trustees formed one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived?
>
> Thirdly, was the opinion at which that body had arrived vitiated by any conflict of interest under which any of the trustees had been labouring, either because such conflict actually had, or because it might have had, an effect on the decision which they took?"

40. The Court of Appeal approved this approach in *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312, [12], though reformulating the test in more general terms. *Lewin on Trusts*, 20th ed, 2022, summarises the position similarly (footnotes omitted):

> "39-095 … The approach of the court has been summarised, both in England and overseas, as requiring the court to be satisfied, after proper consideration of the evidence, that:
>
> > (1) The trustees have in fact formed the opinion that they should act in the way for which they seek approval;
> >
> > (2) The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at; and
> >
> > (3) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.
>
> The second requirement involves two aspects. First, process: has the trustee properly taken into account relevant matters, and not taken into account irrelevant matters? Second, outcome: is the decision one which a rational trustee could have come to?"

The three questions

Have the trustees formed the relevant opinion?

41. Mr Learmonth KC says that the trustees "have supplied next-to-no evidence of its decision-making process". Only one of them has given evidence, they have not disclosed any minutes of trustee meetings or other communications, and they have not disclosed any legal advice given to them. I agree that the evidence could have been fuller. But I do not think that the fact that only one of them gives the written evidence, when all are claimants, and counsel for the claimants at the hearing puts the one witness statement forward on behalf of all of them, makes any difference. Nor do I

think it matters whether trustee minutes or communications, or legal opinions, are exhibited. (In fact, there is at least one opinion of Mr Legge in the hearing bundle, as well as advice from a US lawyer.) If I believe the substance of the witness statement, and if that is sufficient for my purpose, then I do not need to see the underlying documents. How much evidence will satisfy the requirement of full and frank disclosure (if after *Denaxe Ltd v Cooper* that is still necessary) is case- and fact-specific.

42. On the evidence before me, I am entirely satisfied that the trustees have formed the opinion that they should exercise the power of advancement in the way proposed, on the basis that it would be for the benefit of the first defendant. It is not necessary for me to decide whether in addition *the court* need be satisfied that the proposed exercise would be for the benefit of the first defendant. This is because, if it were, on the facts of this case that hurdle too would be surmounted.

Is this a proper opinion to arrive at?

43. The next question is whether this is a *proper* opinion for the trustees to arrive at, such that the court should declare that the trustees are at liberty to exercise the power in this way. The evidence (at [23]-[25] of the second claimant's witness statement, which I accept) gives three reasons for the trustees' decision. Of these, the first is the most important. This is the perceived unfairness of treating the first defendant's children differently, because one of them (Henry), although (like the elder son, John) genetically the son of the first defendant and his wife, was born of a surrogate mother. From this unfairness proceeds the moral benefit to the first defendant in putting his children on as equal a footing as the dynastic circumstances allow, as well as the material benefit of not having to provide for Henry out of his own resources to the same extent as he would have to if Henry continued to be outside the class of beneficiaries. These are significant benefits which in my judgment on their own well justify the trustees' decision. The second and third reasons given add support for the decision in the form it is intended to be implemented, though in my judgment they are not strictly necessary.

44. The decision meets the test of rationality, in that it is one made in good faith, with a logical connection between the evidence and the reasons given, and is certainly not perverse: *cf Hayes v Willoughby* [2013] 1 WLR 935, [14], SC. There is no evidence or submission that the trustees have taken into account any irrelevant matters, or that they have failed to take into account relevant matters. In my judgment, it is a decision which a reasonable body of trustees could make in the circumstances.

Is there any conflict of interest of the trustees?

45. As the second claimant makes clear in his witness statement (at [32]), which I accept, there are no circumstances suggesting any conflict of interest on the part of the trustees, and neither were any submitted to exist.

Denaxe Ltd v Cooper

46. In my earlier judgment in this matter, I dealt in some detail with the impact of applications of this kind of the decision of the Court of Appeal in *Denaxe Ltd v Cooper* [2024] Ch 65: see [2026] EWHC 209 (Ch), [39]-[52]. I record here simply

that, in my judgment, on the facts of this case as they are presented, and in the light of the arguments put forward, there is nothing further that I need to say about that decision. The potential difficulties have been taken care of. In other applications of this kind, the matter may well be different.

Conclusion

47. For the reasons given, I am satisfied that the court should approve the proposed exercise of the trustees' power of advancement, and will make an order that the trustees be at liberty so to do.