

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 0072 OF 2011

EQUITY TRUSTEE LIMITED

Claimant

-V-

- (1) YANG HSUEH CHI SERENA**
- (2) MONG SIEN YEE CYNTHIA**
- (3) MONG TAK YEUNG DAVID**
- (4) MONG WAI YEE VIOLA**
- (5) MONG TAK FUNG STEPHEN**
- (6) MONG JO YEE JOSEPHINE**
- (7) WONG PUI FAN**
- (8) MONG PUI YEE, PERLIE**

Defendants

Appearances: Mr David Brownbill QC and Mr Ian Mann for the Claimant
Mrs Shân Warnock-Smith QC and Mr Raymond Davern for the first to sixth
Defendants
Mr Alan Steinfeld QC and Ms Arabella di Iorio for the seventh and eighth
Defendants

JUDGMENT

(2013: 10, 11, 19 June)

(Discretionary trust – no appointments made by trustee in favour of beneficiaries - definition of beneficiaries setting out purported 'entitlements' – whether beneficiaries having absolute indefeasible beneficial interests as a result – whether words of entitlement taking precedence as 'written' or 'typed' terms over 'printed' terms – application of principles in **Homburg Houtimport**

**BV v Agrostin Private Ltd (The Starsin)¹ to
family trusts considered)**

- [1] **Bannister J [Ag]:** In these proceedings the Claimant ('the Trustee') seeks the assistance of the Court in the interpretation of an *inter vivos* settlement, The Huge Surplus Trust, of which it is the original trustee. The Trustee is a BVI registered company and the proper law of The Huge Surplus Trust is the law of the Virgin Islands.

The Settlement

- [2] The settlement was made by a deed dated 20 November 1989 ('the trust deed'), although the evidence shows that it was not executed until after 18 December of that year. The nominal settlor was a Nauru incorporated entity and the initial trust property was US\$10, but the real settlor was the late Dr William Mong ('Dr Mong'), who had made his fortune in Hong Kong in the electronics industry, and the real trust fund consists of an indirect half share in Shun Hing Electronic Trading Company Limited ('Trading'), worth some US\$700 million in late 2010, together with a portfolio of investments valued at some US\$35 million. Dr Mong died on 21 July 2010. He left a widow, the seventh Defendant, Wong Pui Fan, who I will refer to, as she has been referred to throughout, as 'Helen,' and their daughter, the eighth Defendant, Mong Pui Yee, known as 'Perlie.'
- [3] The trust deed is an unwieldy, although, except in one respect which I shall have to mention later and upon which this case turns, impeccably drafted document stretching to ninety one pages. Its construction takes the form of a very short deed of trust proper, which broadly speaking requires the Trustee to stand possessed of the corpus on its trusts, and which defines, amongst other things, the excluded beneficiaries and the proper law of the trust.
- [4] There follow nineteen Schedules (A to S) and one Annexure, each expressed to be part of the principal deed and to be construed as if they were set out in the principal deed. Schedules A to R contain a wide number of trust, powers and administrative provisions which, taken on their own, show (subject to the arguments advanced by the first to sixth Defendants) that the trust established by the deed, together with the provisions of those Schedules, is a discretionary trust. No appointments have ever been made by the Trustee in favour of any of the beneficiaries

¹ [2004] 1 AC 715

of the trust. Schedule S contains a list of forty nine definitions. Some of those definitions stand on their own, but a significant number simply refer the reader to the Annexure. So, for example, definition S1 (14) reads:

'The Distribution Date' means the date specified or described in the Annexure in the item "the Distribution Date is . . ."

- [5] Schedule S defines the Beneficiaries as meaning any of the Specified Beneficiaries and any of the General Beneficiaries. Specified Beneficiaries are defined by clause S1 (46) as each of the persons *named or described* in the Annexure item 'the Specified Beneficiaries are.' There is a similar 'definition' of 'General Beneficiaries.'² It is worth setting out clause S1 (46) in full:

"Specified Beneficiary" means each of the persons named in the Annexure in the item "The Specified Beneficiaries are" and any person who at the time when it is necessary to determine whether he is a Specified Beneficiary falls within the description of a person or class of persons described in that item in the Annexure whether in existence at the Date of this Deed or coming into existence thereafter (and for this purpose in relation to the exercise of a power by the Trustees the time when it is necessary to determine whether a person is a Specified Beneficiary is the time when the Trustees would or could exercise that power in the manner contemplated by them only if that person is a Specified Beneficiary) and any person added as a Specified Beneficiary pursuant to clause Q1 of this Deed after he has been so added but does not include a person who has ceased to be a Specified Beneficiary pursuant to clause Q4 of this Deed after he has so ceased unless at a later point of time he again becomes a Specified Beneficiary when he shall from that time again be included in the expressions "Specified Beneficiary".

- [6] When the reader finally arrives at item (26) in the Annexure ('item (26)'), he or she comes across the following:

² General Beneficiaries are defined, as the children and grandchildren of Specified Beneficiaries

'The Specified Beneficiaries and their respective entitlements are:

<u>Name</u>	<u>Address</u>	<u>Percentage of Entitlement</u>
Yang Hsueh Chi	6 Essex Crescent Kowloon Tong Kowloon Hong Kong	20%
Mong Tak Yeung, David	- do -	25%
Mong Tak Fun, Stephen	- do -	25%
Mong Sien Yee, Cynthia	- do -	10%
Mong Wai Yee, Viola	- do -	10%
Mong Jo Yee, Josephine	- do -	<u>10%</u>
		<u>100%</u>

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

The listed individuals are the first, but subsequently divorced wife of Dr Mong, Yang Hsueh Chi ('Madam Yang'), and the five surviving and now adult children of Dr Mong and Madam Yang. They are the first to sixth Defendants. They now claim, in reliance only upon the wording of item (26), but with the exception of the words found below the Table set out above, which they say are to be ignored, that they are exclusively beneficially entitled to the entirety of the trust fund in the proportions there set out. These proceedings are brought by the Trustee in order to have it determined whether that contention is correct. Before I go on to deal with it, I must set out some more of the history.

Further history

- [7] Between 1979 and 1989 the ultimate holding company of the Shun Hing Group, of which Trading forms part, was a Liberian company called Timmerton Company Inc ('Timmerton Liberia'). Each of Madam Yang and the second to sixth Defendants held the same number of shares in Timmerton Liberia as the figure which is set against each of their names in item (26) When The Huge Surplus Trust was set up in late 1989, it acquired 50% of the Shun Hing Group's Hong Kong registered holding company, Shun Hing Holdings Co Ltd ('Shun Hing') from (effectively) Timmmerton Liberia, although the mechanism by which that was carried out is not entirely plain. That is how the Huge Surplus Trust came indirectly to own 50% of Trading.
- [8] On 4 January 1990 Dr Mong executed a letter of wishes in respect of the Huge Surplus Trust. It was addressed to the Trustee and read as follows:

Dear Sirs

LETTER OF WISHES
THE HUGE SURPLUS TRUST
DEED OF SETTLEMENT DATED 20TH NOVEMBER 1989

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

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

<u>Name</u>	<u>Address</u>	<u>Occupation</u>	<u>Percentage of Entitlement</u>
Yang Hsueh Chi	6 Essex Crescent Kowloon Tong Kowloon Hong Kong	Housewife	20%
Mong Tak Yeung, David	- do -	Student	25%
Mong Tak Fun, Stephen	- do -	Student	25%
Mong Sien Yee, Cynthia	- do -	Merchant	10%

Mong Wai Yee, Viola	- do -	Merchant	10%
Mong Jo Yee, Josephine	- do -	Student	<u>10%</u> <u>100%</u>

should receive a distribution of the whole of the assets as soon as practicable in the above-mentioned percentages.

It is my further wish that, in the event that either one of the abovenamed beneficiaries has not survived me or dies before distribution has been completed, the amount so rendered available for distribution to the deceased should be distributed among the survivors of the abovenamed beneficiaries pro-rata to their respective entitlements.

It is my further wish that, in the event that all the abovenamed beneficiaries have not survived me or die before distribution has been completed, the amount so rendered available for distribution should be accumulated or distributed to the following persons in the undernoted percentages.

[Left blank]

I understand that this letter of wishes can be changed at any time during my lifetime and that it does not impose any trust or create any obligation upon you.

Yours faithfully,

It is not known whether this letter was signed before or after the settlement was executed.

- [9] In February 2001 Madam Yang began divorce proceedings against Dr Mong. She obtained a decree absolute on 28 January 2002 and Dr Mong and Helen were married in August 2005. On 11 April 2001 Dr Mong attended a meeting with the Trustee. He indicated a wish to remove Madam Yang altogether as a Specified Beneficiary of The Huge Surplus Trust and to alter the percentage entitlements mentioned in his January 1990 letter of wishes by substituting the figure of 60% in respect of his son David, the third Defendant, and 10% in respect of each of the other siblings. Dr Mong made and initialled manuscript amendments to his original letter of wishes to that effect. On the same day the directors of the Trustee resolved to delete Madam Yang as a Specified Beneficiary of the Huge Surplus Trust and to delete altogether the

percentage 'entitlement' previously assigned to the other Specified Beneficiaries. A Deed effecting these changes was executed on 12 April 2001.

- [10] In June 2001, by means of further issues of share capital by Shun Hing the interest of Timmerton Liberia in Shun Hing was reduced to 10% and a 40% interest in Shun Hing was allotted to a BVI registered company, also called Timmerton Co Inc, which is wholly owned by Mr David Mong.
- [11] On 10 April 2003, in a memorandum countersigned by Dr Mong, the Trustee recorded his wish that the Huge Surplus Trust's 50% holding in Shun Hing be distributed to Mr David Mong and that the other assets of the trust be distributed for charitable purposes, on the grounds that Dr Mong's other sons and daughters would be covered in his will.
- [12] At a meeting at the Trustee's offices attended by Dr Mong on 18 May 2009, he indicated the wish that, following his death, the 50% interest held by the Huge Surplus Trust in Shun Hing be distributed as to half of that holding in specified proportions to his four children other than Mr David Mong and as to the other half to Helen (30% of 50%) and Perlie (20% of 50%). Dr Mong countersigned a memorandum recording these wishes.
- [13] As I have said, Dr Mong died on 21 July 2010.
- [14] On 20 August 2010 the Trustee received a letter from Solicitors acting for the second to sixth Defendants alleging that the Trustee had committed a breach of trust when, following the amended letter of wishes of 11 April 2001, it had removed the percentages against their names in item (26), thus, it was claimed, changing what had hitherto been a fixed interest trust into a discretionary trust.
- [15] On 17 June 2011 the Trustee instigated these proceedings to which the first to sixth Defendants were joined by amendment dated 25 July 2011 in order for it to be determined whether it had the power by its deed of 12 April 2001 to delete Madam Yang from the list of Specified beneficiaries in item (26) and to delete the percentages formerly appearing against the names of the other Specified Beneficiaries listed in that item; and whether it has the power now to distribute the fund in accordance with the memorandum of 18 May 2009. Helen and Perlie were added as Defendants on 22 November 2011.

The parties' submissions

- [16] At the hearing Mr David Brownbill QC, who appeared together with Mr Ian Mann for the Claimant Trustee, and who represented in addition all other potentially interested parties other than those joined as Defendants, opened. It will be convenient, however, if I begin this section of this judgment by setting out the submissions of the first to sixth Defendants, for whom Mrs Shân Warnock-Smith QC appeared, together with Mr Raymond Davern.
- [17] The essence of Mrs Warnock-Smith's written submissions is that the opening language of item (26)³, taken together with the table of 'entitlements', compels the conclusion that each of the persons identified by name in item (26) obtained, so soon as the settlement was executed, an immediate fixed indefeasible interest in possession in the entirety of the trust fund in the proportion set out against his or her name. The proportions of these entitlements mirror their holdings in Timmerton Liberia and were intended, so it is submitted, to compensate them for the loss of value suffered when The Huge Surplus Trust was 'given' 50% of Shun Hing. From its inception, therefore, The Huge Surplus Trust held the trust fund as bare nominee for the Specified Beneficiaries. The ninety one pages of densely drafted discretionary provisions were either entirely otiose or provided a framework, under Schedule O,⁴ for their interests to be held until paid over. The words which appear beneath the table which is to be found in item (26) must be disregarded as inconsistent with these conclusions. Any attempt, therefore, to disregard the fixed trusts established by the opening section of item (26) amounted to a breach of trust and the Trustee could have no right, for the same reason, to distribute in accordance with Dr Mong's wishes as set out in the Memorandum of 18 May 2009. No extrinsic evidence was admissible to contradict any of these propositions, which followed from the plain language of item (26). The questions asked in the fixed date claim form (whether the trustee had power to make the amendments of 12 April 2001 and whether it may lawfully distribute in accordance with the memorandum of 18 May 2009) must therefore be answered, submits Mrs Warnock-Smith QC, in the negative.

³ see paragraph [6] above

⁴ see paragraph [31] below

- [18] Mrs Warnock-Smith's principal reason for inviting the Court to accept these conclusions was founded on the supposed distinction between 'typed' and 'printed' provisions of the Trust deed and its Schedules and Annexure. I shall have to go back to that point in a moment, but her argument is that the reference to and quantification of the entitlements of the Specified Beneficiaries where they occur in item (26) (I shall call these 'the words of entitlement') are to be treated as special provisions deliberately selected and introduced by the parties into an otherwise standard form document and that as such they must have primacy over any of the remaining, standard form provisions which would derogate from or contradict their plain meaning. It follows, says Mrs Warnock-Smith, that the entitlements set out in item (26) are excepted from the exercise of any power that might otherwise be available to the Trustee to vary or revoke beneficial interests.
- [19] Mr Brownbill QC, for the Trustee and for any unborn or unascertained beneficiaries, submits, first, that the words of entitlement are merely precatory. They are, he submits, taken from and merely reflective of the percentages in the original letter of wishes and confer no beneficial entitlements, whether in possession or at all. Alternatively, if the words of entitlement are to be treated as intended to confer beneficial interests, they are ineffective to bring that about because they are too uncertain. They do not, for example, identify whether the purported interests are intended to take effect over capital, or income, or both, or whether any such interests are to take effect immediately or at some time in the future.. So, he says, they are to be disregarded. Finally, Mr Brownbill submits that if the words of entitlement were effective to confer beneficial interests, those interests are defeasible on the exercise by the Trustee of powers conferred upon it by the settlement in that behalf. He says that the deed of deletion of 12 April 2001 was effective to bring that about and that accordingly each of the questions raised in the fixed date claim form is to be answered in the affirmative.
- [20] Mr Steinfeld QC, for Helen and Perlle, submits that not only are the provisions of item (26) internally contradictory – they are also at odds with the entire remainder of the settlement, including, in particular, item (28) in the Annexure (which I will refer to in a moment). He says that the only provisions of the settlement under which beneficial interests are capable of arising are either the default provisions intended to take effect

upon the Vesting Day⁵ or interests created by the Trustee using dispositive powers granted to it by the trust instrument. The words of entitlement are neither. They should not have been included in the deed at all and are to be disregarded accordingly. As a subsidiary argument, Mr Steinfeld submits that had it really been the intention of the settlor to grant indefeasible interests to the Specified Beneficiaries, those interests would have been created by and set out in an Additional Clause Paramount ('ACP'), inserted into the Annexure pursuant to clause 3 of the principal deed and as such taking priority over any other provision of the settlement. So far from that route having been chosen, the item in the Annexure in which any such ACP would have been set out is completed with the single word 'Nil.'

- [21] Before these submissions can be considered it will be necessary to summarise the relevant provisions of the Trust, insofar as they have not already been set out above. In what follows clauses referred to by a number preceded by a capital letter of the alphabet are clauses contained in the Schedule which bears the same letter of the alphabet.

The deed of settlement

- [22] Clause 2 of the principal deed provides that the Trustee shall stand possessed of the 'corpus' and income of the Trust upon the trusts and with and subject to the powers and provisions set out in the deed.
- [23] Clause 4 identifies the members of an 'Excluded Class,' none of whom may be or be added by the Trustee as an additional General or Specified Beneficiary pursuant to the powers conferred upon the Trustee by Schedule Q to the deed.
- [24] Clause 3, to which I have already referred, provides for the insertion by the settlor into the deed of any desired ACPs.
- [25] Clause A1 gives the Trustee power to distribute or accumulate the income of the fund during the period down to the Vesting Day. Free net income available at the end of any accounting period is to be held on trust for the persons who would have become entitled to the corpus had the Vesting Day occurred at the end of the relevant accounting period.
- [26] Clause A3(1) provides that until the Vesting Day the Trustee shall hold the corpus subject to the trusts constituted 'by or under' the deed.

⁵ 31 March 2005 or, if earlier, termination of the perpetuity period selected by the settlement. The latter period has yet to expire

Clause A3(2)(a) provides that as from the Vesting Day the Trustee shall hold the corpus upon trust for such of the Beneficiaries in favour of whom they may have appointed shares of corpus by appointments in writing made before the Vesting Day. Any part of the corpus not comprised within any appointments made pursuant to clause A3(2)(a) is to be held by the Trustee upon the trusts set out in item (28) of the Annexure. Item (28)(i) provides that in default of appointments made under clause A3(2)(a) the corpus is to be held at the Vesting Day for the then living Specified Beneficiaries as tenants in common in equal shares, with living issue taking *per stirpes* in case any Specified Beneficiary has died before the Vesting Day. There are elaborate trusts over, culminating in a residual gift, if all else fails, to an individual with an address in Scotland, identified in item (12) of the Annexure as 'The Final Repository.'

[27] Clause K2 gives the Trustee power to apply trust property for the benefit of any trust of which any Beneficiary of the Huge Surplus Trust is a beneficiary, notwithstanding that such application may be to the detriment of Beneficiaries of the Huge Surplus Trust.

[28] Clause L1(1) gives the Trustee power, down to the Vesting Day, to revoke, add to or vary

'all or any of the trusts powers terms and conditions
contained in this Deed'

Clause L1(3) makes explicit that the power contained in clause L1(1) permits the trustee to revoke, add to or vary any beneficial interest 'created by this deed,' but goes on to provide⁶ that where any amount is held for a Beneficiary absolutely or held as a separate trust for a Beneficiary pursuant to the provisions of Schedule O (provisions regarding the treatment of any amount directed or determined to be held as a separate fund in trust for any Beneficiary), then the clause L1(1) power may not be used so as to affect such Beneficiary's beneficial entitlement. Clause L1(3)(c) makes clear that while the power conferred by clause L1(1) may not be used to enlarge the class of persons *capable* of falling within the definition of Beneficiary, it shall not affect the power of the Trustee, conferred by clauses Q1 and Q2, to add to the class of Beneficiaries.

[29] Clause M1 confers a power of advancement in favour of any Beneficiary.

⁶ clause L1(3)(b)

- [30] Clause N1, read together with item (15) of the Annexure, contains an elaborate power to make accumulations during the period down to the Vesting Day.
- [31] Clause O1, as already indicated, provides that where 'pursuant to any provision of this Deed' any amount is directed or determined to be held as a separate trust fund in trust for any Beneficiary absolutely, that amount shall cease to form an asset of The Huge Surplus Trust and be held by the Trustee pending handing over as a separate trust fund belonging to the Beneficiary in question. There are provisions dealing with the management of such separate trust fund pending handover.
- [32] Clauses Q1 and Q2 permit the Trustee to declare additional Specified and General Beneficiaries. Clause Q3 permits the Trustee to extend membership of the Excluded Class. Clauses Q5 and Q6 enable the Trustee to declare that a particular person shall cease to be a Specified or General Beneficiary (but with a power of reinstatement under clauses Q1 and Q2). Clause Q6 provides that the power to remove Beneficiaries under clauses Q5 and Q6 may not be used in such a way as to derogate from any interest, whether in corpus or income or in a separate trust fund, to which a Beneficiary has previously become indefeasibly entitled, whether in possession or reversion or otherwise.
- [33] Clause R1 provides, subject to some qualifications which are not relevant, that all of the powers are exercisable at the Trustee's absolute and uncontrolled discretion.
- [34] With that summary of the principal provisions of The Huge Surplus Trust, so far as relevant for present purposes, I can now turn to deal with the submissions of Counsel on the two questions raised by the fixed date claim form.

Discussion

- [35] The oral submission of Mrs Warnock-Smith QC is that under item (26) each of the Specified Beneficiaries there mentioned became, on execution of the settlement, absolutely beneficially entitled as against the Trustee to the income and corpus of the trust fund in the proportion set out against his/her name. If that is correct, then it seems to me that such interests must have been indefeasible, since the power of revocation or variation conferred by clause L1(1) cannot be used to affect the entitlement of a beneficiary absolutely entitled against the

Trustee, nor may the power of addition or deletion under clauses Q5 or Q6 be used to bring about a similar result.⁷

[36] In my judgment, however, item (26) conferred upon the Specified Beneficiaries there mentioned no interest, absolute or otherwise, in the trust fund or in its income. The principal reason for this conclusion is that clause A3(1) directs the Trustee to hold the trust fund, until the Vesting Day, subject to the trusts constituted 'by or under' the deed. So far as corpus is concerned, the only trusts 'constituted by' the deed are the trusts set out in item (28) of the Annexure. Those trusts are liable to be defeated, *pro tanto*, by any appointments made by the Trustee 'under' clause A3(2)(a), by any applications of trust property made by the Trustee 'under' clause K2, by any advancements made by the Trustee 'under' clause M1, and by any permissible variations made by the Trustee to the classes of Specified and General Beneficiaries 'under' clauses Q5 or Q6, but, as I read the document, not otherwise. Those are the trusts of The Huge Surplus Trust constituted by, or capable of being constituted under, the trust deed. Those trusts cannot have been cut down by the inclusion, in a provision of the Annexure whose function, as set out in clause S1(46),⁸ was to *name* the initial members of the class of Specified Beneficiaries and to *describe* the class of Special Beneficiaries, of words which, if they have any meaning at all (see below), are wholly superfluous to that function.

[37] Mrs Warnock-Smith QC says, however, that the words of entitlement must take precedence over any provision of the trust deed which is inconsistent with them, and does not flinch from submitting that that means all the provisions of the deed, with the possible exception of clause O1. She bases this submission upon a line of authority dealing with the approach to the interpretation of commercial contracts made upon standard forms, such as the ISDA Master Agreement, or a bill of lading, which are completed by the parties or by a broker in order to fill in blanks in the form which are left to be completed or to tailor it to the particular transaction contemplated. It is well established⁹ that in such cases the Court will, in case of conflict, tend to prefer or give more weight to the superadded terms or definitions than to the printed terms

⁷ see paragraphs [28] and [32] above

⁸ see paragraph [6] above

⁹ see, for example, **Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)** [2004] 1 AC 715, at paragraphs 10-18

or definitions contained in the particular standard form which is being adapted to the parties' purpose.

- [38] While it may be inferred that the basis for the trust deed as ultimately executed was a precedent then in use in the Hong Kong offices of Ernst & Whinney (who were responsible for setting up the trust), in which the draftsman filled in spaces, particularly in the Annexure, which required completion where necessary, it does not seem to me that this line of authority has any application to the proper construction of item (26) itself. While it is obvious that the names and figures occurring in item (26) must be unique to The Huge Surplus Trust and while there is good reason to believe that the words of entitlement are not to be found in the precedent (because they are outwith the meticulous description contained in clause S(46)¹⁰ of the contents and function of what turned out to be item (26)), it does not follow that the words of entitlement are to be accorded any special status or priority over any other provisions of the settlement.
- [39] That is not merely because the settlement is not a standard commercial form in common use between merchants and requiring completion or adaptation to conform it to the particular transaction for which it is intended to be used, although that is a critical distinction between this case and the authorities which are expounded in the **Starsin**.¹¹ In the present case the draftsman has clearly made interpolations into a precedent from which she was working, but the result of her doing that was not to produce a completed standard form, but the execution draft of a settlement. It is not possible, by looking at the document, to infer that the settlor intended any one term or provision of it to override any other term or provision – which is the *rationale* behind the standard form cases. It is not possible, in particular, to infer from the appearance and nature of the document that the inclusion by the settlor of clause A3 or item 28 was any less considered and deliberate than the inclusion of the words of entitlement. The typed/printed distinction simply does not arise on the facts of this case. The mere fact that a draftsman may have elaborated upon a precedent cannot be an aid to the construction of the document as executed. The **Starsin**¹² principle does not apply to the settlement.

¹⁰ see paragraph [5] above

¹¹ (*supra*)

¹² (*supra*)

- [40] I therefore reject the submission that the words of entitlement trump all other provisions of the settlement which are not consistent with them.
- [41] The Court is thus left having to decide what effect to give to a provision which is not only internally nonsensical¹³ but, if it were to carry the meaning contended for by Mrs Warnock-Smith QC, repugnant to the impeccably drafted trusts set out in clause A and in item (28), which itself is dependent upon clause A3(2)(b). I have no doubt that item (26) should be ignored as repugnant to the earlier terms of the settlement. No violence is done to the settlement as a result. It works perfectly well without it. The Trustee has ample power under clause Q1, either in reliance upon one or other of Dr Mong's letters of wishes or of its own motion, to constitute a class of Specified Beneficiaries – which is what, to all intents and purposes, was done on 12 April 2001. Alternatively, the words of entitlement should be ignored as repugnant.
- [42] Whether I am right or wrong about that, it seems to me that the words of entitlement cannot be read as conferring upon the Specified Beneficiaries there mentioned any interest – let alone an immediate interest in possession – in the trust fund. The operative provisions of the settlement provide a fully comprehensive and exhaustive scheme for the initial existence (item (28)) and future creation (clause A3 (2)(a)) of beneficial interests under the trust. A description of persons in a definition clause as having 'entitlements,' in the air and unrelated to any particular property, cannot, against that background, be treated as declaratory of trusts of any sort. The words of entitlement can only be treated, in context, as some sort of interpolated reflection of the percentage interests which Dr Mong's January 1990 letter of wishes desired to be conferred upon the Specified Beneficiaries after his death (by which time, as we know, his wishes had in any event altered). They cannot, in my judgment, be read as words of grant.
- [43] These conclusions make it unnecessary for me to deal at any length with Mrs Warnock-Smith's submission that Clause O1 provided a sufficient *rationale* for the existence of the provisions of the trust instrument, notwithstanding that the trust was, on her case, from its inception a bare trust. The answer to the submission is that clause O1 provides only for what is to happen to a separate trust fund set aside as a result of a

¹³ because it identifies 'entitlements' which have the appearance of being fixed while going on to provide for their variation or defeasance

direction or determination of the Trustee. It could have no application to the supposed entitlements, which were not the result of any such direction or determination. If the submissions of Mrs Warnock-Smith QC were correct, therefore, the whole of the trust instrument other than the definition of the trust fund and the words of entitlement would have been otiose.

- [44] It is similarly unnecessary for me to deal more than very shortly with the submission of Mr Steinfeld that, had the words of entitlement been intended to override all other provisions of the trust, they would have been embodied in an ACP in item (31) of the Annexure. All I would say about that is that if, which for the reasons which I have given is not the case, they had conferred absolute interests, such a step would have been unnecessary (see clauses L1 (3) and Q6).

Conclusion

- [45] For these reasons, I answer each of the questions raised in the fixed date claim form in the affirmative.

A handwritten signature in black ink, appearing to read 'L. J. Smith', written in a cursive style.

Commercial Court Judge
19 June 2013