Neutral Citation Number: [2023] EWHC 2025 (Ch) **Case No. CR-2022-000729**

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF SAFE HANDS PLANS LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 8 August 2023

Before :

I.C.C. JUDGE JONES

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Between :

(1) NEDIM PATRICK AILYAN

(2) BEN STANYON

(In their capacity as Joint Administrators of Safe Hands Plans Limited)

Applicants

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MR MARCUS HAYWOOD (instructed by **Pinsent Masons LLP**) for the **Applicants**
Ms CHARLOTTE COOKE (instructed by **DLA Piper (UK) LLP**) for **Dignity Funerals Limited**
Mr WILLIAM WILLSON (instructed by **Pinsent Masons LLP**) for **the Plan Holders**

Hearing dates: 20 July 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely at 9.30 am on 8 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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I.C.C. JUDGE JONES

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A) Introduction

1. Safe Hands Plans Limited ("**SHPL**"), formerly Safe Hands Funeral Plans Limited, now in administration, carried on a business selling *"pre-arranged funeral plans"*. A document entitled *"Safe Hands Funeral Plans Your Terms and Conditions"* set out the terms and conditions of the funeral plan which as an introduction can be summarised as follows:

    a) Plan holders agreed to pay a lump sum or instalments with a deposit in return for SHPL agreeing to ensure that a funeral director retained within its national network would provide the services required for their funeral, the precise nature of which would depend upon the plan purchased. If death occurred before payment of the instalments in full, the plan holder would benefit from the "Safe Hands Guarantee" which potentially would ensure the shortfall was covered by SHPL.

    b) A plan holder's money would be *"kept safe"* by being held in a trust ("**the Trust**") less an allowance to be taken by SHPL for its administrative costs. The money would be *"released to [SHPL on death] so the funeral can be provided"*. It could also be released in other circumstances, the example given being a refund upon cancellation. It was expressly provided that the *"Trust Funds are held separately to the money of [SHPL]"*. They and their proceeds would be held by an independent trustee and managed by independent fund managers.

    c) In the event SHPL ceased to trade, the independent trustee would still hold the funds and would work with the Funeral Planning Authority or with another funeral director to provide the funeral.

2. The terms of the Trust were first set out in a deed between SHPL and Pitmans Trustees Limited dated 6 March 2014. Various deeds followed until the terms of the Trust, as relied upon by the parties for this application, were declared by Sterling Trust Corporation Limited ("**Sterling**") in a deed of appointment ("**the Trust Deed**") dated 6 May 2020 to which SHPL was also a party.

3. On 23 March 2022 directors appointed the Applicants as administrators ("**the Administrators**") to manage SHPL's affairs, business and property in accordance with ***Schedule B1 to the Insolvency Act 1986***. They were faced with the need not only to take control of SHPL's assets but also to take steps to preserve any Trust funds/assets, which by their nature did not belong to SHPL.

4. The Administrators successfully achieved this on the day of their appointment by causing SHPL to enter into **"the *Deed of Delegation"*** with Sterling. This was based upon the premise that Sterling was and should remain the trustee but would transfer the Trust funds and assets to SHPL whilst also delegating to SHPL, acting by the Administrators, all of their trust powers, duties and discretions.

5. The Administrators' investigations have established a significant shortfall between the monies and assets held under the terms of the Trust and the amounts required to pay

the plan holders' respective funerals or to return to them the amounts paid to purchase their respective pre-arranged funeral plans. Current plan holders are likely to receive a distribution of only between 11–15p in the pound. It is understood that there are in the region of 46,000 plan holders.

6. As part of their role and duties, the Administrators sought to find ways to enable the existing policy holders to transfer to other pre-arranged funeral plan providers on terms as beneficial for them as possible. That inevitably took time, not only to arrange that opportunity but also to allow plan holders a reasonable period in which to decide whether they wanted to transfer or to be repaid whatever they would be entitled to from the remaining Trust assets.

7. Time and tide waiting for no person, and with the addition of the sad consequences of COVID, the Administrators had in the meantime to address the problem that those responsible for the funerals of plan holders who died would need to make and pay for the necessary arrangements unless and until new plans were in place or funds capable of being returned. The binary choice for the Administrators was to do nothing and leave them to fend for themselves without access to the funds of the Trust or to try to provide interim assistance.

8. The Administrators chose the latter course and their actions resulted in Dignity Funerals Limited ("**Dignity**") stepping in to assist. Initially, they provided free funerals but that could not continue for a significant period. On or about 30 April 2022 an agreement ("**the Agreement**") was reached with the Administrators (as agents for SHPL) by which Dignity would provide funerals (in summary) without profit from 1 May 2022 until 31 October 2022. This is what occurred, sadly, for 416 policy holders. However, Dignity and the Administrators also agreed that the Agreement, and therefore the payment of the cost of the funerals, was conditional upon it being approved or sanctioned by the Court.

9. The outcome was that only those who died during or shortly before the period specified received the benefit of funerals paid from Trust funds. Everyone else is left with only the distribution of net realisations to which they are each entitled and that sum will be reduced by about £13.00 for each living plan holder if the Administrators are permitted to pay the cost price agreed with Dignity Funerals Limited.

10. That has led to this hearing at which the key issues have been: (i) whether there was power under the terms of the Trust to use the Trust monies for payment of funerals rather than to distribute them parri passu; if so, (ii) whether the Court should approve or sanction the exercise of that power; if not, (iii) whether there is power to approve or sanction payment to Dignity pursuant to the Court's equitable jurisdiction applying the principles identified within and resulting from the decision of ***In re Berkeley Applegate (Investment Consultants) Ltd (In Liquidation)*** 1 Ch 32; and if so, (iv) whether that power should be exercised.

11. Although I reject any suggestion that jury points should resolve those issues, it is only fair to make the judicial notice observation that the distress resulting from the insolvency of SHPL would have immeasurably increased for those relatives or close friends responsible for the funeral arrangements for plan holders during the period from 1 May 2022 to 31 October 2022 absent the Agreement achieved by the Administrators and willingly entered into by Dignity Funerals Limited to assist. The

role of Dignity Funerals Limited has been criticised by some on the basis that it only acted in its own commercial interests. However, there is no doubt that Dignity's actions enabled funerals to take place and whilst there are arguments as to the extent to which this should be considered altruistic, there is no doubt that there will be many families who are extremely grateful for their actions. Again without deciding altruism, it should be appreciated that Dignity stood in when others in the industry did not. On the other hand it is right to recognise that the objecting plan holders are not challenging that fact but are asserting that as a matter of law this should not have occurred at their expense.

B) Submissions

12. Mr Haywood appeared for the Administrators and explained that they adopted a neutral position. That does not mean they do not advocate for the Agreement. It is, after all, a contract they entered into. It means, appropriately, that it being a conditional contract they should ensure that the Court is aware of the matters which should be raised on both sides, namely for and against approval or sanction. In other words the traditional approach often taken by an office holder when seeking directions from this Court. That task was relieved, however, by the fact that Ms Cooke appeared for Dignity and Mr Willson appeared as independent counsel appointed to make submissions on behalf of the plan holders.

13. I should add that Mr Willson's specific role was to take such points as can be taken against the proposition of payment to Dignity. In doing so he received information from Ms Balam who filed a witness statement and from Mr Eddy Wainwright. That was because their input as plan holders who strongly objected to payment might be of assistance. However, he was only required to present matters as he considered appropriate bearing in mind his duties to the Court, and he did not do so from the basis that the plan holders as a whole or as a majority objected to payment. As to that, there were differences between his case and Ms Cooke's case concerning the extent to which affected plan holders object. However, the issues before me are not to be decided from the subjective views or opinions of the plan holders and I do not need to address the resulting submissions.

14. I do wish to acknowledge the excellent skeleton arguments and oral submissions of counsel. I should expressly state that I consider that Mr Willson has fulfilled his duties and role admirably.

15. In delivering this judgment I will try to follow the wise words of Lord Justice Munby when describing the purpose of judgments: *"Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law…"* (***In Re F (Children)*** [2016] EWCA Civ 546 at [22]). Therefore, whilst I have borne all I have read and heard in mind when reaching my decision, I will only refer to specific facts and matters, submissions and arguments insofar as it is necessary to do so. The starting point is to identify the Agreement.

C) The Agreement

16. The background to the Agreement identifiable from the evidence (including the fourth witness statement of Mr Ailyan as referred to in the skeleton argument of Mr Haywood) can be summarised as findings of fact as follows:

    a) The primary reasons for the Company's entry into administration, as helpfully summarised by Mr Haywood, were: (i) There were insufficient assets available to SHPL to cover the cost of providing funerals to each Plan Holder; and (ii) From 29 July 2022, the Financial Conduct Authority ("**FCA**") began to regulate providers of pre-paid funeral plans. Although the Company applied for FCA authorisation to provide such plans, it was told by the FCA that the application would not be granted and withdrew its application. That meant that the Company could not operate its business from 29 July 2022 onwards.

    b) SHPL had little or no available assets at the date of the administration. The Administrators' investigations established that the Company's standard terms and conditions changed multiple times over the years. However, each version provided for the plan holder funds to be held under the terms of the Trust subject (in summary) to the deduction provided to allow SHPL to meet certain overheads and expenses. As at the date of the administration the terms of the Trust were contained within the Trust Deed.

    c) The Trust Deed is described as being supplemental to *"the Settlement"* (to which I was not taken, there being no dispute that the Deed of Trust was permitted) and to the earlier documents and events set out in Schedule 1 (which need not be repeated here but in essence identify the previous documents of the Trust). Clause 2 provides that from 6 May 2020 the Trust funds including money, investments and property shall be held on the trusts contained in Schedule 2. Clause 4 of Schedule 2 provides that the capital and income is held for the benefit of the plan holders, their personal representatives and such other persons as may be added under sub-clause 3.1, to pay to SHPL (in summary) the amount required for a funeral of any plan holder.

    d) The Deed of Delegation was entered into to ensure that the Trust's assets were securely held by SHPL (acting by the Administrators) to protect the interests of those entitled to them. Mr Haywood has summarised its effect as follows (and his summary has not been placed in issue): (i) Any right, title or interest of Sterling in the assets subject to the Trust and any other assets of Sterling that were held or were intended to be held for the benefit of the plan holders and/or otherwise in connection with the business of SHPL were transferred to SHPL (acting by the Administrators) to hold them on the same terms as those assets were held by Sterling; and (ii) Sterling irrevocably delegated to SHPL the exercise of all or any trusts, powers, duties and discretions conferred or imposed on Sterling.

    e) The Administrators' investigations revealed that (at least in more recent years) plan holders paid for their funeral plan contracts either to an account of SHPL held at Barclays Bank plc or, at their option, by direct debit into an account of Sterling with HSBC Bank Plc. Sterling also operated a bank account with Barclays Bank plc which received funds from the HSBC account and from

which payments would be made in particular to SHPL, funeral directors, fund managers, professional advisers and generally for the ordinary trading expenses of Sterling relating to the funeral plans and possibly other expenses. Certain plan holders also made payments to third party agents or associates of the Company such as the National Federation of Funeral Directors.

f) The Administrators' investigations led to the conclusion that the payments from individual plan holders were held subject to the terms of the Trust Deed as a collective fund being mixed together and, incapable of being traced back to the individual plan holder. Sterling had appointed The TJM Partnership Limited (which was formerly called Neovision Global Capital Limited) and Interactive Advisors as fund managers. They made investments using the plan holder funds as a collective investment and both appointed their own custodians.

g) Although SHPL had never become a regulated provider of pre-paid funeral plans, the FCA understandably monitored its position in the context of its insolvency and the difficulties faced by existing plan holders. The FCA explained to the Administrators that they wished the adverse impact of insolvency upon the plan holders to be mitigated to the extent that this could be achieved. In the short term they wanted other regulated providers to step in to ensure that funerals that would have been but now could not be paid for by SHPL from the Trust funds would take place. In the long term they wanted plan holders to have the ability to transfer to other pre-paid funeral plan providers. The Administrators liaised with the FCA.

h) There was no compulsory means of ensuring that other businesses would step in to assist. However, the Administrators investigated the position and following extensive discussions, Co-op Funeralcare and Dignity each agreed to offer significantly discounted funeral plans for existing plan holders to purchase. A letter dated 19 September 2022 was sent to all existing plan holders in which the offers from each were enclosed. Each plan holder was given the option of expressing an interest in a discounted funeral plan with one or both of them. It was made clear in the letter that the plan holders were not obliged to acquire a new plan and that their acquisition of a new plan would not affect their right to a distribution of the Trust assets. The offer from Dignity received expressions of interest from approximately 10,272 Plan Holders.

i) The Administrators still needed to address the short term position concerning funerals required during the period it would take for long term arrangements to be agreed with industry providers. Accordingly, on 23 March 2022, the Administrators secured an arrangement with Dignity under which it would provide funeral services without charge for a period of 14 days from the date of the Administrators' appointment. This was extended to those who died before 1 May 2022. This agreement led to the provision of funerals for 114 plan holders.

j) Unsurprisingly, Dignity did not commit to "free funerals" after 30 April 2022. Instead discussions took place concerning the terms of their provision in the context of potentially providing the long term solution required. By email sent

on 13 April 2022 Dignity sent a document to the Administrators entitled *"Safe Hands Rescue Proposal"*. Although as Mr Willson submitted this was only a proposal, it nevertheless identifies the contemporaneous background for the Agreement. The proposal may be summarised as follows:

i) The aim being addressed was the *"orderly wind down of Safe Hands without a gap in funeral coverage"* for those who wanted to remain covered. To achieve that for 6 months Dignity would continue to provide funeral cover on terms to be agreed whilst plan holders could decide whether to move to a replacement funeral plan provided.

ii) "Step One" would be to agree terms proposed for the continued provision of funerals over the 6 months. Agreement could be reached on this step without agreeing the subsequent ones. It was asserted that: *"Agreeing Step One will stabilise the situation and give some peace of mind to Safe Hands plan holders and give time to the administrator to get a clearer understanding of the situation"*.

iii) "Step Two" would involve Dignity Funerals Limited providing replacement plan options to the plan holders having calculated from data provided by the Administrators the payments (if any) required to secure the replacement plan.

iv) "Step Three" would involve payment of the distribution of the net proceeds of the Trust to Dignity Funerals Limited for those who accepted replacement plans and to the plan holders who did not.

k) Emails between the Administrators and Dignity sent on 26 April 2022 together with the witness evidence of Mr Ailyan establish that "Step One" was agreed on terms that each funeral provided to an individual that passed away between 1 May 2022 and 31 October 2022 would be provided by Dignity at a rate of £750 plus disbursements, and the disbursement cost per funeral would be capped at £1,100. The Administrators understood this to be considerably lower than the ordinary costs and (without needing to make a finding) it appears that it would be at cost. However, the Agreement was conditional upon and therefore will only take effect if the Court approves or sanctions it.

17. Although Mr Willson in his skeleton argument submitted that this *"arrangement … is of limited, if any, contractual force …. To the outside observer (including the Plan Holders) its terms are inchoate and uncertain."*, rightly that was not pursued at the hearing. Instead, again correctly, he relied upon the Agreement being subject to a condition precedent. In other words, the £615,629.65 claimed by Dignity Funerals Limited for the 416 funeral services provided under the terms and in accordance with the rates of the Agreement will only be paid if the Agreement is approved or sanctioned by the Court. That leads to the first issue, namely the submission of Ms Cooke that the Agreement was permitted by the powers of the Trust.

D) The Terms of the Trust

Di) The New Argument

18. It was acknowledged by Mr Haywood during the hearing that until the skeleton argument of Ms Cooke this application for approval or sanction proceeded in reliance upon what are known as "***Berkeley Applegate*** *principles*". Ms Cooke, however, submitted that SHPL acting by the Administrators under the terms of the Deed of Delegation had power under the terms of the Trust to enter into the Agreement. Specifically, that it had the power to use the Trust funds to pay the funeral expenses in the circumstance of the need to ensure that plan holders would be buried during the period when plan holders were being offered replacement plans by Dignity.

19. The submissions of Ms Cooke and Mr Willson with regard to the terms of the Trust were correctly premised upon the proposition that it was necessary to construe the meaning of the clauses relied upon in the context of the content of the Deed of Delegation as a whole and in its factual context to ascertain their objective meaning from the language used by the parties to express those terms.

20. Mr Willson drew attention to the following recitals of the Trust Deed:

> *"(C) It is intended that the sums paid by Plan Holders for funeral plans should be safeguarded during their respective lifetimes Whereupon [SHPL] shall provide or procure the services specified in the funeral plan contract entered into by each customer with [SHPL].*
>
> *(D) Sterling wish to make this appointment to protect Plan Holders' funds and to ensure that the relevant services can be provided on the death of a Plan Holder….*
>
> *(F) [Sterling] wish to exercise their power of appointment under clause 4 of the Settlement for the primary benefit of the Plan Holders.*
>
> *(G) The Plan Holders are members of the class of Discretionary Beneficiaries (as defined in the Settlement)".*

21. Ms Cooke principally relied upon sub-clauses 4.6 and 4.8 of clause 4 of Schedule 2 and drew support for her submission from the power to pay expenses provided by clause 18 of Part 2 of Schedule 2. In essence her submission was that those clauses when read together and in context required the Administrators because SHPL was insolvent, pursuant to the delegated powers of the Trustees to distribute the existing funds parri passu between the existing plan holders but also empowered them to use the funds at their discretion before their distribution as they should think fit. She drew particular strength for that submission from the fact that sub-clause 4.8 which contained the discretionary power expressly provided that it should not be exercised to *"reduce, prejudice or impair the interests of the Plan Holders under sub-clauses 4.1 – 4.5"* but not sub-clause 4.6. or sub-clause 4.7.

22. Sub-clauses 4.1 – 4.8 read as follows:

> *4. TRUST OF CAPITAL AND INCOME FOR PRIMARY BENEFICIARIES*
>
> *The Trustees shall hold the capital and income of the Trust Fund for or for the benefit of the Primary Beneficiaries as follows:*

4.1 On the death of a Plan Holder, the Trustees pay to the Company the lesser of (i) the Indexed Funeral Plan Subscription and (ii) the amount required to pay for the contracted funeral service as evidenced by the Company's expenditure report

4.2 (a) If at the point of death the plan is fully paid, the Trust will cover:

(i) The disbursements, as applicable, capped at £1200 (or capped at £1,100 prior to 1st January 2016) and increased in line with the annual consumer price inflation (CPI).
(ii) The costs of the funeral director's fees and services.

(b) If at the point of death the plan is not paid in full, the following shall apply:
(i) If the outstanding balance is settled the costs outlined in a) will be covered.
(ii) If the outstanding balance is not settled the monies paid towards the plan less commission and interest charges will be paid to the funeral director.

In either case the outstanding balance will be paid out of the Trust.

4.3 If, on the death of a Plan Holder, the Company is unable to provide or procure the contracted funeral service, the Trustees shall pay to that Plan Holder's personal representatives an amount equal to the Indexed Funeral Plan Subscription.

4.4 Where a Plan Holder pays for a Funeral Plan by instalments and the term extends beyond two years a handling charge shall be added to the instalment payments payable by the Plan Holder and such instalment handling charge will be charged by way of interest rate applied to the total amount payable. Where a plan paid by instalments lapses or the Plan Holder dies before the total amount due is paid in full, the Trustees shall pay to the Company an amount equal to the premium paid by the Plan Holder less any instalment handling charges and any commission and benefits paid to date.

4.5 If the Company shall, for whatever reason, cease trading or otherwise abandons the funeral plan business, the Trustees shall pay to all the Plan Holders and amount equal to their respective for indexed Funeral Plan Subscriptions.

4.6 If the Company becomes insolvent (being (i) unable to paying debts as they fall due, or (ii) having assets valued at less than its liabilities), the Trustees shall pay to all the Plan Holders living at the date of such insolvency an amount equal to their respective Indexed Funeral Plan Subscriptions or, failing which, the Trustees shall distribute the Trust Fund to all the Plan Holders living at the date if such insolvency in shares proportionate to their respective Indexed Funeral Plan Subscriptions.

4.7 If the Plan Holder cancels the plan, the Trustees may pay to the Company the amount needed to enable the Company to pay to the Plan Holder the amount due under the terms of the funeral plan.

4.8 The Trustees shall have the power to appoint the whole or any part of the capital or income of the Trust Fund for the benefit of such of the Primary Beneficiaries in such manner as the Trustees shall in their discretion think fit provided that no exercise of this power shall reduce, prejudice or impair the interests of the Plan Holders under sub-clauses 4.1- 4.5.

23. Mr Willson, on the other hand, submitted that the pari passu requirement of distribution to creditors and to those with proprietary interests has "primacy" both as a natural reading of the terms of sub-clause 4.6 of the Trust and also because this is a general principle accepted by the courts for insolvent trusts. He relied in particular upon the judgment of Lord Briggs in the case of ***Equity Trust (Jersey) Ltd v Halabi*** [2022] UKPC. He also submitted that the omission of sub-clause 4.6 within sub-clause 4.8 was attributable to the scheme of the Trust, which in fact gives effect to the primacy of parri passu distribution.

24. His resulting submission was that sub-clause 4.6 was omitted because it provides for a separate regime to the one provided by sub-clauses 4.1-4.5. Only sub-clause 4.6 applies to insolvency, whilst the others are concerned with the period when SHPL is solvent. The general power of appointment under sub-clause 4.8 is only applicable to the solvency regimes. That is why it is only sub-clauses 4.1-4.5 to which the proviso refers and applies. Mr Willson specifically submitted that the language of sub-clause 4.6 would be *"otiose"* if the parri passu obligation could be *"trumped by the free*

standing power" of sub-clause 4.8. In support of his submission he drew attention to clause 5, which applied to secondary beneficiaries but was in similar language and he submitted that the distinction was reiterated within clause 6. Those clauses read:

> *5. TRUST OF CAPITAL AND INCOME FOR SECONDARY BENEFICIARIES*
> *Subject to the written approval of the Appointed Actuary and being satisfied that there are sufficient funds in the Trust Fund to satisfy the trusts set out in clause 4, the Trustees may in their discretion appoint capital and income of the Trust Fund to or for the benefit of such of the Secondary Beneficiaries as they think fit.*
>
> *6. EXERCISE OF POWERS*
> *The exercise of the powers of appointment conferred by sub-clause 4.6 and clause 5 shall be subject to the application, if any, of the rule against perpetuities and be by Deed, revocable during the Trust Period or irrevocable, executed during the Trust Period.*

25. Ms Cooke in reply emphasised in particular that, as she submitted, this approach missed the distinction between the use of funds held on the terms of the Trust and their distribution. The intended expenditure upon the costs of the funerals required during the agreed period would be paid (subject to approval or sanction of the court) as an expense before distribution. She submitted that the importance of sub-clause 4.8 was that it expressly enabled the Trustees to use funds pending the distribution, and sub-clause 4.6 was excluded from the proviso because the prohibition against reduction, prejudice or impairment would be inconsistent with that intention. Viewed from that context, she submitted, clauses 5 and 6 did not assist the submissions of Mr Willson.

Dii) The Decision on Construction

26. It is clear from the background to and the terms of the Trust Deed that the money paid by individual plan holders under their contracts with SHPL were received from time to time by Sterling as trustee and held in a collective fund for the purpose of investment or retention until it was needed to pay a plan holder their individual entitlement under their contract. As a result the plan holders and their representatives would fall within the class of primary beneficiaries of the Trust Deed.

27. The contractual entitlement of each plan holder would depend upon the terms of their contract with SHPL but sub-clauses 4.1–4.5 and 4.7 of the Trust Deed addressed the obligations of the Trustees (Sterling) to make payment from the Trust fund in the following circumstances: fully paid plans; when the plan was not fully paid; when the contracted funeral service could not be provided; when the plan lapsed; and when it was cancelled.

28. The underlying point from those provisions is that the Trustees are intended to use the Trust funds to enable SHPL to fulfil its contractual obligations to the plan holder/their personal representative (as appropriate). That may involve payment to SHPL for the funeral or to the funeral director or to the plan holder or to their personal representative depending upon which particular sub-clause applied.

29. No compliance problems should arise. SHPL is solvent (otherwise sub-clause 4.6 will apply) and able to carry out its obligations. The risk would be that the Trust fund is

inadequate but that should not occur. There should always be sufficient funds to pay the plan holders' contractual entitlements as and when they fell due because any shortfall in the Trust fund should be made good by SHPL under clause 8 of the Trust Deed:

> *"8. TRUST FUND SHORTFALL*
>
> *[SHPL] jointly and severally covenant with the Trustees to add sufficient further funds to the Trust Fund to make good any shortfall in the event that the Appointed Actuary certifies that there are insufficient funds to satisfy the trusts set out in clause 4 and such addition shall be made within 12 months of the Appointed Actuary's certificate or within such other period as may be agreed by [SHPL] and the Trustees."*

30. That explains a difference between sub-clauses 4.1-4.5 (noting all agree that sub-clause 4.5 does not apply to this case) and sub-clause 4.6. The former make no reference to what should happen if the required repayment of Trust funds cannot be made in full because there is a shortfall. In contrast sub-clause 4.6 does. That difference is not surprising looking at the meaning through the eyes of a reasonable reader:

    a) First, no such appointment should have been made under sub-clauses 4.1-4.5 in such circumstances because of the terms of the proviso to sub-clause 4.8: *"no exercise of this power shall reduce, prejudice or impair the interests of the Plan Holders under sub-clauses 4.1- 4.5"*.

    b) Second, should the Trustees ask the solvent SHPL to make up any shortfall, whether as a result of a payment under sub-clauses 4.1-4.5 or not and SHPL is insolvent, the Trustees will find that sub-clause 4.6 applies. They will then need to follow its requirements for distribution of the Trust fund. It provides that instead of paying *"all plan holders living at the date of the insolvency"* their *"Indexed Funeral Plan Subscription"* entitlement in full, payment will be proportionate.

31. I agree with Mr Willson, therefore, that sub-clauses 4.1-4.5 and 4.7 (which has the distinction of being discretionary) each address a solvent scenario both in terms of SHPL and the Trust Fund and that this is in contrast to sub-clause 4.6. However, that still leaves the key issue: whether that distinction explains, as he submits, the omission of sub-clause 4.6 from the proviso to sub-clause 4.8, the explanation being that sub-clause 4.8 does not apply to sub-clause 4.6 in any event.

32. An initial observation for the purposes of construction is that sub-clause 4.7 confers a discretion upon the Trustees to make payment of the sum due under their funeral plan should they cancel the plan. Its omission from the sub-clause 4.8 proviso can be construed as resulting from the fact that there was no intention at the time the Trust Deed was made for the fact of a plan cancellation to prohibit the exercise of the power of appointment. That would be a reasonable general proposition but is enhanced by the fact that the power to return the sums due at cancellation is discretionary, looking at the Trust Deed through the eye of a reasonable man.

33. That observation leads to the argument of construction that the same intention applied to sub-clause 4.6. That is to say the omission of sub-clause 4.6 from the proviso is not because sub-clause 4.8 does not apply but because the proviso is not intended to apply

just as in the case of sub-clause 4.7. Plainly it is not a decisive argument but a factor to be borne in mind.

34. Clause 4.8 confers a very wide discretionary power to appoint *"the whole or any part"* of the capital or income of the Trust Fund in favour of one or more of the plan holders. The Trustees when exercising that power, albeit within the width of acting as they *"think fit"*, will nevertheless have to take account of the purposes of the Trust and of all of its specific, relevant provisions including the payments which the Trustees may have to make to plan holders under clause 4. That inherent constraint is expressly extended by the prohibition of the sub-clause 4.8 proviso: *"no exercise of this power [to appoint] shall reduce. prejudice or impair the interests of Plan Holders under sub-clauses 4.1-4.5"*.

35. The interests of plan holders referred to are their respective equitable rights in the Trust Fund for payment of the sums to which they are entitled in accordance with sub-clauses 4.1-4.5. (whether to provide the funeral or to be paid to the plan holder/personal representative). What the proviso intends to avoid, therefore, is the loss to any other plan holder of their entitlement under sub-clauses 4.1-4.5 as a result of the exercise of the power of appointment under sub-clause 4.8. That should not occur.

36. It is hardly surprising that such a proviso was inserted in the context of SHPL being solvent. In principle the exercise of this power of appointment could produce a shortfall activating clause 8 of the Trust Deed. It is reasonable to conclude objectively at the date of the Trust Deed that it was not intended that the power should have that result. Instead, the power should only be exercised when the Trust had sufficient value to enable the power to be exercised without a shortfall resulting and SHPL having a consequential, potential liability under clause 8.

37. There would also, objectively, be the concern that a shortfall could lead to the activation of sub-clause 4.6 and the end of the pre-arranged funeral plan protection as a result of SHPL being unable to comply with its covenant under clause 8. The simple point for the intention behind the proviso was that the fundamental purpose of the Trust is to ensure payment to achieve fulfilment of SHPL's contractual obligations under the pre-arranged funeral plans. That purpose should not be "scuppered" by use of the sub-clause 4.8 power. The proviso was intended to prevent that occurring.

38. In contrast, sub-clause 4.6 will only be activated when SHPL is insolvent. The sub-clause anticipates that SHPL will no longer be able to perform its contractual obligations because of its insolvency whether limited to compliance with clause 8 or not. There is no immediate cause to move from that understanding of intention at the date the Trust Deed was made to the conclusion that sub-clause 4.8 should not apply to affect the return of funds when appropriately exercised. There is no reason in principle why the intention may not have been to require return as prescribed by sub-clause 4.6 but allowing for the Trustees to make a specific appointment under sub-clause 4.8 when it was right to do so in the exercise of the wide discretion notwithstanding the Trustees taking into account the terms of sub-clause 4.6.

39. Obviously that is at the heart of the dispute. The choice of construction presented by Mr Willson on the one hand and Ms Cooke on the other is between (i) deliberate omission because sub-clause 4.8 does not apply at all to sub-clause 4.6 and (ii)

deliberate omission from the proviso because only the proviso does not apply. It is a choice which must be made in the drafting context of the solvency/insolvency distinction that applies to clause 4.

40. It is now necessary to analyse sub-clause 4.6 further:

a) At the date it is activated, the date of SHPL's insolvency, the Trust funds may be in surplus. That is to say, in excess of the amount needed to pay each plan holder their entitlement under sub-clause 4.6 of an amount equal to their respective *"Indexed Funeral Plan Subscriptions"*, as defined. That presents the potential for the argument that the proviso is needed (just as it is for the solvency positions of sub-clauses 4.1-4.5) to ensure the sum appointed will not exceed the surplus and prevent payment in full to the plan holders. The omission of sub-clause 4.6 from the proviso being explained by the fact that sub-clause 4.8 never applied to it.

b) On the other hand, the argument can be made in this insolvency scenario (as already identified above) that there is no reason why the intention should not be for sub-clause 4.6 to operate subject to the potential for a sub-clause 4.8 appointment. That the existence of a surplus would establish the very scenario when the power of appointment was most likely to be exercised. In addition, that there is no need for the proviso to protect SHPL from compliance with clause 8 because its insolvency will mean the covenant will never be enforceable.

c) Sub-clause 4.6 may instead be activated at a time when the Trust Fund cannot pay each plan holder their entitlement of an amount equal to their respective Indexed Funeral Plan Subscriptions. In that case there will be a proportionate payment. This gives rise to the argument that sub-clause 4.8 was never intended to apply, which is why the proviso makes no reference to sub-clause 4.6. The reasonable man would conclude that sub-clause 4.8 was never intended to prevent a parri passu distribution in the circumstance of insolvency.

d) On the other hand, a shortage of distributable funds does not remove the circumstances in which the exercise of the power of appointment might be needed. A variety of scenarios can be envisaged which would create the need for an appointment. As one example, the distribution is only to those plan holders *"living at the date of [SHPL's] insolvency"*. Objectively it would not be unreasonable to expect the Trust Deed to intend awaited funerals for those recently died to still be paid for. The counter-argument, therefore, is that exclusion from the proviso was required to avoid the exercise of the power being prohibited whenever there had to be a proportionate payment.

41. I agree with the submission of Mr Willson that for the purpose of construction in this case it is sufficient to remind oneself of the holding in ***Arnold v Britton and others*** [2015] UKSC 36, [2015] AC 1619:

> *"that the interpretation of a contractual provision … involved identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural*

> *meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract had been made; and that, … the purpose of contractual interpretation was to identify what the parties had agreed, not what the court thought that they should have agreed …".*

42. Applying those principles, I prefer the following objective construction of clause 4.8: The Trust Deed intends that a power of appointment can still be exercised under sub-clause 4.8 when SHPL is insolvent and sub-clause 4.6 applies whether or not the Indexed Funeral Plan Subscription entitlement can be paid in full. The proviso omitted sub-clause 4.6 to give effect to that intention.

43. I prefer that construction for the following combined reasons, albeit each reason carries a different weights and not all are required to reach the construction I have:

a) Sub-clause 4.8 does not expressly exclude sub-clauses 4.6 or 4.7 from its ambit although it obviously could have done had that been the intention when the Trust Deed was made.

b) Absent the proviso sub-clause 4.8 would on its face have applied to sub-clauses 4.6. and 4.7. The fact that the proviso was limited to sub-clauses 4.1-4.5 gleans the intention to exclude sub-clauses 4.6 and 4.7 from its reach. It is the more obvious intention at the time the Trust Deed was made than the intention that sub-clause 4.8 did not apply at all.

c) The conclusion above that sub-clause 4.7's omission from the proviso is not because sub-clause 4.8 does not apply to it is a factor to be borne in mind. It supports a construction to similar effect for sub-clause 4.6 if one exists.

d) There is good reason for concluding objectively that the intention at the time the Trust Deed was made was for sub-clause 4.8 to apply to sub-clause 4.6 and for the proviso to omit sub-clause 4.6:

i) Sub-clause 4.6 only provides for distribution to those living at the date of insolvency. It was foreseeable when the Trust Deed was made that there probably would be people who would die before that date but whose funerals still required payment from the Trust fund to enable them to take place. Objectively, it would not reasonably be anticipated that the Trust Deed intended to exclude them from potential payment. Instead the reasonable man would conclude that sub-clause 4.8 is intended to be used to ensure those funerals take place if the Trustees considered it fit to reach such a decision in all the circumstances.

ii) The rationale behind the reason at sub-paragraph (i) above is given greater weight when account is taken of the fact that it will not necessarily be easy to tell when the date of insolvency arises and sub-clause 4.6 is activated, certainly not at the time (see generally ***BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*** [2013] UKSC 28, [2013 1 WLR 1408). Indeed the issue of SHPL's insolvency might not arise to the knowledge of the Trustees until a shortfall certificate is provided by the appointed actuary under clause 8 of the

Trust Deed and they seek payment of the shortfall even though SHPL had been insolvent for some time. The result of that difficulty, foreseeable when the Trust Deed was made, is that some of those living at the date the insolvency began will inevitably have received later funerals paid for by the Trust rather than the financial payment required by sub-clause 4.6. Fairness would justify the exercise of the power of appointment within sub-clause 4.8. and sub-clause 4.6's omission from the proviso whenever needed during the identified insolvency period when it is known that sub-clause 4.6 applies.

iii) On similar lines, a further justification for the reasoning of sub-paragraph (i) above is that it would have been objectively foreseeable at the time the Trust Deed was made that the Trustees might be uncertain from the information available whether sub-clause 4.6 was activated but still be faced with the need to provide for funerals in the meantime. It was foreseeable that it would be necessary to have a power in the terms of sub-clause 4.8 applying to the sub-clause 4.6 period.

iv) As a matter of objective construction it is also reasonable to conclude that sub-clause 4.8 was intended to potentially be applied not just in the scenarios envisaged by sub-paragraphs (i) to (iii) above but also if a plan holder died after the date of insolvency and the funeral could not take place without an appointment of additional funds. The intention being to provide a power of benevolence and humanity. It will be for the Trustees to decide when appointment should be made but the construction that sub-clause 4.8 did not apply would mean that this power would be lost even for the most exceptional of circumstances. That would not be the conclusion of intention by the reasonable man.

e) The construction is consistent with the background to the Trust Deed, its recitals and the fundamental intention to ensure plan holders are buried other than in a pauper's grave and to avoid the distress caused to those responsible for the funeral if the available funds are unreasonably limited.

f) In contrast, there was good reason at the time the Trust Deed was made for the proviso to apply to sub-clauses 4.1-4.5 when viewed objectively. The proviso prevented the wide ambit of sub-clause 4.8's discretionary power being used if it would disrupt the application of sub-clauses 4.1-4.5 by reducing the value of the Trust's assets and, as a result (whether directly or indirectly by adding to other causes for reduced value) potentially require SHPL to make up the short fall pursuant to its covenant under clause 8. It also prevented the potential of SHPL becoming insolvent and sub-clause 4.6 applying, bringing to an end the Trust and the pre-arranged funeral plans because SHPL was unable to make up the shortfall.

g) Those reasons for the proviso do not apply to sub-clause 4.6. SHPL being insolvent, it would not be able to fulfil its covenant within clause 8 in any event.

h) None of those reasons are undermined by clauses 5 or 6 of the Trust Deed (noting for completeness that plainly the reference to sub-clause 4.6 instead of

4.8 in clause 6 is a typographical error as submitted by Mr Willson). Clause 5, as Ms Cooke submitted, addresses any surplus remaining after fulfilment of clause 4.

44. The next issue is whether the Court should approve or sanction the exercise of the power.

E) Sanction or Approval of the Sub-Clause 4.8 Power

Ei) The Court's Power - Discussion

45. The issue arises in the context of the Agreement being conditional upon the grant of approval or sanction by the Court. It does not arise because the Administrators as office holders have no power to use the assets of the Trust beneficially owned by the plan holders, which would give rise to a request for permission to pay the expenses of the funerals from Trust assets applying ***Barclay Applegate*** principles. It arises because the Administrators, as agents, do not want to exercise the powers conferred upon SHPL by the Deed of Delegation by fulfilling the terms of the Agreement without knowing that they are able to do so. If approval or sanction is granted, the Agreement will cease to be conditional and the assets of the Trust can be used to pay Dignity notwithstanding that they would otherwise be used to pay each plan holder their entitlement of an amount equal to their respective Indexed Funeral Plan Subscriptions or, as in this case, to receive a proportionate payment.

46. The Court's power to approve or sanction is explained in the well-known case of ***The Public Trustee and another v Paul Cooper*** [2001] WTLR 901 in which Hart J. identified four situations in which the court might be asked to adjudicate on trustees' proposed course of action:

a) To decide whether the course was within their powers, which would ultimately be a question of construction.

b) To decide whether the course was a proper exercise of powers thereby granting the court's *"blessing for the action on which they were resolved and which was within their powers"* which would normally be sought for a particularly momentous decision where *"there was real doubt as to the nature of the ... powers ... [they] had decided how they wanted to exercise"*.

c) When the trustees persuaded the court to accept their surrender of their powers to the court. This would require good reason and would normally not occur for decisions which could be made by the trustees where they were in a much better position than the court to know what is in the best interests of the beneficiaries.

d) In hostile litigation where the action taken was challenged as being outside or an improper exercise of the trustees' powers.

47. There is no suggestion in the witness statements of the Administrators that they are asking the court to accept the surrender of their powers. In my judgment the court must require a specific request by the Administrators with (at least usually) evidence

addressing that request before deciding whether to reach a decision itself in the context of a surrender of powers.

48. I also do not consider that this is what the conditional Agreement required. The whole tenor of the evidence and of the terms of the Agreement lead to the conclusion that this is a case falling within sub-paragraph (a) and (b) of paragraph 46 above. The existence of the power has been addressed and it is sub-paragraph (b) which now applies.

49. However, the complication is that there is no evidence that the Trustees knowingly exercised the power under sub-clause 4.8. The evidence indicates that they reached the decision to enter into the conditional Agreement in circumstances of perceived need in their capacity as Administrators. In that capacity they reached that decision as agents for SHPL whilst under a duty to manage SHPL's affairs business and property and to perform their functions in accordance with the objectives of the administration. Mr Haywood on behalf of the Administrators very properly acknowledged that fact.

50. This raises the question whether the Administrators can obtain approval or sanction removing the Agreement's condition when they have not consciously exercised their powers. In my judgment they can for the following reasons: (i) no objection has been taken to this course; (ii) the power will nevertheless be exercised by making the payment if the condition is raised; (iii) the Administrators can still present their reasons for their decision to enter into the Agreement and ask the Court to consider whether those reasons should secure the Court's blessing in the context of the existing power; and (iv) there appears to be no reason why the Administrators should not ratify their decision to enter into the conditional Agreement if need be and plainly making an appointment is their current intent if they have the power to do so.

51. The Court's function when deciding whether to give its *"blessing"* is discussed with care and in detail in ***"Lewin on Trusts"***, 20th Ed at 39-095–097. I refer in particular to the following opinion of the editors, experts in their field, which I accept as an accurate reflection of the law:

> *The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. 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 court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed)…. But the fact that the court is asked to approve the trustees' decision without the benefit of full disclosure and cross-examination cannot, by itself, cause the court to withhold its consent where there is sufficient and appropriate material upon which it can act.*

Eii) Administrators' Reasons

52. In those circumstances the Court needs to consider the factual background to and the reasons for the Agreement. The factual background has been addressed above including under paragraph 16. Without being thought to ignore other factors, the following matters stand out from the evidence:

    a) People became plan holders because they wanted to ensure their funerals would be paid for and they wanted plans in force on their death.

    b) The Administrators were not in a position to be able to distribute the Trust's funds in accordance with sub-clause 4.6 until they had appreciated its validity and scope and most importantly investigated, secured and realised the Trust's assets. They included (at least for the purpose of investigation) causes of action concerning the recovery of assets. In addition it would be necessary to complete a reconciliation of the Trust accounts and of the rights of the individual plan holders. That would inevitably take time and people would be without funds otherwise intended for distribution in the meantime.

    c) In the meantime plan holders died and funds were required for their funerals. The funerals had to take place bearing in mind personal need and distress, public health issues and the views of the FCA.

    d) This all occurred within the context of the Administrators performing their functions under ***Schedule B1 to the Insolvency Act 1986*** and in so doing causing SHPL to exercise the powers delegated to them under the Deed of Delegation. No-one suggests the Deed of Delegation should not have been entered into to secure the Trusts' funds and other assets and to fulfil the functions, duties and powers otherwise to be exercised by Sterling.

    e) This all also occurred whilst the Administrators were seeking to transfer the plan holders (with their consent) to new plan providers to achieve their original aim of having plan protection at death.

53. Against that background the evidence in my judgment establishes the following key reasons for the decision to enter into the Agreement and to pay the funeral costs agreed if approved or sanctioned by the Court:

a) The need for the funerals to take place.

b) The fact that the Agreement was the only method of SHPL achieving this pending the time required not for completion of the winding up of the Trust but for the plan holders to have the opportunity to decide whether to transfer to another plan provider.

c) The fact that the Agreement, as viewed on the date it was made, would provide for this period of time the same benefit for all plan holders. They would all in effect have continuing plan holder cover in accordance with the reason which caused them to take out a plan with SHPL in the first place. In other words, they would all have funds to ensure their funeral was paid for should they die during the relevant period.

d) The Agreement was a commercially sensible and prudent one based upon need, cost and consequence for distribution of the Trust fund and assets.

e) Exercise of the benefit by a plan holder's estate would also reduce any proof of debt that the relevant estate would obviously have (no decision having been reached as to whether it would extinguish it).

54. The objections raised to which specific attention should be drawn from the evidence generally but including the statement of Ms Balam, the skeleton argument and submissions of Mr Willson (with adaption being made when necessary for their application to a **Berkeley Applegate** decision and taking into account that their objection to an absence of power cannot be relied upon) can be summarised as follows:

a) The services for which Dignity will be paid were not services provided for the benefit of all the beneficiaries of the Trust.

b) The effect of the order sought by Dignity would mean that plan holders who received funerals between 1 May 2022 and 31 October 2022 would be 'made whole'– whereas other Plan Holders who did not receive a funeral would receive a mere dividend from the Trust Assets.

c) This unequal treatment would not only breach the terms of the Trust Deed; it would also be contrary to the *pari passu* principle, which is now the properly accepted basis for allocating an insolvent trust fund.

d) Payment to Dignity out of the Trust Assets would be contrary to the plan holders' legitimate expectations that Dignity would not be paid from the Trust Assets (which are already seriously depleted, and in relation to which the current estimated dividend is 11-15 pence). The plan holders rely (*inter alia*) on Dignity's membership of the Funeral Planning Authority and the pledge by members of the FPA to co-operate and guarantee/underwrite funeral services where a fellow member becomes insolvent.

e) Not all plan holders received the benefit, for example none in the Isle of Man.

f) It is not established that Dignity's charges under the Agreement exclude any element of profit and their claim that there is no profit should be approached with caution.

g) Dignity is the largest funeral provider in the UK, it has substantial funds and entered into the Agreement with its eyes open with regard to the potential for non-payment. There have been obvious commercial advantages to it providing funeral services during the Relevant Period. Specifically (a) it has charged "Additional Expenses" of approximately £250,000 and (b) the potential transfer of 10,000s of Plan Holders to Dignity (which is likely, in time, to lead to future 'for-profit' business from those Plan Holders' family/friends) will be to its commercial benefit.

h) If approval or sanction is not granted, Dignity if it has a claim can prove in the administration of SHPL.

i) The Court should not grant approval or sanction for an Agreement potentially adverse to the beneficiaries.

Eiii) Decision

55. I find the reasons of the Administrators above to be overwhelming especially when the outcome is that each plan holder alive at the date of the insolvency effectively received continuing plan protection for the period of uncertainty that inevitably occurred for an anticipated reduction in their dividend of £13.00 each. It is unnecessary, therefore and without any disrespect at all, to set out the detailed submissions of Ms Cooke addressing the reasons why approval or sanction should be granted.

56. As to the objections, the Agreement was not entered on the basis that only some beneficiaries would benefit. That is to apply the outcome of the contract not to identify the benefit of the contract at the date it was made. Although there will be an impact upon the distribution, as Ms Cooke submitted, the impact results from the expenses incurred winding down the Trust prior to distribution. Even if the appointment is viewed instead as a distribution, the decision of the Privy Council in ***Equity Trust (Jersey) Ltd v Halabi*** (above) was not that the law prevented distributions resulting from the exercise of an express power of appointment such as contained within sub-clause 4.8 of the Trust Deed arising in the circumstances of insolvency. It is to be noted that Lord Briggs at [238] was addressing the issue of a rule of priority between trustees' liens in the context of a fund unable to pay them all. A very different issue.

57. The legitimate expectation objection could be raised as a matter the Administrators failed to take into consideration, as could the financial position of and benefits for Dignity. In addition that they do not appear when entering into the Agreement to have undertaken an in depth investigation of the absence of a profit element or considered the resulting commercial benefits and/or the ability of Dignity to prove.

58. However, these are plainly not matters for which the absence of consideration leads to even an arguable case that the decision to enter into the Agreement was one which a reasonable body of trustees could not properly have reached. The Administrators could not have compelled Dignity to carry out the funerals without charge and had to reach their decision to enter into the Agreement in that circumstances. If some have not received the benefit that applied to all, that does not mean the Agreement should not have been entered into. There is nothing to suggest that the Administrators should not have entered into the Agreement because of the financial position and benefits of Dignity or because they are receiving profit directly or indirectly or because of any subsequent right to prove. The decision was a commercial one which the Administrators were entitled to make in the capacity as agents for SHPL in accordance with the Deed of Delegation.

59. In my judgment the decision to enter into the Agreement was a proper exercise of powers and the court should grant its "*blessing"*.

F) *Berkeley Applegate*

60. In that circumstance it is unnecessary to address the application of the ***Berkeley Applegate*** principles. I do not see any benefit doing so but more importantly do not consider it right to do so as a result of my decision. That is because the case has changed and proceeded on the basis that there is either a power to enter into the Agreement or such a course is prohibited by the terms of the Trust Deed. In contrast ***Berkeley Applegate*** principles apply when the office holder is not in the position of a trustee and has no power to deal with the trust assets. The Court may approve the payment of costs and remuneration from the trust fund because the work carried out nevertheless benefits the trust and should be paid for. My decision is that payment is permitted because the power to do so was exercised.

61. However, had I reached the opposite result I would have decided that the Trust Deed did not empower them to enter into the Agreement or that exercise of the power should not be *"blessed"*. The case for ***Berkeley Applegate*** equitable relief would need to be developed in that specific context. It is of course the case that counsel have presented detailed submissions both as to the ***Berkeley Applegate*** law and its application but had I reached the opposite result I would have provided them (both as a matter of fairness and to assist the Court) with the opportunity (probably in writing) to supplement their submissions in the light or context of the judgment explaining such a decision.

62. I will hear from counsel upon the terms of the order and any consequential relief resulting from this decision subject to receiving an agreed form of order. In doing so I will consider (if required) any submissions which ask me to reach an alternative ***Berkeley Applegate*** decision in the light of the negative decision above which counsel have for obvious reasons not yet had the opportunity to address.

Order Accordingly