

Neutral Citation Number: [2026] EWHC 869 (Ch)

Claim No: PT-2025-BHM-000120

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST
IN THE MATTER OF THE F.R. KERRY FAMILY 1962 TRUST**

Priory Courts
33 Bull Street
Birmingham, B4
6DS

Date: 14 April 2026

BEFORE:

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a Judge of the High Court)

BETWEEN:

(1) SALLY WEST
(2) ROGER FRANK KERRY
(as Trustees of The F.R. Kerry Family 1962 Trust)

Claimants

- and-

ELIZABETH ANN BULLIVANT

Defendant

Representation:

Daniel Burton (instructed by Roythornes LLP) for the Claimant
T.J.B. Dumont KC (instructed by Roythornes LLP) for the Defendant

Hearing dates: 28 January and 14 April 2026
(draft judgment sent to the parties' representatives by email on 7 April 2026)

JUDGMENT

Introduction

1. The Claimants are the present Trustees of an *inter vivos* settlement known as the F.R. Kerry Family 1962 Trust (“*the Trust*”).
2. The Defendant is the life tenant of the Trust. The Defendant’s 4 children (including the First Claimant) (“*the Daughters*”) are the remaindermen of the Trust.
3. By Trust instruments executed in 2012, 2016 and 2021 sums totalling £3,390,000 were purportedly distributed to or vested in the Daughters.
4. The Claimants apply pursuant to Civil Procedure Rules r.64.2 for the court to determine questions arising in connection with the validity and effect of those Trust instruments. In my judgment, the key questions to be addressed are:
 - a. Whether the Defendant validly surrendered her life interest in the Trust in 2021.
 - b. Whether the benefit of loans (being the legal right to recover the debts) made by the Trust to the Defendant was validly assigned to the Daughters.
 - c. Whether the Trustees were entitled to administer the Trust on the footing that the class of remaindermen (the capital beneficiaries) was closed.
5. The Claimants’ and the Defendant’s positions are that the distributions/vestings were validly made. In reality it is HMRC that has the contrary interest, but HMRC has elected not to be joined as a defendant to these proceedings and has not advanced any positive case. Without prejudice to the Claimants’ stated position of supporting the interests of the Daughters, the Claimants’ counsel, to assist the court, has set out any arguments that might be made that the distributions/vestings were not validly made.

Background

6. The Defendant was born on 18 June 1947.
7. By way of a settlement deed dated 1 March 1962 (“*the Trust Deed*”), Francis Robert Kerry (“*the Settlor*”) established the Trust, which was one of a series of family trusts, primarily for the benefit of the Defendant, who was then the Settlor’s only minor child.
8. So far as relevant for present purposes, Clause 2 of the Trust Deed provides as follows:

“(3) Upon the attainment by the Beneficiary [defined earlier in the Recitals to the Trust Deed as the Defendant] of the age of Twenty five years to pay and transfer one half of the Trust Fund to her absolutely and as to the remainder of the Trust Fund to pay the income therefrom to the Beneficiary until she dies and on her

death Upon Trust for such of her children as shall attain the age of Twenty one years and if more than one in equal shares absolutely.

(4) If the Trusts hereinbefore declared in favour of the beneficiary shall fail then to hold the whole or the part of the Trust Fund in respect of which the trusts have failed as the case may require for such of the children of the Beneficiary as shall attain the age of Twenty one years and if more than one in equal shares absolutely and in relation to the income arising therefrom until they successively attain their majority the provisions contained in sub-clause (1) hereof shall apply mutatis mutandis as though they were set out herein [sub-clause (1) contained provisions applicable to when the Defendant was under the age of 21].

(5) If the foregoing trusts shall fail then To Hold the Trust Fund Upon Trust for my Son Roger Frank Kelly absolutely.”

9. In 1972, the Defendant attained age 25, and Clause 2(3) of the Trust Deed took effect so that the Trustees were required to:

- a. pay half of the Trust fund to the Defendant; and
- b. hold the remaining half on trust for the Defendant for her life, remainder to such of her children as shall attain the age of 21.

10. In 2004, the youngest of the Daughters attained the age of 21.

11. On 28 August 2012, Shakespeares Legal LLP (“*Shakespeares*”) sent an Engagement Letter to the then Trustees:

“Work to be done

You have asked us to advise you with regard to a possible release by the life tenant of part of her life interest in the trust fund so as to accelerate the interest of the ultimate remaindermen. This includes advising on the taxation implications, both on the life tenant and on the trustees and drafting the necessary documentation to effect that release.”

12. Also on 28 August 2012, Shakespeares sent to the then Trustees a letter of advice:

“Clearly there is a substantial trust fund and as you are no doubt aware in the event of your sister's death the value of that trust fund will be aggregated with her own estate for inheritance tax purposes and will potentially produce a significant IHT liability.

The thinking therefore is that to the extent that she feels she can afford to do so your sister gives up or surrenders her life interest in part of the trust fund so that that part then accelerates the interest of her four daughters and passes to her four daughters. This has the advantage of starting the 'clock' running for inheritance tax purposes, and providing that she survives that release by a period of seven years, should result in no inheritance tax liability arising. Similarly it also assists her four daughters by providing them with a sum of cash at the present time, which I understand will be of considerable assistance to them.

Under normal circumstances there would be a capital gains tax liability that would arise in relation to the part of the trust fund that the four daughters would

become absolutely entitled to on the surrender by their mother. However discussions between John and the investment advisors have indicated that there are sufficient investments to avoid capital gains tax being an issue, and I understand that a number of sales have already taken place from the portfolio in order to raise the appropriate level of cash.

Ultimately it was agreed with your sister that she would surrender or release her life interest in £800,000 worth of assets within the trust. That £800,000 worth of assets would be made up of £600,000 worth of cash and investments with the balance being made up of the £200,000 loan that is currently outstanding from Mrs Bullivant to the trustees, which I understand, was made some years ago.

The effect of this is to reduce the value of the trust fund that would otherwise be aggregable on your sister's death by a sum of £800,000, and assuming she survives that release by seven years would potentially result in a saving of inheritance tax of some £320,000.

That was the essence of the agreement that was reached when we met and I have subsequently been asked to draft the appropriate legal documentation to put this into effect.

The terms of the trust are such that in effect your sister can give up her life interest in £800,000 worth of assets, and that will have the effect of accelerating the interest of her four daughters to the capital in which the life interest has been given up. This is therefore done by a simple deed of release, a draft of which I have sent to John Delaney for approval. The deed of release includes specifically reference to the debt for reasons I will explain later in this letter.

Assuming the deed of release is acceptable it will need to be executed not only by Mrs Bullivant, but also by the three of you as trustees, and the date of that deed will then be the effected date of release for IHT purposes and will be the date on which the seven year clock starts to run.

With regard to the debt, there was some discussion with myself, your sister and John Delaney about whether that debt had ever been recorded in any form of memorandum of loan. John, I understand has checked with David Wild, who cannot recall a memorandum ever being done, but the debt clearly exists and appears within the trust accounts. The question that arises is whether the debt was repayable on demand (almost certainly it would have been) and also whether it carried any requirement to pay interest. In the case of the latter I think it highly unlikely simply because any interest that would have been payable by Mrs Bullivant on the debt would therefore have immediately come back to her in her capacity as life tenant!

The debt clearly represents an additional liability against Mrs Bullivant's estate and so it is worthwhile retaining the debt, and the question I have raised with John Delaney is whether once the debt has been assigned to her four daughters whether the terms of the debt should be renegotiated so as to carry a level of interest repayable, that is probably a matter for discussion between the four daughters and Mrs Bullivant rather than involving the trustees.”

13. On 24 August 2012, the Defendant and the then Trustees executed a deed of release (“*the 2012 Deed of Release*”), which provided as follows:

“Recitals

- A. This Deed is supplemental to the settlement (The Settlement') and to the other documents specified in the First Schedule.
- B. The Trustees are the present trustees of the Settlement
- C. Under the Settlement the Life Tenant is entitled to the income of the Trust Fund
- D. The Life Tenant wishes to release her interest in the income of that part of the Trust Fund specified in the Second Schedule

Operative Provisions

- 1. The Life Tenant hereby releases her interest in the income of that part of the Trust Fund specified in the Second Schedule to the intent that the provisions contained in clause 2 (3) of the Settlement shall take effect on the release of such interest.
- 2. The Trustees hereby agree to administer the Trust Fund in accordance with this Deed of Release.

.....

Second Schedule

£600000 cash and investments

£200000 debt owed by the Life Tenant to the Trustees”

- 14. On 20 October 2016, the Defendant and the then trustees of the Trust executed a deed of release (“*the 2016 Deed of Release*”). It was drafted by Keystone Law, although it largely mirrored the format of the 2012 Deed of Release and provided as follows:

“Recitals

- A. This Deed is supplemental to the settlement (the “Settlement') and to the other documents specified in the First Schedule.
- B. The Trustees are the present trustees of the Settlement.
- C. Under the Settlement the Life Tenant is entitled to the income of the Trust Fund (as therein defined).
- D. The Life Tenant wishes to release her interest in the income of that part of the Trust Fund specified in the Second Schedule

Operative Provisions

- 1. Release

The Life Tenant hereby releases her interest in the income of that part of the Trust Fund specified in the Second Schedule to the intent that the provisions contained in clause 2 (3) of the Settlement shall take effect on the release of such interest.

2. Ongoing Administration

The trustees hereby acknowledge the Life Tenant's release and agree to administer the Trust Fund in accordance with the terms of this Deed.

.....

The Second Schedule

£90,000 loan owed by the Life Tenant to the Trustees"

15. On 22 March 2021, the then trustees of the Trust signed a written resolution ("*the Resolution*"), which resolved:

Trustee's Resolution

1. We, Roger Frank Kerry, Sally West and Timothy Guy Birtwistle are the current Trustees of the Settlement created in the Deed of Settlement made by Frances Robert Kerry dated 1st day of March 1962, we acknowledge that the Life Tenant of the Settlement, Elizabeth Ann Bullivant, has consented to surrender her interest in the Settlement in favour of her daughters and, this advances the funds that would be due to the reversionary beneficiaries on Mrs Bullivant's death.
2. Bearing in mind the above, the Trustees have decided to (1) to appoint £2,500,000.00 (Two Million Five Hundred Thousand Pounds) from the Settlement outright to Sally West, Charlotte Louise Brown, Lisa Gaffney and Aimee Louise Webster in equal shares.

In respect to 1 above:

- a) Elizabeth Ann Bullivant has given her consent to the appointment of funds to her daughters;
- b) The Beneficiaries are the Reversionary Beneficiaries of the Settlement.

16. Also on 22 March 2021, the Defendant and the then trustees of the Trust executed a deed of appointment ("*the 2021 Deed of Appointment*"), which was drafted by Fishers Solicitors. It provided:

RECITALS

- (A) This Deed is supplemental to the Francis Robert Kerry Settlement dated the 1 March 1962 (the ‘Settlement’) and to the other documents and events referred to in the Schedule.
- (B) The Appointors are the present trustees of the discretionary trust contained in the Settlement
- (C) The Life Tenant has agreed to surrender her life interest in the funds appointed by this Deed (the “Appointed Fund”) as set out in the Second Schedule
- (D) **Sally West, Lisa Gaffney, Charlotte Louise Brown and Aimee Webster** are members of the class of Beneficiaries
- (E) The Appointors wish to exercise their Power of Appointment under clause 2 of the Settlement in the following manner:

OPERATIVE PROVISIONS

1 Definitions and construction

In this Deed:

- 1. where the context admits, the definitions and rules of construction contained in the Settlement shall apply.

2 Appointment

The Appointors, in exercise of the power of appointment conferred by clause 2 of the Settlement and of all other relevant powers, hereby irrevocably appoint and declare that the Appointed Fund shall on the date of this Deed be held upon Trust for **Sally West, Lisa Gaffney, Charlotte Louise Brown and Aimee Webster** absolutely in equal shares.

3 Trustees' lien

Nothing in this Deed shall prejudice or impair in any way any lien or charge to which the Trustees are entitled in respect of any tax and other liabilities whatever for which they are or may become accountable.

.....

SCHEDULE 2

Division of Appointed Fund

Sally West	£625,000 (six hundred and twenty five thousand pounds)
Lisa Gaffney	£625,000 (six hundred and twenty five thousand pounds)
Charlotte Louise Brown	£625,000 (six hundred and twenty five thousand pounds)
Aimee Webster	£625,000 (six hundred and twenty five thousand pounds)

17. On 7 August 2024, the Claimants’ present solicitors, Roythornes Solicitors, wrote to HMRC:

“The Issue

[24.] Upon taking specialist legal advice (privilege over which is not waived), it became apparent, inter alia, that the Trustees have purported to exercise a non-

existent power of appointment in the 1962 Deed and that, technically, the class of remaindermen beneficiaries is not closed, see e.g. see *Figg v Clarke* [1997] 1 WLR 603 (Ch.).

.....

The Legal Framework

The Court's Approach to Incapacity of Childbearing

[28.] As explained in *Lewin on Trusts* (20th Ed.) at 24-080, it was frequently held in the past that the Court would authorise trustees to administer their trust on the footing that a woman was past bearing children if, on taking account of her age and matrimonial history, the dates on which any children had been born, the evidence regarding any possibility of the birth of further children and any medical evidence, it appeared practically certain that she would have no child in the future, citing *Re Westminster Bank Ltd's Declaration of Trust* [1963] 1 W.L.R. 820.

[29.] On occasion, the Court has authorised distribution without the need for variation under the Variation of Trusts Act 1958 on the basis that a woman in her seventies would not have any further children, see *Re Pettifor's Will Trusts* [1966] Ch. 257 (Ch.).

HMRC's Approach to Incapacity of Childbearing

[30.] HMRC have recognised and accepted that the policy adopted in *Re Pettifor's Will Trusts* (supra) should be applied in cases where the class of beneficiaries has not technically closed but the parties nevertheless wish to enter into a deed of variation.

[31.] Specifically, IHTM35048, entitled "*Who should make the instrument?: women past the age of child-bearing*" provides the following guidance:

"On the authority of *In Re Pettifor's Will Trusts, Roberts v Roberts and Others* (1966) Ch 257, it should be accepted that a woman in her mid-fifties has become incapable of child-bearing.

Therefore in the example at IHTM35047, if instead of being left to Stuart the capital was left to Winnie's daughter, Diane, who was aged 56 and either childless, or all her children were of age and parties to the variation, the instrument should not be challenged on the grounds that contingent interests of her children (born or unborn) had been adversely affected."

The Trustees' Position

[32.] The Trustees wish to be able to give effect to the intention of the instruments, which was to wind up the Trust (and prior to that, to release the life tenant's interest over part of the trust property). Following the full surrender of the life interest in 2021, the Trustees wish to be able to distribute the capital of the Trust fund to the remaindermen beneficiaries in equal shares absolutely on the footing that their mother, then aged 74, is incapable of bearing any further children.

[33.] We consider that this mirrors the approach taken by the Court in *Re Pettifor's Will Trusts* (supra) and by HMRC when considering contingent interests in deeds of variation. Indeed, the same principle applies.

[34.] In the premises, we ask that HMRC provide written clearance to the Trustees that they accept that the Trustees and the beneficiaries were and are permitted to proceed on this footing and wind-up the Trust. We also ask that the clearance includes the property subject to the two Deeds of Release, which has been advanced on a similar basis.”

18. On 10 September 2024, HMRC responded as follows:

“Thank you for your letter and attachments dated 7 August 2024. However, we are unable give the Trustees any form of clearance.

That is because the circumstances do not fall within the criteria for non-statutory clearance and, in any case, we do not consider that there is any real doubt about how IHT would apply to any of the potential consequences of the documents that have been executed.

We see it as a request for our separate view on the interpretation and legal effect of the trust documents, which does not form part of the non-statutory clearance mechanism.

That said, we are willing in this case to make a few comments about your letter, which we hope will be helpful.

In particular, we wonder whether the starting point is to ask whether the life tenant has, in each case, validly surrendered her interest in possession in relation to the property referred to in the deeds to which she was a party. We cannot see that there is any doubt that this was the intention.

The doubt, if any, appears to be the consequences of any surrender, e.g. did it then cause the trusts in the particular property to “fail” under clause 2(4) of the declaration of trust and thus accelerate the interests of the children or, if not, could there be a resulting trust in favour of the settlor’s estate?

Once that is clear, it would appear that the existing powers of the trustees would follow the result. And if the interests did fail then we wonder why the trustees would need a specific power – statutory or otherwise – to deal with trust property to which a beneficiary would be beneficially entitled?

In saying this we do acknowledge that the interests of the beneficiaries may, in form, be the subject of a future defeasance but, in practice, there is the guidance provided by the Court in *Re Pettifor* and in the Inheritance Tax Manual.

The other doubt is caused by the fact that the life tenant was not a party to the later deed and, more broadly, we do not know what her position is.

Lastly, we doubt that any of these comments will come as a surprise to you or your counsel and if the decision is made to make an application to the Court then the Trustees should follow the guidance at HMRC accepts service of legal proceedings by email - GOV.UK (www.gov.uk).

19. The Claimants issued the present claim on 14 March 2025.
20. On 18 March 2025, the Claimants' solicitors served the Claim Form and supporting evidence upon HMRC and the Defendant's non-party Daughters inviting them to be joined as parties to the proceedings.
21. On 11 June 2025, it was directed that notice pursuant to Civil Procedure Rules ("CPR") r.19.13 [power to make judgments binding on non-parties] be served upon the non-party Daughters. The court declined to direct that such notice be served upon HMRC having earlier recorded as a recital to the order that "in circumstances where the outcome of the claim might have tax consequences, HM Revenue and Customs have been served by the Claimants with the Claim Form and supporting evidence, but have not indicated in writing or at all that they wish to be joined as a party".
22. On 25 June 2025, the Claimants' solicitors served upon HMRC and the non-party Daughters (i) Notice of the Claim, (ii) the Claim Form, (iii) the evidence in support of the claim, (iv) the order of 11 June 2025, and (v) Response Pack including draft Acknowledgment of Service.
23. The non-party Daughters unsurprisingly chose not to be joined as parties to the proceedings having previously indicated in writing that they supported the claim. On 26 June 2025, HMRC responded to the Claimants' solicitors:

"We refer to your letter dated 18 March 2025 and your further letter dated 25 June 2025. We are sorry for the delay in acknowledging and responding to your letter of 18 March.

We confirm that HMRC does not wish to be joined to the proceedings or make any comment on the claim."

Statutory power of advancement

24. There is no express power of appointment or advancement under the Trust Deed to enable the Trustees from time to time to pay capital to the Daughters after they had attained the age of 21.
25. There was a statutory power of advancement by virtue of s.32(1) of the Trustee Act 1925. Further, the exercise of a power by trustees will not fail simply because the trustees relied upon the wrong power provided that the power that did exist did not require the examination of materially different considerations from those relevant to the power that the trustees saw themselves as exercising: *Re Gleeds Retirement Benefits Scheme* [2015] Ch. 212 (Ch.) and *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511 (Ch.).
26. However, the problem here is that because the Trust Deed was executed before 1 October 2014, the statutory power of advancement was subject to a 50% cap. The distribution of £2.5 million to the Daughters in 2021 was intended to be a distribution of the lion's share of the remaining Trust assets. As a result of the 50% cap valid statutory advancements could only have been made for capital sums of around £1.075 million, after taking into account sums of (i) £800,000 in 2012, (ii) £90,000 in 2018, and (iii) £185,000 in 2021.

Question 1 – Did the Defendant validly surrender her life interest in the Trust fund in 2021

27. The effect of a surrender of a life interest is to accelerate the interests of the remaindermen, which take effect in possession, although acceleration does not of itself close the class of the remaindermen: *Re Harker's Will Trusts* [1969] 1 W.L.R. 1124.
28. A surrender of a life interest under a trust is a disposition, which requires signed writing pursuant to s.53(1)(c) of the Law of Property Act 1925.
29. The Defendant signed the 2012 Deed of Release and the 2016 Deed of Release (together "*the Deeds of Release*"), which each contained an operative clause whereby the Defendant expressly released her life interest in those parts of the Trust fund referred to thereunder.
30. The problem here is that, although the Defendant signed the 2021 Deed of Appointment, it did not contain an express release unlike the Deeds of Release. Instead the recital to the 2021 Deed of Appointment merely recorded that the Defendant "has agreed to surrender her life interest in the [appointed fund]".
31. It is argued on behalf of the Claimants that:
- a. The usual principles of interpretation apply to trust instruments as they do to contracts following the dicta of the Supreme Court in *Marley v Rawlings* [2015] A.C. 129 (SC) (at paras [19 – 20]).
 - b. The court can and should infer the release from the recital and the Defendant's signature (being signed writing). Put simply, if the Defendant had not provided her consent then why did she execute the 2021 Deed of Appointment? The court ought to adopt an interpretation that is most consistent with common sense.
32. HMRC acknowledged in their pre-action correspondence: "We cannot see that there is any doubt that this was the intention [to surrender the Defendant's life interest]". However, the counter argument is that if she wanted to do this then the Defendant should have expressly said so in an operative provision in the 2021 Deed of Appointment or in a separate deed of release (as was done previously in the Deeds of Release).
33. As noted in *The Interpretation of Contracts 8th Ed.* (at para [6.28]):
- "[a]lthough (i) interpreting the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract, interpreting the words used and implying additional words are different processes governed by different rules."
34. In *ABC Electrification limited v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645 Carr LJ (as she then was) summarised the process of interpretation as follows:
- "[17.] The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36;

[2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24;
[2017] AC 1173.

[18.] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant 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 that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.”

35. In *Yoo Design Services Ltd v Iliv Realty PTE Ltd* [2021] EWCA Civ 560 Carr LJ summarised the process of implication as follows:

“[51.] In summary, the relevant principles can be drawn together as follows:

i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;

ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;

iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;

iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test.”

36. As evidenced from Shakespeares’ letters in 2012, it was the Defendant’s long established wish that whenever she could afford to do so she would give up her life interest in Trust property in order to accelerate the interests of the Daughters in the capital. This was not merely intended as part of legitimate estate planning, but also

because the Defendant quite understandably wanted the Daughters to receive financial support at a stage in their lives when they stood to benefit from it most.

37. Shakespeares advised that, in order to give up her life interest, the Defendant and the trustees of the Trust would need to execute a simple deed of release. The Defendant and the then Trustees executed the Deeds of Release.
38. There was a Trustee meeting held on 12 February 2021. In attendance were the Claimants and the Defendant together with Guy Birtwistle of Fishers Solicitors (co-Trustee), John Delaney of Bourne & Co Accountants (retired Trustee and guest), and Kevin Douglas of Brian Mole IFA. The minutes of the meeting recorded as follows with my emphasis added:

“Invesco have sold assets to the value of £3,363,066.29..

.....

- KD confirmed that the majority of the portfolio (minus the Blakeney investments) is currently held in cash with Investec. He said that Investec were happy to hold onto this cash as long as we needed it in their cash account with no additional charges.
- JD said that he will check the book cost versus his records and then plan to submit a tax return on 5th April 2021 resulting in the CGT bill needing to be paid by January 2022. He suggested that on the basis that we will not know the final CGT figure until all investments have been liquidated and that there will be administration costs to pay by the Trust that an initial distribution of £2.5million be paid out to the 4 beneficiaries (the girls) and the rest held back to cover such expenses. GB confirmed that he also felt this was the right decision.
- SW reconfirmed that the trust has a bank account so would be able to complete this transaction but JD suggested that the distribution to the girls be paid directly from Investec. He added that this was because there are no internet banking facilities on the trust bank and logistically this may be easier.
- KD said this may be possible but he will need to check with Investec as to what will be needed. He and GB suggested that full ID and a copy bank statement may be required from each trustee. SW said that her and EAB will be able to speak to the beneficiaries and organise this if required.
- JD asked if EAB will need to complete any paperwork to relinquish the life interest and GB confirmed that a deed will be needed for this but that will not hold up the distribution of the proposed amount of £625,000 per beneficiary.
- GB confirmed that once all tax bills paid, all expenses paid and all final distributions paid that he will complete paperwork to wind up the trust. He stated that in the meantime there may be need for other documents and deeds such as a Trustees Resolution to confirm the distribution to the beneficiaries or perhaps a deed of appointment to authorise the payments directly from Investec. KD said that he will liaise with GB and JD as to what paperwork Investec will need for their internal procedures.
- JD pointed out that Investec may be missing the last few trust documents that have been completed in the last 12-28 months. SW said that she would liaise with KD to make sure they have all these.

- SW asked if everyone was in agreement and all parties confirmed they were happy with the initial distribution of £2.5m total / £625,000 per beneficiary. This will of course be correctly documented by official paperwork produced by GB from Fishers Law.
- RK voiced that this has been a very prosperous Trust thanks to the works of KD and Investec. He said that his father would have been very happy.
- SW said that it was a true legacy that her Grandfather had set out and that he would have been very proud. She said the beneficiaries will be very grateful for this wonderful gift.
- EAB thanked everyone for their hard work and said that hopefully later that day, her and RK will raise a glass to their Father.”

39. It is clear from those minutes that the Defendant was again advised that, in order to release her life interest and to allow for the final distributions to be made to the Daughters to complete the wind-up of the Trust, the Defendant would need to sign a deed.

40. The Defendant duly signed the 2021 Deed of Appointment. There was no reason why the Defendant would have signed the 2021 Deed of Appointment other than in doing so she intended to release her life interest.

41. It was necessary for the Defendant to have released her life interest to enable the distributions to be made to the Daughters out of the funds that had already been disinvested in contemplation of and to complete the wind-up of the Trust. Without such a release, the 2021 Deed of Appointment would not work. It would lack practical and legal effect.

42. In conclusion:

- a. Although the 2021 Deed of Appointment does not contain an express operative clause of release, it records in its recital that the Defendant has agreed to surrender her life interest. It was executed by the Defendant, who had no reason to do so other than to surrender her life interest. It formed part of a series of transactions all intended to distribute Trust property to the Daughters. The 2021 Deed of Appointment could not operate as intended unless the surrender took effect. In those circumstances, on a true construction of the 2021 Deed of Appointment, the Defendant thereby validly surrendered her life interest in the Trust property referred to therein.
- b. If I am wrong about that then it is entirely obvious and necessary to give efficacy to the 2021 Deed of Appointment that an operative term that the Defendant thereby released her life interest is implied. Such a term can be clearly and precisely formulated by simply adopting exactly the same words used in the earlier Deeds of Release:

“The Life Tenant hereby releases her interest in the income of that part of the Trust Fund specified in the Second Schedule to the intent that the provisions contained in clause 2 (3) of the Settlement shall take effect on the release of such interest.”

- c. Whether analysed as a matter of construction, or if required as the implication of a term obvious and necessary to give the instrument practical and legal effect, I am satisfied that the 2021 Deed of Appointment constituted a valid written surrender of the Defendant's life interest for the purposes of s.53(1)(c) of the Law of Property Act 1925.

Question 2 – was the benefit of the loans validly assigned to the Daughters

43. Under the Deeds of Release the Defendant released the benefit of loans (totalling £290,000) to her daughters, and the Trustees agreed to administer the Trust on that basis.

44. Section 136 of the Law of Property Act 1925 provides:

“(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

- (a) that the assignment is disputed by the assignor or any person claiming under him; or
- (b) of any other opposing or conflicting claims to such debt or thing in action; he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.”

45. The Claimants have been unable to produce any statutory assignment of the benefit of the loans to the Daughters. However, they argue that it is probable that the loans were validly assigned and rely upon the presumption of regularity.

46. The counter-argument is that there is no evidence of a valid assignment of the loans to the Daughters, and the presumption of regularity does not apply to documents purportedly executed in recent history.

47. Henderson J explained the presumption of regularity in *Entrust Pension Ltd. V Prospect Hospice Ltd* [2012] EWHC 3640 (Ch) as follows:

“[38] I now turn to consider whether any assistance can be gained from the presumption of regularity, which is sometimes expressed in the Latin maxim “*Omnia praesumuntur rite esse acta*”. The principal circumstances in which the presumption has been applied appear to be cases where certain formal

requirements have to be satisfied, or where due to the lapse of time it would be unreasonable to expect primary evidence to be adduced in order to establish the lawful origin of a proprietary right: see *Halsbury's Laws of England*, 5th edition, volume 20, para 1103 where several examples are given. The presumption is, at least normally, a presumption of fact, not law, and as such it is rebuttable by evidence to the contrary. So viewed, the term “presumption of fact” is in my judgment something of a misnomer, because such a presumption does not shift the persuasive or evidential burden of proof on the relevant issue, but merely “describes the readiness of the court to draw certain repeated inferences as a result of common human experience”: see *Phipson on Evidence*, 17th edition (2010), para 6-17, and also para 1-17 where it is said that “Not only are [*presumptions of fact*] always rebuttable, but the trier of fact may refuse to make the usual or natural inference, notwithstanding that there is no rebutting evidence.”

[39] Mr Moeran drew my attention, in this connection, to the judgment of Lindley LJ in *Harris v Knight* (1890) 15 PD 170 at 179-80, 62 LT 507, 6 TLR 234, where in relation to the question whether a lost will had been duly executed and attested, he said this:

“The maxim, 'Omnia praesumuntur rite esse acta', is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.”

This passage appears to suggest that the maxim will be of assistance only where there would otherwise be no proof one way or the other; but since the maxim is also stated to be “an expression . . . of a reasonable probability” and “an inference which may reasonably be drawn”, I would respectfully question whether it really adds anything to the power which the court anyway has to make a finding of fact on the balance of probabilities based on inferences drawn from circumstantial evidence. But if that is right, the so-called presumption is really no more than a rebuttable statement, founded on common sense and experience, of the inference that it will normally be appropriate to draw in a given situation where primary evidence is lacking.”

48. I agree with Henderson J that the presumption of regularity appears to add little to the power that the court has in making findings of fact on the balance of probabilities to draw inferences from the undisputed facts.
49. There is no evidence of a statutory assignment. However, an assignment that does not satisfy the requirements for a statutory assignment, can still take effect as an equitable assignment. In *Technocrats International Ltd v Fredic Ltd (No. 1)* [2004] EWHC 692 (QB) Field J said this:

“[57] As Lord Macnaghten said in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462: “The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree.” For there to be an effective equitable assignment there must be some transaction that sufficiently manifests an intention by the owner of an identified chose in action to assign it to another..... It is not necessary for there to be a perfected equitable assignment as between assignee and assignor that there be a notice served on the debtor. Plainly, however, for the assignment to be enforced against the debtor the latter must have notice of it.....”

50. The Deeds of Release clearly manifested an intention by the then Trustees of the Trust to assign the benefit of the loans to the Daughters. Under the Deeds of Release the then Trustees expressly agreed to administer the Trust on that basis and in fact did administer the Trust on that basis as evidenced by the Trust accounts, which no longer recorded the loans as Trust assets after the times that the Deeds of Release were executed. The Defendant also clearly had notice of the assignments because she executed the Deeds of Release specifically to enable the benefit of the loans to be assigned to the Daughters by the then Trustees.
51. Further the Claimants have produced an unexecuted Memorandum of Loan between the Defendant and the Daughters, which refers in the recitals to the 2012 Deed of Release and the release thereunder of the £200,000 loan to the Daughters. It then records the agreed basis upon which the loan would continue between the Defendant and the Daughters. The Memorandum of Loan appears to have been professionally drafted. It is inherently unlikely that the Defendant and the Daughters would have spent time and money on the preparation of the Memorandum of Loan if the loan had not already been assigned by the then Trustees.
52. In making my findings of fact in this case, I have had particular regard to the contents of the documents, the conduct of the interested parties, the objective inferences properly to be drawn from those undisputed facts, and the overall probabilities including by reference to the interested parties' motives.
53. Accordingly, I find on the balance of probabilities that the benefit of the loans (being the legal right to recover the debts) was assigned by the then Trustees to the Daughters in equity.

Question 3 – Were the then Trustees entitled to distribute/vest the Trust funds on the basis that the class of beneficiaries was closed?

54. As already noted, the surrender of a life interest does not have the effect of closing the class of beneficiaries. As explained by HMRC in CG377700:

“If the class is not closed, then the trustees cannot distribute the property to the beneficiaries because they cannot tell whether the apparent share of a particular beneficiary will be reduced by the addition of further members to the class. Therefore absolute entitlement is deferred.”

55. The problem here is that under the terms of the Trust Deed the class of remaindermen beneficiaries is defined to be such of the Defendant's children as shall attain the age of 21 at the time of the Defendant's death. Therefore, technically the class remains open until the Defendant's death.

56. Notwithstanding that the class of beneficiaries did not close on the release of her life interest by the Defendant, it is argued by the Claimants that the distributions/vestings were nevertheless valid on the long standing authority of *Re Pettifor's Will Trusts* [1966] Ch 257 that trustees should administer their trusts on the basis that the impossible will not happen. In that case one-half of a testator's residuary trust fund was held upon trust for his daughter (“D”) for life with remainder to three beneficiaries, together with any further children who might be born to D and attain the age of 21 years, in equal shares absolutely. The only contingency which could reduce the shares in remainder expectant on the death of D was the birth of a further child to D, who was 78 years of age. On the footing that D had passed the age of childbearing, the trustees sought an order under the Variation of Trusts Act 1958 approving variation of the trusts of the Will so that any future child born to D would be excluded. Pennycuick J held as follows:

“It seems to me that an application under the Variation of Trusts Act, 1958, to cover that contingency, namely, the event of the birth of a child to a woman of 78, is misconceived and is not a proper application to make under the Act. It was, of course, well established prior to the enactment of the Perpetuities and Accumulations Act, 1964, that for the purpose of the rule against perpetuities a woman was never to be presumed as past child bearing. On the other hand, it is equally well established that in administration the court will allow funds to be distributed on the footing that at a certain age, normally in the middle or late fifties, a woman has become incapable of childbearing. In the case of a woman in the seventies, not only would trustees be authorised to distribute a fund on that footing without any doubt or question, but the court would, I think, normally consider it an unnecessary waste of money for the trustees to come to the court and ask for leave so to distribute. Trustees can with complete safety and propriety deal with their funds on the basis that a woman of 70 will not have a further child.

It does not seem to me that protection against this impossible contingency is a matter which can properly be dealt with by way of variation of existing trusts. The proper way to deal with it, if the intervention of the court were to be sought, would be by an application to the court in its administrative jurisdiction for leave to carry out the existing trusts without variation on the footing that the impossible will not happen.

In the course of argument I suggested to counsel who appeared for the plaintiff that any doubts which he or those he was representing might feel in the matter would be covered if the summons were suitably amended and an order were made that the trustees be at liberty to deal with the settled share of Mrs. Roberts in the residuary estate of the testator on the footing that no child will hereafter be born to Mrs. Roberts. That order I am perfectly willing to make. Counsel for the plaintiff and counsel for all the defendants were willing to acquiesce in such an order, and I will make that order accordingly.

I have thought it right to give this formal judgment because I do not think that an application to vary trusts so as to cover the contingency of a woman of 70 having a child is an appropriate use of the Variation of Trusts Act, 1958. The Act is concerned to vary trusts applicable in events which will or may happen and not to cover impossible contingencies.”

57. *Re Pettifor's Will Trust* was followed in *Re Levy Estate Trust* [2000] CLY 5263 where it was held that the trustees of a settlement were authorised to administer a

settlement on the basis that a woman aged 68 years and 11 months would not have any further children.

58. At the times of the Deeds of Release and the 2021 Deed of Appointment the Defendant was respectively aged 65, 69 and 73 years of age.
59. In addition, the Trust was executed in 1962, and so is governed by the Adoption Act 1958, which provides that a child adopted before but not after the date of disposition qualifies as the adopter's child. That position was changed by the Adoption Act 1976 so that a child adopted before or after the date of disposition qualifies as the adopter's child, but by paragraph 6 of Schedule 2 not in relation to existing instruments. In other words, under domestic law any child adopted by the Defendant after the date the Trust was executed would not qualify as a child for the purposes of the Trust Deed.
60. However, the counter-argument is that the modern position is more complex. Even where (i) a woman has reached menopause, and (ii) a subsequently adopted child would not qualify as a child for the purpose of the trust instrument under domestic law, trustees cannot now safely and properly proceed on the footing that the class is closed. This is because:
 - a. Advances in fertility treatment mean that there is the possibility of a woman who has reached menopause using another woman's eggs to conceive through in vitro fertilization ("*IVF*"). It has been widely reported that women in their 70s have given birth using IVF.
 - b. The Human Rights Act 1998 considerably restricts the extent to which effect is given to the statutory provisions limiting the property rights of adopted children. In *Re Hand's Will Trust* [2017] EWHC 533 (Ch) the testator by his Will made in 1946 left the residue of his estate to his three children in equal shares for life with the remainder in each case to their "children who attain the age of 21 years". The claimants were the adopted children of the testator's second son, who died in 2008. The Will was governed by the Adoption of Children Act 1926, which meant that "children" did not include adopted children (whether adopted before or after the Will was made). It was held that the claimants would succeed in a claim before the ECtHR that the United Kingdom Government had by retaining the discriminatory provisions of the Adoption of Children Act 1926 conferred more limited inheritance rights on adopted children than were conferred on natural children, and in doing so it infringed article 14, in conjunction with article 8, of the Convention for the Protection of Human Rights and Fundamental Freedoms. Further it was possible to read down paragraph 6(1) of Schedule 2 of the Adoption Act 1976 so as to uphold the claimants' rights not to be discriminated against.
61. In the particular circumstances of this case, and for the following reasons, I find that at all material times it was and remains virtually certain that the Defendant would not have any further children (whether by adoption or use of another woman's eggs) such that that the class was and is properly to be treated as closed for all practical purposes:
 - a. The Defendant has four adult children of her own.
 - b. The Defendant's youngest child was born in 1983.

- c. In 1984, the Defendant underwent a hysterectomy so that using another woman's eggs to conceive through IVF became a physical impossibility.
- d. In her witness evidence, the Defendant stated that "I have never for a moment given any thought to adopting a child, and – in case of any relevance, now – would certainly not entertain the idea of adopting a child at the age of 77, even if any relevant authority were bold enough to allow me to do so."
- e. I accept that the Defendant has never given any thought to adopting a child, and even if she were to change her mind it is highly implausible that the lifelong welfare test for adoption of a child could be met by the Defendant when aged in her late 70s.
- f. However, it is not unusual for grandparents to have to assume caring responsibilities for their grandchildren in place of the parents due to unforeseen circumstances.
- g. That said, adoption completely and permanently transfers parental responsibility from the birth parents to the adoptive parents, and severs the legal relationship with the birth parents. Therefore, following the Supreme Court decisions in *Re B* [2013] UKSC 33 and the clarification provided thereafter in *Re B-S (Children)* [2013] EWCA Civ 1146, adoption is the "last resort" and only permissible if "nothing else will do". As a result it is always necessary to explore and attempt alternative less drastic and more proportionate solutions.
- h. A child may be placed formally with a grandparent under a child arrangements order or a special guardianship order, either of which has the effect of conferring parental responsibility upon the grandparent without severing the legal relationship with the birth parents and adversely impacting upon the child's sense of identity.
- i. It is not impossible that the Defendant, due to unforeseen circumstances, might have to assume caring responsibilities for a grandchild under formal arrangements. However, if that necessity did ever arise, it would be inevitable that any such grandchild would be placed with the Defendant under alternative formal arrangements that were less draconian than adoption.

62. In *Figg v. Clarke* [1997] 1 WLR 603 (Ch.) Blackburne J. observed that "if because of her age the beneficiaries in [*Re Pettifor's Will Trust*] were in any event absolutely entitled to the income and capital of the fund, the proper way to deal with the matter would have been to apply to the court for a declaration as to their right of distribution rather than for the exercise by the court of its administrative jurisdiction."

63. Whether by way of authorisation or declaration, I conclude that the then Trustees and the present Trustees were/are entitled to administer the Trust and distribute the Trust assets to the Daughters on the basis that there would/will not be any future children of the Defendant (whether by birth or adoption) such that the class of capital beneficiaries was and remains closed.

Notice to HMRC

64. In *Dalriada Trustees Ltd and others v HMRC* [2023] UKFTT 00214 (TC), the First-Tier Tribunal (Tax Chamber) was addressing precisely the same circumstances as had been addressed in earlier proceedings by Bean J in *Dalriada Trustees Ltd v Faulds and others* [2011] EWHC 3391 (Ch). The First-Tier Tribunal held that:

“[269.(1)] notwithstanding the decision of Bean J in *Faulds*, the Respondents are not barred, by reason of the doctrine of issue estoppel, from adopting the Primary Case Preferred Analysis or the Primary Case Alternative Analysis. That is because they were not party to the proceedings in *Faulds* and did not agree to be bound by the decision (see *Faulds* at paragraph [9]). In addition, as noted in paragraph 65 above, following the decision, no application was made under Rule 19.8A(2)(b) [now numbered Rule 19.13] of the CPR for the decision to bind the Respondents unless they applied under Rule 19.8(b) of the CPR to set aside or vary the order of the High Court. As such, the Respondents are free to advocate those analyses in the present proceedings;”

65. The primary driver for this litigation is that the Trustees, quite understandably, wish to be able to complete the winding-up of the Trust safe in the knowledge that they will not be exposed to any subsequent personal liability in circumstances where there will be no remaining Trust assets from which they can be indemnified.

66. It is not entirely clear to me why the judge at the earlier case management hearing declined to direct that notice of the claim be given to HMRC pursuant to CPR r.19.13. HMRC was nevertheless given an early opportunity but declined to participate in these proceedings. There is strong public interest in the finality of litigation. In the circumstances, I direct that notice of this judgment and consequential order be served upon HMRC, which will be bound by them unless, within 28 days of service, HMRC applies to set aside or vary the judgment/order.

Overall conclusion

67. On a true construction of the 2021 Deed of Appointment the Defendant thereby validly surrendered her life interest in the Trust property referred to therein for the purposes of section 53(1)(c) of the Law of Property Act 1925.

68. I find that the benefit of the loans referred to in the Deeds of Release were assigned by the then Trustees to the Daughters in equity.

69. I authorise and declare that the then Trustees and the present Trustees were/are entitled to administer the Trust and distribute the Trust property to the Daughters on the basis that at all material times:

- a. The Defendant surrendered her life interest.
- b. The Defendant was and remains incapable of bearing any further children.
- c. The Defendant has not adopted any child, and there is no real or practical possibility that the Defendant will adopt any child in the future.
- d. The class of capital beneficiaries was and remains closed.