Neutral Citation Number: [2014] EWHC 2507 (Ch)

Case No: HC13C05520

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane
London EC4A 1NL

Date: 22/07/2014

Before :

THE HON MR JUSTICE HENDERSON

Between :

The Charity Commission for England and Wales	**Claimant**
- and -	
(1) Pesh Framjee	**Defendants**
(2) Bryan Gunn	
(3) Donna Naghshineh	
(4) Keith Colman	
(5) Peter Farley	

Mr Tim Akkouh for the **Claimant**
Ms Charlotte Ford (instructed by **Pinsent Masons LLP**) for the **First Defendant**
Ms Francesca Quint (instructed by **Russell-Cooke LLP**) for the **Fourth Defendant**

Hearing date: 3rd July 2014

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.

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MR JUSTICE HENDERSON

MR JUSTICE HENDERSON :

Introduction

1. In this action, which I heard on 3 July 2014, the Charity Commission for England and Wales ("the Commission") seeks declarations and directions in relation to a fund comprising donations paid by members of the public to an unincorporated charity called the Dove Trust. The claim is brought under section 78 of the Charities Act 2011, following the appointment by the Commission on 6 June 2013 of the first defendant, Mr Pesh Framjee, as interim manager of the Dove Trust pursuant to sections 76(3)(g) and 78(1) of the Act. By virtue of section 78(3), the functions of an interim manager are to be discharged by him under the Commission's supervision, and subsection (5)(b) empowers the Commission to apply to the High Court "for directions in relation to any particular matter arising in connection with the discharge of those functions." The High Court may then give such directions, or make such orders declaring the rights of any persons, as it thinks just: subsection (6).

2. The Dove Trust was established on 16 June 1983 by a declaration of trust (the "Trust Deed") made between the settlor, the late Thomas Arthur Colman, and two individual trustees, one of whom was his son Keith Thomas Colman ("Mr Colman"). The trust was registered as a charity by the Commission on 12 July 1983. Mr Colman remained a trustee from its inception until his voluntary resignation on 3 December 2013. He is the fourth defendant, and is separately represented by solicitors and counsel.

3. The remaining three defendants are either former or present trustees of the Dove Trust. Each of them has filed an acknowledgment of service saying that he or she did not intend to contest the claim. Two of them (Mr Bryan Gunn, the second defendant, and Ms Donna Naghshineh, the third defendant) recently indicated that they would like to have an opportunity to address the court for a few minutes; but although I gave them this opportunity, neither of them in the event took advantage of it. The fifth defendant, Mr Peter Farley, filed a witness statement and expressed his willingness to help the court in any way he could, but made it clear that he did not wish to play any part in the hearing.

4. The representation of the parties at the hearing was as follows. Mr Tim Akkouh appeared for the Commission. Ms Charlotte Ford, instructed by Pinsent Masons LLP, appeared for the interim manager Mr Framjee. Ms Francesca Quint, instructed by Russell-Cooke LLP, appeared for Mr Colman. I am grateful to all of them for their clear and helpful submissions.

Background

5. The Dove Trust was established with an initial trust fund of £50, to which it was envisaged that either the settlor or other persons would make later additions. Clause 2 of the Trust Deed directed the trustees to hold the Trust Fund and its income, without distinction between capital and income, "Upon Trust for such charitable purposes as the Trustees with the consent of the Settlor during his life shall in their discretion from time to time think fit." Clause 3 authorised the trustees themselves to engage in charitable activities and use the Trust Fund to pay the expenses thereof, provided that they should not receive any personal benefit other than the reimbursement of out of pocket expenses. As is common in charitable trusts, clause 5(a) enabled the trustees

to act by a majority. Clause 5(e) was an exoneration clause of a then familiar kind, exempting any trustee from liability for any loss to the property of the trust:

> "...by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any other matter or thing other than the wilful and individual fraud on the part of the Trustee who is sought to be made liable."

The trustees had wide powers of investment, and various other administrative powers to which it is unnecessary to refer.

6. In 2004 the trust established a website for charitable giving called www.charitygiving.co.uk ("the Website"). The purpose of the Website, broadly speaking, was to facilitate charitable giving by members of the public by inviting them to make donations to the Dove Trust for the benefit of other charities or good causes of their choice. The donations would normally be paid by credit or debit card, and the Dove Trust would then augment them by gift aid which it would claim on eligible donations, subject to charging an administration fee of 3.99% on such donations. No administration fee was charged in respect of donations which did not qualify for gift aid, for example because the donor was not an individual or because the donor was not a UK taxpayer. In effect, therefore, the Dove Trust took its fee from the tax reclaimed from HMRC. The Website gave a worked example:

> "Thus, on a £100 donation to a nominated charity which qualified for Gift Aid, the administration fee would be £3.99 from the Gift Aid recovered on the donation (which, on £100 at basic rate, would be £25). The nominated charity would accordingly be entitled to receive £121.01."

7. I will need to return later to examine the statements on the Website which may throw some light on the way in which donations were to be treated and the nature of the legal relationship between donors and the Dove Trust. It is enough at this stage to record that it is common ground:

(a) that donations were made to the Dove Trust acting through its trustees as a principal, and not merely as an agent for the intended ultimate recipients of the gifts;

(b) that gift aid was accordingly claimed by the Dove Trust in it own right on donations made by individuals who had given the necessary gift aid declaration relating to the gift, even if the same gift made directly to the intended ultimate recipient may not have qualified (for example because it was not a charity under English law); and

(c) that the "terms and conditions" section of the website says nothing expressly about the nature of the legal relationship between donors and the Dove Trust.

8. In this last respect, the position differs significantly from that of superficially similar arrangements made by well-known charities such as the Charities Aid Foundation ("CAF"), where the legal relationship with donors is clearly spelt out in the terms and conditions which apply to a donor's account with the charity. The position is also different from that of some other websites which facilitate charitable giving, e.g. www.virginmoneygiving.com and www.justgiving.co.uk, where it is made clear to donors that the operator of the website acts only as an agent for the charity nominated by the donor.

9. From 2004 onwards, the running of the Website was the main activity of the Dove Trust. Nearly all of the donations made via the Website were made by members of the public, often in support of a sponsored charitable activity undertaken by a family member, friend or colleague who set up a fundraising page. Occasionally, an account would be set up by a smaller charity in the interests of accessibility or administrative efficiency. The evidence contains examples of many charities and other good causes, both in the UK and abroad, which have benefited from donations made through the Website. Some of the recipients have been heavily dependent on the continued flow of donations through the Website, others less so. In general, there is no reason at all to doubt that the Website was used in complete good faith by donors as a convenient way to facilitate their charitable giving.

10. Unfortunately, it appears that the administration of the Website by the Dove Trust left a great deal to be desired. I am not concerned in the present proceedings to explore the reasons for this or to apportion blame, and it is only right to record that all allegations of misconduct are strenuously denied by the trustees concerned. The fact remains, however, that a situation developed where the trust regularly found itself obliged to have recourse to incoming donations in a later month in order to fund the payment to ultimate recipients of donations made in a previous month – a process apparently known in some quarters as "teeming and lading", an expression which I confess was unfamiliar to me, although the phenomenon has a generic similarity to the typical method of operation of a pyramid or Ponzi scheme. Furthermore, there were long delays in the filing of the trustees' annual reports and financial statements (even now, the latest filed accounts are for the year ended 5 April 2009); complaints began to be received from members of the public that donations made through the Website had not reached the intended beneficiaries; and concerns were raised that apparently improper loans had been made, without independent advice and without proper procedures being followed, to companies connected with Mr Colman.

11. In these circumstances, on 25 August 2011 the Commission established a statutory inquiry into the Dove Trust pursuant to section 8 of the Charities Act 1993 (now section 46 of the 2011 Act). The grounds of concern were set out in a letter from the Commission to Mr Colman. They included serious failures of governance, serious breaches of trust, and financial mismanagement. The inquiry is still in progress. On 11 July 2012 Mr Colman signed off the trustees' reports and financial statements for the Dove Trust for the years ending 5 April 2007, 2008 and 2009 respectively. The auditors, Price Bailey LLP, qualified their reports for the three years with a statement that they were unable to form an opinion whether they gave a true and fair view of the trust's affairs.

12. On 6 June 2013, Mr Framjee was appointed as interim manager, "to act as receiver and manager in respect of the property and affairs of the charity": section 76(3)(g) of

the 2011 Act. In its statement of reasons for taking action under the section, the Commission set out the matters of which it was then satisfied. They included the making of loans in excess of £300,000 to companies associated with Mr Colman out of "restricted funds", that is to say (in broad terms) funds which as a matter of charity accounting could only be used for specified charitable purposes, and were not at the general disposal of the trustees in exercise of their general charitable objects. As one would expect, donations made through the Website were shown as restricted funds in the Dove Trust's accounts. In addition, the Commission made findings of failure to follow proper decision-making processes, failure to submit accounts on time, and unwillingness to remedy matters when raised by the Commission. As a result, the Commission considered that the Dove Trust's funds continued to be at risk, and action needed to be taken to safeguard them.

13. Mr Framjee's appointment was not the subject of any public announcement, not least because he needed to investigate the position before deciding whether it would be possible to continue the operation of the Website as a going concern. Accordingly, the Website continued to receive donations while Mr Framjee investigated matters. On 27 June 2013 he made an urgent interim report to the Commission, the burden of which was that there was a substantial shortfall between the restricted cash balances available and the amount of associated donations received but not yet paid to the ultimate recipients. Mr Framjee further noted that, if the Dove Trust were to remit funds to the designated charities within 30 days of the end of each month, it would need to use funds received after 5 June 2013 to make payments to charities in respect of donations made before that date. It appeared that the shortfall could be of the order of £1,000,000, and there was an obvious risk that the charity was insolvent. The Commission therefore made an order on 28 June 2013 freezing the Dove Trust's numerous bank accounts, and directing that no further payments were to be made without the Commission's consent.

14. Following further investigations, and further discussions with Mr Framjee, on 12 July 2013 the Commission varied the terms of his appointment so as to make it "to the exclusion of the trustees", as permitted by section 78(4)(b) of the 2011 Act. Later the same day, Mr Framjee decided to shut down the Website and it stopped receiving donations.

15. The final payments of distributions to nominated recipients of donations made via the Website, compendiously referred to in the evidence as "charities and good causes", had been made either on or just before 6 June 2013 when Mr Framjee was appointed as interim manager. These distributions had been previously approved by the trustees and were implemented by them. Thereafter no further distributions were made before the Website was closed on 12 July 2013, but in the meantime the trust had received further donations from members of the public amounting to £466,000 odd, made for the benefit of 955 charities and good causes. The amount of money held in the trust's bank accounts on 6 June, after the final distributions had been made, was £291,932. At that date, about 1,709 identified charities and good causes were the specified beneficiaries of undistributed donations amounting to some £1.14 million, exclusive of Gift Aid. Further amounts totalling an estimated £480,000 were owing in respect of various "special cases", and cases where the ultimate recipients had yet to be specified by the donors.

16. The up-to-date financial position of the Dove Trust is set out by Mr Framjee in a witness statement filed by him on the eve of the hearing. The amount now standing to the credit of the trust's bank accounts is £709,529.45. The total number of specified charities and good causes is 1,812, and they are owed £1,680,231 inclusive of gift aid which has been claimed but not yet paid by HMRC. A breakdown of the donations shows that 527 are of under £50; 915 are of amounts between £50 and £999; 349 are of amounts between £1,000 and £9,999; and 21 are of amounts in excess of £10,000, the largest donation being £99,591. The outstanding amount payable in respect of special cases and donations with unidentified beneficiaries is currently estimated at £459,692, of which £340,429 is referable to the latter category. Other external creditors of the trust total just under £39,000. The substantial fees and costs of Mr Framjee and his team, which already exceed £250,000, have so far been met by the Commission.

Issues

17. Against this background, a number of issues arise which need to be determined before the remaining assets of the Dove Trust can be distributed. The issues fall into two broad categories: general, and specific. The parties sensibly agreed during the hearing that I should only be asked to decide the general issues at this stage. In the light of my answers to them, the parties will then try to reach agreement on how the numerous specific questions should be resolved, and (where directions are needed) whether they should be given by the court or by the Commission.

18. The general issues are in substance these:

(a) Did the arrangements under which the Website was operated give rise to a trust or trusts, and (if so) of what nature?

(b) Did the arrangements give rise to a contract between the donor and the Dove Trust, and (if so) what were its terms?

(c) How should the remaining funds in the Dove Trust which are referable to donations made through the Website for specified charities or good causes be distributed among the recipients nominated by the donors? In particular, should the distribution be made:

(i) on a "first in, first out" basis, in accordance with the rule in *Clayton's Case*;

(ii) on a rateable basis, under which all the unpaid beneficiaries share pari passu; or

(iii) in accordance with a simplified version of the rolling charge, or North American method, whereby two pools of assets would be created depending on whether the donations were made before or after 6 June 2013, and each pool would then be divided pro rata between the recipients entitled to share in it?

19. Before considering the issues, I must first explain in more detail how the Website operated and refer to the main statements on it which may have a bearing on the first two issues.

The Website

20. The homepage of the Website contained the following "Welcome to CharityGiving":

> "CharityGiving is a site run by a UK charity with nearly 30 years experience in the fundraising world. CharityGiving is dedicated to giving you quality information and advice about how you can give to charities and good causes anywhere in the world, online, by telephone or post.
>
> However you are raising money for your favourite charity, our dynamic fundraising system will help you get the most from your hard work and effort, and your supporters will be with you all the way.
>
> We will increase your giving by up to 25% by claiming Gift Aid tax for UK taxpayers..."

21. The "Giving" section of the Website explained the procedure to be followed by individual donors, as follows:

> "For all donations Gift Aid is the simplest and most effective method of tax-efficient giving.
>
> You can make donations to the Dove Trust at any time.
>
> Once you have given us a gift aid declaration, which you can do online, or by post, e-mail or telephone, you can then make donations to the Dove Trust whenever you wish.
>
> Each donation you make is treated separately under the Gift Aid system, and there is no maximum limit to the amount you can give.
>
> All you have to be is a UK taxpayer, paying tax of at least as much as we can reclaim.
>
> We will reclaim the tax on your donations as soon as possible, and inform you when it is available for distribution.
>
> Your gifts can be anonymous if you wish...
>
> You can let the recipient know who you are if you wish – you stay in the control of how you give at all times.

> You can then split your donation (money or shares) to give to as many causes as you wish, whenever you want to.
>
> You can make one-off gifts or regular, with no administration required for the recipients of your gifts.
>
> If you are not a UK taxpayer you can still give through the Dove Trust, and keep your giving administration simple, but we will not be able to add tax to your account."

It was then explained how the system could be used by groups of people with a common cause or purpose, and by companies or other business donors. It was pointed out that if a business was a limited company, it would receive tax relief on its giving, but the Gift Aid rules would not apply to it so the Dove Trust would be unable to supplement the donation.

22. There followed a series of "frequently asked questions" in relation to giving, which clarified a number of points about (for example) fundraising pages, and said that donations were normally paid out at the end of the month following receipt, with the gift aid following a month later because of the time it took to claim and receive it from HMRC.

23. A section headed "Giving – Give Online" then said:

> "Online giving is just like a one-off donation, except that you can do it all online, at your convenience. When you make a donation online, you will be given all the options on the screen. If you want to give your money away immediately, you can choose from a list of charities or enter the charity of your choice, but you must enter the charity's registration number and name so that we can check the charity's credentials before making a gift. All online donations will be added to your account, and the tax information sent to you at the end of the year with your statement."

Four steps to giving online were then set out, the second of which said that gift aid tax, if any, "will then [be] added to your account and is ready for you to give away." There was then an illustration of how a donor could "search for the charity or good cause you would like to make a donation to", and a number of boxes showing the different stages of the donation process. The general impression given, I think it is fair to say, is that the donor was being invited to make a gift to a charity or good cause of his choice, but to do so through the machinery provided by the Dove Trust, and on the footing that the Dove Trust would (where possible) recover gift aid tax and add it to the donation.

24. A further section of the Website, headed "Your Account", showed users how to access information about donations which they had made, manage their fundraising

pages, and so forth. Another section, headed "Our Charges", drew a favourable comparison between the charges made by the Dove Trust and those of three other fundraising sites, and after setting out comparative figures in tabular form said this:

> "After a donor makes a donation, when we claim gift aid tax we make a charge of 3.99% of the net gift (which works out at approximately 3.1% of the gross gift when the tax is added), which is deducted by us from the tax before we send it on to the recipient charity.
>
> So if someone gives £10, we claim £2.50 tax, charge 40p and send on £12.10.
>
> If there is no Gift Aid tax to claim (eg from donations by companies, non-taxpayers, overseas donors etc) then we make no charge at all.
>
> ...
>
> We make no charge at all for setting up a page, and no charge to the charity which benefits."

25. The "Terms and Conditions" section at the end of the Website contained various disclaimers of liability on the part of the Dove Trust, and purported to impose various conditions for use of the Website. The initial disclaimer said that the Dove Trust provided the site on an "as is" basis, and made no representations or warranties of any kind with respect to it or its contents, or "about the accuracy, completeness, or suitability for any purpose of the information and related graphics published on this site." It was also stated that the laws of England governed "this agreement", and that the user consented to the exclusive jurisdiction of the English courts in all disputes arising out of or in connection with the use of the site.

26. I was also shown some examples of emails sent to donors confirming receipt of their payments, or of donations to a fundraising page, but these do not seem to me to add anything of substance to the indications that can be gleaned from the Website itself.

Did the arrangements give rise to a trust?

27. Mr Akkouh presented the arguments in favour of a trust analysis, and Ms Quint the arguments against it. On behalf of Mr Framjee, Ms Ford was content to adopt Mr Akkouh's submissions.

28. Mr Akkouh prefaced his submissions by referring to a number of general principles, none of which I think is controversial. Slightly modified by me, they are as follows:

    a) In order for a trust to be established, it is not necessary for a settlor to use the word "trust" or any other formal language, or to have any knowledge of trust law, so long as the traditional "three certainties" (of words, subject-matter and objects) are satisfied: see generally Lewin on

Trusts (18th edition, 2008) paragraphs 4-01 to 4-18, and cases such as Paul v Constance [1977] 1 WLR 527 (CA).

b) Where money is transferred to a recipient to be paid to a third party, and that money is not intended to be at the free disposal of the recipient, it is likely that a trust will arise: see Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164, at [68] and [73] to [74] per Lord Millett, and the discussion in Lewin of *Quistclose* trusts at paragraphs 8-38 to 8-57.

c) Although not a pre-requisite, if there is a requirement for the money to be held by the recipient in a separate account, that will be a strong pointer in favour of the existence of a trust: see Twinsectra at [95], where Lord Millett referred to "the evidential significance of a requirement that the money should be kept in a separate account", and Snell's Equity (32nd edition, 2010) at paragraphs 22-015 and 25-034.

d) The court is more likely to find that a trust was intended in a charitable context than in a commercial context. So, for example, in R Jones v Attorney General (9 November 1976, unreported) Brightman J said (at p. 3H of the transcript of his judgment):

> "...a person who solicits money for a charity is a trustee of the money for the purpose of handing it to the charity. A member of the public who puts money in the box is a donor of his contribution, not distinguishable in principle from any other donor or settlor of trust funds."

e) Whether the trust is an express trust for the third party, or a *Quistclose* trust in favour of the transferor with a power to apply the money in accordance with the stated purpose, will depend in particular upon whether it was contemplated that there was a real risk that the purpose for which the money was paid might fail: see Lewin at paragraphs 8-52 and 8-55.

29. It is worth quoting in this context what Lord Millett said in Twinsectra at [76]:

> "It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440:
>
> 'It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose.'

> The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties...and it binds third parties as in the *Quistclose* case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust."

30. For her part, Ms Quint referred me to a range of authorities from 1840 onwards which stress the need for the three certainties to be satisfied if a trust is to be held to arise in a private law context, and for an imperative dedication to a specific purpose to be found if a special charitable trust is to be held to arise in a more general charitable context. Cases of the former type include Knight v Knight (1840) 3 Beav 148 and Henry v Hammond [1913] 2 KB 515. Cases of the latter type include In Re Church Army (1906) 75 LJ Ch 467 (CA), which Cross J in Neville Estates Ltd v Madden [1962] Ch 832 at 860 cited as authority for the proposition:

> "...that a donor does not direct a special application of his gift unless he subjects it to a trust which prevents the governing body of the charity from using it for its general purposes. The fact that he expects it to be used – and that it is in fact used – for a special purpose is not enough."

31. Mr Akkouh argued that, on an objective appraisal, the effect of the arrangements for operation of the Website was that every donation in favour of a specified charity or good cause which was accepted by the Dove Trust gave rise to a separate express trust of which the donor was the settlor, the trustees of the Dove Trust were the trustees, and the specified charity or good cause was the beneficiary. If this analysis is correct, it follows that the funds in question were never at the free disposal of the Dove Trust as an accretion to its general funds, but were held on trust to be paid on to the specified recipients (augmented, where possible, by gift aid).

32. The factors relied on by Mr Akkouh in support of this analysis include the references on the Website to the donor's separate "account" with the Dove Trust, and the numerous invitations to the donor to use the Website in order to give money to the charity of his choice. There is nothing in the documentation to suggest that the Dove Trust retained any discretion about how funds were to be allocated, and the funds were shown as "restricted funds" in the accounts. Consistently with this, the standard form of letter sent to the ultimate recipient when distributions were made would refer to payments being made of "what is due to you on the enclosed statement", or words to similar effect. Furthermore, donors and fundraisers who have communicated with the interim manager or his team have been adamant in their view that donations were made on the basis that they were raised for particular purposes and would be paid over to the nominated charities or good causes: see paragraph 21 of the second statement of Amy Spiller, a senior investigator with the Commission who has responsibility for the present case.

33. When I questioned with Mr Akkouh whether it was appropriate to analyse the situation in terms of a multitude of separate express trusts, he said that this presented no conceptual difficulty, and referred me to the words of Brightman J in Jones v Attorney-General, quoted above, which envisaged just such a result when members of the public made donations to a charity collector. Brightman J's comments were made in the days of collecting boxes labelled "Orphans' Appeal", but the underlying principle was the same.

34. Ms Quint argued that the imprecise, and sometimes conflicting, indications to be found on the Website and in associated correspondence fell well short of evidencing an imperative dedication of the donations to a specified purpose. She stressed that the treatment of the donations collectively as a single "restricted fund" by the Dove Trust's auditors merely reflected the standard requirements of charity accounting set out in the Charities SORP, and did not necessarily show that each donation was subject to a special trust for specified charitable purposes. The better analysis, she submitted, was that the gifts were made to the Dove Trust for its general charitable purposes, as is shown by the fact that the Dove Trust claimed gift aid on the eligible donations in its own name, and not on behalf of the ultimate recipients. The request or direction by the donor to make a specified payment to a nominated charity or good cause was necessarily subject to the trustees' being satisfied that the institution or purpose in question was legally charitable: otherwise it would have been a breach of trust for the Dove Trust to pay the money on to a non-charitable recipient.

35. Ms Quint accepted that the expression of the donor's wishes, whether by an explicit request or through an online fundraising page, created an identifiable expectation that the trustees would maximise the donations by obtaining gift aid where appropriate, and would then give effect as far as possible to the donor's wishes when applying the net amount in accordance with the Dove Trust's own charitable objects. But that is not the same, she submits, as recognising the creation of a series of separate special trusts. There was never any legal obligation or accounting requirement on the Dove Trust to ring-fence the donations it received, and they were therefore held by the trustees on the general charitable trusts of the Trust Deed.

36. The situation was essentially similar, submitted Ms Quint, to that of a CAF Charity Account, the terms and conditions of which explicitly state that all assets donated to the account "constitute an irrevocable and outright gift by the Donor to CAF of all right, title and interest in such assets", and that although CAF will take into account the donor's wishes as set out in a giving request, "CAF shall at all times have final discretion as to whether or when to distribute all or part of the Charity Account." The problem with this analogy, however, is that it assumes the very thing which is conspicuously absent in the present case, namely a clear statement in the terms and conditions of the true legal relationship between the parties. In the absence of any such clear statement, I think I would need to be very careful before concluding that the arrangements set up by the Dove Trust were similar to those of the CAF merely because they might look superficially similar to a lay person who had not taken the trouble to read the small print.

37. In the course of the hearing, I suggested to counsel that another way of looking at the matter might be to view the establishment and operation of the Website as giving rise to a sub-trust within the Dove Trust itself. In other words, the "Charity Giving" programme should be seen as a way in which the trustees decided to exercise the

general charitable purposes of the Dove Trust. The attraction of such an analysis, it seems to me, is that it makes due allowance for the important fact that the Dove Trust was an established charitable trust with general objects when the Website was established, and the fact that it was the Dove Trust to which donations were made. Against that background, an analysis which posits the creation of a multitude of separate trusts, each of which has a separate settlor and is wholly divorced from the terms of the Trust Deed, strikes me as unnecessarily complex.

38. On the other hand, it seems equally clear to me that the donations, once received by the Dove Trust, were subject to a trust, and were not merely the subject of contractual obligations. At this point I find the observations of Lord Millett in Twinsectra at [76], quoted in paragraph 29 above, compelling. The trustees came under a fiduciary duty to ensure that each donation would be used only for the purpose specified by the donor, because those were the terms on which the donation had been solicited. Furthermore, the trusts on which the donations were held were in my view clearly separate from the general charitable objects of the Dove Trust. The obligations were, in short, to ensure that the donations were passed on to the nominated recipients, together with gift aid where applicable, and without deduction of any charges apart from 3.99% of the net gift where gift aid could be claimed but not otherwise.

39. The idea that the trustees should retain any general discretion as to the destination of the donations would in my view be wholly contrary to the way in which the scheme was presented to intending donors. The need to ensure no breach of the Dove Trust's own charitable objectives was largely catered for by the requirement that donors should either choose from a list of charities provided by the Dove Trust or provide the name and registration number of any other chosen charity. To the extent that the trustees had any discretion at all, it can in my view only have been in relation to the relatively rare cases where the chosen recipient was not in fact a charity under English law, or where there was good reason to question the credentials of the recipient. It may be that specific directions will be needed in due course to deal with exceptional cases of this nature, but at this stage I am concerned only with the question of principle whether the arrangements gave rise to a trust.

40. Taking all the circumstances into account, I feel no real doubt that the donations were impressed with a trust of the general nature which I have described. Although it may not make much practical difference, I prefer to view that trust as a global sub-trust established by the trustees under the aegis of the Dove Trust itself, and not as an arrangement which gave rise to literally thousands of wholly separate trusts. On any view, however, each donor was a separate settlor in relation to the funds which originated from him, and those funds had to be dealt with by the trustees in a way that ensured they reached their specified destination, subject only to a possible residual discretion where for one reason or another that could not be achieved. In the last resort, therefore, the difference between my preferred analysis and that advanced by Mr Akkouh may involve little more than a difference of emphasis, and a recognition that the donations could properly be kept by the trustees in a single fund, provided its component parts remained clearly identifiable within it. In this regard, I find the analogy of a solicitor's client account to be helpful.

41. I should also make it clear, for the avoidance of doubt, that I am not expressing any view at this stage on the question whether the exoneration clause in the Trust Deed may or may not be available to the trustees or their predecessors, as a matter of trust

law, in relation to the execution of the trusts applicable to the donations. That issue may well lie behind the contentions advanced by Mr Colman, which began by denying that the donations were held on trust at all, and then submitted that they were held on the general terms of the Dove Trust, but not on separate special trusts. Resolution of that issue, however, is for another day, and other proceedings.

Was there a contract?

42. There is no reason in principle why a single transaction cannot give rise to both a trust and a contract. As Lord Wilberforce said in Quistclose Investments v Rolls Razor Ltd [1970] AC 567 at 581G, there is "no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies." See too Twinsectra at [76], [95], [97], and [99]. Thus the existence of a trust in the present case does not preclude the simultaneous existence of a contract between the donor and the trustees of the Dove Trust. The question is whether the arrangements also involved the formation of a contract, and (if so) on what terms.

43. In my view, there can be little doubt that the terms of the Website constituted an offer by the trustees to enter into legal relations with potential donors, which matured into a concluded contract as and when a donor made a payment to the Dove Trust in accordance with the specified machinery, thereby accepting by conduct the offer made on the Website. The service offered by the Dove Trust was one of convenience and value to users of the Website, and it was one for which the Dove Trust made a charge if the donation qualified for gift aid. The terms and conditions section of the Website was framed in legal language, and clearly evinced an intention on the part of the trust to enter into legal relations with donors. The governing law clause even refers to "this agreement". From the point of view of donors, they were parting with their money on the understanding that it would be dealt with in accordance with the specified procedure for the benefit of the nominated charity or good cause; and even if the donation was one which was processed free of charge, the donor would in my judgment reasonably have expected to be entitled to hold the trustees to proper performance of the terms on which the gift had been solicited.

44. Even if it is wrong to regard the Website as containing an offer to potential donors, it was at the very least an invitation to treat, and I am satisfied that a contract would have come into existence at the latest when the trustees by their conduct accepted a donation and took steps to process it.

45. Whatever the precise stage at which the contract was concluded, its terms in my view were that, in return for the donation, the Dove Trust would process it in the way explained on the Website and ensure, so far as reasonably possible, that payment would be made (together with gift aid where available) within a reasonable time to the charity or good cause nominated by the donor. I would not regard these basic obligations as ousted by the ill-focused disclaimers of liability in the terms and conditions, which seem to me primarily directed at technical problems connected with the use of the Website rather than the underlying legal relationship between the parties brought into existence through the medium of the Website.

46. Finally, Mr Akkouh submitted, and I would agree, that the contract purported to confer a benefit on the nominated ultimate recipient, and there is nothing to indicate as a matter of construction that the parties did not intend it to be enforceable by the

ultimate recipient. The contract therefore falls within section 1 of the Contracts (Rights of Third Parties) Act 1999, and is in principle enforceable by the ultimate recipient in accordance with the provisions of the 1999 Act.

How should the remaining funds be distributed?

47. I now come to the question of how the remaining funds in the Dove Trust which represent donations for specified ultimate recipients should be distributed. I should say at the outset that, although the trust operated a large number of bank accounts for various purposes, and although the donations with which I am now concerned were in fact paid into several different accounts, nobody suggests that the funds in each account should be treated separately. I have therefore been asked to consider the question on the assumption that all the payments were made into a single blended fund, which was also the source of all the payments out in favour of nominated charities or good causes.

48. In principle, there are three techniques which could be applied in order to determine how the shortfall in the notional blended fund should be borne by the ultimate recipients, all of whom are equally blameless for the mismanagement of the Dove Trust which has led to the shortfall. The first technique is to apply the rule in *Clayton's Case* (Devaynes v Noble (1816) 1 Mer. 572) whereby payments out of an account are attributed to payments into the account in the order in which the payments in were made, or in other words on a "first in, first out" basis. The second technique is to divide the remaining money between the recipients in proportion to the amounts which they are owed. This solution, where distribution is made on a rateable, or pari passu, basis, has frequently been adopted in recent years where the claimants on the fund are all the victims of a common misfortune. It also has the great advantage of being simple and inexpensive to implement. The third technique, which has been considered in a number of English authorities but never yet applied in practice in this jurisdiction, is to apply the "rolling charge" or "North American" methodology, which combines the pari passu approach with the lowest intermediate balance principle. Its effect is that the position has to be analysed whenever a payment is made out of the fund, and no contributor can be paid more than his rateable share of the lowest intermediate balance while his money remained in the fund.

49. I can deal briefly with the *Clayton's Case* approach, because nobody submits that it should be followed in the present case. Quite apart from the arbitrary way in which it favours the recipients of later donations over the recipients of earlier donations, the evidence establishes that it would be prohibitively expensive to attempt to reconstruct the accounts of the Dove Trust over the last ten years in order to ascertain the precise order in which payments in were matched by payments out. Furthermore, the authorities establish that, although the rule in *Clayton's Case* is probably still the default rule in England and Wales which has to be applied in the absence of anything better, it may be displaced with relative ease in favour of a solution which produces a fairer result: see generally Barlow Clowes International Ltd v Vaughan [1992] 4 All ER 22 (CA) and Russell-Cooke Trust Co v Prentis [2002] EWHC 2227 (Ch), [2003] 2 All ER 478. In the latter case, Lindsay J considered the possible application of *Clayton's Case* in relation to a shortfall in funds held in a solicitor's client account, and said at [55]:

> "It is plain from all three of the judgments in the *Barlow Clowes* case, the third being that of Dillon LJ, that the rule can be displaced by even a slight counterweight. Indeed, in terms of its actual application between beneficiaries who have in any sense met a shared misfortune, it might be more accurate to refer to the exception that is, rather than the rule in, *Clayton's Case*."

50. As for the pari passu approach, it is common ground, and I agree, that it should be applied unless it is displaced by the simplified version of the rolling charge approach propounded by Mr Framjee. The arguments in favour of the latter approach were presented to me by Ms Ford. Before considering them, I will first examine what the Court of Appeal said about the rolling charge method in Barlow Clowes.

51. The leading judgment in Barlow Clowes was delivered by Dillon LJ. The question was how to distribute the remaining assets of the heavily insolvent Gibraltar company, Barlow Clowes International Ltd, among investors in two investment plans which it had promoted. It had been held at first instance that the distribution should be made in accordance with *Clayton's Case*, but the Court of Appeal rejected this approach in favour of a pari passu distribution. Having said at 27g that it was not in doubt that the pari passu basis should be adopted if the rule in *Clayton's Case* was not to be preferred, Dillon LJ continued as follows:

> "We were indeed referred in the course of the argument to a third possible basis of distribution, which was called the 'rolling charge' or 'North American' method. This has been preferred by the Canadian and United States courts to tracing in accordance with *Clayton's Case*, as more equitable: see for instance the decision of the Ontario Court of Appeal in *Re Ontario Securities Commission v Greymac Credit Corp* (1986) 55 OR (2d) 673. This method goes on the basis that where funds of several depositors, or sources, have been blended in one account, each debit to the account, unless unequivocally attributable to the monies of one depositor or source (e.g. as if an investment was purchased for one), should be attributed to all the depositors so as to reduce all their deposits pro rata, instead of being attributed, as under *Clayton's Case*, to the earliest deposits in point of time. The reasoning is that if there is an account which has been fed only with trust monies deposited by a number of individuals, and the account holder misapplies a sum from the account for his own purposes, and that sum is lost, it is fair that the loss should be borne by all the depositors pro rata, rather than that the whole loss should fall first on the depositor who made the earliest deposit in point of time. The complexities of this method would, however, in a case where there are as many depositors as in the present case, and even with the benefits of modern computer technology, be so great and the cost would be so high, that no-one has thought to urge the Court to adopt it, and I would reject it as impracticable in the present case."

52. To similar effect, Woolf LJ said at 35h:

> "The second solution for resolving the claims of the investors among themselves is the rolling charge or North American solution ("North American" because it is the solution adopted or favoured in preference to the rule in *Clayton's Case* in certain decisions of the courts in the United States and Canada because it is regarded as being manifestly fairer). This solution involves treating credits to a bank account made at different times and from different sources as a blend or cocktail with the result that when a withdrawal is made from the account it is treated as a withdrawal in the same proportions as the different interests in the account (here of the investments) bear to each other at the moment before the withdrawal is made. This solution should produce the most just result, but in this case, as counsel accept, it is not a live contender, and while it might just be possible to perform the exercise the costs involved would be out of all proportion even to the sizeable sums which are here involved."

53. The third member of the court, Leggatt LJ, said at 44b:

> "As between beneficiaries to whom money in an account belongs, they should share loss in proportion to their interest in the account immediately before each withdrawal. The fairness of that course is obvious. It is exemplified by the judgment of the Court in *Re Ontario Securities Commission v Greymac Credit Corp* (1986) 55 OR (2d) 673. But if, as here, that calculation is too difficult or expensive, the beneficiaries should in my judgment share rateably."

54. It is clear from these citations that at least two members of the Court of Appeal (Woolf and Leggatt LJJ) regarded the rolling charge method as in principle the one likeliest to produce a fair and just result, although all three judges were agreed that it was impracticable to adopt it in the Barlow Clowes case itself on grounds of complexity and expense. Apart from its currency in North America, the method has also been adopted as the general rule in Jersey: see Re Esteem Settlement [2002] JLR 53 at [111] (where it is referred to by the Royal Court as "the apportionment method"). Although it has never yet been applied in an English case, I am certainly prepared to proceed on the assumption that it would be open to me to adopt the rolling charge method, or some variant of it, if I were satisfied that it provided a fairer result than either *Clayton's Case* or pari passu distribution.

55. What is proposed, however, is not a full application of the rolling charge method. It is agreed on all sides that this would be completely impracticable in respect of all periods before 6 June 2013. The problem is not so much the complexity of the calculations, which I imagine a suitable computer program could easily cope with, but rather the reconstruction of the raw data which would be needed in the absence of any computerised record-keeping by the Dove Trust adequate for this purpose. Thus the proposal, as I have already indicated, is that the available funds should be divided into two pools, one constituting the sum available for distribution after the final run of

payments on 5 or 6 June 2013, and the other constituting all donations received after that date. Each pool, it is submitted, should then be distributed pari passu among those entitled to share in it. Some ultimate recipients may of course be entitled to share in both pools, if donations for their benefit were made both before and after the cut-off date.

56. It can be seen, therefore, that the effect of the proposal is to confine all those recipients who were still owed money on 6 June 2013 to a share of the intermediate balance on that date, and to ring-fence subsequent donations so that they are not "infected" by events which took place before 6 June 2013. The difference in outcome which this methodology would produce when compared with a single pari passu distribution of the entire fund, is considerable. According to Mr Framjee's latest estimates, the likely payment to recipients if the entire fund is divided pari passu would be about 33 pence in the pound, whereas under the two pool approach participants in the first pool would receive about 16 pence, but participants in the second pool about 85 pence in the pound.

57. The main argument advanced by Ms Ford in support of the two pool approach is that the donations received after 6 June 2013 cannot have been affected by the trustees' previous procedures which had allowed the shortfall at that date to develop. It would therefore be unfair, she submitted, to make the subsequent recipients suffer for the consequences of a management regime which had no actual effect on donations made after the cut-off date. The submission gains added force from the fact that Mr Framjee had been appointed as interim manager of the Dove Trust on 6 June 2013, even though there was no public announcement to that effect.

58. Ms Ford further submits that the objections of expense and impracticality which were fatal to adoption of the rolling charge method in Barlow Clowes would not apply to the simplified version of the approach proposed in the present case. She accepted that it would be necessary to make appropriate arrangements for the deduction of relevant expenditure from the two pools, but subject to that the pari passu distribution of each pool would involve little more complexity than pari passu distribution of the entire fund.

59. I should also mention that the Commission has canvassed the views of a number of donors, and about 70 submissions have been filed by non-parties pursuant to directions given by Deputy Master Nurse at a preliminary hearing on 20 March 2014. I have taken those views into account, but in the end they do not take matters much further because, as one would expect, the recipients who favour the two pool approach are in general those who would benefit from it. Many of them do, however, make the simple point which Ms Ford placed at the forefront of her submissions.

60. Despite the initial attraction of the two pool approach, I have come to the conclusion that it should be rejected in favour of a single pari passu distribution of the entire fund. The most important point, to my mind, is the fact that the Website operated in precisely the same way, so far as donors were concerned, both before and after 6 June 2013. There was nothing to alert them to the fact that the Commission had appointed an interim manager, and the reasonable expectations of a donor who made a gift on 7 June would in my judgment have been the same as those of a donor who made a similar gift two days previously. The situation remained essentially unchanged, from the perspective of donors, until the Website was closed down on 12 July 2013.

61. In those circumstances, I think the fairest solution is to regard all the unpaid recipients as participants in a common misfortune brought about by the way in which the donation scheme was managed by the trustees. If the matter is viewed in that way, there is no good reason to differentiate between victims depending on when their donations were made, or to seek to divide up the available pool of assets on the basis of a minute examination of changing beneficial entitlements as and when payments were made in and out of it. There is admittedly an element of rough justice involved for the most recent contributors to the pool, but this seems to me unavoidable once a decision has been taken in favour of pari passu distribution, which itself responds to a very basic human feeling that, when faced by a common misfortune, all those affected by it should bear the burden equally.

62. This brings me on to what I regard as the second main difficulty with the two pools approach, namely that it is only a partial application of the rolling charge method. Indeed, so partial is it that it only applies the lowest intermediate balance principle to the last occasion when payments were made out of the fund. I do not think there can be any principled basis for such an approach. The method must either be applied in its entirety, or not at all, throughout the period when the mixed fund has been operated in objectively similar conditions.

63. In the context of the present case, the effect of the two pool approach is to give more favourable treatment to all those who contributed to the fund after the last payments out of it were made, but to confine all earlier contributors to a pro rata share of the balance left in the fund after the final payments out. If that is right, however, it seems to me that similar favourable treatment should always be given to the latest contributors to any fund which is subject to pari passu distribution; and if one goes that far, one should presumably then try to repeat the exercise going backwards until one reaches a stage where it is impractical to take it any further. I do not consider that such a hybrid methodology should be adopted, because it undermines the principle of equality which lies at the heart of pari passu distribution. In short, I am satisfied that the court must in all normal circumstances make a choice between pari passu distribution on the one hand or the rolling charge method on the other hand, always assuming that it is appropriate to depart from the rule in *Clayton's Case*. There is no room for a half-way house which applies the rolling charge method on a selective basis.

64. For these reasons, I accept the submission of the Commission that the distribution should be made on a pari passu basis.