IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
(Not) Restricted
Suitable for Publication

Case No. CI-18-05240

ANDREA CALLUS — Plaintiff

v

K.B. INVESTMENTS (VIC) PTY LTD (ACN 098 168 239)
(as trustee of the O'Neil Family Trust) — First Defendant

v

MARK O'NEIL — Second Defendant

JUDGE:	HER HONOUR JUDGE MARKS
WHERE HELD:	Melbourne
DATE OF HEARING:	16-18, 22, 24 October, 12 November 2019
DATE OF JUDGMENT:	26 February 2020
CASE MAY BE CITED AS:	Callus v KB Investments
MEDIUM NEUTRAL CITATION:	[2020] VCC 135

REASONS FOR JUDGMENT

TRUSTS – Alleged misappropriation of trust property – wholly discretionary trust – trustee company transferred one of two properties held on trust to the sole director of the trust company – sole director also a specified beneficiary of the trust – guardian wanted the transfer to occur – no misappropriation.

TRUSTS – Action for removal of trustee and appointment of new trustee – wholly discretionary trust – trustee refused to answer questions by one of the beneficiaries as to whether the trust continued to exist and whether a property was held on trust – significant hostility between sole director of the trustee company and one of the beneficiaries – in the interests of beneficiaries that a new trustee be appointed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J D Catlin	Marshalls + Dent + Wilmoth
For the Defendants	Mr P Crofts	McKean Park

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HER HONOUR:

INTRODUCTION

1 This case involves a dispute between a sister and a brother about how a family trust has been managed, and who should be in control of it going forward.

2 On 18 July 1985, the O'Neil Family Trust was set up by a deed of settlement. It is a wholly discretionary trust. The beneficiaries are Kenneth and Beverley O'Neil, their children, and other family members. Ken and Bev's children are Mark O'Neil (the second defendant), Andrea Callus (the plaintiff), Steven Masters and Samantha O'Neil.

3 After the trust was established, Ken transferred the family home at Aintree Avenue, Doncaster East (**Aintree Avenue**), and vacant land at Outlook Drive, Venus Bay (**Venus Bay**) to the first trustee of the trust, Aintree Investments Pty Ltd (**AI**).

4 After the transfer, the family kept using both properties. Ken and Bev brought up their children at the Aintree Avenue property and lived there until they were too old and ill to stay; Samantha still lives there now. For many years various members of the family holidayed at the holiday house they built on the Venus Bay land in the 1990s.

5 On 25 October 2001, sixteen years after the trust was established, K.B. Investments (Vic) Pty Ltd (the first defendant) became the new trustee of the trust. Unlike AI, which had two directors, KB had only one director, Mark. And so, from the time KB became trustee, Mark was in control of the trust and able to make all the decisions about the two properties KB held in trust.

6 AI transferred both properties it held as trustee to KB, to hold as the new trustee. The transfer of Venus Bay from AI to KB was registered on 22 March 2004. Just over two months later, on 2 June 2004, KB transferred Venus Bay to Mark.

7 Although Mark has owned Venus Bay since 2004, Andrea only found out about the transfer to Mark much later. She claims in this proceeding that KB as trustee misappropriated trust property by transferring Venus Bay to Mark. She seeks an order that the title to Venus Bay be vested back in the trust, or to have Mark pay compensation for the value of Venus Bay.

8 Andrea also wants KB removed as trustee. She says that KB has not carried out its duties as trustee properly, and that there is such hostility between Mark and her (and between Mark and Steven) that it is in the interests of the beneficiaries that Mark no longer be the one to decide what happens to the trust property. She wants an independent trustee appointed.

9 For the reasons given below, I am not satisfied that KB misappropriated Venus Bay by transferring it to Mark. I will not make the order sought about Venus Bay.

10 But I am satisfied that a new trustee should be appointed in place of KB, and I will make orders to give effect to that.

EVIDENCE

11 The trial took six days.

12 The evidence given traversed a fifty year period and delved into a complicated and often unhappy family history. Part of Andrea's claim was that Mark had been hostile to her from the time he was a teenager and Andrea a small child, and she gave evidence of her recollections of events when she was little, and then of the ongoing disputes she has had with Mark.

13 Mark disputed much of her version of events.

14 Memories fade, and people inevitably recall historical events and what has been said to and by them differently and from their own perspectives. I have principally formed my views about relevant matters from the copious documents that were

put into evidence – emails and letters exchanged between family members, and lawyers who were called in when they could not agree.

15 As McLelland CJ in Equity observed in *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

> … human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the process of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

16 In the recent English High Court of Justice decision of *Blue v Ashley (No 2)* [2017] EWHC 1928 (Comm), Leggatt J said at [67]:

> … the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollection of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

17 In *Bullhead Pty Ltd v Brickmakers Place & Ors* [2017] VSC 206, Sifris J said at [241] (citing *Lake Cumberline Pty Ltd v Effem Foods Pty Ltd* [1995] FCA 1340 at [493]):

> Where there is conflicting evidence, the court will place 'primary emphasis on the objective factual surrounding material and the inherent commercial probabilities' together with documentation tendered in evidence.'

18 I accept that the witnesses generally were endeavouring to tell the truth about events that had occurred a long time ago but, not surprisingly, the detail and the order of events was not always correctly recollected.

19 Mark gave evidence against interest, in some matters, and was direct. Much of his evidence was supported by the contemporaneous documents. He is a businessman, and clearly had a greater understanding of the legal proceedings he and Andrea had been involved in, in various capacities over the years than she did.

20 Andrea's evidence was often confusing, and she jumped about from topic to topic and appeared to have difficulty answering many questions directly. She was clearly trying to answer honestly and thoughtfully, however. She would pause, and think, before answering. She was very emotional in giving evidence, and some of her recollections from years gone by were clearly not correct, when measured against the letters and emails sent at the time (including by her). I accept that some of her confusion was caused by misunderstanding the legalities of complex court proceedings and trust matters which took place over some years. She is a trained nurse and does not have a background in business. She clearly is, and was, very angry and hurt about some of the decisions made by her parents and Mark after her divorce (and because she felt that they did not support her as she believed they should). She also misunderstood over the years what rights she had under the wholly discretionary family trust. She was upset that her requests (when she was in real financial difficulties after her divorce) to have money from a sale or mortgage of Venus Bay were not acceded to, and upset that she was prevented from continuing as a director of the trustee company for the family trust. At different times she has fallen out, not just with Mark, but with both her parents, and Steven. She has cut off contact with family members at times. She is clearly, and unsurprisingly, affected by trauma she has suffered (in particular the very tragic drowning of her three-year-old daughter in 1993).

21 I am satisfied that Andrea was telling the truth as she perceives it now, but I do not accept her evidence about her relationship with Mark over the years, save where it is supported by contemporaneous documents.

22 The following evidence was given.

23 In 1964, Ken and Bev purchased the house in Aintree Avenue, Doncaster East. Mark was eight and a half years old and Andrea was a baby at the time. All four children were brought up there. The Venus Bay land was bought in the 1970s.

24 In 1985, the O'Neil Family Trust was set up, and subsequently the two properties the subject of this case were transferred to AI to hold on trust. Bev and Ken were AI's first directors. On 8 August 1985, they resigned; and Steven and Andrea were appointed directors instead.

25 Mark was living in Queensland at that stage, having moved there in about 1980. He ran a carpet business there for about ten years, until it was put into voluntary liquidation in 1990.

26 Andrea had married Anthony in 1982. Andrea and Anthony visited Mark in Queensland and stayed with him on holidays there a few times. I am satisfied that at that stage Andrea and Mark were getting on well.

27 In 1991, the O'Neil family decided to build a house at Venus Bay. Some evidence was led – and some objected to – about who contributed what to the construction costs. I am satisfied in general terms, however, that Ken and Bev contributed one share on behalf of themselves and Samantha; Mark contributed one share; Andrea and her then-husband Anthony contributed one share; and Steven contributed one share (his contribution was later repaid to him). Who contributed what to construction costs is not an issue in this case. It is, however, a backdrop to Andrea's reactions over the years to decisions made about Venus Bay. The fact that she had contributed money (and labour) to the house that was built, was part of what fuelled Andrea's sense of entitlement to be paid money representing up to a quarter of the then value of the Venus Bay property.

28 The house on Venus Bay was built to lock-up stage by about 1992. On 10 April 1992, Venus Bay was transferred to AI to hold as trustee on behalf of the family trust.

29 On 1 November 1992, Steven stood down as a director of AI. Steven gave evidence that he stood down because he had moved to Western Australia at that time, after he located his biological parents, and that Ken and Mark told him that

he could not be a director of AI if he lived interstate. He said he felt pressured to resign. Mark – who by then was living in Victoria again – replaced him as director. So, at that stage, Mark and Andrea were the two directors of AI, the then trustee company.

30 Steven gave evidence that, at that time, he also hyphenated his name to include the surname of his biological parents, and that Mark was upset by this, calling him a 'snotty-nosed disgusting bastard'. Mark gave evidence that he might have said that he was 'disappointed' that Steven was changing his name, and in cross-examination, said that it was not far from the truth that he said those words to Steven, and that he had got a 'bit upset' about Steven hyphenating his name. However, both Steven and Mark gave evidence that subsequently Steven arranged with Mark to take his biological parents to meet Mark – and they had a brief but amicable meeting.

31 In 1993, Andrea and Anthony's young daughter tragically drowned in the home pool.

32 Around about 1995 to 1996, Andrea and her family stayed with Mark at his home for seven months while renovating their own house. They often had dinner together – Mark recalled that Andrea used to make a green curry on Wednesday nights because it was his favourite – and they helped him renovate a unit. I am satisfied that at this stage Mark and Andrea (and Mark and Anthony) were getting on well. I do not accept Andrea's evidence that there was always hostility from Mark toward her, dating back to childhood.

33 In 1997, Andrea and Anthony's marriage broke down. Anthony, for some time, went to live with Mark. This case was opened on behalf of Andrea on the basis that Mark's long-term hostility to her was evidenced in part by Mark letting Anthony move in with him, at a time when Andrea and Anthony's marriage was breaking down in a most acrimonious way. However, given the evidence that Anthony and Andrea had visited Mark in Queensland on holiday when Mark lived there, and

that they lived with Mark for some time in the year or two before that (and that clearly Anthony knew Mark well), I am not satisfied that Mark having Anthony to stay for a couple of months after the marriage breakdown shows hostility by Mark towards Andrea. That is particularly the case because Anthony's evidence was that he came home from an overseas trip to be told by Andrea that he was to go and live with Mark for a while, and that Andrea had moved all his belongings there because she wanted some time to think. Mark also said that Anthony moved in at Andrea's initiative. (Whilst Andrea did not agree that Anthony moved out at her request, I prefer Anthony and Mark's evidence on this point).

34 Andrea gave detailed evidence about the acrimonious nature of her separation and divorce from Anthony. Andrea said that she came home at one point in 1997 from Venus Bay, to the family home she and Anthony and their children had shared at Yarrambat to find it had been emptied out. She said she saw Anthony, his mother and his brother there, and the house looked like there had been a robbery. She said: 'He took it all. My husband left only the children's bed. And he slashed my – my bed – it was a waterbed. I had nothing to sleep on'. Anthony, on the other hand, gave evidence that he was told that Andrea had moved out and that he could go and get his grandmother's piano and so on from the house. He went in with his key.

35 Andrea sought an intervention order against Anthony in the Magistrates' Court, but it was contested, and she was unsuccessful. It was put to Anthony during cross-examination in this case that Andrea had accused him of assault at that time. He said that was not proven. He agreed, however, that she made many allegations of violence and psychological abuse. He did not recall allegations of rape, assault, punching or spitting. He said at that time he was only concerned about having access to his children and orders concerning that. He recalled that he could not attend the home as a result of court orders, but said nothing was said to him about the reasons for that by the judge. He did not recall that orders were made that he not be alone in Andrea's presence.

36 Andrea formed a new relationship with Glenn Callus, who eventually became her second husband. He moved into the Yarrambat home that Andrea and Anthony had shared, not long after the marriage breakdown. Anthony said that he and Ken attended the house to view works being done on it, and just as they were about to leave, Glenn emerged from one of the bedrooms. In a scuffle that followed, Ken fell over and Glenn put Anthony in a headlock and marched him out of the house. Mark also gave evidence of an incident where Ken was assaulted by Glenn shortly after Andrea invited Ken over to meet Glenn. He said that this was within a month or so of the separation.

37 Just before what Andrea described as the 'final settlement' between she and Anthony, Andrea went to Venus Bay, taking a key she said she remembered as being tagged 'Venus Bay', but found that it did not work in the lock. She entered through a window and took furniture that she believed was hers from the Venus Bay house. She initially gave evidence that she did not tell her parents or Mark before taking it, but then said that she had spoken to her mother first. Anthony also had a key to Venus Bay. Andrea clearly believed that Mark had changed the locks (and alleged this was another example of his hostility). I am not satisfied of this. I accept his evidence that the locks were not changed at Venus Bay until much later.

38 Andrea and Anthony's divorce settlement took place on 6 June 1998, according to Andrea. In the course of the Family Court proceedings, Andrea swore an affidavit on 12 December 1997, of which one paragraph was admitted into evidence in this proceeding. In it she stated:

> I wish to clarify the situation regarding the real property at Venus Bay, which is mentioned in paragraph G.1 on page 7 of my Financial Statement sworn the 4th of December, 1997. In the said Statement, I have deposed that I have the 50% ownership of that property, with an estimated market value of my share of $25,000.00. That is incorrect. During the marriage, the applicant and I contributed a total of $9,000.00 towards the building of a house on the Venus Bay property, which property is owned by my family. During the marriage, my father contributed some $9,500.00 towards the cost of renovations to the former matrimonial home. *My father has informed me, and I believe, that he will*

> *not require repayment of the said sum of $9,500.00 to him, on the basis that the applicant and I do not seek the repayment of the $9,000.00 which we put into the Venus Bay house nor seek an interest in that property and I understand that the applicant is agreeable to those arrangements*. (italics added)

39 Andrea gave evidence in this proceeding that, in fact, the contribution she and Anthony made towards Venus Bay was $12,000, and that her father did not contribute $9,500 towards the cost of renovations to the matrimonial home. In relation to the statement I have italicised from her 12 December 1997 affidavit above, Andrea said in evidence:

> The statement came under instruction from my solicitor because Anthony was having no contact with the children and, if I agreed to this paragraph, they – Anthony would not be taking my parents to court over the Venus Bay Aintree Investments property. I was under duress by my mother to agree and, also, my ex-husband – his condition was I had to agree to it for him to further have any contact with the children.

40 Counsel for Mark objected to Andrea's evidence about this, submitting Mark had served a Notice to Admit about the italicised words above and no Notice of Dispute was filed in reply. Mark argued that this meant their truth was admitted by Andrea. In my view, the relevant point that emerges from Andrea making this statement is that at that time others would have accepted it as true. That is, as at 12 December 1997, Andrea was stating in the Family Court proceeding that her earlier claim in that proceeding – that she had a 50% ownership of Venus Bay – was incorrect. And that she did not seek to be repaid the $9,000 she at that stage claimed to have put into Venus Bay, *nor did she claim an interest in Venus Bay at all.* Whatever her reasons for including that statement in her affidavit, that is what she communicated to anyone reading that statement. I am satisfied that Ken and Bev, in particular, were aware at that stage that she disclaimed any interest in Venus Bay (given the reasons she gave for making the statement).

41 Andrea gave evidence that from the time of the divorce settlement in about June 1998 (when she became homeless, according to her) she repeatedly asked Mark and Ken to give or loan her money, referring to the Venus Bay property. She also gave evidence she was not requesting it as a loan or a gift but 'as my share'.

Initially she asked for about $40,000 (this later increased to $50,000 because she thought Venus Bay was worth more by then).

42 Mark gave evidence that Andrea told him that she did not have enough money to buy a house in Melbourne and asked if she could borrow against one of the trust properties to get a loan. He said he would talk to Ken about it. Mark gave evidence that: 'She had apparently talked to Dad about it as well, and we both agreed that it wasn't a good idea'. Andrea was very upset not to be given or lent the money she sought.

43 A document was put into evidence called 'Constitution of Aintree Investments Pty Ltd (as adopted 18 December 1998)'. It allows under clause 9 for AI to have just one director. Andrea gave evidence that she was given this document some years after 1998 by Bev, when Bev found it in Ken's study. Andrea said she did not sign or adopt it. Despite its title, there is no evidence to show that this Constitution was in fact adopted by AI. Instead, it appears that Ken, in his role as appointer of the trust, took other steps to change who was in control of the trustee company of the family trust.

44 Andrea was taken in cross-examination to a letter of 19 January 1999, sent by Ken's solicitors, Mulcahy, Mendelson and Round. Mulcahy, Mendelson and Round (who had drafted the deed of settlement for the trust) enclosed with the 19 January 1999 letter, a copy of a letter Andrea had sent to them. They wrote:

> It appears that she [Andrea] will not adopt the new Constitution; unless she receives the appropriate legal advice...
>
> We now recommend that, as Appointor, you exercise your rights to remove Aintree Investments Pty Ltd as Trustee of the O'Neil Family Settlement. We also would be pleased to receive the name and address of the new Trustee. We will then prepare the appropriate documentation removing Aintree Investments Pty Ltd and appointing the new Trustee …

45 It appears that Ken did not take steps at that time to remove AI as trustee, as Mulcahy, Mendelson and Round had recommended in the 19 January 1999 letter. Instead, he asked Andrea to resign as a director of AI. She refused.

46 Andrea consulted Wainwright Ryan, solicitors. On 27 June 2000, Wainwright Ryan wrote to Ken and Bev, saying they were acting on behalf of Andrea. They wrote:

> The company is a two director company, the second Director being Mr Mark O'Neil.
>
> The company is the registered proprietor of two properties, one at 1 Aintree Avenue, Doncaster East, the other at Outlook Drive, Venus Bay. Both properties are clear titled.
>
> We are instructed that you have claimed that the company is a trustee company for the O'Neil family pursuant to a discretionary family trust.
>
> We shall be pleased if you would let us have a copy of the discretionary trust as soon as possible.
>
> We are also instructed that you have requested that our client resign her position as director of Aintree Investments Pty Ltd. We have no idea why you have requested this of our client and wish that you would detail your reasons to us as soon as possible, Our client has no intention at this stage of resigning her position.
>
> Our client intends to spend the school holidays with her children at Outlook Drive, which we believe to be a holiday place where the family holidays.

47 On 28 August 2001, R H Ballard & Co (who appear at that stage to have been acting for Ken, and for Mark) wrote to Ken:

> We refer to previous correspondence and discussions.
>
> We apologise for the delay in completing documentation, but our Mr. Frederick has been inundated by property and trust work, over the last twelve (12) months.
>
> We confirm that the situation with regard to the O'Neil Family Settlement is that, your daughter Andrea Callus, one of the Directors of the Corporate Trustee : Aintree Investments Pty Ltd. refuses to resign.
>
> We note that your son Mark has instructed this firm to incorporate a new Company and that you, as Appointor of the O'Neil Family Settlement in accordance with the Powers given by Clause 15 of the Trust Deed, will upon the incorporation of K.B Investments Pty Ltd. remove Aintree Investments Pty Ltd. as Trustee of the Trust and appoint K.B. Investments Pty Ltd. Trustee of the Trust in its place.

48 Andrea said she moved to Queensland with Glenn in September 2001 (she said 'when the twin towers went down').

49 She said she had told her parents before moving. Mark said she had not. He said that Andrea disappeared 'out of the State' one day and could not be found anywhere, 'then apparently, she reared her head in Queensland two or three days later'.

50 Mark's evidence was that because of 'what happened in the marriage break-up and how she was treating the family', Ken wanted Andrea removed from her role as a director of the trustee company of the family trust. He said that 'Mum and dad were very disappointed, um, and so was I'. He said that Ken asked him to follow-up and make sure that removing Andrea from her directorship was all done properly through the lawyers, and that he did that. He said that he thought her disappearance to Queensland was within a week or two of her being told she could not use the trust properties as collateral to get a loan.

51 On 21 September 2001, Ken, as appointer of the trust, signed a notice to remove AI as trustee of the trust. The notice was addressed to AI. Andrea said that she received it around that day, but there may have been some delay. The notice was to take effect from 21 October 2001. (I note that there is no dispute that Ken was competent then, although Ken's comprehension later deteriorated).

52 On 25 October 2001, KB was appointed the new trustee of the O'Neil Family Trust as and from 21 October 2001. The deed of appointment set out that the appointor of the trust (Ken) was desirous of removing the initial trustee and that the guardian (also Ken) had consented to the removal and appointment. The document was executed by Ken, and by Mark on behalf of KB.

53 On 8 October 2003, Wainwright Ryan sent a letter of advice to Andrea. It referred to the deed of appointment of the new trustee dated 25 October 2001. The letter went on to say that Ken's solicitors had requested Andrea (as a director of AI) sign a transfer of land to transfer the two properties held by AI (the former trustee) to the new trustee (KB). The letter referred to clause 5 of the O'Neil Family Trust

deed, which provided that the appointor had the power to remove trustees and appoint new ones. It continued:

> The appointment of a new Trustee shall be valid provided that … no beneficiary shall be entitled to act or shall act as a Trustee.
>
> We therefore advise that given that the proposed Trustee is a company, such appointment is valid as it complies with the requirements contained in the Deed of Settlement. As such, should you continue to refuse to transfer the properties over to the name of the new Trustee your father will be able to apply to the court for an order requesting that you do so.
>
> …
>
> As you will no longer be director of the new Trustee Company, your control over the Trust assets is removed.
>
> We note from the correspondence you have provided to us, that there is the outstanding issue of a debt involving the sum of $12,000 that your father owes you in relation to improvements made to the Venus Bay property. We advise that we may be able to negotiate with your father's solicitors to recover this debt by agreeing to consent to the transfer of the property without resorting to costly legal proceedings.

54 Andrea finally consented to the transfer of the properties, signing the transfer and dating it 30 November 2003. Mark signed too. He resigned as a director of AI on 9 December 2003, leaving Andrea as its sole director.

55 By this stage, Andrea was clearly very upset with both her parents and Mark. She said she wanted nothing to do with them. According to Andrea, Glenn then wrote a letter on her behalf (apparently directed to her solicitors Wainwright Ryan). She sent a copy of the letter to her parents and Mark:

> Thank you for your advice and time in reading the documents. As per our telephone call a few weeks ago I will take up your offer of writing a letter
>
> Update, I have received a resignation of Directorship from Mark O'Neil. I will know[1] be the sole director. I want this company for myself but still will go ahead with the transfer, as I believe this resignation is the commencement then to proceed against me as a sole director. Aintree Investments I wish to retain as a company as I plan to use this. If this possible once all assets are transferred. Something that I gain from this fiasco
>
> Please make clear these points:

[1] The various letters and emails sent by Andrea and Glenn have been replicated in this judgment, without altering or noting minor typographical errors.

> 1. That Mark O'Neil is put on notice that if he fails to act in the spirit of the trust I will take action along with other beneficiaries
>
> 2. I reserve my right of claim on the monies that I contributed to the building of the house at 29 Outlook drive Venus Bay.
> A copy of minutes of annual returns of company K.B Investments is forwarded to my power of attorney Glenn David Callus …
>
> Under no circumstances will there be any direct contact with myself between Mark O'Neil, Kenneth Sydney O'Neil the appointee and Beverly Ann O'Neil (former directors of Aintree Investments. Their active campaign and actions to alienate me from the family have been continuous and relentless, where all matters have been handed over to my power of attorney.
>
> Any mail, gifts for my children will be returned. … Their actions including their treatment of my son … whom has resided in Melbourne for the past 16 month has been contemptuous and without justification. The splitting of my children to only invite my children of my former marriage to attend their home and exclude my son from my current marriage has shown that the family values pertained to this unit has no functioning benefit to my family. The division and upheld values of biological versus adoptive children exhibited by the O'Neil has caused distress to the direct family members and their respective biological parents whom their children were entrusted too.
>
> I am well aware there is no contact or involvement with my brother Steven from Mark Neil or Ken Neil to further align them as abusive of the family trust.
>
> I have dated the papers as of the 3rd of November, 10 years to the date of the death of my daughter Jessica, their granddaughter whom Venus Bay property was built during her time on earth. Since the death of my daughter and the separation of my former abuse husband has been non-existent support or concern for my welfare.
>
> I have sent the transfer papers in the mail.

56 On 18 December 2003, Wainwright Ryan wrote on behalf of Andrea to solicitors Holt & MacDonald. They enclosed the signed transfer of land, and they put KB, as the new trustee, on notice that it must continue to act in the best interests of the beneficiaries. The letter noted that Andrea reserved her rights with respect to the $12,000 contribution she made to the Venus Bay property 'and that such matter will be dealt with if and when the property is sold'. The letter went on:

> Our client requests that all future contact between herself and Mr Mark O'Neil, Mr. Kenneth Sydney O'Neil and Ms Beverley Ann O'Neil cease. She has instructed us to advise that any mail, or gifts addressed to her children will be returned.
>
> …

> Our client further requests that copies of the minutes of meetings of the new Trustee Company be forwarded to her in accordance with the above direction.

57 That same day, Wainwright Ryan wrote to Andrea advising that they had now forwarded the transfer she had executed. They continued:

> We confirm our previous advise [sic] that, as you are now no longer director of the Trustee Company of the O'Neil Family Settlement you no longer have discretionary control over the assets of the Trust. Whilst the Trustee is obliged to act in the best interests of all the beneficiaries, he/she still has discretionary powers under the Trust Deed to apply the trust property for the needs of the beneficiaries, as they feel appropriate.

58 On 22 March 2004, the transfer of Venus Bay from AI to KB was registered.

59 Two weeks later, on 5 April 2004, Glenn wrote a letter to solicitors, Holt & MacDonald. The heading was 'The O'Neil Family Settlement'. He wrote saying he was acting as power of attorney for his wife, Andrea, who had instructed him to write this letter 'with regard to your clients'. Glenn wrote:

> Your clients appear to have difficulty understanding the basics of the correspondence dated the 18th of December 2003. In accordance with your wishes to gain the results that your clients sought, certain conditions were brought into existence to facilitate agreements and to try and satiate your clients' avarice. The former representatives of my wife, Wainwright Ryan sent the correspondence previously mentioned.

60 The letter referred to the request for no further contact between Andrea on the one hand, and Mark, Ken and Bev on the other. It said that it appeared that this had been forgotten or ignored. The letter went on to state that the minutes of the meetings of the new trustee company had not been forwarded to Andrea as requested. It then said:

> Also, my wife wishes to know the status of the new trust and whether any changes have been made to the outcome of the beneficiaries of the Trust. As you are aware, the Directors of the company that over saw the Trust, have a direct responsibility to maintain all aspects of the Trust and the Beneficiaries of the Trust. Any decisions or actions undertaken by a person in this position which causes a negative effect on the trust shall be liable and responsible to the beneficiaries of the trust, including legal action to recoup any losses to the beneficiaries themselves. One could even discern that your clients' actions thus far may fall into this area and have adversely affected three out of the four beneficiaries by making the Trust entirely applicable to Mark O'Neil only.

61 Less than two months later, on 2 June 2004, KB transferred the property at Venus Bay to Mark. The consideration noted on the transfer of land was 'Entitled in Equity'.

62 When asked about the transfer, Mark gave evidence that Ken had approached him and that he had discussed this transfer with Ken several times before doing it, starting three to four months before the transfer. He said he did not recall if he had discussed the transfer with Bev before it occurred but, once it had taken place, the home insurance bills continued to go to her address and she told him 'what do you want to do about this? … I haven't received a rates notice so I'm assuming you're already getting those'.

63 In about 2007, Mark started to go to Thailand regularly, and to spend a lot of time there. (One of the issues Andrea raised in this case was an allegation that he is now resident there, and that is another reason to remove KB as trustee of the trust).

64 In 2012, Ken's health deteriorated. He had vascular problems and a stroke, and required greater assistance. By this stage, Andrea was back in contact with her parents, and she did a great deal to look after them in their final years.

65 Bev and Ken executed new wills and powers of attorney in 2013. Mark said he came back from Thailand and was asked to read a will and sign a power of attorney. He said that his parents told him that Andrea had instigated trying to get them to change their wills.

66 Mark said that his parents made him the first financial and medical power of attorney for Ken, and that Andrea was first financial and medical power of attorney for Bev. Each was the other's alternate.

67 In his will of 28 August 2013, Ken left everything to Bev. In the event that she predeceased him, he left his unit at Thornbury to Samantha, and otherwise effectively divided his estate into four equal shares for his children (with

Samantha's share to be invested). He appointed Bev as executrix and trustee of his estate but, if she were to predecease him or be unwilling to act, then he appointed Mark and Andrea in those roles. I am satisfied from this, that at that stage the hostility between Mark and Andrea was not obvious at least to Ken and Bev, given the roles they appointed them to.

68 By April 2014 Ken required a nursing home placement, and in May 2015, Ken was rushed to hospital with cardiac issues. Andrea and Mark had a series of correspondence about how best to look after him and Bev, who was also unwell by then.

69 On 25 May 2015, Andrea wrote to Mark (in what I consider to be warm tones, in contrast to her evidence that there was constant hostility between Mark and her over these years):

> Dear Bro
>
> Been trying to contact you even tried thai number using cambodia prefix...cant ring
>
> Just need to talk to you to give up date with Drs and mums condition and Sam...beeen ringing them at leaset once or twice a day
>
> love sis.

70 Around this time, Andrea, Bev and Mark had two meetings. The first meeting was at Tunstall Square shopping centre in Doncaster East. They discussed arrangements for Ken's nursing home admission and how it was to be funded. Mark's evidence was that by this stage, Andrea had been to Ken's banks and gained knowledge of his finances using her power of attorney. He gave evidence that Andrea advised there was $80,000 to $85,000 in fixed deposits, and $8,000 to $12,000 in cash, held in his father's name. Andrea could not recall, in giving evidence, what the available funds were. She said that when it was first suggested that Venus Bay be sold, Mark got angry and was going to leave the room, but their mother got him to come back, and the discussion then moved on to who held the title to the property in Thornbury. Mark did not give evidence of any

discussion about Venus Bay and was not cross-examined about such a suggestion having been made. (Andrea also gave evidence that at some stage – it was not clear when – 'it was refused to be sold…at the request of my mother').

71 Andrea and others then went to see possible nursing homes.

72 There was then a second family meeting shortly afterwards, at the Doncaster Hotel. There, Andrea asked for $50,000. Her evidence was that she said that she was entitled to $50,000 as her 'share' of Venus Bay. Mark said that she told him that Ken's costs at the nursing home would be $1,000 per week 'subject to RAD', and that the financial position could be assessed in a year. Andrea's evidence was that she said the expenses for Ken would be $5,000 per month after the costs of the immediate respite care had been covered.

73 Mark gave evidence that, a few weeks later, Andrea emailed him asking if he had considered giving her $50,000, and he said, 'I won't be giving you $50,000'. He said that at that stage 'Andrea went from wanting to be best friends to wanting to be worst enemies'.

74 Around this time, Andrea wrote a detailed letter to her mother. (Her later email, sent on 22 July 2015, indicates she was not happy Bev had shown this 'private' letter to Mark and Samantha). Amongst other things, the letter makes it clear that by then, at least, she knew that Mark owned Venus Bay (she referred to him having been 'gifted' it). She also makes clear that she considered it 'ethically unforgiveable' that Ken and Mark had moved Venus Bay from the family trust, and she refers to 'both' Ken and Bev as being instrumental in transferring Venus Bay to Mark in 2003. The letter included the following:

- Mum in November 2013 I discuss with you at visit in Brisbane ongoing issues with Venus Bay and you deny any knowing and say discuss with your father.
- I visit three time in 2014 many issues were openly discussed between you both including my exclusion from family for years , the Venus Bay issue is never clearly answered by dad …

- Dad requests of me to take him to visit places of his past and to disperse ashs of Nana. I am the only one that these hard emotional issues are placed upon yet I am not worthy of equal and fair treatment. I have never stolen, taken or financially compromised you or dad in my life. Mark has been financially supported over many business and house ventures in the past and gifted Venus Bay which surmount to theft of my jointly own property.

- Venus bay was to be put into the Family Trust but dad and Mark moved it...ethically unforgivable

- Venus Bay has never been enjoyed by my children and denied access. It has been only in its formation and building because of my hard earnt monies. You use it as your escape. Sam wants nothing to do with it...It's the noose around our necks

- I don't have millions of dollars or live the life of being rich like Mark. Steven has been debt free for years and Sam is supported to live at home to be a companion with the capacity to live on her own but she has chosen to live at home knowing her future will be financially rewarded.

- I request my SHARE back of the property I invested in only under the conditions of equal share and that you both were instrumental in transferring the property to Mark in 2003 is beyond betrayal.

- I was promised in April that the monies that I put in would be returned and when I asked dad he said I will speak with your brother. Not knowing what this meant and I did my own research.

- Dads issues with me was emotional for me moving to QLD , yet Mark is supported to live in another country

- It was your and dads actions that prevented me from affording a house to live in Melbourne and my lack of family support forced me to find somewhere I could afford.

- Dad and marks legal action to force to resign as a director nearly cost me my family home in 2003.

- After I was forced to agree under intervention by my on;y supportive sibling dad and Mark together was instrumental to move Venus bay into his name clear title.

…

My last visit was tortuous … dad made a great deal about remaining his favourite … when I asked how favourites are treated he says … "he gives then money" …

I showed him the deed of transfer to Mark in 2003 to Venus Bay … all the properties he own. He lives a life of luxury at my emotional and physical wellbeing and I am to feel loved and wanted?????

…

> You have the means and choice to either sell Venus bay but your son Mark Controls it … your doing.
>
> …
>
> Don't you walk and betray me again. …
>
> So I don't care where my share comes from anymore. All 4 children were to be equal in the investment that I put my hard earned money into all those years ago. Conservatively the house will probably be worth only $200,000, so the amount I seek is $50,000. Either get it from Mark, get it from your saving or get it in a share from my grandmother's home.
>
> …
>
> When I pleaded with you … you fobbed me off and said ring your brother.
> …
>
> You can demand of Mark whilst he is here in Australia of my return of monies for stolen investment.
>
> …
>
> Mark O'Neil early retires with support of gifted properties in former trust being Venus Bay in 2003 and moves to Thailand....

75 On 22 July 2015 at 2:20pm, Andrea wrote to Mark commenting that their mother's health was not good, and that she would like to speak to him about that. It went on:

> I have sought legal advice through MMR and also Parkes Lawyers and now have advice about K and B Investments and Castle Pty.
>
> I know alot more about how Aintree was desolved.
>
> Legal and Finacial advice is that the Unit at Thornbury has to be sold. Dad is aware , I have had many discussions with him.
>
> …
>
> Mum has requested me to send you this information….Everything I have had to disclose and deal with has been to give mum peace of mind anout her finacial well being, Sam to be cared for and that both their ends of life are with peace.
>
> …
>
> I know the adoption thing for you has not been easy. I know your lack of relationship with dad has scarred you as you confided in me.
>
> I was not happy that my private letter discussing all the ONeil family dysfunction was shown to you. It was addressed to mum not to anyone else.
>
> …

One question I have to know from you....where is the title to Venus Bay and do you believe you hold all finacial interests in it and its yours.

Do you hold the title to Aintree Avenue as no lawyers have it in their safe custody.

Its time you make your position clear as I have challenged you and asked the direct question. There is not much time now dad is in permanent care.

So I will continue to look after mum and dad, their health , emotional and finacial well being to ensure they get the best care til they die.

I care about Sam and her future but she has this perception that you are her protector and told me that you have asked her to side with you. Presently medical persons are applying for guardianship over her by the state as they deem to to have no capacity to care for herself. She gets lost in this current system …

She will be in a huge mess when mum dies, she is not really coping with her being ill. I know I will have to step in and intervene. …

I would like to know I have your support. ...this is unknown to me. Legally it has no bearing, you choose to live in Thailand therefore cannot be guardian over Sam where I can as the only compented relative. Legal legislation in this area is my expertise. Nursing for 30 years.

76 At 1:27pm on 27 July 2015, Mark wrote back:

Dear Andrea, I refer to your last email where you agreed to keep me informed but now you say that the only reason you are emailing me is at mums request and that worries me.

You refer to your powers as EPOA but I have not been informed in writing of that and request that you send me a copy of the signed document ASAP that gives you that position. At this point my understanding is that I am the appointed agent for dad.

In reference to the others matters referred to in your last email I don't believe that selling the unit is necessary at this point and maybe a consideration should be given to giving it to Sam now and in return Sam can pay rent to mum, as per dad's request in his will.

I have no paperwork at all in my possession in regards to KB investments as I told you previously and have no knowledge of castle pty.

I don't believe at this stage that Sam even needs any assessment for guardianship and would not be happy if that idea went any further.

…

At this moment has anyone in the medical department assessed dad as being unable to make medical or financial decisions?

I appreciate all you are doing for our parents

Awaiting your reply

Mark

77 Notably, Mark did not answer Andrea's question here about whether he believed he held 'all financial interests' in Venus Bay and whether it was his. He also did not directly answer her question about where the titles to Venus Bay or Aintree Avenue were. He said that he had 'no paperwork at all' in his possession in regards to KB.

78 Later that day, at 11:48pm, Andrea wrote back at some length. She pointed out that Mark had not answered her question in relation to whom he thought owned Venus Bay. The email included the following:

> The situation and option of Sam paying rent to dad…she refused. She does not want to live in the unit and wants to care for mum. She has taken the option with mums support via centerlink to be her live in carer. This suits Sam for many reasons and is documented with medical professions of her inability to function on her own.
>
> EPOA powers came into effect on the date formally when I arrived and took medical and financial control of accounts with mum as I acted and documented to the appropriate lawyers I was acting in my severally capacity as you were out of the country. This was with the direction of mum and dad and with view that you were making your way to Australasia. THEY HAD A BACK UP CLAUSE OF 7 DAYS THAT YOU FAILED TO REACH THEN IT REVERTED TO ME. You should have your own signed legal copy in your procession as I always had mine on standby should it be needed.
>
> …
>
> They do not hold K and B investments title or Venus Bay title , thus I request from you do you have them in your safe keeping which you say you don't
>
> you have not answered my question in relation to who you thinks owns Venus Bay
>
> …
>
> 1 Aintree Ave is a trust and Venus Bay can be challenged how it got to your name. I have ALL the documents and sought legal advice.
>
> Don't challenge me on Samantha's capacity as its only limited legally by my support and when mums care becomes too much I will be taking on her care to the end of life. I have had many paraprofessional meetings with mums GPs over the years concerned about the care inpact on them all in the home Sam will live at Aintree Ave til either parent dies. Unfortunately every case scenario was planned that dad would die and leave everything to mum, then it be used to cater for Sam. It is their duty of care they are legally required to do as her only living relatives are

Living in Thailand, one she dislikes as she thinks I am the favourite of dads and I clean too much and request her to do more care for mum than sitting on her fat arse. Steven in WA. …

79 Four days later, on 1 August 2015, Andrea wrote again to Mark:

Mum will be ringing you.

You are trying to alienate Samantha and causing her emotional stress. Mum is furious.
You chose not to attend the nursing home on the Wednesday you and I that spoke with you for 3 hours in the vicinity of my husband and friend. We both know that date.
I left on the wednesday night and you sold dads car to your friend when he legally had no capacity to sign.
I have known his diagnosis of dementia and lack of capacity for the last 6 months.

…

By all means come back from Thailand and live in your unit in middleborough rd and provide physical care, emotional care and spend time with both of our parents.

…

I know dads wishes and I am doing everything to protect I his bed at the nursing home which is providing the best care for him which is mum, sams and my wish. You have visited him there and were also happy with the level of accommodation and care.

…

I provided you with this information in our joint meeting with mum at the coffee shop on the tuesday. You were only worried about the money dad had in his accounts. You didn't want to look or read any material or discuss the situation of age care costings or how this would be met.

The disolving of Aintree Investments and creation of K and B Investments and the removal of Venus Bay from the trust will investigated.

...

Your threats I will enact MMR as my legal represenative along with Ballard Lawyers which is now Parkes as they have accepted my position as EPOA. You will have to find another lawyer.

Any challenge to my position will be covered by mum and dads money.

So my advice to you brother is meet with me in melbourne next week at the family home where I will be staying to sort out your unfounded allegations and threats. I will show you any documnets you wish to see to see you that Iam acting in the best interests of firstly mum, then Sams needs. I have legal documents from Drs treating of his dementia and lack of capacity. When dad and mum dies that is the only time we may inherit anything that is not my driving force. ...

> I am so angry and betrayed by you yet again, but your actions in early 2000 has been to only secure your finacial future with the intent of controlling Sams assesst and have Steven and I on the outer. …
>
> So meet with me mum and dad and I on Saturday next week, …
>
> Bring your documents and records of changing and signing Aintree Investments to KAnd B Investments . Also proof you havent borrowed any monies against Aintree Ave or Venus Bay … One government question is that has their been any change to trusts companaies since they went on a pension back in1997. You are required by law as joint EPOA to provide the answers to many questions.

80 On 22 July 2015, Andrea wrote to Mark saying that she had legal and financial advice that Ken's Thornbury property needed to be sold. Mark told her that she could not sell Thornbury, because it was what Samantha was going to inherit under their father's will.

81 Andrea said that she responded, in part, that no one inherits until people die. She gave evidence that she considered that it should be sold, as did the lawyers acting for her parents at the time.

82 On 8 August 2015, Andrea sold the Thornbury property – exercising the power of attorney Ken had given her – without telling Mark. Mark said he 'couldn't believe it' when he found out, and he came back to Australia 'but it was all too late' and there was nothing he could do about it.

83 Settlement of the sale of Thornbury occurred on 8 October 2015. It was sold for $480,000, and of that Andrea received $463,206.46 into her account (she gave evidence this was the account she held as power of attorney). She then transferred $410,980.65 of that to a joint account she held with Glenn six days later, on 14 October 2015.

84 Mark contacted his lawyer to try and organise to have Andrea's powers under the power of attorney removed, and commenced VCAT proceedings. (Mark also took steps later, as administrator of his father's estate, to have that money repaid into his father's account. Andrea sought to justify taking the money, in an affidavit in the estate proceeding. Amongst other things she said that she had to have her

home renovated to care for her parents, and that she and the friend who had helped her should be paid $243,840 for caring for them. Her renovations included a car port. Orders were eventually agreed that $185,000 be repaid.)

85 In March 2016, Andrea tried to gain control of the trust in a novel way. She arranged for documents to be prepared by solicitors, which had the effect of naming her as trustee – based on a recited history which ignored the fact that KB was the trustee. This was despite the fact that she had previously been told KB had been appointed trustee, and that she had previously expressed her annoyance with her parents and Mark over the fact that Mark had effective control of the trust.

86 The first document was called the 'Aintree Family Trust: Removal and Appointment of Trustee Deed'. It recorded that it was made in March 2016. It referred to the 'Aintree Family Trust' established on 18 July 1985. The document stated that the 'Aintree trustee' was, at all relevant times between its establishment and 18 July 2005, the sole continuing and only trustee of the Aintree Family Trust. It continued that on 18 July 2005, the Aintree trustee was deregistered as a company and that since then 'no replacement alternative or substitute trustee had been appointed'. It said that Andrea was the new trustee of the trust.

87 On 22 March 2016, Andrea signed a 'Confirming Deed', primarily directed at correcting perceived errors in the 'Removal and Appointment of Trustee Deed'. The Confirming Deed provided that a form of trust 'known as the O'Neil Family Trust' had been established by trust deed on 18 July 1985, that AI was at that stage the 'Aintree trustee', and that AI was the only trustee of the trust when AI was struck off in 2005. It said that by the 'Removal and Appointment of Trustee Deed of 16 March 2016', Andrea was appointed as trustee of the O'Neil Family Trust. It said that in the earlier Deed, 'the O'Neil Family Trust was for referencing purposes, referred to as the Aintree Family Trust'.

88 Clauses G and H of the Confirming Deed provide:

> G. In the period between 18th July 2005 and 16th March 2016, there was no effective or controlling trustee of the O'Neil Family Trust in place from an ongoing functional perspective although, as a matter of law, the trust continued to itself function and had not been terminated or extinguished.
>
> H. During this same period of time, the Trustee and the Appointor, together, or on occasion attended to various functional, ongoing or recurrent matters concerning or affecting the O'Neil Family Trust. They did so in the belief, understanding and assumed knowledge that the Aintree Trustee was still functional and operational and attending, in a trustee capacity, to the ongoing trust management requirement of the O'Neil Family Trust.

89 Having created these deeds, Andrea then put signs up at Aintree Avenue which said that it was under her control, and emptied it of furniture.

90 Mark was asked when he first learnt of the two deeds Andrea had prepared. He said:

> … I can tell you exactly when I found out, and that was the day I turned up at the house to find that they had Dad sitting in a chair and they were emptying all the furniture out of Aintree Avenue.

91 Mark gave evidence that Andrea had taken Ken out of his aged care home, Bupa Templestowe, for the day and that Ken was 'almost in a comatose state' when he saw him.

92 Andrea gave evidence that she did this on her father's instructions. Asked if she tried to evict Samantha, she said 'my father did'. However, she had referred to Ken as having dementia by then in an earlier email she had written. I am satisfied that these were her decisions, made to try to gain control of Aintree Avenue.

93 Mark called his lawyer. He said that after the police came, 'we changed the locks' and put Samantha back in the house.

94 Three weeks later, on 15 April 2016, Bev died.

95 On 19 April 2016, Mark issued proceedings in VCAT seeking Andrea's power of attorney in relation to Ken be revoked. Andrea gave evidence that it was her view that by this stage, 'Mark wanted me out of his life'.

96 On 11 June 2016, Mark prepared a tenancy agreement regarding Aintree Avenue. It was between Samantha and 'Mark O'Neil ATF O'Neil F/S'. It provided for $50 rent per month commencing 11 June 2016 as a periodic tenancy. It was signed by Samantha and Mark.

97 Samantha obtained an intervention order against Andrea, 'under Mark's direction', according to Andrea.

98 A medical report filed with VCAT on 12 June 2016 indicated that Kev had vascular dementia, and was 'presently in the care of Bupa Templestowe'.

99 On 2 August 2016, VCAT made orders by consent, revoking Andrea's power of attorney, and appointing Anthony Burke as Ken's administrator.

100 Between 1 and 19 September 2016, Andrea repaid $75,095 of the Thornbury proceeds into Burke and Associates' trust account.

101 A few days later, on 23 September 2016 Andrea discharged Ken from the Melbourne hospital where he was then receiving treatment, and took him to her home in Queensland. Subsequently, she looked after him there, with a friend's assistance. Steven went to stay and helped for a while too.

102 Andrea initially gave evidence that she moved Ken with Mark's knowledge. However, she then agreed that she did not tell Mark until afterwards. He said he only found out she had moved their father interstate some days after it occurred – and that it was someone at Bupa (Ken's aged care home) who told him, not Andrea. I accept Mark's evidence about how he found out, and that he was told very little about his father's condition.

103 Mark said that after his father was moved interstate, he was able to speak to a Dr John, who was looking after Ken, about his father's condition. He said that Dr John told him that his father had a condition that meant 'Dad would probably live another 12 or 18 months and this wouldn't necessarily kill him straight away'.

104 Mark went back to VCAT seeking orders to have Ken brought back to Victoria.

105 On 14 October 2016, a hearing at VCAT hearing took place. Andrea appeared at the hearing by telephone and was represented by counsel who was present at the hearing. She gave evidence that on 5 October 2016, Ken had been diagnosed with stage 4 multiple myeloma. Mark's evidence was that he knew of the diagnosis but was not aware of how serious it was at the time of the hearing.

106 In the course of that VCAT hearing, arrangements were being made for Ken to be returned to Melbourne if he obtained medical clearance and if he had two support persons accompanying him. Although Andrea said in evidence in this proceeding that as a registered nurse she had concerns about Ken's health at that time, there is no evidence she expressed those concerns at the VCAT hearing. Travel logistics were to be managed through lawyers.

107 VCAT orders were made – with Andrea's consent – that Mark be appointed Ken's limited guardian with powers and duties to make decisions concerning accommodation and to make decisions concerning access to services.

108 A handwritten document called 'Interim Care Management Principles' was signed – including by counsel representing Andrea at the VCAT hearing – and attached to the order. It stated:

> 1. No travel by Represented Person [Ken] from Brisbane to Melbourne without medical clearance and two support persons.
>
> 2. Medical clearance to be sought from Dr Nick John, if available, but otherwise from a specialist medical practitioner of like expertise.
>
> 3. Andrea Callus to facilitate travel and interim medical care and assessment.

4. MPOA and Interested Party [Andrea] to keep extended family informed of travel, medical clearance and treatment regime.

5. 24 hours notice of travel.

6. Travel logistics through lawyers.

109 Andrea was cross-examined about this:

> Arrangements were being made, weren't they Andrea, for his return to Melbourne?--- No. They weren't, 'cause he was too ill.
>
> Isn't the position that arrangements were being made for his return to Melbourne, but on a condition that he obtained medical clearance? --- If he obtained a medical, ah, um, clearance. Yes.
>
> So there was no suggestion on 14 October 2016 that your father was about to die, was there? -- I had my concerns as a registered nurse.

110 Just five days after that hearing, on 19 October 2016, Ken died at Andrea's home in Queensland.

111 Mark gave evidence that he had only known his father was dying 'within 24 hours' beforehand. Mark said Andrea rang him on 19 October, and he was told that he could speak to Ken and that the mobile would be put to Ken's ear.

112 When Ken died, Steven telephoned Mark. He said it was within 15 minutes of Ken's death. Mark called Steven and Andrea murderers. He then called the police.

113 Steven gave evidence about the phone call with Mark, and the arrival of the police at Andrea's house shortly afterwards:

> I and Andrea were both referred to as murderers, um, and that we were responsible for Ken's death and that he would be calling the police. Um, he did that… within 15 or 20 minutes, ah, two police officers showed up at Andrea's front door, um, because they had an obligation or duty to investigate the claim, um, and it, ah, it was quite an unbelievable scene.

114 There was some dispute about how quickly the police came. Nothing turns on how quickly the police arrived. It was, at the latest, within a few hours of Ken's death. The important point – given the questions of hostility this case brings up –

is that within a brief time after Ken's death, Mark called the police and accused Andrea and Steven of murdering his (and their) father.

115 On 29 March 2017, Anthony Burke (who had been appointed by VCAT as Ken's administrator) sought orders for the return of the money Andrea had taken from the sale of the Thornbury property. He made the application in the Supreme Court under s15 of the *Administration and Probate Act 1958*.

116 On 15 May 2017, orders were made in those proceedings. Andrea is the 'second defendant' referred to in them. It was noted in Other Matters, in those orders, that:

> H. The second defendant held an enduring power of attorney for the deceased and during the time she was the deceased's attorney, she sold the deceased's property at Unit 2, 67 Flinders Street, Thornbury, in the State of Victoria and paid the net sale proceeds into a joint bank account in the name of herself and her husband, Glenn Callus.
>
> I. The first defendant alleges that the second defendant has used more than $200,000 of the net proceeds of sale of the deceased's property for her own benefit or for the benefit of herself and her husband.
>
> 1. The second defendant and Glenn Callus consent to a declaration that the net proceeds of sale of the deceased's property at Unit 2, 67 Flinders Street, Thornbury in the State of Victoria is held on trust for the deceased's estate.

117 A coronial investigation of Ken's death took place. The findings handed down on 5 June 2017 indicate that after 'family members' reported a concern about Ken's death, the coroner decided to investigate. Mark was the only family member from whom there was evidence showing that he was concerned. Even if any other family member was concerned, the relevant point here, given the hostility issues, is that Mark was.

118 The findings stated, relevantly:

> Kenneth Sydney O'Neil was aged 84. He died in his home whilst in the care of his daughter Angela [sic] Callus, a registered nurse.
>
> Mr O'Neil had a diagnosis of multiple myeloma and was receiving palliative care in accordance with his wishes and as supervised by his GP, Dr Margaret Cotter. Dr Cotter signed a Cause of Death Certificate stating Kenneth died from multiple myeloma complicated by aspiration pneumonia and urosepsis.

> After his death concerns were raised by other family members that Mr O'Neil was heavily medicated by an unregistered nurse (Andrea Callus) without proper prescriptions being provided, particularly morphine, which have resulted in his death.
>
> Further, it was suggested that Mr O'Neil was in hospital less than two weeks previously and his discharge report is at odds with a person who died shortly thereafter.
>
> Mr O'Neil's body had already been collected by a funeral director and an embalming process had commenced.
>
> The concerns of other family members were referred to the Coroners Court. After an initial review a decision was made to further investigate and orders were made for an autopsy to take place. [CB 943]
>
> …
>
> This would support that she [Andrea] was registered.
>
> A letter dated 13 October 2016 and addressed to 'To Whom It May Concern' states Dr Cotter had discussed Mr O'Neil's condition with him, that he understood the disease process and that palliative management was also discussed with him.
>
> …
>
> Statement by Dr Margaret Cotter
>
> …
>
> Mr O'Neil was clinically very unwell and stated that he did not wish to stay in a hospital and wanted to be cared for at home by his daughter, and that he did not want any futile treatment. He also wished to have any nursing care provided by his daughter …
>
> Autopsy Examination
>
> …
>
> The cause of death was considered to be due to multi-organ failure secondary to multiple myeloma.
>
> Conclusion
>
> …
>
> The cause of death was due to natural causes …

119 On 8 November 2017, a without prejudice letter was sent by Mark's solicitor to Andrea's solicitor. Mark refused to waive privilege. Mark was cross-examined as to why he would not waive privilege. There was no application made that the letter fell within any of the exceptions to privilege being claimed, and the letter was not

produced to the Court. In the circumstances, I draw no conclusions about a letter I have not seen.

120 On 17 November 2017, orders were made in the Supreme Court by McMillan J in the proceedings relating to Ken's estate that by 20 November 2017 Andrea file and serve a statement detailing her assertions concerning what his estate assets comprised.

121 On 20 November 2017 Andrea filed a statement in those proceedings, which was headed 'Statement regarding alleged Misappropriation of Trust Properties'. It raised the question of whether the alleged misappropriation of Aintree Avenue should be part of the court's investigation in that proceeding. The statement recorded the following:

> 16. KB is the Plaintiff's private company. A recent title search for 1 Aintree stipulates that the registered proprietor is KB, presumably as Trustee for the family trust. Despite requests to the solicitors for the Plaintiff to confirm whether 1 Aintree still forms part of the family trust, no response has been received. Rather, the solicitor has stated that the property is owned by KB. Interestingly, the Transfer of Land signed on 30 November 2003 regarding 1 Aintree is stamped '*Not Chargeable Pursuant to 33-3*'. Section 33(3) of the Duties Act 2000 states:
>
> (3) No duty is chargeable under this Chapter in respect of a transfer of dutiable property to a person other than a special trustee if the Commissioner is satisfied that the transfer is made solely—
>
> (a) because of the retirement of a trustee or the appointment of a new trustee, or other change in trustees; and
>
> (b) in order to vest the property in the trustees for the time being entitled to hold it.
>
> 17. On that basis it appears that 1 Aintree should still form part of the family trust.
>
> 18. On 30 June 2004, Mark as the sole Director and Secretary of KB transfers the Venus Bay property which forms part of the family trust to himself in his personal capacity for the same consideration: "*entitled in equity*".
>
> …
>
> 27. A proper objective to the current proceeding – clawing back funds into the deceased's estate for distribution to the four beneficiaries under the deceased's Will to the parties and their two siblings – is

> unavailable. Legal costs and the limited assets of the Defendant leave nothing rendering the proceeding pointless except as an exercise by a brother to ruin a hated sister. …

122 Importantly, at paragraph 31 the following was stated:

> The Plaintiff was invited to settle all matters (trust and estate) but has refused stating there is no trust. This has surprised the Defendant. She knew the Plaintiff controlled 1 Aintree but thought he did so as in his capacity as Director of the Trustee, KB.

123 On 20 November 2017, at 1:37pm, Andrea's solicitor, Sandy Rizkallah, of Marshalls + Dent + Wilmoth Lawyers, wrote to Mark's solicitor under the heading 'RE: Estate of Kenneth O'Neil':

> We are about to file and serve our material in accordance with Her Honour's Orders particularly in relation to the trust issues.
>
> Please confirm in open correspondence whether or not 1 Aintree Avenue, Doncaster East forms part of the O'Neil Family Settlement (family trust).

124 At 2:36pm, Sandy Rizkallah wrote again:

> Further to our email correspondence below, so as to avoid us wasting the Court's time, please provide your response before 3.30pm today.

125 At 3:22pm, Leigh Brown of McKean Park Lawyers wrote back:

> As your client is well aware, 1 Aintree Avenue, Doncaster East, is owned by KB Investments Pty Ltd.
>
> We therefore fail to see the relevance of that issue for the purposes of the Trial and our client otherwise reserves his rights in relation thereto.

126 At 3:31pm, Sandy Rizkallah responded:

> As you are aware, the issue of the family trust has been raised many times by our client. In order to assist the Court as per both our obligations under the Civil Procedure Act, please confirm whether the property is held by K.B Investments as Trustee for the O'Neil Family Settlement Trust.

127 On 21 November 2017, a detailed letter was written by Sandy Rizkallah to Leigh Brown referring to the email correspondence of that day:

> We are concerned that in circumstances where the Court needs to make a decision in relation to the nature of the estate of the late Kenneth Sydney O'Neil and in particular to our client's application relating to the family trust, you are not being open and frank pursuant to your

> obligations under the *Civil Procedure Act* (Vic) 2010, and given the role of the question in a pending decision by the Court on an adjournment, your obligations to the Court. Despite repeated requests with regards to the family trust, you have skirted around the issue and have chosen not to disclose basic fundamental information. In closed correspondence you have stated one thing and in open correspondence you state another. We respectfully suggest you consider the ethics of this. We will certainly be raising it with the Court should you attempt to obtain a punitive costs order for any vacation of the hearing date.
>
> Your client has been made aware of the family trust issues and has had plenty of opportunity to put on affidavit material and has failed to do so. The issue of the family trust has been fully canvassed in the affidavit of the Defendant affirmed on 14 June 2017. To suggest that this is new material and are therefore surprised and unprepared for the trial is simply contradicted by the evidence.

128 The letter then made an offer of settlement, in full satisfaction of all claims by Andrea against the estate of Ken O'Neil, but said that Andrea did not forego any rights as against the family trust. It said she was open to negotiating an outcome where her interest in the family trust was offset against an agreed amount owing to the estate.

129 On 30 November 2017, Andrea's solicitors wrote again:

> Pursuant to the Orders of 24 November 2017, your client is to file and serve a response to our client's statement detailing her assertions concerning the assets including the Trust. On 20 November 2017 you were provided with the various materials relating to the family trust. Despite repeated requests for clarity on the matter, your client has yet to confirm whether 1 Aintree Avenue, Doncaster is held within the family trust or not. Whilst we note that KB Investments is the registered proprietor, on our instructions, KB Investments is simply the Trustee of the Trust and holds the Doncaster property on trust. Please confirm.
>
> Please also provide us with the relevant documentation about the status of the property. We consider that our client is entitled to this information under ss. 22, 23 and 26 of the *Civil Procedure Act*.

130 In fact, no orders had been made requiring the filing of a response to Andrea's statement. However, the email correctly stated that 'your client has yet to confirm whether 1 Aintree Avenue, Doncaster is held within the family trust or not'.

131 On 18 April 2018, when the trial commenced in the estate proceeding, Justice Riordan commented that the matter involving the trust was a free-standing dispute that had nothing to do with Ken's estate. The matter was then adjourned over for

a mediation, and a settlement was reached. The terms of settlement entered into that day provided that Andrea would pay Mark $185,000, in his capacity as administrator of the estate. Asked in evidence if she agreed that this had happened, Andrea prevaricated, then said that Glenn paid it.

132 On 22 August 2018, Andrea's solicitors wrote to McKean Park again seeking information:

> You will recall that during the course of the Supreme Court matter (Proceeding No. S CI 2017 01164) our client provided various materials relating to the Family Trust. Despite repeated requests for clarity on the matter, your client has yet to confirm whether 1 Aintree Avenue, Doncaster is held within the Family Trust or not. Whilst we note that KB Investments is the registered proprietor on title, on our instructions, KB Investments is simply the Trustee of the Trust and the property is held within the family trust.
>
> Further, we are instructed that the Venus Bay property was also transferred out of the Family Trust into your client's name solely and he is currently the registered proprietor on title.
>
> We seek your client's confirmation as to:
>
> (a) whether the Doncaster property is held by KB Investments as Trustee for the O'Neil Family Settlement Trust;
>
> (b) if it has been transferred out of the trust how and for what consideration;
>
> (c) how Venus Bay was transferred out of the trust and for what consideration; and
>
> (d) whether the trust still exists.

133 On 29 August 2018 McKean Park responded:

> Dear Madam
>
> RE: ALLEGED O'NEIL FAMILY SETTLEMENT TRUST
>
> We refer to your letter dated 22 August 2018.
>
> Your client is well aware of our client's position in respect to the matters raised on her behalf in your correspondence.
>
> Accordingly, our client does not intend upon incurring costs of entering into any further discussions or correspondence with your client in relation to same.

134 On 15 April 2019, Steven and Mark emailed each other. The correspondence between them was, in my view, friendly. Steven said that he had been excluded from everything involving Andrea after the estate litigation. Mark said that it was 'all about money and control with her', and if it was up to her 'Sam would be on the streets'. Steven referred to his non-existent relationship with Andrea. He said that when he refused to contribute $50,000 to her legal fees, she disowned him. Included in his correspondence with Mark was Steven's comment about Andrea: 'She is no longer my sister'.

135 On 23 September 2019, Andrea commenced this proceeding. KB (and Mark) admitted (finally) in the defence they filed that KB held Aintree Avenue on trust for the family trust. There is no evidence that Mark or KB had told Andrea this before the proceeding was issued.

WAS TRUST PROPERTY MISAPPROPRIATED?

136 Andrea claims that KB, as trustee of the O'Neil Family Trust, misappropriated trust property when it transferred Venus Bay to Mark in 2004.

137 In order for Andrea to succeed on this claim, she needs to establish, on the balance of probabilities, that in transferring Venus Bay to Mark, KB (with Mark making its decisions) failed to give real and genuine consideration to the matter entrusted to its discretion as trustee, or that it failed to act honestly and in good faith. I am not satisfied of any of these matters. I am not satisfied that KB misappropriated trust property by transferring Venus Bay to Mark.

Was there real and genuine consideration?

138 The authorities establish that it is necessary for a trustee to exercise its discretion in good faith, upon real and genuine consideration and for a proper purpose.

139 As stated by Habersberger J in *Rosenberg v Fifteenth Eestin Nominees Pty Ltd* [2007] VSC 101 at [181] (citing *Karger v Paul* [1984] VR 161 in the first sentence quoted below):

> The exercise by the trustee of a broad and unfettered discretion will not be examined or reviewed by the Court if the discretion is exercised by the trustee in good faith, upon real and genuine consideration, and in accordance with the purposes for which the discretion is conferred and not for some ulterior purpose. It is, however, open to the Court to examine the evidence to decide whether there has been a failure by the trustee to exercise the discretion in good faith, upon genuine consideration and in accordance with the appropriate purpose.

140 In *Re Marsella; Marsella v Wareham (No. 2)* [2019] VSC 65 (***Marsella***) McMillan J considered this issue in circumstances where the first defendant (and the second defendant, her newly appointed co-trustee) resolved as trustee to pay the first defendant (as one of the beneficiaries) the whole benefit of a fund held in a self-managed superannuation trust.

141 I set out below part of her Honour's analysis of relevant legal principles (citations omitted):

> 34 In accepting office, a trustee becomes bound by certain duties, including becoming familiar with the terms of the trust instrument, and exercising her or his powers in the best interests of the beneficiaries.
>
> *Good faith and real and genuine consideration*
>
> 35 While a trust instrument may afford the trustee absolute and unfettered discretion, such discretion must be exercised in 'good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred'. The following summary of the approach was quoted by the High Court in *Attorney-General v Breckler*:
>
> > [w]here a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously, wantonly, irresponsibly, mischievously or irrelevantly to any sensible expectation of the settlor, or without giving a real or genuine consideration to the exercise of the discretion. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable or unwise. Where a discretion is expressed to be absolute it may be that bad faith needs to be shown. The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness.
>
> 36 In considering the question of whether the trustee acted in good faith, upon real and genuine consideration and in accordance with the purpose for which the power was conferred, a court may look at the inquiries the trustee made, the information they had, and their reasons for, and manner of, exercising their discretion. This

includes consideration of any gaps or errors in the information. However, it is not the Court's role to determine the weight that the trustee should have attributed to relevant matters in exercising its discretion, or to decide how the power should have been exercised, or the wisdom of its exercise'.

37 In this context a lack of good faith, or mala fides, encompasses more than fraud. It may include the taking account of irrelevant considerations and a refusal to take into account relevant considerations. While unreasonableness of itself is not a ground for interference by the Court, it may form evidence that a discretion was never really exercised at all, or evidence of mala fides. Moreover, a 'grotesquely unreasonable result may be evidence of a miscarriage of duty'. 'Mere carelessness or honest blundering' will not amount to mala fides.

38 The trustee must inform her or himself of the matters relevant to the decision. If consideration is not properly informed, it is not genuine'. There must be the exercise of an 'active' discretion. Byrne J set out a number of applicable principles in *Sinclair v Moss*, including:

> The Court will interfere where a clear case is made out that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees' discretion:
>
> "If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene."

39 In *Finch v Telstra Super Pty Ltd*, the High Court said that '[t]he duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type'. Of note, however, those comments were made in the context of entitlement to Total and Permanent Invalidity benefits — a strict trust under which the duty of the trustee was to form an opinion. The circumstances were viewed as distinct from those in which discretion is exercised in respect of 'competing claims of potential candidates for bounty'.

Purpose for which the power is conferred

40 The purpose for which the power is conferred on the trustee must be inferred from the trust deed. Whether a trustee exercised a power for a proper purpose is a question of fact to be decided on the evidence. A trustee is not bound to disclose her or his reasons in reaching a particular decision, and a negative inference cannot be drawn from the non-disclosure by a trustee of the reasons for his or her decision. Where a power is exercised for a combination of proper and improper purposes, the improper purpose will constitute a fraud on the power if it is an 'operative or actuating purpose — one without which it cannot be said that the appointment would have been made'.

…

47 Contrary to the defendants' submissions, the power of distribution provided in clause 51.4(b) is a special power, in accordance with which the trustee must distribute the proceeds of the fund to one or more individuals who fall within the class of objects identified. The fact that the first defendant falls within the class of objects did not negate her duty to exercise the power in good faith, upon real and genuine consideration, and for the purposes for which the power was conferred.

48 It has been suggested that the donee of a fiduciary power ought to be even more vigilant that she has discharged her duties when exercising the power in her own favour. Here, it appears the first defendant took the opposite approach. Based upon the correspondence of Hill Legal, the first defendant appears to have approached the exercise of discretion under misapprehensions as to the terms of the fund deed, the duties she owed to the plaintiff and the relevance of the plaintiff's role as legal personal representative of the estate of the deceased.

…

51 While it is not the Court's role to consider the fairness or reasonableness of the outcome of the exercise of discretion and usurp the role of the trustee, the outcome itself, particularly where the result is 'grotesquely unreasonable', may form evidence that the discretion was never properly exercised, or was exercised in bad faith. In the circumstances of this proceeding, the outcome of the defendants' exercise of discretion, that is, the distribution of the entire proceeds of the fund to the first defendant, supports the conclusion that there was a lack of real and genuine consideration.

52 Relevant factors for consideration include, but are not necessarily limited to, the intention of the deceased as the settlor of the fund, the relationship between the deceased and the dependant, and the financial circumstances and needs of the dependants. …

…

56 On balance, the inference to be drawn from the evidence is that the first defendant acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependants. This conclusion is supported by the outcome of the exercise of discretion.

57 The ill-informed arbitrariness with which the first defendant approached her duties also amounts to bad faith. The dismissive tenor of the correspondence from Hill Legal, the willingness to proceed with the appointment and distribution in the context of uncertainties and significant conflict and the lack of specialist advice despite the recommendation of Mr Hayes, all support the conclusions that her conduct was beyond 'mere carelessness' or 'honest blundering'. This conclusion is reached without reference to the lack of evidence deposed by the defendants personally.

…

66 Several points must be made in this regard. First, the appointment of the second defendant did little to alleviate the conflict between the trustee of the fund and plaintiff. As submitted by the defendants, it can be accepted that in appointing the first defendant as trustee, the fund was established by the deceased as tolerating a degree of conflict between the first defendant's duties as trustee and interest as a dependant. In this regard, the rule against conflicts of duty and interest may have been modified. However, the first defendant's position of conflict extended beyond that created by her appointment as trustee, to the significant personal acrimony between her and the plaintiff. This conflict appears to have commenced upon the deceased's death, and as such, it would not have been considered by the deceased at the time of establishing the fund. In that context, there was a heightened risk that the first defendant would not bring a rationale mind to her duties as trustee.

…

73 The defendants failed to exercise the discretion afforded to them under clause 51.4(b) by not giving real and genuine consideration to the interests of the defendants. In distributing the proceeds of the fund to the first defendant they arbitrarily dealt with the entirety of the property subject to the trust. They did so in the context of substantial personal conflict with the plaintiff. In all the circumstances it is appropriate for the defendants to be removed as trustees of the fund.

142 The facts in *Marsella* are significantly different to here. It involved a superannuation fund. The correspondence in evidence relating to what had occurred demonstrated important uncertainties, conflicts, and errors which her Honour found that the first defendant had at the time she exercised her discretion to distribute the entire trust fund to herself. McMillan J decided that the evidence in that case established that the first defendant 'was not in a position to give real and genuine consideration to the interests of the dependants', and that bad faith was shown because of her 'ill-informed arbitrariness' and the 'dismissive tenor' of her correspondence and willingness to proceed 'in the context of uncertainties and significant conflict and the lack of specialist advice', which all supported her Honour's conclusion this went 'beyond mere carelessness or honest blundering'.

143 I am not satisfied that the evidence in the present case establishes that KB was not in a position to give real and genuine consideration to the interests of the

beneficiaries, or that it did not give real and genuine consideration of those interests.

144 KB did not give any reasons for its decision to transfer Venus Bay to Mark. It was not required to. Whilst clause 16 of the trust deed provided that a corporate trustee 'may' evidence the exercise of a discretion or power conferred on it by a 'memorandum of a resolution of its Directors in writing signed by a majority of those Directors', it does not require such a memorandum to be provided. In any event, no record was provided of this decision – and had there had been a document disclosing the reasons, clause 19 of the trust deed provides that the trustee is not bound to disclose any document disclosing any reasons for any particular exercise of the trustee's power.

145 KB was entitled to transfer Venus Bay to Mark under the terms of the trust deed, which under clause 7 provides that the trustee may in its absolute discretion transfer any property 'to any beneficiary for his own use and benefit in such manner as it shall think fit'. Mark was one of the beneficiaries of the trust – in fact, one of the four specified beneficiaries. (The other specified beneficiaries were Andrea, Steven and Samantha. The general beneficiaries also included Ken, Bev and other family members).

146 Clause 10 of the trust deed provides:

> Subject always to any express provision to the contrary herein contained every discretion vested in the Trustee shall be absolute and uncontrolled and every power vested in it shall be exercisable in its absolute and uncontrolled discretion without any obligation to consider competing claims of beneficiaries-
>
> PROVIDED THAT notwithstanding anything contained in this Deed-
>
> (a) the Trustee may before exercising any discretion or power vested in it or making any determination hereunder consult the wishes of the Guardian (if any);
>
> (b) where a Guardian is in office he may at any time by instrument in writing declare that thenceforth the Trustee shall not be obliged to obtain his consent or that of any future Guardian as a condition precedent to the validity of the exercise of any power or powers.

147 In other words, not only was KB vested with 'absolute and uncontrolled' discretion in exercising its powers under the trust deed, but it specifically did not have any obligation 'to consider competing claims of beneficiaries'. (Whilst initially Andrea claimed in this case that her needs had not been properly considered by KB in making the decision to transfer, this claim was not pursued by the end of trial).

148 On the other hand, clause 10 provides that the trustee *may* consult the guardian's wishes before making a determination. That suggests the guardian's wishes are of some significance: at the least, the guardian is specifically noted as someone who may be consulted by the trustee. It is often a settlor's wishes that are of some significance, but this trust deed nominates the guardian to that position.

149 According to both Andrea and Steven, Ken had made the decisions about the trust which they then carried out when they were directors of the then trustee, AI. Steven gave evidence that Ken told the family what had to be done in relation to the trust, when he and Andrea were directors of AI. Andrea's evidence was that she was given company documents by her parents frequently, company meetings never took place, and that she ran it 'under my parents' direction'. She also said:

> We were under the instruction of my father, and, as the appointor, appointee, and it was under his direction what was to be signed and what not… So he had the final say.

150 I accept that Ken also told Mark what he wanted to occur about the trust both when AI was trustee, and Mark was a director of it (replacing Steven), and when KB became the trustee. The correspondence establishes that Ken decided to change the trustee company to one controlled solely by Mark. I accept Mark's evidence that Ken and Mark discussed the transfer of Venus Bay to Mark in the three to fourth months before it was done. I am satisfied Mark had communicated with Ken about this. Ken was a beneficiary, as well as the guardian (and appointer) of the trust.

151 I do not need to consider Ken's reasons for wanting Mark to have control of the trustee company that would make decisions about the trust, or for wanting Mark

then to own Venus Bay personally. I note though, that this arose following Andrea's divorce and a breakdown at that time in her relationship with her parents, and after she moved to Queensland. It also occurred after she had said she did not claim any interest in Venus Bay, in her Family Court affidavit of 12 December 1997.

152 I am not satisfied that the evidence establishes that Mark had sufficient hostility to Andrea at the time of the transfer to lead to the inference that KB was unable to exercise its discretion properly, in all the circumstances. His hostility increased markedly later, as discussed below. But in relation to the transfer of Venus Bay, it is what had occurred to the date of transfer that I need to consider.

153 In circumstances where Mark gave evidence that he did not have a copy of the trust deed for many years, he was cross-examined as to whether he read the terms of the trust deed before causing KB to transfer Venus Bay to himself. This of course went to whether KB had given proper consideration to the matters it needed to consider. Mark responded, 'I would have read them back in the day'. I am satisfied on the balance of probabilities that Mark did read the trust deed before the transfer occurred. His evidence that he 'would have read' the deed, is supported by the fact he had instructed lawyers about the trust and they clearly had a copy of the deed. (I refer to the letter of 28 August 2001 sent by RH Ballard, where Ken sought to have Andrea resign as director of AI, the then trustee company. Mark was a director of AI at the time. The letter referred to Mark having instructed the firm to incorporate a new company, and referred to a particular provision of the trust deed).

Did KB fail to act honestly and in good faith?

154 I am not satisfied that at the time of the transfer, KB did not act honestly and in good faith.

155 Andrea argued that the fact the transfer to Mark was 'covert' is relevant. Mark did not tell Andrea (at least) about the transfer for many years after it occurred. However, this does not establish that *at the time* the transfer was not made honestly and in good faith. KB did not have an obligation to tell other potential beneficiaries of the trust (who extend beyond Mark's parents and siblings to nieces, nephews and so forth) that KB had transferred Venus Bay to Mark. (Not answering Andrea's valid questions about the trust later is a different point, which I deal with below in setting out reasons for removing KB as trustee going forward).

REMOVAL OF TRUSTEE

156 I find that KB should be replaced as trustee of the trust because the welfare of the beneficiaries (other than Mark) requires it. I am satisfied that KB's continuance in office as trustee would be detrimental to the beneficiaries' welfare, because of the hostility between Mark and Andrea.

157 Just before the trial, another director (Mark's accountant) was appointed as an additional director of KB. That was solely in case Andrea's allegation was upheld that KB could not be trustee as Mark, as its sole director, does not to live in Australia. It has not been suggested that the appointment alters the fact that Mark remains the controlling mind of KB.

158 Andrea, and the other people named as specific and general beneficiaries of the O'Neil Family Trust are the 'potential objects of the exercise of a discretionary power'. They may or may not receive something from the trust, depending on how the new trustee to be appointed exercises its discretion. The trustee is required to at least consider them as potential recipients of trust property (although not required under the trust deed to weigh up their competing interests, as discussed above).

159 Whilst Mark did express an intention in the trial to properly consider all beneficiaries, I am not satisfied that he will be able to do that, at least as far as Andrea is concerned, given the hostility he has shown to her. I consider it would be 'almost impossible' for him to avoid his emotions 'colouring discretionary decisions' as to whether provision should be made to Andrea, and if so, of what amount. (See Crispin J's comments in *Titterton v Oates* (1998) 143 FLR 467 (***Titterton***) at [481]).

160 Whether the Court exercises its discretion to remove a trustee turns on the circumstances of each case. In *Miller v Cameron* (1936) 54 CLR 572, the principles to be applied in an application for the removal of a trustee under the Court's inherent jurisdiction were stated by Dixon J at 580-581 (with whom Evatt and McTiernan JJ agreed):

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised.

161 Starke J, in that decision, cited *Letterstedt v Broers* (1884) 9 App Cas 371 at 579, and stated:

> The only guide is the welfare of the beneficiaries, and a trustee may be removed if the Court is satisfied that his continuance in office would be detrimental to their interest.

162 The welfare of the beneficiaries is so important that a trustee may be removed if it is in the beneficiaries' interests, even if there has been no breach of trust or improper behaviour. As Bryson J stated in *See v Hardman* [2002] NSWSC 287 at [17]:

> … the court has power to remove a trustee who has not acted in breach of trust and has not been guilty of misconduct, and the court might decide, for the purpose of seeing that trusts are properly executed, to remove a trustee whose conduct had not been improper in any way.

> This could only happen rarely. A state of conflict with a beneficiary or other interested person might, at least in concept, so interfere with the administration of a trust as to cause the court to remove the trustee. An application for removal naturally tends to take the form of charges of misconduct against the trustee, but is not necessarily to be disposed of according to findings upholding or dismissing those charges. The true issue is not whether there have been breaches of trust or misconduct. See *Hunter v Hunter* [1938] NZLR 520 at 529 (Myers CJ) and at 556 where Northcroft J said:
>
> > The court, however, is not concerned with a vindication of the appellants, but with the welfare of those for whom the trust was created.

163 In *Jacobs' Laws of Trusts in Australia*, JD Heydon and ML Leeming (LexisNexis Butterworths Australia, 8th ed, 2016) at [15-86] state (citing authority) that '[f]riction or hostility between the trustee and the beneficiaries is not of itself a reason for the removal of the trustee', but they acknowledge that there are circumstances where the hostility is of a particular nature that it is not to be disregarded.

164 G E Dal Pont in *Equity and Trusts in Australia*, (Lawbook Co. 6th ed, 2015) at [21.115] states:

> … absence of a breach of trust provides no ground to resist removal if that course aligns with the beneficiaries' welfare. Though mere friction between the trustees, or between the trustees and the beneficiaries, does not usually offend the principle of welfare of the beneficiaries, outright hostility may justify removal. The court will remove trustee(s) if the friction is so obstructive to the administration of the trust that there is no prospect of improvement in the future.
>
> …
>
> Yet courts are wary to remove a trustee where the friction is not the trustee's fault; otherwise beneficiaries could be placed in a falsely powerful position of being able to raise a dispute with the trustee and then apply for her or his removal.
>
> [citations omitted]

165 In *Ying Mui & Ors v Frank Kiang Ngan Hoh & Ors (No 6)* [2017] VSC 730, Vickery J found that the trustees had breached their duties due to fraud, and found separately that hostility existed between the persons behind the corporate trustee and the beneficiaries. He removed the trustees. His Honour usefully summarised aspects of the law regarding when it might be appropriate to remove a trustee

where there is significant hostility, and the advantages of the appointment of an independent trustee:

> [583] It is also accepted that, whilst the exercise of the power to remove a trustee 'is not penal in character', it has been held to be appropriate to remove a trustee who has adopted 'confrontational approach and tactics' and where the 'friction and hostility' between a trustee and the beneficiaries has 'a cumulative effect on the disintegration of the trustees' capacity to carry out their duties' capacity to carry out their duties'.
>
> [584] Similarly, it has been held that removal might be appropriate where 'distress or bitterness arising from tensions in family relationships' would make it 'almost impossible' for the trustee make fair 'discretionary decisions', where a beneficiary 'might reasonably fear that future decisions might be tainted by self-interest', where a beneficiary is 'genuinely apprehensive about the risk of further breaches of trust', and where 'family relationships are now attended with such bitterness and suspicion that a significant barrier to communications [with the trustee] has been erected'.
>
> ..
>
> [594] The proceeding, to this point at least, evidences a long running acrimony between family members, who have divided their allegiances between the two central protagonists — the brothers Frank and George.
>
> [595] Unless trustees independent of these factions are appointed, the likelihood of further disputes resulting in yet further litigation, is unacceptably high.
>
> [596] Given the present structure of the control of Ying Mui Pty Ltd and Amore Corporation Pty Ltd, both in terms of present directorships and shareholdings, these companies do not provide the necessary degree of independence.
>
> [597] The advantages of the appointment of an independent trustee in these circumstances are obvious. An independent trustee, not being, or being associated with any, beneficiary, would have the benefit of neutrality, and impartiality, and the beneficiaries will be provided with some comfort that the trustee is independent and impartial. The facility of an independent trustee would more than likely ensure that the trusts are properly administered according to law and without conflict. In this way, the risk of further disputation and the potential for further adversarial litigation, would be minimised. This would be of undoubted benefit to the trusts and the beneficiaries.
>
> [citations omitted]

166 In *Titterton*, Crispin J removed the trustee in question. That case centres around administration of trust income, a feature that the matter before me does not share,

but some of the comments made by Crispin J are relevant to the decision to be made here. Crispin J found that the trustee had administered the trust with 'due honesty' (at 480) but that a number of other considerations warranted the removal of the trustee. Crispin J stated (at 481-2):

> Thirdly, even if the first defendant were able to ensure the timely provision of information and/or distribution of income notwithstanding any distress or bitterness arising from tensions in family relationships and her mother's decision to exclude her from any benefit under her will, I think it would be almost impossible for her to avoid such emotions colouring discretionary decisions as to the provision that should be made for the second defendant.
>
> Fourthly, even if the discretionary decisions required by the trust were in fact sound, in the light of the events which have occurred since the testator's death and the potential conflict of interest inherent in her trusteeship it seems to me that the second defendant might reasonably fear that future decisions might be tainted by self-interest or concern for the interests of the first defendant's children.
>
> Fifthly, I accept that the plaintiff is genuinely apprehensive about the risk of further breaches of trust involving the withholding of information and/or failure to make timely payment of the income due to her under the trust. Having regard to the manner in which the trust was administered since the first defendant became the sole trustee, these apprehensions cannot be dismissed as unreasonable.
>
> Sixthly, it seems clear that the family relationships are now attended with such bitterness and suspicion that a significant barrier to communications has been erected. The first defendant herself has recognised this and has previously nominated her accountant or solicitor as neutral arbiters because she anticipated that the second defendant would not feel able to approach her directly about his entitlement under the trust. I accept that her decision to nominate these people was well motivated but find it difficult to accept that a person in the position of the second defendant would perceive either her accountant or her solicitor to be a neutral arbiter. In my view the difficulties in communications that have arisen as a result of the present circumstances are not likely to be substantially overcome in this manner. I think it is likely that the second defendant would continue to feel that there was a substantial emotional barrier to any contact with the trustee, whether directly or indirectly, in relation to his rights under the trust.

167 Crispin J referred to the fact that the interests of a trustee who was also a beneficiary also needed to be considered in exercising the Court's discretion:

> In the present case, of course, the plaintiff and second defendant are not the only beneficiaries. The first defendant is herself a residuary beneficiary and her children are entitled to the residue upon her death. Consequently, the case cannot be approached upon the basis that it is only the interests of the plaintiff and the first defendant that must guide the exercise of any discretion that the Court may be called upon to

exercise.

168 The testator in *Titterton* had appointed Oates as trustee, alongside a company as co-trustee. That company became insolvent, leading to Oates becoming the sole trustee. In considering the relevance of the fact that the testator had appointed Oates as trustee despite knowing that there was a potential conflict between his interests and those of the other beneficiaries, Crispin J said (at 477-478):

> … it is appropriate to begin with the presumption that the testator made his decision to appoint the first defendant having regard to his knowledge of her character and abilities and to the nature of the duties she would be called upon to discharge. In particular, I think it is appropriate to assume that the testator made a considered judgment about the wisdom of appointing her to be trustee of a discretionary trust in favour of her intellectually disabled brother and that he was confident of her ability to carry out that task fairly and competently. It is also appropriate to begin with the presumption that he had made a judgment that she would discharge her duties in that manner notwithstanding the potential conflict of interest which her appointment occasioned.
>
> Nonetheless, whilst the testator's decision is entitled to be given due weight, it cannot be treated as limiting the Court's jurisdiction to ensure that the welfare of the beneficiaries is adequately protected and the trust properly administered. In the present case relevant circumstances have changed in the years ensuing since his death. If it is now clear that there are adequate grounds for requiring the removal of the first defendant as trustee then the Court should not shrink from taking that step.

169 Trustees are required to provide certain information to beneficiaries. How much depends on the type of trust in question.

170 In *Fast v Rockman* [2015] VSCA 61 at [44], the Victorian Court of Appeal recently restated the general principle that:

> [I]f a beneficiary requests it, a trustee is in general obliged to provide documents and information to the beneficiary, at his cost, in relation to the trust property and to provide an accounting in respect of the administration of it.

171 In *Fast*, the court did not need to consider the debate over whether the beneficiaries' right to copies of documents is a proprietary right or if it follows the trustees' duty to carry out their obligations under the trust (see *Fast* at [45]). I do not need to consider that in this case either.

172 Mark concedes in this case that Andrea was entitled to the information about the trust which she requested. Whilst the right to information for potential objects of a discretionary power does not extend to information about how the trust is managed or reasons for decision, that is not what Andrea was asking about.

173 KB, and Mark, have repeatedly failed to answer questions posed over some years from Andrea about whether the trust continued to exist, what properties were held by KB as trustee, and whether it was still the trustee of Aintree Avenue.

174 As well as demonstrating hostility, this is separately a significant breach of KB's duties as trustee.

175 Andrea is a named 'beneficiary' of the O'Neil Family Trust. She was entitled to information from KB as trustee about whether the trust continued to exist and what was held on trust. KB had a duty to give her this information if it was requested.

176 A submission was made for Mark that the questions about the family trust asked by Andrea's solicitors in the letters sent from 20 November 2017 to 22 August 2018, were directed to Mark in his capacity of being executor of Ken's estate, and in the context of the estate proceeding, and so did not need to be answered by him or KB as trustee. The suggestion that Mark was wearing 'different hats', and so did not need to answer questions about the family trust, is rejected. It was clear that Andrea wanted to know from Mark what KB held in trust – as she had wanted to know for some time (see for example, her emails to him sent on 22 July 2015). He did not tell her.

177 Mark was cross-examined about this:

> I don't need to go to particulars at this stage, so I'll just say you were aware, and it's part of this case, that in November of 2017, Andrea's corresponding with your solicitors, trying to ascertain whether the trust still exists, and whether Aintree, the land in Doncaster, is still in it. Is that – do you agree with that proposition?---Yes.
>
> All right. Now, Mark O'Neil and Mark O'Neil, director of KB Investments, have the same brain, don't they?---I hope so.

> Yes. So do you say Mark, the director of the trustee KB Investments, would have been more cooperative in the getting out of information than Mark O'Neil, administrator of the estate of Ken O'Neill?---I don't know.
>
> Well, do you say you would have answered the question if the solicitors for Andrea had specifically said, 'We're asking you as a director of KB Investments'?---Well, I'm not sure, 'cause that was never done. Was it?

178 The email sent by McKean Park to Andrea's solicitors on 29 August 2018 had the subject line '*Alleged* O'Neill Family Settlement Trust' (my italics). The email did not answer the questions asked, and sought to shut the door on further queries:

> Our client does not intend, upon incurring costs of entering into any further discussions or correspondence with your client in relation to same.

179 Mark accepted, in giving evidence, he (for KB) has a duty to provide beneficiaries of the trust with information. He was not sure how long he had known that, but said it was a 'long time'. He said he knew he had that duty in November 2017. He accepted that it was reasonable for Andrea to ask those questions. He was cross-examined on why answers were not given:

> So why didn't you provide the information to Andrea when she requested it?---I'm not sure.
>
> …
>
> Do you agree this information is extremely simple and probably could have been produced in a single sentence?---Yes.

180 Andrea repeatedly sought answers to questions about what KB held as trustee. There was only one property it held: Aintree Avenue. Answering that would have been simple. KB – and Mark – had obligations under the *Civil Procedure Act* 2010 to minimise disputes where possible, as well as KB having obligations as trustee. It is outrageous that it took Andrea issuing this proceeding for there to be an acknowledgment of the fact that KB still held Aintree Avenue on trust.

181 Mark's hostility to Andrea (and Steven) is also established by the fact he accused them of murdering his father, and had the police attend at Andrea's home, where Ken's body was, within hours of Ken's death. As a result of those accusations, there was a coronial inquest.

182 I am satisfied that hostility continues. Mark clearly continues to believe Ken's death is suspicious, and that Andrea was involved. That is despite the coroner's report, which found Ken died naturally. He gave evidence about the VCAT hearing which took place five days before Ken's death, saying that:

> it was agreed in the court that he [Ken] would be returned to Melbourne and we'd already made arrangements to go and pick him up when all of a sudden his health deteriorated almost overnight

183 Mark was taken to the coroner's report and asked in cross-examination:

> Now, do you still maintain even now that Andrea is responsible for your father's death?

184 His answer was:

> Well, there's definitely suspicion around it…

185 He also gave evidence, about Ken's death:

> All I can say is it came on exceptionally quickly after she [Andrea] agreed to return him to Melbourne.

186 Mark submits that it is relevant that Ken, as appointer, chose to appoint KB as trustee (with Mark as the sole director) knowing that there was then some hostility between Mark and Andrea. He submits:

> ..the conflict that the Trustee might exercise a discretion to prefer Mark … is a permitted exercise of discretion and the conflict between duty and interest must have been reasonably anticipated by Ken when appointing KB

187 However, the hostility between Mark and Andrea has greatly increased since Ken appointed KB as trustee, and particularly by the time of Ken's death.

188 Mark also refers to the hostility being '…if not totally, then at least substantively one sided'. In written submissions he submits:

> [64] *Hunter v Hunter* [1938] NZLR 520 as summarized by Her Honour at [57] seems applicable to these facts as the life tenant and the trustees were in a state of hostility from which there was no immediate prospect of relief and where the hostility was grounded in the mode in which the trust been administered. Examination of the actual decision shows that the allegations of mismanagement of the trust estate had been regarded as proven in the court below

> (i.e the Trustee had disregarded the interest of the infant cestui que trust) but on appeal Myers CJ said at 531 "The hostility might be one sided or it might be deliberately induced by the tenant for life, and in such a case , at all events unless it appeared that there were circumstances which made the continuance of the administration by the existing trustees prejudicial to the interest of other beneficiaries, the Court would probably refuse to order their removal. In this case it has been suggested that the hostility was one sided. As I read his judgment the learned trail [sic] judge was not of that opinion". It is submitted that the allegations of mismanagement in the sense of allowing the Venus Bay transfer and not developing the Estate or paying interim distributions do not establish mismanagement of the Trust estate and the evidence is that the hostility is, if not totally, then at least substantively one sided

189 And further submits:

> [67] The defendants do not deny that the court has a discretion to remove the first defendant as trustee. However, they say that
>
> a. The plaintiff has failed to prove any improper conduct in the administration of the trust; and
>
> b. The conflict between her and the trustee has been generated by her incorrect views of her entitlements under the trust and her behaviour, particularly in seeking forms of self-help to deliver the financial benefits she says she is entitled to receive;
>
> In such circumstances the court should be very reticent in removing the first defendant as trustee; …

190 However, I am satisfied that improper conduct in administering the trust has been shown by repeated refusals by KB, and its director Mark, to answer reasonable questions about the trust's existence, and what properties it held. (I note too that Mark wrote Andrea an email on 27 July 2015 saying he had 'no paperwork at all' in his possession regarding KB; and that he did not have a copy of the trust deed for years.)

191 I do not accept that all the conflict between Andrea and Mark has been 'generated by her incorrect views on her entitlements under the trust and her behaviour'. There is no doubt that Andrea had incorrect views of her entitlement. She became very upset with Mark (and her parents) because she thought she had a 'right' to be paid money, and was entitled to a share in Venus Bay. She did not. It is also true that Andrea has behaved badly over the years – creating deeds with a false

history of what had occurred in relation to AI when she tried to take control of Aintree Avenue, emptying out Aintree Avenue and trying to take control of it when Ken was ill, selling Thornbury and taking the proceeds herself, removing Ken from his nursing home in Victoria (which she had previously praised as a good home) to her house in Queensland without first telling Mark she was going to do so. Andrea has acted in the course of her dealings with Mark – and other family members – at times in a difficult, irrational, and tempestuous manner.

192 But it is *Mark's* conduct that is relevant for the purposes of considering if KB should remain trustee. Refusing to answer questions about the trust, and accusing his siblings of murder, are Mark's independent actions demonstrating hostility, that I do not consider were 'generated' by Andrea's actions.

193 I take into account, as submitted by Mark, that if KB is removed as the trustee this will likely affect Samantha – one of the beneficiaries – negatively. That is because with a new trustee being appointed, Aintree Avenue will most likely need to be sold to pay that trustee's fees, which will mean she will have to move house. Mark argues that the home her parents intended her to have – Thornbury – has already been sold as a result of Andrea's actions.

194 In written submissions Mark submits:

> [68] There is an additional consideration, as noted above (refer Para 62(a) above) the dominant consideration in exercising the jurisdiction to remove trustees must be the welfare of the beneficiaries. To ameliorate the real problem the plaintiff complains of any new trustee would, it is submitted have to be independent and professional. They would accordingly charge fees. The trust has no assets beyond the Aintree Avenue property and to pay such fees this property must necessarily be sold with a substantive impact on Samantha, a specified beneficiary. Further, as noted at paragraph 38 above after meeting the costs of sale, CGT, independent trustees fees et cetera it cannot be outside reasonable contemplation that a prudent trustee would exercise a discretion to distribute a significant part, if not all of the remaining trust property, to Samantha; thereby providing no benefit to the vast bulk of beneficiaries.

195 I am satisfied from the evidence that Samantha has some special needs. Andrea referred to them in her emails, including needing to look after Samantha after her parents died. (Although she does not now make any concession as to Samantha's special needs in this case). Bev and Ken specifically left Samantha the Thornbury property in the will, before otherwise dividing the estate between all four children. Mark gave evidence that she has had epilepsy. The medical records in evidence referred to her having seizures in 1980.

196 But the family home at Aintree Avenue once housed all six O'Neil's, and until a few years ago housed Bev, Ken and Samantha. The Thornbury property Ken sought to leave Samantha in his will was worth far less than Aintree Avenue. I accept that it is likely that Aintree Avenue will need to be sold by the new trustee and its proceeds distributed. Samantha may need to move and her need for accommodation will no doubt be one of the matters the new trustee considers in exercising its discretion about the distribution of the proceeds of the trust.

197 I do not need to consider further reasons Andrea has submitted as to why KB should be removed as trustee, given my finding. Since some time was spent on it, however, I will briefly deal with the argument put by Andrea arising from Mark spending most of his time in Thailand in recent years. She submitted that as Mark, as KB's director, is not resident in Australia, a new trustee should be appointed. I disagree. The trust deed does not require the directors of a corporate trustee to be resident in Australia (though it does require an individual trustee to be resident). I am satisfied from his tax returns in evidence that Mark is in any event an Australian resident for tax purposes. He regularly returns to Australia from Thailand for visits. There is very little to be done in managing one property – all that is held by the trust – and no reason that managing that property, and its sale at the time that occurs, requires the director of a corporate trustee be present in Australia.

CONCLUSION

198 I direct the parties to consider the orders (including as to costs) that should be made as a result of these reasons and provide me with proposed orders by 4pm on 18 March 2020. If the parties cannot agree on those orders, they should file submissions as to the orders they say are appropriate. If necessary, a hearing on those matters will be listed.

Certificate

I certify that these 55 pages are a true copy of the reasons for judgment of her Honour Judge Marks, delivered on 26 February 2020, revised on 11 March 2020.

Dated: 11 March 2020

Zeinab Ali
Associate to Her Honour Judge Marks