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Case No: PT-2021-000352

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHD)

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

Date: 29/04/2022

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

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Between :

(1) SARAH BUTLER-SLOSS (as trustee of the Ashden Trust)
(2) CLAIRE BIRCH (as trustee of the Ashden Trust)
(3) GRACE YU (as trustee of the Ashden Trust)
(4) JOHN JULIAN SAINSBURY (as trustee of the Mark Leonard Trust)
(5) MARK LEONARD SAINSBURY (as trustee of the Mark Leonard Trust)
(6) ZIVI SAINSBURY (as trustee of the Mark Leonard Trust) — **Claimants**

- and -

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES
(2) HER MAJESTY'S ATTORNEY GENERAL — **Defendants**

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Edward Cumming QC and Maxim Cardew (instructed by **Bates Wells & Braithwaite London LLP**) for the **Claimants**
Ben Jaffey QC (instructed by **Legal Services, the Charity Commission for England and Wales**) for the **First Defendant**
William Henderson (instructed by **Government Legal Department**) for the **Second Defendant**

Hearing dates: 8, 9 and 10 March 2022

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

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Mr Justice Michael Green :

INTRODUCTION

1. Should charities, whose principal purposes are environmental protection and improvement and the relief of poverty, be able to adopt an investment policy that excludes many potential investments because the trustees consider that they conflict with their charitable purposes? One might be forgiven for thinking that the answer should obviously be that such a policy would be entirely appropriate. But because of uncertainty over the reach of the only leading case in this area – *Harries v Church Commissioners for England* [1992] 1 WLR 1241, a decision of Sir Donald Nicholls V-C, as he then was, (commonly referred to as the ***Bishop of Oxford* case**) – and the fact that this is a very important decision for them, the Claimants, who are the trustees of two such charities, seek the Court's blessing for the adoption of their new investment policies.

2. The two charities are the Ashden Trust and the Mark Leonard Trust. Both are part of the Sainsbury Family Charitable Trusts network. They have approximately £42m and £22m respectively by way of assets. The First Claimant, Ms Sarah Butler-Sloss, is the settlor and a trustee of the Ashden Trust; her brother, the Fifth Claimant, Mr Mark Sainsbury, is the settlor and a trustee of the Mark Leonard Trust. Both charities work closely together, having similar purposes and sharing staff and the same investment manager, Cazenove Capital Management (**Cazenove**).

3. The application is brought principally under what is known as Category 2 within the four categories described in *Public Trustee v Cooper* [2001] WTLR 901 (***Public Trustee v Cooper***). The Claimants, who are all the trustees of the two charities, seek the court's approval for the adoption of their proposed new investment policies to ensure that they are acting lawfully in such respect. They also seek a series of declarations as to the proper approach to be taken in relation to such issues generally by charity trustees. I will deal with whether that is appropriate relief to be seeking from the Court later in this judgment. On 14 April 2021, I gave permission to the Claimants to bring these proceedings pursuant to s.115(5) of the Charities Act 2011 because I considered that the Charity Commission had refused permission.

4. The Defendants are the Charity Commission for England and Wales and the Attorney General, each of whom are separately represented. Both invite the Court to deliver a judgment that sets out the correct approach in law for charity trustees to follow in considering adopting an ethical or responsible investment policy but say that it is premature for the Court to approve these investment policies based on the available evidence. Everyone recognises that there needs to be clarification as to the effect of the *Bishop of Oxford* case, and I will endeavour to provide that, but it is important not to lose sight of the fact that this is a specific application by these charities in relation to their proposed new investment policies and I will be determining the issues before me in that context.

5. I have been greatly assisted by the written and oral submissions by Counsel and their legal teams. Mr Edward Cumming QC with Mr Maxim Cardew appeared on behalf of

the Claimants; Mr Ben Jaffey QC appeared on behalf of the Charity Commission; and Mr William Henderson appeared on behalf of the Attorney General.

CONTEXT

6. The method that the Claimants have chosen for identifying the investments that the charities should invest in is whether they are aligned with the Paris Climate Agreement which was signed on 22 April 2016 under the United Nations Framework Convention on Climate Change (the **Paris Agreement**). There are 195 countries that are parties to the Paris Agreement, with 189 of them having ratified it. The principal goal of the Paris Agreement is to limit global warming to well below 2°C above pre-industrial levels, and pursuing efforts to limit it further to 1.5°C. It aims to do this by reducing greenhouse gas emissions and fostering climate resilience and sustainable development. Paragraph 1(c) of Article 2 to the Paris Agreement is particularly pertinent as it states:

> "(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development".

7. The signatories to the Paris Agreement asked the Intergovernmental Panel on Climate Change (**IPCC**) to produce a special report as to the difference in effect of 2°C warming to 1.5°C warming. The IPCC published its report in October 2018. In relation to investments, the IPCC said that: "*Realizing the transformations towards a 1.5°C world would require a major shift in investment patterns… pursuing 1.5°C mitigation efforts requires a major reallocation of the investment portfolio, implying a financial system aligned to mitigation challenges*" (para 2.5.2.2).

8. The challenges of tackling irreversible climate change are obvious and have been recognised by the UK Committee on Climate Change and Parliament which approved a motion on 1 May 2019 declaring an environmental and climate emergency.

9. After the hearing had finished Mr Jaffey QC brought to my attention a decision of the Administrative Court handed down on 15 March 2022 in *R (Friends of the Earth) v. Secretary of State for International Trade/Export Credits Guarantee Department (UK Export Finance) and ors* [2022] EWHC 568. In his judgment, Stuart-Smith LJ helpfully set out the framework of the Paris Agreement and its adoption and legal effect in domestic law (see [15] to [38]) and the meaning and extent of the obligation on the UK Government to comply with Article 2(1)(c) of the Paris Agreement (see [225] to [240]). It should be noted however that Thornton J disagreed with Stuart-Smith LJ, particularly over the assessment of Scope 3 emissions (see below) and therefore whether the UK Government had acted consistently with its Article 2(1)(c) obligations.

10. Whatever the UK Government's obligations under the Paris Agreement (and indeed all the other signatories' obligations), it is clear that private persons and charities are not bound as such to it. But the Claimants have decided that the goals of the Paris Agreement should be the appropriate basis for assessing whether their investments are consistent with their charitable purposes.

11. In the exercise of their power to invest, the Claimants want to ensure that the investments they make are not in conflict with the charities' purposes and to be able to pursue such a policy even if the financial returns may not be maximised as a result. As they see it, they wish to exclude investments, so far as practically possible, that are not aligned with the Paris Agreement. By that they mean that the total investment portfolio should ensure that its greenhouse gas emissions will overall be limited so as to comply with the target of 1.5°C. Various guidelines for assessing whether individual investments are acceptable or have to be excluded are set out in their proposed investment policies.

THE CHARITIES

12. Both charities were established by trust deeds: the Ashden Trust Deed is dated 27 November 1989; and the Mark Leonard Trust Deed is dated 14 July 1994. The Trust Deeds both provided for general charitable purposes.

13. The trustees of the Ashden Trust have determined principally to pursue the statutory charitable purposes of: environmental protection or improvement; the prevention or relief of poverty; and the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage. It pursues its charitable purposes principally through grant-making in four categories: the Climate Change Collaboration (an umbrella term for joint grant making by three Sainsburys trusts); Sustainable Farming; Avoiding Deforestation; and Connecting People with Nature. During the 2019/2020 financial year, the Ashden Trust approved nearly £1.8m of grants.

14. The trustees of the Mark Leonard Trust have determined principally to pursue the charitable purposes of: environmental protection or improvement; and the relief of those in need. Like the Ashden Trust, it does this primarily through grant-making. During the 2018/2019 financial year, the trustees approved grants totalling just under £1.5m.

15. The Trust Deeds contain express powers of investment in addition to the statutory power of investment in s.3 of the Trustee Act 2000 (dealt with below). Clause 3 of the Ashden Trust Deed provides as follows:

> "The Trustees shall stand possessed of such part of the Trust Fund as shall consist of cash UPON TRUST either to pay or apply the same in accordance with the trusts hereinafter declared or to invest the same in any investments hereby authorised and shall stand possessed of such investments and any other investments and property which may from time to time form part of or the whole of the Trust Fund UPON TRUST either to allow the same or any part thereof to remain as actually invested so long as the Trustees shall think fit or at any time or times in their discretion to sell call in or convert the same or any part thereof into money and at their discretion either to pay or apply the proceeds of such sale calling in or conversion in accordance with the trusts hereinafter declared or to invest the same in any manner hereby authorised with power to the Trustees at their discretion from time to time to vary or transpose any investments made under this Clause for or into other investments hereby authorised."

Clause 5(g) also contained an express power to invest. And clause 9.1 dealt with trust moneys "*requiring to be invested*" as follows:

> "Trust moneys requiring to be invested may be invested not only in any mode for the time being authorised by law for the investment of trust funds but also in the purchase or upon the security of… such shares stocks securities… or other investments or property of whatever nature and in any part of the world and whether involving liability or not and whether producing income or not or secured at interest or by way of guarantee in furtherance of the above objects as the Trustees shall determine [.] To the Intent that the Trustees shall be empowered to invest and transpose the investment of trust moneys in the same unrestricted manner as if they were the beneficial owners of such moneys…"

16. The Mark Leonard Trust Deed contained similar powers in clauses 3 and 9.

17. Approximately 85% of the funds in both trusts are managed by Cazenove. The remaining 15% is managed directly by the Claimants through an "*Impact Investment*" fund. Its mandate is to achieve positive environmental and societal impact and to achieve a return commensurate with the rest of the trusts' funds. There is an independent financial advisor dealing with the Impact Investment fund and it does not form part of this application or the relief sought from the Court.

18. The Claimants' current investment policies with Cazenove were approved on 27 April 2015 for the Ashden Trust and on 3 November 2015 for the Mark Leonard Trust. The policies excluded investments that were considered to be contributing to climate change, such as fossil fuel companies, but favoured companies with policies or products designed to limit climate change. The Ashden Trust policy stated that it:

> "supports the development of equitable, sustainable societies. The Trust has a duty to act in the long-term interests of its beneficiaries. In this fiduciary role, the trustees wish to make investments that will provide a good return and will not undermine the trust's charitable objectives and the work of its grantees".

The policy continued to state that the trustees considered fossil fuel stocks to be overvalued and that if climate change were not limited to a 2°C increase there would be high costs to the global economy. Even though the Claimants had divested their investments in fossil fuel companies, they still retained single shares in them in order to be able to exert pressure on green policies at shareholder meetings.

19. However the Claimants consider that many of the current holdings in their portfolios conflict, or might conflict, with the Trusts' charitable purposes of advancing environmental protection or improvement, the prevention or relief of poverty and the relief of those in need. They are still invested in shares that are not fully aligned with the goals set down in the Paris Agreement for limiting the increase in global temperatures to well below 2°C and preferably to 1.5°C.

THE PROPOSED NEW INVESTMENT POLICY

20. Because of this concern, the Claimants, in conjunction with WREN, an independent private investment office, have developed detailed draft investment policy statements (there are immaterial differences and for convenience I will refer to them collectively

as the **Proposed Investment Policy**) and this seeks to ensure that the Charities' investments are aligned with the goals of the Paris Agreement and thereby avoid direct conflict with their charitable purposes. The Ashden Trust policy is dated 21 April 2020 and the Mark Leonard Trust policy is dated 24 April 2020.

21. The Proposed Investment Policy begins with a "*Statement of Investment Beliefs*". It states:

> "Through grant giving the trust supports the development of sustainable, resilient and equitable societies. As well as requiring an investment return to fund its charitable giving, the trust has a duty to act in the long-term interests of its charitable purposes. In this fiduciary role, the trustees wish to make investments that will provide a good risk-adjusted return and that do not conflict with the trust's charitable purposes or adversely affect the issues that the trust, through its charitable giving, seeks to address."

It then continued to set out the risks of not doing anything to tackle climate change. A little later in the same section, the Proposed Investment Policy stated:

> "The trustees also consider that investments in sustainable sectors and climate solutions provide opportunities to increase the trust's financial return and support its charitable objectives. Zero and low carbon technologies, energy, resource efficiency and nature based solutions and adaptation investments will continue to grow in the developed and developing world. The trustees seek to increase their exposure to these investments."

22. Under the heading "*Investment Goals and Objectives*", it stated:

> "To protect and enhance the trust's financial returns and support its charitable objectives, the trust aims to align its investments with the Paris Climate Agreement. In other words, the trust's total investment portfolio should be constructed on the basis that its GHG [greenhouse gas] emissions are aligned with the long-term global warming target of well below 2°C, and preferably 1.5°C, above pre-industrial levels, accepting that individual investments will differ in their carbon intensity.
>
> The investment objective for the trust is to generate capital growth in excess of inflation over the long term whilst generating a sustainable spending level to support the trust's ongoing grant making activities. The trustees wish to express their overall investment return objective as UK consumer price inflation (CPI) + 5% per annum on average over five year rolling periods. The return objective will be reviewed regularly.
>
> The trustees are comfortable with meeting their spending needs from a combination of income and capital and therefore have adopted a total return approach to investing."

23. There is an obvious difficulty in defining which investments are or are not aligned with the goals of the Paris Agreement. The Paris Agreement itself does not attempt to do that and as Mr Jaffey QC submitted and as stated above it only purports to bind its signatories and it does not impose obligations on other parties or charities.

Nevertheless the Claimants have chosen to use the goals of the Paris Agreement as the basis for the formulation of the Proposed Investment Policy. The "*Investment Guidelines*" attempt to spell this out as follows:

- "Constrain the portfolio's exposure to sectors highly exposed to climate change (see investment exclusions);
- On average a minimum of a 7% yearly reduction in GHG emissions intensity until 2050;
- Starting from 2020, a 50% minimum reduction in GHG emissions intensity compared to the market index and an absolute reduction of 50% by 2030;
- At least four times more green assets than the market index of brown assets;
- Scope 3 emissions analysis should be factored in over the next four years."

24. The Greenhouse Gas Protocol, which was developed by the World Resources Institute, sets out internationally accepted greenhouse gas accounting and reporting standards for companies and organisations so as to provide transparency in relation to GHG emissions. It divides emissions into three Scopes: Scope 1 emissions are direct emissions under the direct control of the company; Scope 2 emissions cover indirect emissions which include the production and use of energy by the company; and Scope 3 emissions cover all other indirect emissions which are a consequence of a company's value and supply chain activities. Presently, Scope 3 reporting by companies is optional and it is therefore difficult to measure. The last bullet point in the Proposed Investment Policy reflects the fact that more accurate reporting of Scope 3 emissions will become available over the next four years or so.

25. Those guidelines are implemented by exclusions that have three elements: quantitative screens; qualitative screens; and limits on fund selection. The quantitative screens exclude all direct investments in tobacco, weapons, fossil fuel extraction, production and reserves and companies which derive more than 50% of revenues from the fossil fuel sector and mining.

26. The qualitative screens and limits on fund selection are as follows:

- Energy intensive companies (cement, steel, paper) and mining unless they have adopted a business strategy and plan that accords with the Paris Climate Agreement to cut emissions limit to climate change and transforming to low-carbon energy. A best in class approach should be applied and the trustees would need to be convinced that these companies are being managed and operated to the highest ethical, social and governance standards
- Clean tech companies that specialise in extending the lifespan of fossil-fuel industries

- Commodity producers that contribute to deforestation and destruction of the rainforest (unsustainable beef, soya and palm oil producers)

- Companies which do not rank in the 1st and 2nd quartiles of ESG [Environment, Social, Governance] ratings, unless the investment managers can convince the trustees that there is a strong case for investment from a sustainability point of view, as outlined in the section on Investment Guidelines

No investments in funds or passive tracker investments with exposure to fossil fuel extraction."

27. As Mr Jaffey QC pointed out this necessarily excludes over half of publicly traded companies and many commercially available investment funds, because of the requirement to be in the top two quartiles of ESG ratings. Nevertheless, the Proposed Investment Policy specifies a targeted rate of return of "*CPI + 4% over 5 year rolling periods (net of all fees)*". As to relevant benchmarks against which to measure the portfolios' performance, the Proposed Investment Policy states that:

> "The investment managers will be expected to outperform relevant benchmarks and to rank above the median of the relevant peer group. The trustees acknowledge that Paris alignment will result in deviation from traditional benchmarks and therefore also wish to monitor the portfolio performance against the relevant ESG and Paris aligned benchmarks."

28. At a meeting on 21 April 2020 of the Ashden Trust trustees together with representatives from Cazenove and WREN, the Proposed Investment Policy was considered and all those attending were happy with it. It was not formally approved at the meeting but Cazenove said that they could manage the portfolio based on the policy. Cazenove were asked to formulate a new portfolio based on the Proposed Investment Policy.

29. On 1 May 2020, Cazenove presented a new portfolio to the Ashden Trust trustees that was within the Proposed Investment Policy. This proposed direct investments in a number of shares in different companies across a range of industries including technology and new media, fish farming and pharmaceuticals. Cazenove said that it considered the proposed portfolio to contain an appropriate level of risk for a long-term charity investor. It has also accepted the investment return target of CPI + 4% over 5 year rolling periods although it did not specify the predicted returns of the 1 May proposed portfolio. It estimated that the restrictions imposed by the Proposed Investment Policy excluded approximately 20.1% of the investable universe in total, although the trustees consider that the exclusions will actually be much higher once further information about companies' alignment with the Paris Agreement is forthcoming.

30. However at the meeting on 1 May 2020, when Cazenove presented its proposed portfolio, the trustees expressed some concerns about the concentration of the portfolio in direct equities. They instructed Cazenove to prepare amended versions that reduced the allocation to direct equities to 50% and increased the allocation towards green funds and general sustainability funds.

31. By email dated 12 May 2020, Cazenove outlined three options that would comply with the Proposed Investment Policy and the trustees' instruction. Option 1 was the 1 May proposed portfolio with 60% directly invested in global equities and 12% in thematic funds with a green focus. Option 2 was an amended version of the 1 May proposed portfolio with 50% of directly invested equities, 12% thematic funds with a green focus and 10% in general sustainability funds. And Option 3 was a further amended version with 50% directly invested equities, 18% thematic funds with a green focus and 4% in general sustainability funds. Cazenove explained that Option 3 with its additional fund exposure had the highest overall costs and volatility and a higher green revenue exposure than the other Options.

32. The trustees prefer Option 3 as the baseline for implementation of the Proposed Investment Policy. They recognise that there will be a financial detriment in the short term and that as more Scope 3 emissions data becomes available the investable universe will be diminished further. Ms Butler-Sloss in her witness statement properly admitted that she and the trustees are unable to conclude the extent of the financial detriment that may be suffered by the adoption of the Proposed Investment Policy. She said:

> "Excluding investments that are not aligned with the Paris Agreement would reduce the investable universe by a much greater extent than the exclusion of fossil fuels. At this point, the Trustees cannot precisely ascertain the magnitude of this reduction or how it will increase the risk of financial detriment. The financial risks and potential financial detriment resulting from the adoption of the Investment Policy Statement may become more accurately quantifiable at some point in the future as or if financial markets adopt Paris-alignment more widely."

33. In the two years since the proposed portfolios were put forward by Cazenove, none of them have actually been implemented pending the approval by this court of the Proposed Investment Policy. Therefore the charities' portfolios have continued to be managed under the existing 2015 policy.

34. Both the Charity Commission and the Attorney General submit that the Claimants did not adequately balance the potential financial detriment that would be suffered by the adoption of the Proposed Investment Policy with the conflict to the charitable purposes. However it is clear from the Proposed Investment Policy itself that there is a targeted rate of financial return within it, which the Charity Commission's evidence indicates is in line with the published rates of return of other large charities, such as the Church Commissioners or the Wellcome Trust. The Claimants therefore hope that the Proposed Investment Policy will not have any material financial impact in the long term while also acting in accordance with their charitable purposes.

CHARITY COMMISSION GUIDANCE

35. Pursuant to section 15(1) of the Charities Act 2011, one of the general functions of the Charity Commission is "*Encouraging and facilitating the better administration of charities*". Section 15(2) provides that in relation to this function, the Charity Commission may "*give such advice or guidance with respect to the administration of charities as it considers appropriate*".

36. In 2014, the Charity Commission published general guidance in relation to charity trustees' duties in respect of investments. The publication was called "*Charities and investment matters: a guide for trustees* (CC14)" (**CC14**). It was updated in 2016 following the coming into force of the Charities (Protection and Social Investment) Act 2016. The guidance is accompanied by a "*legal underpinning*" document which sets out the Charity Commission's view of the law.

37. In 2021, the Charity Commission sought to consult on potential changes to its guidance in this respect but after I granted permission to the Claimants to bring these proceedings, the Charity Commission has indicated that it will await my decision before finalising its new guidance and legal underpinning document.

38. CC14 identifies four types of investment:

> a) '*financial investment'*, the purpose of which is "*to yield the best financial return within the level of risk considered to be acceptable – this return can then be spent on the charity's aims*." It is only this type of investment with which this application is concerned.
>
> b) '*programme related investment*', which is aimed at furthering the charity's purposes while also achieving a financial return. An example might be a loan scheme to support unemployed people back to work, repayable with interest.
>
> c) '*mixed motive investments*' where the investment does not fit wholly within either previous category and may be justified.
>
> d) '*social investments*' which were introduced by the Charities (Protection and Social Investment) Act 2016 and have the mixed purpose designed to further the charity's purposes and achieve a financial return.

39. Section 3.3 of CC14 asks the question whether a charity can "*decide to make ethical investments?*"[1]. It answers as follows:

> "**The short answer**
>
> Yes. Trustees of any charity can decide to invest ethically, even if the investment might provide a lower rate of return than an alternative investment. Ethical investment means investing in a way that reflects a charity's values and ethos and does not run counter to its aims. However, a charity's trustees must be able to justify why it is in the charity's best interests to invest in this way. The law permits the following reasons:
>
> • a particular investment conflicts with the aims of the charity
>
> • the charity might lose supporters or beneficiaries if it does not invest ethically
>
> • there is no significant financial detriment

[1] In the 2021 Consultation, the Charity Commission have decided to call this "responsible investment".

In more detail

Trustees must ensure that any decision that they take about adopting an ethical investment approach can be justified within the criteria above. They must be clear about the reasons why certain companies or sectors are excluded or included. Trustees should also evaluate the effect of any proposed policy on potential investment returns and balance any risk of lower returns against the risk of alienating support or damage to reputation. This cannot be an exact calculation but trustees will have to assess the risk to their charity.

An ethical investment approach may involve one or a combination of the following approaches:

- negative screening: this means avoiding investment in companies or sectors or companies undertaking a particular activity or operating in a way which may be harmful to the charity's interests

- positive screening: this means investing all or part of an investment portfolio in companies or sectors which reflect a charity's values in areas like environmental protection, health, employment or human rights, or in a wider range of companies that demonstrate good corporate social responsibility and governance; for example, positive screening might involve only investing in companies that have targets/proven records for reducing their carbon footprint

- stakeholder activism: this is where a charity, as a shareholder, exercises its voting rights in order to influence a company's policies in a way that reflects its values and ethos; this could mean that a charity might invest in companies whose environmental policies it does not approve of in order to encourage more responsible business practices within those companies - it is also possible to engage in stakeholder activism as a programme related or mixed motive investment (see section 8)"

40. As was made clear in the legal underpinning document, the above guidance is based on the approach taken in the *Bishop of Oxford* case. However, Mr Cumming QC submitted that the guidance actually elides what the Vice-Chancellor said in the *Bishop of Oxford* case about direct and indirect conflicts with a charity's purposes and suggests that charity trustees have a discretion in relation to all investments and that even direct conflicts with a charity's purposes require a balancing exercise with the financial detriment and risks. Mr Cumming QC said that this contradicts the *Bishop of Oxford* case in that the Vice-Chancellor held that there was an absolute prohibition against investments that directly conflict with a charity's purposes. I will examine below whether that is the correct interpretation of the *Bishop of Oxford* case. In any event, Mr Cumming QC supported the approach of the Charity Commission and everyone seemed to be agreed that if the Vice-Chancellor had held that there was an absolute prohibition, then his *dictum* in that respect should not be followed.

41. The Charity Commission filed evidence in these proceedings that gave an overview of the broad nature of the charity sector and some of the bigger charities' investment policies. There are around 170,000 charities in England and Wales, most of them relatively small and with little or no assets to invest. A few charities have substantial assets to invest, such as these charities, but there is a wide variety of investment strategies that they adopt. This shows the discretion that their trustees have, but always acting so as to further the purposes of the particular charity.

42. It is clear from this evidence that the law in relation to trustees' powers of investment needs to be capable of being implemented and complied with by trustees of all types of charities. It should not be overly prescriptive and should enable trustees to adopt policies that are suited to their particular charity. That is not to say that the law has to be relaxed so as to accommodate all different types of charities, just that the law must realistically protect all charities whatever their size or purposes.

LAW ON CHARITIES' POWERS OF INVESTMENT

43. Before turning to the *Bishop of Oxford* case, it is important to have in mind some general principles relating to charities and their trustees' powers of investment.

44. Charities can be structured in a number of different ways, including by traditional trust, registered company (normally limited by guarantee), unincorporated association, friendly society and, since January 2013, a Charitable Incorporated Organisation. Both the Ashden and Mark Leonard Trusts are trusts in the strict sense of the word and the Claimants are trustees in the same sense. As such they are subject to the same duties as any other non-charitable trustees. Importantly for these purposes, the Trustee Act 2000 applies to them.

45. In a private trust, the trustees owe their fiduciary and other duties to the beneficiaries who may enforce such duties. Charities have no beneficiaries as such; they are trusts for a public benefit purpose. They are protected and supervised by a combination of the Attorney General, the Charity Commission and the High Court. As Mummery LJ said in *Gaudiya Mission v Brahmachary* [1998] Ch 341, at p.350E:

> "Under English law charity has always received special treatment. It often takes the form of a trust; but it is a public trust for the promotion of purposes beneficial to the community, not a trust for private individuals. It is therefore subject to special rules governing registration, administration, taxation and duration. Although not a state institution, a charity is subject to the constitutional protection of the Crown as parens patriae, acting through the Attorney-General, to the state supervision of the Charity Commissioners and to the judicial supervision of the High Court. This regime applies whether the charity takes the form of a trust or of an incorporated body".

46. In the recent charity case in the Supreme Court, *Children's Investment Fund (UK) v Attorney General* [2022] AC 155, Lady Arden seems to have concluded that the fiduciary duties owed by trustees (in that case it was actually the member of the

incorporated registered charity) are owed "*to the charitable purposes or objects of the charity*" (see [50], also [78] and [200]). The overriding duty of charitable trustees is to further the purposes of the charity (see p.1246A of the *Bishop of Oxford* case) and the Attorney General represents the Crown as *parens patriae* and can enforce the trustees' duties acting in the public interest in ensuring that charities are properly administered.

47. I have set out above the express powers of investment contained in the respective Trust Deeds. The general power of investment set out in the Trustee Act 2000 is also applicable to these trustees. Section 3 of the Trustee Act 2000 defines the general power of investment in the following terms: "*Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.*"

48. The standard investment criteria that must be considered by trustees in exercising their power of investment are set out in s.4 of the Trustee Act 2000 as follows:

> "4. Standard investment criteria
>
> (1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.
>
> (2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.
>
> (3) The standard investment criteria, in relation to a trust, are –
>
> (a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and
>
> (b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.
>
> (4) This section has effect subject to section 292C(6) of the Charities Act 2011 (which disapplies the duties under this section in cases where they would otherwise apply in relation to a social investment within the meaning of Part 14A of that Act)."

Subsection (4) refers to social investments, which are not relevant to this case. Trustees' duties in relation to social investments are set out in s.292C of the Charities Act 2011.

49. By section 5 of the Trustee Act 2000, before exercising any power of investment, trustees must obtain and consider proper advice about how their power of investment should be exercised. That is subject to the exception in s.5(3) where the trustees have reasonably concluded in all the circumstances that it is unnecessary or inappropriate to obtain such advice. And by s.1 of the Trustee Act 2000, the trustees have a duty of care when exercising their powers of investment.

50. The requirements of the Trustee Act 2000 say nothing about non-financial considerations that can or cannot be taken into account by trustees when exercising

their powers of investment. Nor is there anything specific to charities in the Trustee Act 2000, save for the reference to social investments in s.5(5).

51. In relation to social investments, which were introduced into s.292A of the Charities Act 2011 (by the Charities (Protection and Social Investment) Act 2016) these are a hybrid form of investment that charities can make when done "*with a view to both – (a) directly furthering the charity's purposes; and (b) achieving a financial return for the charity*." This came about because there was uncertainty as to whether charity trustees were able to use their ordinary power of investment when there might be no anticipated positive financial return (see the Law Commission Consultation Paper on *Social Investment by Charities* – Consultation Paper No 216). This case is not about social investments but it is interesting to see why it was thought necessary to provide a specific power to charity trustees to make such investments.

52. In *Cowan v Scargill* [1985] 1 Ch 270, Sir Robert Megarry V-C had to consider whether the trustees of the mineworkers pension scheme, half of whom were appointed by the National Union of Mineworkers, including Mr Arthur Scargill (who represented himself in court), were acting in breach of their duties in blocking an investment plan which included an increase in overseas investment and investments in energy companies that were in direct competition with coal. Such investments would be contrary to the NUM's policy and principles. This was a trust for the provision of financial benefits to individuals, not for a charitable purpose. As such, the Vice-Chancellor held that as this was a trust to provide financial benefits, the power of investment must be exercised to yield the best return for the beneficiaries. However he qualified this moderately by saying that while the trustees' paramount concern must be the beneficiaries' financial benefit, there may be non-financial benefits that the beneficiaries may wish to obtain even if they might as a result receive lesser financial benefits. He thought that this would rarely be the case and it seems to me to be heavily dependent on the fact that the beneficiaries would effectively have to consent to that course of action. In the case of charities, there are no beneficiaries who can give such consent. That is the situation that the Vice-Chancellor had to contend with in the *Bishop of Oxford* Case, to which I now turn.

THE *BISHOP OF OXFORD* CASE

53. The *Bishop of Oxford* case is the only reported case dealing with so-called ethical investments by charities. It was brought by the then Bishop of Oxford (and two other priests) against the Church Commissioners in relation to their investment policy concerning South Africa. The case was heard in 1991, at the time South Africa was transitioning to democracy and there were a range of views within the Church of England about the appropriateness of investing in South Africa. While there has been understandable focus on the Vice-Chancellor's general exposition of the law relating to the exercise of charitable trustees' investment powers, it is important not to overlook the actual decision that he made.

54. The Church Commissioners' charitable objects were "*financial assistance for clergy of the Church of England*". In that sense, the Bishop of Oxford (who was himself a Church Commissioner) and the other Claimants could be said to be beneficiaries. The Church Commissioners already had in place an ethical investment policy that

excluded investments in armaments, gambling, tobacco and newspapers. They also had an express policy in relation to investments in South African companies but the Claimants considered that it did not go far enough and sought stricter investment criteria for such investments. However the actual declarations that they were asking the Court to make did not refer to South Africa and were in quite general terms (p.1252B-C):

> "(1) That the commissioners…are obliged to have regard to the object of promoting the Christian faith through the established Church of England; and (2) that in the exercise of those functions…may not act in a manner which would be incompatible with that object."

55. The Vice-Chancellor refused to make both declarations on the grounds of their ambiguity and lack of necessity. He said that the Church Commissioners had had regard to their objects as shown by their adoption of their ethical investment policy. Furthermore he said "*"Have regard to the object" is a loose phrase, and there is a real danger it will mean all things to all men*." He also rejected the second declaration on the basis that it would not assist the Church Commissioners in that: "*it would not deal with how the commissioners should proceed when confronted with differing views on whether, on moral grounds, a proper investment is in conflict with the objects the commissioners are seeking to promote*."

56. That was the actual decision of the Vice-Chancellor. But it has been the general principles as to the exercise of investment powers by charity trustees that has been influential and informed decision-making as to investment policy ever since, including the basis for the CC14 guidance on ethical investment. It is technically *obiter dicta* but given the great standing of the Vice-Chancellor in this field and the rarity of such cases getting to court, the judgment deserves the utmost respect.[2]

57. At p.1246A-B, the Vice-Chancellor set out the fundamental principle underlying the exercise of any power by charity trustees:

> "It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them better to discharge that duty, trustees have powers vested in them. Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust. That is the guiding principle applicable to the issues in these proceedings. Everything which follows is no more than the reasoned application of that principle in particular contexts".

58. Dealing specifically with the power of investment, the Vice-Chancellor said that maximising financial return is the "*starting point*" because charities always need more money. At p.1246D-E he said:

> "…prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital

[2] The Charity Commission (for instance in its draft Legal Underpinning document dated March 2021) had originally suggested that the Vice-Chancellor only intended to deal with trusts that had a permanent endowment and therefore a duty to invest. However at the hearing it accepted that the principles set out by the Vice-Chancellor are not so limited.

> growth which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish.
>
> In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return".

59. The Vice-Chancellor then went on to consider what have subsequently been categorised into three exceptions to the general rule. Perhaps more accurately they should be described as situations where the "*starting point*" is not necessarily the end point and other considerations can come into play. The Vice-Chancellor considered that these would only be "*comparatively rare*" cases.

60. The first is of direct conflict with the charity's purposes. The Claimants say that this is the category with which this case is concerned. The Vice-Chancellor had in mind the straightforward conflicts exemplified by cancer research charities investing in tobacco shares; temperance charities in brewery/distillery shares; and Quakers in armaments companies. In relation to these situations the Vice-Chancellor said (emphasis added):

> "If, as would be likely in those examples, trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects the charity is seeking to achieve, <u>they should not so invest.</u> Carried to its logical conclusion the trustees <u>should take this course</u> even if it would be likely to result in significant financial detriment to the charity. The logical conclusion, whilst sound as a matter of legal analysis, is unlikely to arise in practice. It is not easy to think of an instance where in practice the exclusion for this reason of one or more companies or sectors from the whole range of investments open to trustees would be likely to leave them without an adequately wide range of investments from which to choose a properly diversified portfolio."

61. There was much debate before me as to whether, by using the word "*should*", the Vice-Chancellor was holding that there was an absolute prohibition on investments that directly conflict with the charity's purposes. It seems to me important that the context of the Vice-Chancellor's holding is that he thought that in practice there would not be a significant financial detriment in such cases of direct conflict. He could not have contemplated the current case where there is potential exclusion of a large number of possible investments on the basis that they do directly conflict with the charities' purposes.

62. The second category, which has been termed "*indirect conflicts*", is where the proposed investments might alienate supporters or donors to the charity or make recipients from the charity less willing to be helped. The Vice-Chancellor seemed to consider that this would also be comparatively rare but that in this situation the trustees would have to balance the risks involved. At p.1247A-B, he said

> "…the trustees will need to balance the difficulties they would encounter, or the likely financial loss they would sustain, if they were to hold the investments against the risk of financial detriment if those investments were excluded from their portfolio. The greater the risk of financial detriment, the more certain the trustees should be of countervailing disadvantages to the charity before they incur that risk"

63. The Vice-Chancellor then suggested that there may be other cases "*where trustees are justified in departing from what would otherwise be their starting point*" but he did not elaborate on what they might be. He did explain, however, (and this is the third category) that investment decisions should not be made by taking into account moral considerations, particularly where that causes financial detriment to the charity. At p.1247E, he said:

> "[Trustees] must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees. Those who wish may do so with their own property, but that is not a proper function of trustees with trust assets held as an investment."

He then expanded on the question of differing moral opinions at p.1247G:

> "Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment":

64. The boundaries of law and morality are sometimes difficult to define and perhaps even more so in the context of charities, which are often underpinned by a strong sense of moral imperative. But decisions by trustees have to be legally justifiable. In the case of charities, s.106 of the Charities Act 2011 requires charity trustees to obtain the approval of the Charity Commission, the Attorney General or the High Court when they "*regard themselves as being under a moral obligation*" to make a payment or refuse a gift. In other words, acting pursuant to what the trustees perceive to be a "*moral obligation*" will be carefully supervised.

65. This is in line with the Vice-Chancellor limiting the involvement of morality in trustees' decision-making. And the Vice-Chancellor had had cited to him the case of *Re Snowden* [1970] 1 Ch 700 in which there was discussion as to whether the Attorney General or the Court had power to approve a payment which is motivated purely by the trustees feeling under a moral obligation to make the payment. So the circumscribing of decisions by trustees taken on moral grounds is not new and continues to be a constraint on the exercise of the power of investment.

66. Mr Jaffey QC took me to the Supreme Court decision in *R (Palestinian Solidarity Campaign Ltd and anor) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774, where both Lord Wilson and Lord Carnwath JJSC[3] expressly approved a statement in the Law Commission's report entitled *Fiduciary Duties of Investment Intermediaries* (2014) (Law Com No 350) as to when trustees

[3] Lady Arden and Lord Sales JJSC dissented, but not on this point.

(these were pension trustees) can take into account non-financial factors in relation to investment decisions. Lord Carnwath said that trustees:

> "may take non-financial considerations into account – "provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.""

(Mr Cumming QC submitted that there may be a difference between "*significant risk of financial detriment*" and "*a risk of significant financial detriment*", as the Vice-Chancellor put it.)

67. Mr Jaffey QC put forward a thesis based on the *Bishop of Oxford* case, that trustees should reverse through the categories when deciding on their investment policy. So starting with category 3 he submitted that trustees had first to work out whether the proposed investment policy risked significant financial detriment over the period of investment. If so, moral considerations could not play a part in their decision whether to adopt the policy. They would then move to category 2 and consider whether the charity might lose supporters or beneficiaries if the policy was not adopted and balance that against the likely investment returns. Finally they would turn to category 1 and if investments are thought to conflict with the charity's objects then they need not be made even if there is a risk of significant financial detriment.

68. While there is a certain neatness to it, I am not persuaded by this schematic approach to trustees' decision-making in this area and I do not consider that this was what was contemplated by the Vice-Chancellor in the *Bishop of Oxford* case. Similarly, I do not think that the Vice-Chancellor was laying down either what "*significant financial detriment*" actually meant or that it was any form of threshold test that the trustees had to consider before anything else. Clearly financial detriment arising out of the pursuit of a particular investment policy is an important factor that trustees need to consider when balancing all the relevant factors. But there is a danger in treating the words of the Vice-Chancellor as though they are statutory requirements and prescriptive.

69. The important issue for this case arising out of the *Bishop of Oxford* case is whether there is an absolute prohibition against making investments that directly conflict with the charity's purposes or objects (i.e. whether there is a category 1 conflict) or whether it is always a discretionary exercise by trustees and a direct conflict is a major but not decisive factor in the balancing process. To a certain extent, the view that the Claimants have taken as to the meaning and effect of the Vice-Chancellor's judgment as imposing an absolute prohibition has shaped their application to the Court and their evidence. Starting from the perspective that investments that directly conflict with their charitable purposes must automatically be excluded, they have sought to define what those investments are. They have concluded that any investments that do not align with the goals of the Paris Agreement are in direct conflict with their charitable purposes.

70. I think this highlights the serious difficulties that arise if directly conflicting investments are automatically excluded by law. First, the Vice-Chancellor only had in mind the relatively simple cases of cancer charities not investing in tobacco or the Quakers not investing in armaments companies. One would expect that such

investments would probably be expressly excluded in the charity's trust deed or governing constitution. Not only did the Vice-Chancellor not contemplate this sort of case but also he clearly thought that the straightforward cases that he did refer to would not affect greatly the overall investable universe of that charity. The second point is both the adequacy of the definition for identifying directly conflicting investments and whether the definition that has been adopted will actually in practical terms pick up all such investments. In respect of the latter, I am thinking about the lack of information concerning Scope 3 emissions.

71. It seems to me that the Vice-Chancellor was not, as a matter of law, distinguishing between a category 1 case of direct conflict and a category 2 case of indirect conflict. While he does say that in a case of direct conflict, the trustees "*should not so invest*", he goes on to say that "*Carried to its logical conclusion, the trustees should take this course even if it would be likely to result in significant financial detriment to the charity*" but then concludes that this is "*unlikely to arise in practice*". No authority is relied upon by the Vice-Chancellor for saying there is an absolute prohibition[4] and he does not appear to be saying that that is the legal conclusion that he comes to. Rather he is explaining the unlikelihood of there being any sort of financial detriment if trustees excluded directly conflicting investments.

72. The Vice-Chancellor then goes on to explain the balancing exercise that trustees must perform in considering the indirect effect of particular investments on beneficiaries or donors. There is nothing controversial about this. Nor is there in what he says about moral considerations in category 3. But the way the Vice-Chancellor framed the issues he was considering was that they were departures from the "*starting point*" of maximising financial returns. If that is the starting point then I find it difficult to see how it should be ignored completely when there is a potential direct conflict. If there is an absolute prohibition on directly conflicting investments then it would mean that this is the first question that trustees must ask and that presumably they are under a duty to do so. Again I do not think that the Vice-Chancellor intended to be so categoric and his use of the word "*should*" means something slightly less than "*must*" and does not preclude consideration of other important factors. It is just that a direct conflict is likely to be the most significant factor and should be avoided if possible. But where there are the practical difficulties around identifying which companies are in fact acting in conflict with the charity's purposes, it cannot be the case that the failure to identify such companies may constitute a breach of trust.

73. My view as to what the Vice-Chancellor meant is fortified a little by his rejection of the second declaration that the Bishop of Oxford was seeking, namely that the Church Commissioners "*may not act in a manner which would be incompatible with that object*", which was promoting the Christian faith through the established Church of England. That declaration was principally not made because he thought that there could well be differing <u>moral</u> views within the Church as to whether particular investments were in conflict with the charity's purpose (see p.1252H). But if he thought that there was an absolute prohibition on acting in conflict with the charity's purposes, there should be nothing wrong with a declaration in those terms, which would only express what the Church Commissioners were bound to do anyway.

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[4] He expressly states at p.1248A that he "*was referred to no authority bearing directly on these matters*".

74. Where conflicts arise, whether in trusts or in companies, they can be resolved by the consent of the beneficiaries or the shareholders. There is no absolute prohibition by law to entering transactions that involve a conflict. The trouble with charities is that there are no beneficiaries as such who can give consent (save for the Attorney General acting in the public interest) and in my view that adds weight to the conclusion that these are matters for the discretion of the trustees acting consistently with and so as to further the purposes of the trust.

75. Even if I am wrong about what the Vice-Chancellor was saying and he was saying that there is an absolute prohibition on direct conflicts, I agree with Mr Henderson that, with all due respect, such a *dictum* should not be followed. It is understandable that the Claimants felt that there was sufficient uncertainty around what the Vice-Chancellor meant so as to require them to seek clarity from the Court in this respect. Their case brings sharply into focus what the Vice-Chancellor actually meant in relation to direct conflicts because of the difficulties of establishing whether a direct conflict actually exists. But for the same reasons as set out above, I do not believe that the passage of the Vice-Chancellor's judgment should be read as imposing, as a matter of law, an absolute prohibition against directly conflicting investments. It will all depend on the particular facts of the case but the trustees have a discretion in relation to the exercise of their powers of investment and that includes in relation to potential situations of direct conflict.

76. This seems to have been the view of the Charity Commission as expressed in CC14 and the submissions of Mr Jaffey QC. It is also the position of the Attorney General, who, if anyone, would be expected to support an absolute prohibition if that was thought to be in the public interest. But Mr Henderson was quite clear that this was a discretionary decision by the trustees which has to be made with regard to their overarching duty to further the purposes of the charity. And Mr Cumming QC also preferred that view of the *Bishop of Oxford* case in terms of what the law should be, albeit that, as I said above, he understandably wanted the comfort of this being clarified by the court.

77. The real area of dispute was therefore not about this but about whether the Claimants should have the declarations they seek and whether they have in fact carried out the necessary balancing exercise in relation to their decision to adopt the Proposed Investment Policy such that the court should bless their decision. That is dealt with below.

78. But before turning to the declarations themselves, I should summarise what I consider to be the law in relation to charity trustees taking into account non-financial considerations when exercising their powers of investment:

(1) Trustees' powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000.

(2) Charity trustees' primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes.

(3) That is normally achieved by maximising the financial returns on the investments that are made; the standard investment criteria set out in s.4 of the Trustee Act

2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is so as to produce the best financial return at an appropriate level of risk for the benefit of the charity and its purposes.

(4) Social investments or impact or programme-related investments are made using separate powers than the pure power of investment.

(5) Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.

(6) But where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.

(7) In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.

(8) However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.

(9) Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment.

(10) If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.

THE DECLARATIONS

79. The Claimants have sought a series of declarations, identical for both charities, most of which concern the process by which they ultimately concluded that the Proposed Investment Policy should be adopted. The final declaration is for the court's blessing in relation to the Proposed Investment Policy and is really, it seems to me, what this claim is about. The other declarations are seeking the court's approval for the building blocks of the actual decision under scrutiny. The Claimants invoke the court's inherent jurisdiction to supervise the administration of charities. I questioned at the

hearing the need for and purpose of these preliminary declarations. There were originally ten declarations in the draft Order attached to the Claim Form but some of these were conditional on the proper interpretation of the *Bishop of Oxford* case. During the course of the hearing Mr Cumming QC sensibly removed four of the proposed declarations and adjusted some of the wording of the remaining ones.

80. In relation to the main declaration concerning the Proposed Investment Policy, the Claimants apply under what is known as Category 2 from *Public Trustee v Cooper*. Hart J in that case was actually quoting from an unreported judgment of Robert Walker J (as he then was) in which he explained four different types of application that trustees might make. Category 2 is:

> "where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers... In a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries."

81. In *Re F* (Guernsey Court of Appeal, unreported, 10th September 2013) Mr John Martin QC sitting as a Judge of the Guernsey Court of Appeal, explained the distinction between Categories 2 and 3 of *Public Trustee v Cooper*, the latter being where trustees surrender their discretion to the court because they are unable themselves to make the decision. Mr Martin QC said of Category 2:

> "In the second type of application, however, the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision. It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a way different from that proposed by the trustees. To the extent that the court has any discretion, it is in whether or not to admit the application: if, for example, the court considers that the trustees' decision is of insufficient moment, it may refuse to entertain the application at all. Once it has decided to deal with the application, however, it has no more discretion than in the making of any other declaration, and will make it once satisfied of the propriety of the proposed exercise of the power

(See also the helpful summary from Snowden J, as he then was, in *Charity Commission v Mountstar* [2016] Ch 612 at [70-71].)

82. Mr Henderson took the point that the evidence in relation to the Ashden Trust showed that the trustees had not actually decided to approve the Proposed Investment Policy and so there was no decision on which the court could give its blessing. There was correspondence on this point with the Claimants' solicitors in the run-up to this hearing from which it is reasonably clear that the Claimants had formed the opinion that they should adopt the Proposed Investment Policy subject to the court's approval. Ms Butler-Sloss' witness statement at paragraph 96 had stated that it had not yet been formally approved by the trustees, whereas Mr Sainsbury had said in paragraph 74 of his witness statement that the Mark Leonard trustees do "*intend to adopt the [Proposed Investment Policy] (subject to the court's approval*)." Mr Cumming QC confirmed in oral submissions that the position in relation to the Ashden Trust was the same as for the Mark Leonard Trust.

83. If this is a point on jurisdiction in relation to Category 2 of *Public Trustee v Cooper*, then I think it is a bad one, being based purely on semantics and possibly the need for a minute recording the decision. The Claimants have clearly decided to adopt the Proposed Investment Policy if the court gives its blessing to their decision to do so. But I think Mr Henderson was relying on this so as to make a wider point that the Claimants should have set out clearly in their record of decision-making the basis for that decision. In other words, they should have explained the factors that they took into account, the balancing exercise that they undertook and generally how they concluded that their discretion should be exercised in favour of adopting the Proposed Investment Policy.

84. This feeds into the substantive objections expressed by both Mr Jaffey QC and Mr Henderson as to whether the evidence of the Claimants as to their carrying out of the necessary balancing exercise is sufficient for the court to be able to approve their decision to adopt the Proposed Investment Policy. Their principal objection, it seems to me, is as to whether adequate account has been taken of the financial effect of the Proposed Investment Policy. They accept, I think, that the Claimants have carefully considered the potential conflict with their charitable purposes of investing in companies that are not aligned with the goals of the Paris Agreement. They might not agree that the Paris Agreement is necessarily the best way for the conflict to be tested but I do not think there could be any basis for suggesting that the Claimants had not thought about and researched this responsibly and diligently, including taking into account specialist advice. Their concerns are focused on the other side of the equation, namely whether the trustees have adequately balanced the anticipated financial detriment that would be suffered by the adoption of the Proposed Investment Policy.

85. I think part of the problem in this case is that the Claimants' evidence and consideration of these matters were dependent on two alternative views of the law arising out of the *Bishop of Oxford* case. If the absolutist interpretation that all directly conflicting investments were automatically excluded was correct, then the Claimants needed a workable definition of what are directly conflicting investments. They came up with investments that were misaligned with the goals of the Paris Agreement. On that scenario, there was no need to work out the financial implications. But if, as I have found, there is no absolute prohibition and the Claimants have to perform a discretionary exercise, there needs to be balanced against the potentially conflicting investments, the risk of financial detriment from implementation of that policy.

86. Mr Jaffey QC and Mr Henderson submitted that the Claimants have not yet struck this balance, or if they have, their doing so has not been explained either in the evidence or recorded in the minutes of a trustees' meeting. I think the trustees would have been well advised to have set out their reasons for adopting the Proposed Investment Policy in principle but I do not accept that they have not provided adequate reasons. In particular as to the financial effect of the Proposed Investment Policy, it is explained in the Policy itself what the investment goals and objectives are, in particular an investment return of CPI +4% pa on average over five year rolling periods. The proposed portfolios put forward by Cazenove are dealt with in paragraphs [28] to [32] above and take into account that investment return objective which Cazenove considered attainable. Ms Butler-Sloss explained in her witness statement that there might be a "*risk of short term financial detriment- because of the substantially more limited investable universe and sectors in which the* [Proposed Investment Policy] *permits investments. The longer the time frame over which this is assessed, the higher the likelihood of the return objective being achieved, and the Trust avoiding diminished returns as a result of the contemplated change of approach.*" [114]. I have quoted from [116] of her witness statement in paragraph [32] above.

87. It seems to me that the Claimants have very much in mind the potential financial effect of the Proposed Investment Policy. They cannot be more precise as to the figures because things change rapidly and furthermore there remains uncertainty about the effect of further Scope 3 emissions data affecting the investable universe. Mr Jaffey QC submitted that there is no evidence of the Claimants considering alternative strategies such as engaging with companies as a shareholder to bring about change from within rather than divesting completely. But I think this criticism is unfounded. The Claimants have decided, reasonably in my view, that there needs to be a dramatic shift in investment policies in order to have any appreciable effect on greenhouse gas emissions and for there to be any chance of ensuring that there is no more than a 1.5°C rise in pre-industrial temperature. The only question is whether they have sufficiently balanced that objective with any financial detriment that may be suffered as a result. In my view they have and the performance of the portfolio will be tested regularly against recognised benchmarks and will seek to provide the financial return specified in the Proposed Investment Policy.

88. Accordingly I consider that the Claimants have exercised their powers of investment properly and lawfully, having taken account of all relevant factors and not taken into account irrelevant factors. I believe that the decision to adopt the Proposed Investment Policy is sufficiently "*momentous*" to justify the court giving its blessing to that decision and I therefore make the declaration that is sought in the adjusted wording of declaration 9 in the draft Order. That is in the following terms, with my amendments:

> "The trustees of the Charities are (a) permitted to adopt [the Proposed Investment Policy] and (b) that doing so will discharge their duties in respect of the proper exercise of their powers of investment."

89. Mr Cumming QC accepted in the end that this was the only declaration that he actually needed and he left it to the court to decide if the other declarations needed to be or should be made. The other declarations explain how the Claimants got to make their decision to adopt the Proposed Investment Policy and seek the court's approval for the lawfulness of each step in that process. Mr Jaffey QC and Mr Henderson had a

number of objections to these declarations, in respect of their vagueness, uncertainty and whether they were correct in law.

90. In my view, the other declarations are both unnecessary and inappropriate. They do not obviously come within Category 2 of *Public Trustee v Cooper* (they may come within Category 1 or the inherent jurisdiction to supervise charity trustees). They do not really add to the main declaration that I am going to make as to the decision to adopt the Proposed Investment Policy. And I do not think it is appropriate for the court to be making declarations as to such granular detail as to whether the Claimants were entitled to rely on a particular IPCC Report or whether by the adoption of the Policy the Claimants were not making "*impermissible moral statements*". Quite apart from taking *obiter dicta* of the Vice-Chancellor in the *Bishop of Oxford* case as being effectively statutory words, I do not think the court is in a position to come to a conclusion on that.

91. In all the circumstances I will make the declaration as set out above, subject to any drafting points that the parties may have in relation to it, but I will not make any other declarations. Accordingly the Claimants can proceed to implement their Proposed Investment Policy and they will be acting lawfully in doing so.

92. I should record that the Charity Commission have expressed some concern about the high level of costs expended on this litigation by the charities. I will not comment on that, save to say that I think it was important, not only for these charities, but also for charities generally, that there should be clarity as to the law on investment powers of charity trustees. That is why I gave permission for these proceedings to be brought. I hope that such clarity has been provided. I understand that there has been agreement between the parties in relation to the costs of the proceedings and I need say no more about that.