REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 13342/19

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

25/5/2020

In the matter between:

LEE HITGE	Applicant
and	
MICHAEL CONRAD HITGE	First Respondent
MICHAEL CONRAD HITGE N.O.	Second Respondent
(in his capacity as trustee for the time-being of the MC HITGE TRUST No. [....])	
REGISTRAR OF DEEDS, PRETORIA	Third Respondent
MASTER OF THE HIGH COURT, PRETORIA	Fourth Respondent
CURRO HOLDINGS LIMITED	Fifth Respondent
DE KLERK & VAN GEND INC	Sixth Respondent
ROBERT DAVID LEES	Seventh Respondent
ROBERT DAVID LEES N.O.	Eighth Respondent
(in his capacity as trustee for the time-being of the MC HITGE TRUST No. [....])	

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This application concerns the alleged maladministration of a family trust, the MC Hitge Trust, ("the Trust"). The application is opposed by the trustees of the trust (the first, second, seventh and eight respondents), collectively referred to in the judgment as ("the respondents").

[2] The applicant is the daughter and the only child borne of the first respondent, "Mr Hitge", who was the sole trustee of the Trust from the time it was established in 1995, until the appointment of the seventh respondent, ("Mr Lees"), as co-trustee on 4 July 2019. The events material to the application principally concern the tenure of Mr Hitge as trustee.

[3] The sole object of the Trust is to provide for the maintenance and care of the applicant, her parents and the applicant's dependants. The applicant, Mr Hitge and applicant's mother are therefore all beneficiaries of the Trust. The applicant was 14 years old when the Trust was established. She is currently 38 years old and has no dependants. She is the sole capital beneficiary of the Trust.

[4] The Trust has one asset, an immovable property, previously known as Holding [....] L[....] Park Agricultural Holdings ("the property") that was transferred into the Trust by the applicant's grandmother in 2000. The property consists of a main house, a large warehouse, an office premise and 12 one-bedroom cottages. It is a valuable, income-producing asset. According to the applicant the property was valued nine

years ago, in 2001, at R9 000 000 (nine million rand). For the last 25 years or more, the main house on the property has been Mr Hitge's primary residence. It is common cause that the office premises, cottages and warehouse generate a monthly rental income. The applicant contends that for the last 15 years, at least, Mr Hitge has applied the income generated from the property towards his expenses and lifestyle. In December 2018, the applicant became aware that Mr Hitge wants to sell the property to the fifth respondent, ("Curro"), and use the proceeds of the sale mainly for his own benefit. The applicant told Mr Hitge that she did not agree with the sale of the property. The conversation ended in an argument and the parties have not spoken verbally since that date.

[5] The applicant contends that the Trust is to provide for the maintenance of the beneficiaries up until the *"distribution event"*, as defined in the Trust Deed, namely when the applicant turned 25 years of age. It is contended that, despite the fact that the applicant turned 25 years old in 2007, Mr Hitge failed to give effect to the "*distribution event*" as required under the Trust Deed, nor has he indicated any basis upon which to exercise a discretion not to do so. Consequently, the applicant has not received the benefits to which she is entitled under the express terms of the Trust Deed. The applicant contends that she has been compelled to bring the application because of her increasing sense of disquiet at the manner in which Mr Hitge (and now Mr Lees as well) are running the Trust.

[6] The applicant seeks an order directing the transfer of the property into her name, pursuant to the express terms of the Trust Deed. If the applicant does not succeed in obtaining specific performance of the Trust Deed, then she asks that Messrs Hitge and Lees be removed from their office as trustees of the Trust, and that independent

trustees be appointed in their stead, so that proper effect can be given to the Trust Deed. The basis of this claim is the allegation that Mr Hitge has abused his fiduciary position and allowed his own personal interests to conflict with the applicant's. In either event, whether the applicant is granted the relief in in the form of specific performance of the Trust Deed, or paragraph removal of the trustees, it is submitted that she is also entitled to the interdictory relief sought in the amended notice of motion, namely, an order interdicting any transfer of the property without her written consent.

[7] The applicant stated that she took a number of steps prior to launching the application to resolve this very personal family matter. She has exchanged correspondence with two sets of lawyers acting on Mr Hitge's behalf in which she set out her concerns in detail, but these were dismissed out of hand. She also wrote to the Master to seek his assistance, but that too did not yield any results. She contends that in the circumstances, she had no alternative but to approach this court for relief and without' the relief being granted, the property will be sold and the sale proceeds dissipated to nothing by Mr Hitge, to the applicant's obvious prejudice.

[8] The respondents contend that the relief sought by the applicant, namely for the property to be transferred into her name, is incompetent because the prayers sought do not flow from the provisions of the Trust Deed. The respondents submit that there is simply no basis for such a drastic order and it would be to the detriment of the respondent as it would effectively leave the respondent homeless from the date of the order until the date on which he passes away. The respondents deny any allegations of maladministration of the Trust and contend that the applicant failed to establish the requirements for a final or interim interdict.

[9] The various orders sought in the amended notice of motion are dealt with in turn below.

SPECIFIC PERFORMANCE OF THE TRUST DEED

[10] The Trust is a discretionary trust. In this respect, the Trust Deed provides the trustees with the sole and absolute discretion and powers to, *inter alia*, sell property, reimburse themselves from the trust fund for all expenses incurred by them in or in respect of the execution of the Trust, to sign and execute transfers and cessions of property, enter into contracts on behalf of the Trust and distribute the trust capital at any time and in any manner that they deem fit. As such, the trustees of the Trust discretion is not merely regarding the mode of applying the terms of the Trust but extend even, as to whether or not to distribute any benefit to a particular beneficiary.

[11] As stated before, the applicant is the sole capital beneficiary of the Trust. Clause 2.5 of the Trust Deed describes capital beneficiary as *"any person whom a share of the trust capital may devolve in terms of clause 12 ....".* Clause 12.6 of the Trust Deed, which is central to the application, reads as follows:

> "*12.6 All distributions to a beneficiary shall be subject to the following:*
>
> *12.6.1 No beneficiary shall receive his share of the income or capital until he reaches the age of 25 years. Instead, the trustees shall continue to hold his portion in trust until he reaches such age.*
>
> *12.6.2 Once a beneficiary has reached the age of 25 years his share of the capital as well as any accumulated income, shall be paid to him, but subject to clause 12.6.3.*
>
> *12.6.3 If the trustees decide for any reason whatsoever that it would be in the best interests of the beneficiary not to pay out their share of the capital until a later stage, then the beneficiary shall be bound by such decision.*"

[12] The applicant contends that in terms of clause 12.6.2 she should have received the property (being the Trust's only capital asset) some twelve years ago in 2007, when she turned 25. She further submits that in accordance with clause 12.6.3, it is clearly in her best interest to receive the property and that Mr Hitge has never suggested nor articulated any reason why this is not so.

[13] The respondents contend that clause 12.6 should be read in conjunction with Clause 12.3. Clause 12.3 reads:

> "*Upon termination of the trust, the total value of the trust capital shall be determined and disposed of for the benefit of the children born of Hitge failing then their dependants, equally subject to clause 12.6".*

[14] The respondents contend that the Trust has not terminated nor has a distribution event been decided/resolved by the trustees. As such the applicant has no claim whatsoever to any benefit from the Trust. Even less so does she have a claim to seek transfer of any trust asset(s) to her in the past or present. Moreover, any alleged claim to a transfer or interdicting the sale by the trust of its assets to the exclusion of the trust and/or the trust creditors is absurd. Mr Hitge further states that the applicant is not a trustee and does not have any decision-making authority or power with regard to the Trust. He also says that the Trust Deed provides the trustees with sole and absolute discretion and power *inter alia* with regard to the property and that the Trust Deed allows the trustees to distribute the Trust capital at any time and in any manner which they deem fit.

[15] Firstly, on a proper reading of the Trust Deed, it is clear that clause 12.6 is not reliant on the termination of the Trust. Secondly, clause 12.6 is mandatory and clearly states that once a beneficiary has reached the age of 25 years his or her

share of the capital as well as any accumulated income, **shall** be paid to her, subject to clause 12.6.3. If it is not paid out it must be because the trustees have **decided** that it is not in the best interest of the beneficiary to pay out her share of the capital until a later stage. It is only when such a decision had been made that the beneficiary shall be bound by such decision. (Own emphasis added)

[16] The respondent is correct. The applicant does not have any decision making authority with regard to the Trust. But, that is not the point. Mr Hitge, as trustee, has failed to give effect to the clear provisions of clause 12.6, as he is obliged to do, and has never given any explanation whatsoever for this failure, even though the applicant turned 25 many years ago. The discretion granted to the trustees is not without limit and Mr Hitge is bound to follow the provisions of the Act and the Trust Deed and act in the best interests of the beneficiaries in making decisions.

[17] More importantly, simple reliance y on the wide discretion accorded to him does not answer the specific complaint formulated in the founding papers, which is this: If Mr Hitge, for any reason, did not think it was in the applicant's best interest to pay out the accumulated income and capital of the Trust to her when she turned 25, he was not obliged to do so and the applicant would be bound by the exercise of his discretion under clause 12.6.3. The respondents did not give any answer addressing this cardinal point. The court is given no detail as to whether a decision was taken and if so, on what basis. The only reasonable inference to draw is that Mr Hitge did not apply his mind to his obligations under the Trust Deed. He has certainly never conveyed any reason why it was not in the applicant's best interests to pay out the capital of the Trust to her when she turned 25 or any time thereafter.

[18] The applicant seeks an order for the transfer of the property into her name. In

the specific circumstances of this case I am not convinced that such an order would be justified.

REMOVAL OF MESSRS HITGE AND LEES AS TRUSTEES

[19] The applicant alleges that Mr Hitge has patently abused his fiduciary position and allowed his own personal interests to conflict with the applicant's. It is further alleged that Mr Lees is not independent as he is closely allied to Mr Hitge and this necessitates the appointment of independent trustees to take control of the Trust's affairs and assets in order to protect the interests of the beneficiaries and especially those of the applicant. It is contended that in such circumstances, Mr Hitge could still be maintained out of income from the Trust, as could the applicant's mother, as beneficiaries of the Trust.

[20] The removal of a trustee from his or her office is expressly provided for under the Act. In terms of section 20, a trustee may, on the application of any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the Trust and its beneficiaries.

[21] The general principle is that a trustee will be removed where continuance in office will prevent the trust being properly managed or will be detrimental to the beneficiaries.[1] The respondent argues that there is no evidence to show that the continuance in office of the respondent will prevent the trust being properly managed or be detrimental to the applicant. The respondents submit that there is therefore no basis for removal of the respondent as trustee. I disagree. The applicant raised a number of grounds upon which she relies. They are summarised hereunder.

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[1] See *Honore's South Africa Law of Trusts* 6th Edition on page 271, para 141.

No records

[22] In terms of section 9(1) of the Act:

> "*A trustee shall in the performance of his duties and the exercise of his powers act with care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*"

[23] In terms of section 10, "*[w]henever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society*".

[24] In terms of section 11, a trustee is obliged to:

> *"(a) Indicate clearly in his bookkeeping the property which he holds in his capacity as trustee and which is in his personal capacity; and*
>
> *(b) If applicable, he must register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;"*

[25] In terms of section 12, trust property shall not form part of the personal estate of a trustee except insofar as he, as the trust beneficiary, is entitled to the trust property.

[26] Clause 7.1 of the Trust Deed provides that:

> "*7.1 Proper books of account of the trust shall be kept and such books, together with all other papers and documents connected with or relating to the trust, shall be kept at such place as may be agreed upon by the trustees and the same shall at all times*

be accessible to each of the trustees. The trustees may engage such secretarial or accounting assistance as may be required for the purposes of the trust.”.

[27] Section 16 of the Act provides that:

> “*16.* ***Master may call upon trustee to account****.–(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.*”.

[28] Despite these provisions, no proper books of account (or indeed any books of account) for the Trust have been kept since its inception. Accordingly, there is no record *inter alia* of:

(a) what assets the Trust owns, besides the property;

(b) what business the Trust is involved in;

(c) what income the Trust receives and has received in the past and to whom such income has been paid;

(d) what expenses the Trust incurs and for whom, and what it has expended in the past;

(e) what investments the Trust has, how they are performing and how they have performed in the past;

(f) to whom the Trust has paid money in the past;

(g) by whom the Trust has been paid money in the past; and

(h) what the Trust's tax liabilities are and if its tax obligations have been met in the past.

[29] Before the applicant launched the application she repeatedly requested the books of account to be made available to her, but none were ever provided and none were attached to Mr Hitge's original papers. Instead, Mr Hitge's attorneys stated in a letter dated 7 March 2019, that a new accountant had been "*nominated*" earlier that year and that "*financials for the Trust are in the process of being prepared*".

[30] "Financial statements" for the Trust were eventually produced for the first time on 15 July 2019 under cover of Mr Hitge's supplementary affidavit. They are fundamentally defective. Firstly, the Trust has not produced any annual financial statements for the period 1996 to date. Secondly, the document that has now been produced does not begin to reflect the necessary information, and is an entirely self-serving attempt to remedy an obvious breach.

[31] The "accounting documents" that were produced by Mr Lees, which purport to reflect the income and assets of the Trust from 1996 – 2018, is a patent reconstruction and does not evidence fulfilment of the trustees' obligations in relation to accounting matters. It is noteworthy that Mr Lees was apparently the Trust's

auditor for 23 years and thus well placed to give a comprehensive account of financial matters according to the Trust. He has failed dismally to do so. It is telling that he denies that he "*in fact had any obligations in terms of the Trust Deed*". Accordingly, the applicant's allegation that financials were in the process of being manufactured in an attempt to legitimise Mr Hitge's administration of the Trust retrospectively, was completely justified.

Taking all monies for himself

[32] It is common cause that the Trust had been leasing out the cottages and rooms in the main house of the property, as well as the office premises and warehouse. There can be little doubt that the Trust has generated substantial income over the years from the leasing thereof. The applicant has speculated about the precise quantum of that income, which must be material by any standards. However, despite requests for information on this score, absolutely none has been forthcoming. Instead, Mr Hitge contented himself with the baldest of denials in his answering affidavit, saying simply: "*I have not taken the income from the Trust for myself and the income has been utilised to pay for the bond, improvements, upkeep and maintenance of the property as a whole, as well as to maintain me as beneficiary and trustee of the Trust*". No itemisation of the amounts is given in his answering papers. Mr Hitge's response is evasive and highly unsatisfactory.

Attempts to alienate the Trust's only asset

[33] On 12 December 2018, the applicant first learnt that her father intended selling the property to Curro. Although Mr Hitge as trustee has the discretion to sell the property, he had to exercise that discretion responsibly, pursuant to the provisions of the Trust Deed, and in the best interests of the applicant. It is apparent that this is

not so for several reasons.

[34] Firstly, the applicant expressed grave reservations in correspondence that the sale price of the property was less than its market value. Despite the detailed concerns made out in her founding papers, Mr Hitge merely stated in his answering affidavit that he had obtained independent advice "*from estate agents and neighbours in the area who have advised that the amount offered by Curro is above the market price for the property*". He attached a municipal valuation of the property and affidavits from neighbours but failed to attach the valuation report from estate agents as he was *"advised this is confidential information which cannot be published*".

[35] I agree with the applicant that this answer is unsatisfactory. A municipal valuation is not evidence of the market value of a property and Mr Hitge's neighbours are hardly in a position to express an expert opinion about the value either, even if their valuations were disclosed. Whilst the views of estate agents may well be of evidential value (although, of course, a sworn valuation is what one would have expected to be attached to the answering affidavit), the valuations by the estate agents are not even given to the court, on the thin pretext that they contain confidential information.

[36] Although Mr Hitge confirms that the property has been sold to Curro, he did not attach a copy of the sale agreement in his answering affidavit and did not tell the court anything about the mechanics of the sale, including for instance, what amounts have been paid thus far by Curro, if any, when transfer is to take place, when occupation is to be given, or any such detail.

[37] Secondly, it is clear from Mr Hitge's response that he does not intend to replace

the property with another investment but to spend most of the proceeds of the sale on himself. The applicant alleged in her founding affidavit that Mr Hitge had told her and other people, including her ex-husband whose confirmatory affidavit is attached to her papers, that his plan was to sell the property so that he could travel with his girlfriend and enjoy his life. In answer to this, Mr Hitge simply stated that the Trust is a discretionary Trust and the decision to sell the property does not breach the Trust Deed and that the sale of the property is in the best interests of the Trust and the proceeds of the sale will be invested. He then stated the following:

> *"The proceeds of the sale will be invested so as to provide firstly for my living expenses until my passing and secondly, to provide an inheritance for my daughter, the Applicant, as she would have received had I passed away and the Trust owned the property… At the time that the proceeds of the sale of the property are to be invested, Lees and I as trustees of the Trust will obtain independent advice as to the best possible method of investing the proceeds of the sale. Taking into account that my daughter resides in the United Kingdom, it will be best that at least part of the funds are invested in offshore unit trusts and in British Pounds in order to mitigate against the falling value of the Rand as compared to the British Pound in order that when I pass my daughter, the Applicant, will receive the best possible amount as an inheritance*".

[39] Given the circumstances and Mr Hitge's past conduct there is no guarantee that the proceeds of the property would indeed be invested, whether prudently or at all. In the absence of any concrete facts these "assurances" are simply empty assertions, especially if one has regard that he also stated that the proceeds of the sale will only

being vested "*after deducting the amounts due to me in respect of the costs of maintenance, repairs and development of the property*". He gives no detail whatsoever of the quantum of any of these costs or expenses in his answering affidavit. Although Mr Hitge denies that he has any intention to use the proceeds of the sale "*for frivolous overseas vacations*" he gives no comfort in relation to the other expenses which he says he will meet out of the proceeds of the sale.

[40] I am satisfied that all of the above facts clearly shows that Mr Hitge has failed in his duties as trustee in every material respect, and that he cannot be trusted to property administer the Trust's affairs. Mr Lees' appointment gives no comfort since he fails to address the complaints in any meaningful way and makes common cause with Mr Hitge. I am further satisfied that if Mr Hitge is permitted to pursue his intended course of action, there will be nothing left to distribute and the Trust will have failed. The paucity of information in the answering affidavit coupled with the bald denials of the applicant's detailed allegations, simply confirms these fears.

INTERDICTORY RELIEF IN RESPECT OF THE PROPERTY

[41] The applicant seeks an order interdicting the sale of the property. The respondents contend that the applicant had failed to establish the requirements of a final interdict.

[42] The applicant is required to show: (a) that the right which it seeks to enforce is clear; (b) an injury actually committed or reasonably apprehended; (c) the absence of any other satisfactory remedy.

[43] I am satisfied that the applicant has established a clear right to the proper

administration of the Trust and a right to insist that Messrs Hitge and Lees be prevented from acting contrary to their duties as trustees by concluding or executing the envisaged sale.

[44] The applicant has also established a real apprehension that if the envisaged sale transaction is allowed to proceed, she will suffer irreparable harm as the sole capital beneficiary of the Trust. The property is a valuable asset and has the capability to generate a significant income, yet it is alleged that it not being sold at its true market value. Furthermore, even if the trustees intend to invest the proceeds of the sale for the benefit of the Trust the applicant will suffer grave prejudice given the fact that the property will not have realised the price which it ought to have on the open market and such loss can never be recouped. If the relief sought is not granted, then the Trust and the applicant will suffer irreparable harm since there is no remedy other than interdictory relief which is satisfactory in the circumstances.

CONCLUSION

[45] In the founding papers, the applicant made detailed and serious allegations of maladministration of the Trust by Mr Hitge. In my view, she has succeeded in showing that the trustees have acted in breach of the Act[2] and The Trust Deed. Right from the outset in 1995, no proper books of account for the Trust have been kept and accordingly, there is no record *inter alia* of what income the Trust receives and has received in the past and to whom such income has been paid, and what expenses the Trust incurs and for whom, and what has been expended in the past.

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2 Trust Property Control Act No. 57 of 1988 ("**the Act**").

[46] Mr Hitge has not informed the court whether the Trust holds a bank account and if so, with which bank and what the balance is in that account. This is notwithstanding the explicit provisions of clause 7.4 of the Trust Deed in section 10 of the Act. The so-called "financials" that were attached to the supplementary affidavit are wholly unsatisfactorily and was a contrived attempt to purge the trustees' default. In addition, Mr Hitge has apparently concluded a sale agreement with Curro on behalf of the Trust and intends to dispose of the Trust's sole (and very valuable) income-producing asset to a third party. This step was seemingly taken by Mr Hitge without proper advice and without a proper valuation of the property to establish its true market price. Even more worrying is that Mr Hitge has said he intends to live off the proceeds of the sale and use them to pay himself compensation for various unspecified "*expenses*" which he says he has incurred.

[47] Despite detailed correspondence, requests for specific information, requests for specific documentation and requests for particular undertakings, none of this has ever been satisfactorily dealt with by Mr Hitge or his attorneys, and the applicant was dismissed out of hand as being a nuisance and despite the serious allegations in the founding affidavit Mr Hitge has responded in the most perfunctory way. His lack of response exacerbates the applicant's fears and justifies her decision in bringing the application.

[48] Mr Hitge has not put up a single income statement or balance sheet for the Trust or any other book of account showing the Trust's state of affairs, its income, assets, expenses, payments or anything of the like for the entire period of its existence, from 1995 to date. This is notwithstanding the explicit provisions of clause 7 of the Trust Deed and section 16 of the Act. The applicant was further told, for the first time on 4

January 2019, that the Trust Deed had apparently been amended to include Mr Hitge as a capital beneficiary. Despite numerous requests for a copy of the purported amendment to the Trust Deed, it has not been produced or any documentation from the Master evidencing registration and approval of such amendment, despite the provisions of section 4(2) of the Act. Mr Hitge has also not given details of the circumstances in which a new trustee was suddenly appointed in 2019, nor did he attach to his answering papers any documentation, including letters of authority evidencing such appointment, notwithstanding requests and his obligations under section 6 of the Act. Crucially, Mr Hitge has given no explanation for his non-compliance with clause 12.6.2 of the Trust Deed and has not explained to the court why, notwithstanding the explicit provisions of the Trust Deed, the property has not been transferred to the applicant as capital beneficiary. The same criticisms are true of Mr Lees, who simply associates himself with Mr Hitge and makes no explanation for the lack of financials, despite his apparent role as auditor of the Trust. Mr Lees attempts in his answering papers to cure the obvious defects in Mr Hitge's affidavit, but does not succeed in doing so.

[49] Mr Hitge is manifestly in breach of the duties of care, diligence and skill required of trustees under section 9 of the Act and the Trust Deed. Furthermore, Mr Lees has made common cause with Mr Hitge and cannot be relied upon to curb Mr Hitge's errant ways.

[50] In the result the following order is made:

(a) The second and eighth respondents are removed as trustees of the Trust.

(b) Trust Project (Pty) Ltd represented by Phia van der Spuy is appointed as trustee of the Trust.

(c) Any transfer of the property to the fifth respondent, or anyone else, sold under the authority of the second and eight respondents, is interdicted pending the appointment and subsequent approval of any such sale and transfer of the property, by Trust Project (Pty) Ltd represented by Phia van der Spuy.

(d) The first and seventh respondents to pay the costs of the application.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

<u>APPEARANCES</u>

Counsel for the applicant:	Adv. A.E. Franklin SC
Attorney for the applicant:	Rossouws, Leslie Inc
Counsel for the 1st, 2nd, 7th and 8th respondents:	Adv. C. B. Garrvey
Attorney for the respondents:	Kekana Hlatshwayo Radebe Attorneys
Date of hearing:	17 March 2020
Date of judgment:	May 2020