FROM BISHOPS TO BLESSINGS: MOMENTOUS DECISIONS BY TRUSTEES

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The English courts have for centuries exercised a supervisory jurisdiction over trustees and with the development of Jersey and Guernsey as trust jurisdictions the Islands' courts have taken on a similar role. One aspect of that role is the courts' ability to "bless" momentous decisions of trustees. This article examines the development of this jurisdiction by the Royal Courts of Jersey and Guernsey and the tests that will be applied both in making the application and receiving the court's consent to proceed.

1 A day or two after the death of Clayton Cracherode, the Bishop of Durham introduced himself to Clayton's grieving sister, who was to inherit the bulk of Clayton's estate. He said that he was a friend of the deceased who knew Clayton's mind very well and that he would "assist her in the arrangement of her affairs" and help her distribute her estate for such objects as Clayton would have wanted. Having won her confidence he insisted at a subsequent meeting that he be made her sole executor and residuary legatee so that he could distribute to "such objects of benevolence and liberality" as he in his own discretion shall most approve of. On the day that he made this proposal he insisted on a positive answer otherwise he "would have nothing more to do with her concerns" whereupon he walked into the next room. The sister decided to agree as the Lord Bishop was "a good man of high rank". The Bishop refused to take the executorship "on any other condition than as a trust and not for his own benefit". A new will was drafted with the Bishop's assistance, leaving what turned out to be a substantial residuary estate to the Bishop on the terms that he had insisted upon.

2 Following the death of Clayton's sister, her cousin, William Morice issued proceedings seeking a declaration that the residuary request was void for uncertainty. The Lord Chancellor held that the intention of the testatrix was to create a trust but, that object "being too indefinite", the trust failed. The need for certainty of intention (in common with the other two certainties of object and subject matter) lies in the courts' jurisdiction to supervise; where necessary, the court will administer the

trust. In the words of the Lord Chancellor in the Bishop of Durham's case[1]—

> "As it is a maxim, that the execution of a trust shall be under the controul [*sic*] of the court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the court; or if the trustee dies, the court can itself execute the trust."

3 The role of the court in supervising the administration of trust is fundamental to the trust concept. One aspect of this supervisory jurisdiction that flourishes today is the giving of directions to trustees in the form of a "blessing" of a momentous decision.

4 The framework for modern day applications to bless momentous decisions was laid down in an un-named and unreported decision of Robert Walker J (as he then was) given in Chambers in 1995 which was cited with approval by Hart J in *Public Trustee v Cooper*.[2]

5 Walker J divided cases where the court has to adjudicate on a course of action proposed or actually taken by trustees into four distinct categories. Perhaps unfortunately for Lord Walker, sitting in an unreported and un-named case, these are now referred to as the four categories in *Public Trustee v Cooper*. The first category is where some proposed action lies within the trustees' powers. Given that this is essentially a matter of construing the trust instrument, or a statute, or both, such applications would be heard in open court.

6 The second category is the "momentous decision" category. In such cases there is unlikely to be any doubt as to the nature of the power, and the trustees will have decided how they wish to exercise it, but the decision is of such a momentous nature that they wish to seek the court's blessing. Obvious examples would be selling a major asset or a controlling interest in a family business.

7 The third category is where the trustees surrender their discretion to the court. As with the second category there is unlikely to be any doubt as to the existence of the relevant power, but there is some reason why the trustees feel unable to exercise it, perhaps because they are conflicted or deadlocked. Both the second and third categories would ordinarily be heard in chambers, the difference between them being that in the second category the court is being asked to bless a decision

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[1] *Morice v Durham (Bishop of)* (1804), 9 Ves 399; 32 ER 656; [1803–13] All ER Rep 451; on appeal (1805), 10 Ves 522; 32 ER 947.
[2] [2001] WTLR 903.

of the trustees, whilst in the third category it is being asked to take the decision itself.

8 The fourth category is where the trustees have actually taken action and that action is being attacked as outside their powers or as an improper exercise of their powers. This is an ordinary breach of trust claim, decided in open court.

9 In the *Cooper* case, Hart J pointed out that the categories may not always be as clear-cut in practice as they appear to be in theory. A *Beddoe* application is an obvious example: a decision to commence or defend proceedings could be regarded as falling within the "momentous" category or it could be a case where there is a risk that the trustees' conduct may be impugned, thereby giving rise to a conflict. Hart J referred to a decision of Lindsay J in *In re Drexel Burnham Lambert UK Pension Plan*,[3] where trustees were assumed for the purposes of the judgment to have a potentially disabling conflict but were nevertheless authorised by the court to exercise a dispositive power. In that case, Lindsay J drew attention to the difference between the question "whether the trustees' proposals were ones which they could properly be given general liberty to carry into effect" and "the different question of how should the court, having the trustees' decision surrendered to it, exercise that power". In Hart J's view that illustrated precisely the difference between Robert Walker J's second and third categories.

10 *Public Trustee v Cooper* helpfully categorised the various types of cases where trustees were likely to seek the court's directions in exercise of a jurisdiction which has existed for many years. Jersey's trust statute, the Trusts (Jersey) Law 1984, had of course recognised that jurisdiction in art 47 which stated, at art 47(1)—

> "a trustee may apply to the court for direction concerning the manner in which he may or should act in connexion with any matter concerning the trust and the court may make such order, if any, as it thinks fit."

As a result of subsequent amendments to the 1984 Law, art 47(1) is now to be found at art 51(1).[4] *Public Trustee v Cooper* was decided on

[3] [1995] 1 WLR 32.

[4] In conformity with modern standards "he" has become "the trustee" and "connexion" has become "connection".

20 December 1999 and was subsequently cited with approval by the Royal Courts of both Jersey and Guernsey.[5]

11 In the 2001 case of *Abacus (CI) v Hirschfield*, the application by the trustees for directions came in the course of litigation involving the trustees, charitable and family beneficiaries, over the entitlements of a widow and her sons to the property of the deceased and their entitlement under certain trusts. After hearing evidence for three days, the court was informed that the family beneficiaries had reached a compromise which requested the trustee to confer on the widow a life interest in the trust assets, applying the trust capital for her benefit and making a loan to her out of the trust fund. The trustee sought directions as to whether or not it should enter into the agreement and, if so, the court's sanction for the various steps required of it. The trustee suggested that it would be appropriate to surrender its discretion to the court rather than ask the court to bless a decision given that the court was alone in a position to judge the possible outcome of the litigation which had been before it, its consequent impact on the trust and the appropriateness or otherwise of entering into the proposed agreement. It suggested that the application was therefore in the third category of cases referred to in *Public Trustee v Cooper*. The court noted that in order to enable the court to exercise its discretion it was incumbent on the trustee to put the court in possession of all the material necessary to enable the discretion properly to be exercised.

12 Following the *Cooper* decision in England, it was inevitable, given the size of Jersey's trust industry, that the courts' jurisdiction to approve a trustee's proposed course of action was increasingly likely to be invoked. A few months after the *Hirschfield* decision, the Royal Court helpfully set out the matters that should be considered by the court in such applications, in *In re S Settlement*,[6] namely (1) is it satisfied that the trustee has in fact formed the opinion in good faith that the circumstances of the case render it is desirable and proper to carry out each of the steps; (2) is it satisfied that the opinion which the trustees have formed is one at which a reasonable trustee properly instructed could have arrived; and (3) is it satisfied that the opinion at which the trustee has arrived has not been vitiated by any actual or potential conflict of interest which has, or might have, affected its decision? In subsequent decisions, a fourth requirement is often

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[5] *Abacus (CI) Ltd v Hirschfield* (2000 JLR 420), *Thommessen v Butterfield Trust (Guernsey) Ltd* (2009–10 GLR 102); on appeal *sub nom. Red Cross (Intl Cttee) v. Thommessen* (2009–10 GLR 377).

[6] Royal Ct, 24 July 2001, unreported; noted at 2001 JLR *N* [37]

expressed, namely whether the opinion or decision reached is within the scope of their powers, which necessarily follows if a case is to fall within the second category in *Public Trustee v Cooper*.

13 The English courts have emphasised the importance of making full and frank disclosure. Thus in *Tamlin v Edgar*,[7] Morritt J made it clear that the trustees should put the court in possession of all relevant facts and—

> "they must satisfy the court that they considered, and properly considered, their proposals to be for the benefit of the advancees or appointees. All this requires full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisers must be astute not to appear to treat them as such."

Although the courts have made clear that they are not to be treated as a rubber stamp, they have also recognised that they must not place too great a burden on trustees who apply to them. Thus in *Cotton v Earl of Cardigan*,[8] Vos LJ had this to say—

> "the court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason . . . The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways."

14 The importance of providing full and frank disclosure and summarising the arguments for and against a proposed course of conduct was emphasised in *In re M Trust*.[9] The trustee had applied to the Royal Court in July 2011 for directions in relation to matrimonial proceedings before the Family Division of the English High Court. The parties to the matrimonial proceedings were not members of the beneficial class, which included the husband's mother and father, and his children and remoter issue. Following an application by the wife to join the trustee to the matrimonial proceedings, the trustee sought the court's approval (i) to continue to disclose information about the trust assets to the husband's father in the knowledge that he was likely to

[7] [2011] EWHC 3949.
[8] [2014] EWCA 1312 (Civ).
[9] 2012 (2) JLR 51.

disclose the information to the husband; and (ii) not to submit to the jurisdiction of the Family Division and therefore not take part in the matrimonial proceedings. The court approved the trustee's decisions. The adult beneficiaries of the trust then applied to intervene in the divorce proceedings. As a condition for obtaining leave, they gave an undertaking to the Family Division to produce within 24 hours if ordered to do so all documents that they had received in connection with the trustee's application for directions. They applied to the Jersey court for leave to produce the documents as they were concerned that if they were to use them without leave of the Royal Court they might be in contempt of that court but if, on the other hand, they failed to produce the documents they would be in contempt of the English court. The trustee did not object to disclosure of the documents that had been placed before the Royal Court at the previous directions hearing save in respect of legally privileged material and material that disclosed the purpose of the earlier hearing or that set out the trustee's decision-making process. The Royal Court noted that it was very common for trustees in Jersey to seek the directions of the court and that such applications were an important part of the courts' supervisory jurisdiction over trusts. Further, a trustee making such an application had to make full and frank disclosure and summarise the arguments for and against a proposed course of conduct. Such applications were invariably held in private and it was of vital importance that if they were to serve the purpose for which they were intended, information and documents received by the parties convened to them should be held in confidence. If the trustee considered that the documents disclosed in such applications might be provided to persons hostile to the trust, it would be less likely to be candid and the underlying purpose of the procedure would be liable to be frustrated. It would be a contempt of court were a party to disclose documents that he had only received by virtue of being a party to such an application. The Royal Court expressed the hope that the Family Division would take note of its concerns at preserving the confidentiality of such documents and invited the Family Division to consider very carefully whether it needed to order the disclosure of the material in the divorce proceedings. Accordingly the court refused to grant consent to disclosure of the legal advice but in the unusual circumstances of the case (whereby the applicants had given an undertaking to the Family Division) the Royal Court gave leave to disclose all other material should the beneficiaries be requested to do so even after the Family Division had heard arguments to the contrary.[10]

[10] Ultimately the Family Division required disclosure of all of the material but noted that it had—

15 In cases coming before the Royal Courts of Jersey and Guernsey for the blessing of momentous decisions, the courts generally regard their function as merely reviewing the decision, unless of course the trustee has surrendered its discretion to the court, for example in cases of deadlock or conflict. However a Jersey case, *U Ltd v B*[11] (a case which concerned a beneficiary's request for disclosure of information) suggested that there may be a category of cases where the trustee is not conflicted or deadlocked but the court nevertheless exercises its own discretion, namely cases where the matter in issue is a core obligation of the trustee such as disclosure of information to beneficiaries.

16 In 2014, in *In re Y Trust*[12] the Royal Court had the opportunity to re-examine the stance that it had taken in *U Ltd v B*. The trustees in *In re Y Trust* had refused to disclose trust information requested by a former beneficiary of a trust. In notifying the claimant of their decision, they advised that they were prepared to take the "prudent approach and seek the approval of the Royal Court of Jersey of its decision". They advised the claimant's lawyers that if they did not confirm within a stipulated period that they accepted the trustees' position, the trustees would reserve their right to apply to the Royal Court without further notice. Not receiving that confirmation, the trustees applied to the Royal Court. In response to a request to fix a date for the hearing, the claimant's lawyers confirmed that the client was not pursuing the request for disclosure any further at that stage nor were they requesting or insisting on a judicial determination of the trustees' right to decline the disclosure request. Notwithstanding this communication, the court proceeded to determine the trustees' application, the only party appearing before the court being the trustee, through its counsel. That the court proceeded with the hearing is somewhat surprising, given that the request for disclosure was not being actively pursued.

17 The court referred to the three questions that it had to answer, as set out in *In re S Settlement*, and declared that it was satisfied in relation to them, declaring that it would have made the same decision as the trustees if exercising its own discretion. Whilst that might have

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> "given very considerable weight to the concerns expressed by the Royal Court in particular because the interests of comity have a powerful place in cases involving offshore trusts when the English courts will often depend on the trusts' home courts not least for the purposes of enforcement."

See [2013] EWHC 3627.

[11] 2011 JLR 452.

[12] 2014 (1) JLR 199.

been the end of the matter, counsel for the trustees had drawn to the court's attention case law concerning the function of the court, which appeared to be somewhat contradictory and in particular the decision in *U Ltd v B*. The court in *U Ltd v B* had cited with approval a passage from *Lewin on Trusts*, 18th edn (2008), which, having noted that the trustees had a discretion in deciding whether or not to disclose information went on to say—

> "But if the matter is taken to the court, whether by a beneficiary whose application for disclosure has not been met to his satisfaction, or by the trustees who may be well advised themselves to take the initiative in seeking directions in some circumstances, the court will exercise its own discretion. And the function of the trustees will be to persuade the court not to intervene against their decision or to assist the court in reaching a decision where the trustees make the application, the views of the trustees being no more than a factor taken into account by the court in determining the application."[13]

However in the *Y Trust* case the court noted that the passage in *Lewin* cited in *U Ltd v B* had subsequently been revised to express the view that if the issue of disclosure to a beneficiary was taken to the court it would not exercise its own discretion unless there was a surrender.

18 Lewin's change of view was brought about by an English High Court decision of Briggs J in *Breakspear v Ackland*,[14] a case concerning disclosure of a letter of wishes. Briggs J noted that a request by a beneficiary for disclosure of a letter of wishes merely triggers an occasion upon which the trustees need to exercise their discretion to disclose or not. In difficult cases they may seek directions from the court but will need to think twice as to whether the difficulty of the question justifies the expenditure. If the matter proceeds to court he suggested that there were four different ways in which the matter might be presented: (i) a surrender by the trustees of their discretion which, if accepted, would require the court to exercise its own discretion; (ii) a request to the court to bless their refusal; (iii) an application to the court made by a disappointed beneficiary, which would involve a challenge to the trustees' negative exercise of the discretion to disclose; and (iv) an invocation by the beneficiary to the court to exercise its original discretion as part of its jurisdiction in the administration of trusts. Briggs J had held that where there is no surrender of discretion and where the beneficiary is unable to invoke

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[13] *Ibid*, at para 17.

[14] [2009] Ch 32; [2008] 3 WLR 698; [2008] 2 All ER (Comm) 62; [2008] EWHC 220 (Ch).

the original jurisdiction of the court by demonstrating that an occasion has arisen which calls for the interference of the court, then the court will proceed on the basis of a blessing involving a review of the trustees' decision, as opposed to exercising its own discretion. He held that a refusal to disclose a letter of wishes would not ordinarily justify intervention.

19 Counsel in *In re Y Trust* suggested that the approach of Briggs J in *Breakspear* was the same as the test usually applied in approval hearings, namely, has the power been properly exercised? He submitted that the approach in *U Ltd v B*, namely for the court to exercise its own discretion, gives rise to difficulties and was inconsistent with the approach in *In re S Settlement* where, in the absence of something clearly having gone wrong, the court will not impose its own decision in place of that of the trustee. However Clyde-Smith, Commr in *In re Y Trust*, although attracted by counsel's argument stated that—

> "in the case before us the court was content to bless the trustee's decision as requested because it would have reached the same decision if exercising its own discretion. On the face of it, the unopposed submissions on behalf of the trustee as to the function of the court were attractive but having reflected on them we think that there are substantive contrary arguments that could be put on behalf of beneficiaries and we wish to leave expressly open the question of whether this jurisdiction should follow the decision in *Breakspear* . . . to a future case where full argument can be heard."[15]

20 The court's principal concern was that if *Breakspear* were to be followed, then in an application by trustees to bless their decision to refuse disclosure, the court's role would be limited to one of review according to *In re S Settlement*. The court noted that—

> "If it were to withhold its blessing, then, unless the circumstances were such as to call for the court's intervention, the trustees' decision to refuse disclosure would still stand. If the disaffected beneficiary seeking to hold the trustees to account applied to the court, then *Breakspear* contemplates the trustees being able, on *Londonderry* . . . principles, to withhold the reasons for their refusal from the beneficiaries and indeed the court, unless the beneficiaries can impugn the fairness or honesty of the trustees' decision. This approach could arguably represent a material

[15] 2014 (1) JLR 199, at para 20.

> dilution of the rights of beneficiaries to have the court enforce the trustees' fundamental obligation to account."[16]

21 The court suggested that a distinction could be drawn between decisions that related to the discharge of a core obligation and decisions representing the exercise of powers vested in the trustees by the trust deed or by law. It suggested that in the former cases the court should, in any application for disclosure before it, for the proper protection of beneficiaries, reserve to itself the exercise of its own discretion.

22 However, the court noted that as its observations had been made without the benefit of full argument it was likely to continue to exercise its own discretion in relation to matters relating to the discharge of core obligations.

23 In 2017, the Royal Court had an opportunity to review the competing arguments rehearsed in *In re Y Trust*, in *M v W Ltd.*[17] In this case, the representor, a beneficiary of a trust governed by Jersey law, sought disclosure of, *inter alia*, copies of all trust instruments and the latest accounts of the trust together with the most recent financial statements for all underlying companies owned by the trust. The court noted the discussion in *In re Y Trust* of the competing contentions, namely between applying the *S Settlement* test or exercising its own discretion, which would inevitably involve reaching a conclusion on a wider basis. It further noted that whilst the court in *Y Trust* expressed some doubt as to whether *Breakspear* was to be followed in Jersey, it did not decide the matter. Unfortunately there was little appetite on the part of the parties in *M v W Ltd* to continue the debate. The trustee did not suggest that the court should merely review the trustee's decision on *S Settlement* grounds, instead submitting that the representation specifically engaged the court's supervisory jurisdiction which, it was argued, would require the court to exercise its own discretion. Counsel for five of the beneficiaries who were party to the proceedings did not address the issue in terms but did refer in his skeleton argument to *Y Trust*. The court therefore proceeded as requested and exercised its own discretion. It did however add that—

> "if we had been called upon to make a decision on the competing arguments which are set out in the Court's judgment in the matter of the *Y Trust*, we would have proceeded on the basis that the right approach was that the Court should exercise its own discretion rather than adopt the approach set out in *Re S*. The

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[16] *Ibid*, at para 35.
[17] [2017]JRC168A; 16 October 2017, Jersey Royal Ct, unreported.

> main reason for that conclusion is that there is no doubt on the authorities that a beneficiary has the right to come to court and ask the Court to direct the trustees to make disclosure. There will be cases therefore where the Court is faced with an adjudication which is not necessarily straightforward; where two reasonable people might reach different but equally reasonable conclusions. It seems to us that it would be very undesirable if the outcome to the substantive resolution of whether or not disclosure should be made would be dependent on whether the trustee got in first with its representation seeking endorsement of its decision not to disclose, or the beneficiary had successfully anticipated such a course by bringing first his own application. In our judgment, it is not a question that the Court is usurping the role of the trustees in exercising its own discretion, but rather that it is exercising its jurisdiction to adjudicate upon a matter on which the beneficiary as much as the trustee is entitled is ask for assistance. This is also consistent with the terms of Article 51 of the Law which contains no restrictions on the powers of a court to make an order concerning the execution or the administration of any trust. To the extent therefore that *Breakspear* provides authority for the proposition that *Re S* should be applied to any question of disclosure of documents to a beneficiary by the trustee, our conclusion is that we would not be minded to follow it."[18]

24 Thus far it would seem, the Jersey courts are leaning towards a rejection of the *Breakspear* approach, effectively carving out a category of cases where the momentous decision involves core obligations such as provision of information to beneficiaries. In such circumstances the court is likely to exercise its own discretion.

25 There is another category of cases where the courts will exercise their own discretion and these are cases where the directions are sought by trustees who are contemplating, or find themselves on the receiving end of, litigation: the so-called *Beddoe* application, named after the 1892 case of *In re Beddoe, Downs v Cottam*.[19] It is clear that by 1892 the process of applying to the court for directions was already well established, Lindley LJ stating—

> "But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without

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[18] *Ibid*, at para 50.
[19] [1893] 1 Ch 547; (1892), 62 LJ Ch 233; 68 LT 595; 2 R 223; 41 WR 177.

> leave, it is for him to show that the costs so incurred were properly incurred . . . If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the points under discussion, and ask the court whether the point is one which should be fought out or abandoned."

26 Although the *Beddoe* jurisdiction appears to be an aspect of the court's supervisory jurisdiction, it considerably pre-dates the *Public Trustee v Cooper* line of cases and as such the approach of the court has become well established. In *In re F Charitable Trust*,[20] a *Beddoe* application was made in the Royal Court in relation to a purely charitable trust in respect of the recovery of a substantial debt. Counsel submitted that on the basis of *Public Trustee v Cooper*, approved in Jersey in *In re S Settlement*, the question for the court was whether it was appropriate to bless the action of the trustees in circumstances where there was no real doubt as to the nature of the power but the decision was particularly momentous. It was suggested that the court's role was a limited one; all that the court had to do was to satisfy itself that the proposed exercise of the power was lawful and that it did not infringe the duty to act as ordinary, reasonable and prudent trustees might act. If the trustees could properly form the view that the proposed transaction was for the benefit of the beneficiaries and they had in fact formed that view, the court should not interfere because it was only concerned with the limits of rationality and honesty. The court however disagreed, stating that—

> "[W]e think the position, established in practice and by the cases, is slightly more nuanced than is contended by [counsel]. In our view, it is right to have regard to the substratum of the decision which the trustee seeks to have blessed. Frequently this will be a decision where the court would not normally claim to have any more expertise than the trustee, and indeed very possibly less . . .
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> 13 Where the substratum of the decision is the question of litigation, however, it appears to us that the court is not in quite the same position. One thing that can firmly be said about litigation is that it is something with which the court is familiar, probably in most cases more familiar than the trustee. Where the trustee therefore seeks to have a decision to litigate blessed by the court, it should expect the court to exercise a more direct, inquisitorial role, and be ready to form its own judgment as to

[20] 2017 (2) JLR 26.

> whether it is sensible for the trust estate to be put at risk by the litigation in question."[21]

It is perhaps curious that the basis of the court's approach appears to be predicated on whether it feels that it knows more about the subject matter than the trustee.

27 A decision of the Supreme Court of Bermuda, *Trustee L v Att Gen*[22] suggests that the origin of the *Beddoe* jurisdiction lay in Order LXV, r 1 of the Rules of the Supreme Court 1883. This provided that the award of costs of proceedings in the Supreme Court lay in the discretion of the court or judge, it being provided that—

> "nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would entitled according to the rules hitherto acted upon in the Chancery Division . . ."

Lindley LJ in *Beddoe* drew a distinction between the jurisdiction to award costs and the jurisdiction of the court in separate proceedings to grant an indemnity to a trustee out of a fund, the latter being a jurisdiction to allow charges and expenses. Thus when a modern day *Beddoe* application is made, the court is considering whether the trustee's proposed course of action is reasonable. On this basis it is unsurprising that it is exercises its own discretion rather than applying the more limited *S Settlement* tests. This would appear to be a more appropriate rationale for the approach adopted in *In re F Charitable Trust* than that suggested by the court.

28 It may seem obvious, but for the court to be able to bless a decision there needs to be a decision to bless. In this connection, a case which highlights what not to do when trustees seek the court's blessing is the 2014 Royal Court of Guernsey decision in *In re AAA Children's Trust*.[23] The trustees were seeking the court's blessing of their decision to sell a family property which formed a substantial part of the trust assets. The deceased settlor had described the property in his memorandum of wishes as "the finest jewel in the jewel box" and therefore he did not wish it to be sold other than in exceptional circumstances "and then at an appropriately extraordinary price such that the news will reach him even in heaven". The difficulty that the court found was whether or not a decision had actually been taken. At

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[21] *Ibid*, at para 12.
[22] [2015] SC (Bda) 41 Com.
[23] Judgment No 29/2014, 8 January 2014, Guernsey Royal Ct, unreported.

the time the property was marketed, no decision had been taken to sell it. No minute was produced to show when or for what reasons the property was marketed. Although the court was satisfied that the trustees had the power under the trust instrument to make the momentous decision, Collas, Bailiff stated that

> "the real issue is whether the Trustees have taken into account all relevant matters, that they have taken into account no irrelevant matters and that they have not reached a decision that no reasonable body of trustees could have reached."

However, in the Bailiff's words—"it is impossible to pinpoint a meeting of the Trustees at which the momentous decision the Court is asked to bless was taken". Instead it appears to have been a

> "rolling decision taken over a long period of time, discussed in telephone conversations . . . of which no file notes were created, or if they were recorded, they were not disclosed. It was also considered [according to the applicant's counsel] in a multitude of emails exchanged between them which, again, were not produced."

The court's view was that—

> "such a failure of disclosure is unforgivable, especially when the [Respondents'] counsel had pressed the Applicant's advocates on numerous occasions to ask whether there had been full disclosure."

29 The court agreed with counsel for the minor and unborn beneficiaries that—

> "it is surprising that professional trust administrators (who are charging substantial fees for their services) did not prepare a dossier of relevant information for consideration by the Trustees at a meeting convened for the purpose of considering this momentous decision and that they did not convene such a meeting."

The court noted that, had they done so, it would have known what matters were considered and, assuming that they produced a thorough and comprehensive minute of their deliberations, it would have been possible to review the decision for the purpose of assessing its propriety. The court concluded that in the circumstances it was impossible for it to say that the proposed transaction should be blessed by the court. On the other hand, they could not conclude that the decision was one that no reasonable trustee could properly take. Its only option was therefore to decline to bless the transaction.

30 It would appear that Guernsey trustees took heed of the Bailiff's criticism in *AAA Children's Trust* of the poor decision-making process of the trustee as in a case decided in April 2016 (*A v R*[24]) the court said of the trustees—

> "the documentation shows them acting responsibly and rationally throughout, with decisions properly recorded and reasoned. Not only is their application meritorious, but a responsible trustee could not properly have acted otherwise on the facts available to them."

31 As a result of the Bailiff's reference to the need for a "dossier" in the *AAA Children's Trust* experience suggests that it is now usual for Guernsey legal advisers to recommend that one is prepared, which is no doubt sound advice. However the approach of Jersey advisers, and indeed of the Jersey courts, is less prescriptive. In *In re Poon*,[25] the Jersey Court of Appeal was considering an appeal against the Royal Court's decision to bless a momentous decision by trustees to make a substantial distribution to a beneficiary in order to enable him to make a lump sum payment to his wife (she was also a beneficiary) in Hong Kong divorce proceedings and then to exclude the wife as a beneficiary. On appeal the court approved the three-limb test set out in *S Settlement*, namely that the court must be satisfied (i) that the trustees' decision has been formed in good faith; (ii) that the decision is one which a reasonable trustee properly instructed could have reached; and (iii) that the decision has not been vitiated by any actual or potential conflict of interest, all of which was consistent with the approach of the English courts following *Public Trustee v Cooper*. However, the wife submitted that the English courts had developed an additional requirement, namely that the trustee must also prove that it has given proper consideration to the matter under scrutiny, setting out in detail the steps taken by the trustee and the considerations which informed the trustees' decision. In rejecting the analysis of English case law, and hence the suggested fourth requirement, the Court of Appeal said—

> "it is both unnecessary and undesirable to introduce a separate requirement for a trustee to prove in all cases precisely what it has done in giving consideration to the matter under scrutiny: a decision-maker can consider matters carefully and still reach an

[24] Judgment no 25/2016, 22 April 2016, Guernsey Royal Ct, unreported.
[25] [2015]JCA109, 20 May 2015, Jersey CA, unreported (Bennett, Bompas and Doyle JJA).

> irrational decision, and conversely an entirely rational decision can be reached on the basis of superficial thought processes."[26]

The court pointed out that in some cases the decision may be a difficult and doubtful one, in which case the quality of the decision-making process may be more important than in cases where the decision is obvious.

32 In the majority of cases coming before the courts the fact that a decision is momentous is likely to be self-evident. However that is not to say that the necessity for the application will not be questioned. In 2018 the Royal Court of Jersey had occasion to hear a contested application in which both the need for an application and the decision reached were subject to scrutiny.[27] The facts of the case were relatively straightforward. The trust in question was discretionary in nature, the named beneficiaries being the settlor's widow and her three children. The only material asset of the trust was a Jersey company which owned a property in London. The property had been used by the beneficiaries and their families when visiting London but was falling into disrepair and the trustee had no other assets from which to pay either for its upkeep or for other trust expenses (including their fees). In 2016 the trustee had suggested to the beneficiaries that the property should be sold. Whilst the elder son agreed, the younger son and his sister wished the property to be retained with a view to the two younger siblings purchasing the property from the trustees. Various discussions as to the future of the property continued over a period of time but did not produce a solution and the trustee therefore applied to the Royal Court to bless its proposal to sell the property at the best price that could reasonably be achieved and, following such sale to wind up the company, the proceeds being applied by the trustee to paying various costs and expenses with the balance being distributed to the beneficiaries. The elder son, whilst supporting the proposal to sell the property, did not support the application. He suggested that given the insolvency of the trust the sale of the property was an obvious course to take and that a blessing of the decision would prevent the beneficiaries bringing a breach of trust claim in respect of the trustee's inaction in resolving the matter. The remaining siblings suggested an alternative solution, namely a change of trustee and the securing of finance to put it into a state where it could be let to produce an income, which in turn would service the relevant borrowing.

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[26] *Ibid*, at para 17.
[27] *In re H Trust* [2018] JRC171.

33 In relation to the question as to whether this was a momentous decision the court was clear that it was, given that it would result in the sale of the sole asset of the trust, the termination of the trust and distribution of the entire fund . As for whether an application to the court was appropriate the court noted, quoting from a passage in *Lewin on Trusts*[28] that—

> "contention amongst the beneficiaries may well turn a decision which should otherwise be taken by the trustees without recourse to the court into a 'momentous' one where it is reasonable to seek the court's approval."

34 In relation to the argument that the blessing of the decision would prevent claims by the beneficiaries for breach of trust the court pointed out that all that is blessed is the decision itself. Thus whilst no allegation of breach of trust could be made on the basis that the property should not have been sold, the blessing of the decision would not affect arguments that the property should have been sold earlier. However, whilst rejecting the elder son's arguments, the court decided not to bless the decision, for a number of reasons. The first reason was that the trustee had failed to address its obvious conflict of interest. It had outstanding fees of £120,000 and the sale of the property was the most obvious way in which it would be able to recover those fees. The court recognised that the existence of a conflict did not of itself mean that trustees may not take a decision or that the court would not bless it. The court relied on an observation of Hart J in *Public Trustee v. Cooper*, cited with approval by Commissioner Clyde-Smith in *Representation of Centre*,[29] where Hart J referred to three possible ways in which a conflict could be successfully managed, namely i) resigning ii) surrendering their discretion to the court or iii) taking the decision following an application to the court where any opposing beneficial interests could be properly represented. The Royal Court, in the *H Trust case*, was of the view that the application before it fell within the third category. However it noted that neither the representation of the trustee nor the supporting affidavit made any mention of the conflict albeit that both documents disclosed the outstanding fees. The court stressed that—

> "what is important is that the trustee should be seen, when making its decision, to have been aware of its conflict of interest, to have taken it into account and to have considered clearly why, despite the conflict, it is nevertheless in the interests of the trust estate/beneficiaries to reach the relevant decision."

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[28] 19th edn, para 27–077.
[29] [2009] JRC109.

The further reasons for refusing the application were the trustee's' failure to take tax advice on the tax consequences of its decision and its failure to explore the proposals of the younger siblings to obtain financing for the renovation of the property. The court noted that the fact that the court had withheld its approval did not mean that the trustee could not proceed with the sale. Instead, it meant that if it decided to proceed, it would not have a court order to protect it from any allegation of breach of trust in respect of the sale.

35 In a subsequent judgment the court determined liability for the costs of the abortive application in *In re H Trust*.[30] Given the decision of the court not to bless the trustee's decision, the elder son sought to argue that the trustee should be ordered to bear its own costs in relation to the application. The court noted that a trustee is ordinarily entitled to an indemnity out of the trust fund unless he has been guilty of misconduct (*i.e*. he has behaved unreasonably). The court had given three reasons for withholding its blessing of the decision to sell, namely the failure to obtain relevant tax advice, the need to give the siblings further time to bring forward proposals for buying out the elder son, and the failure to deal properly with the conflict of interest. In relation to the first two reasons the court did not regard them as reaching the "high threshold" to deprive a trustee of its costs. However in relation to the third, namely the conflict of interest, whilst the trustee had not sought to hide it, its failure to deal properly with the conflict was unreasonable. Given that it was only part of the picture, the court regarded it as fair and just to deprive the trustee of 50% of its costs rather than the full amount.

36 Although the court's' supervisory jurisdiction over trusts is long established, the Royal Court of Jersey has found itself able to exercise a similar jurisdiction to bless momentous decisions by the council of a Jersey foundation. In *In re A Ltd*,[31] the qualified member of a Jersey foundation applied for directions under art 46 of the Foundations (Jersey) Law 2009. The qualified member sought directions that the foundation should adopt a neutral stance in proceedings brought in Jersey by a Cypriot company whereby it sought to recover from the foundation, *inter alia*, sums that had been transferred to it by a judgment debtor of the company. The Royal Court noted that a Jersey foundation was a statutory entity and that the 2009 Law was the only source of law providing for the formation and governance of foundations, equity having no role to play. The court further noted that under art 46(1) of the 2009 Law the court could give directions if

[30] [2019] JRC 072.
[31] 2013 (1) JLR 305.

satisfied that to do so would assist the foundation to administer its assets or carry out its objectives or that it was otherwise desirable to do so. The court found that the provisions of Part 5 of the 2009 Law which included art 46(1) were intended to give the court a supervisory jurisdiction in relation to foundations and that whilst analogies could be drawn with trust law principles they were important but not exact. The court likened the art 46(1) jurisdiction to the courts' general supervisory jurisdiction in relation to trusts to—

> "assist in the interpretation of trusts and to bless (or not) momentous decisions the trustee wishes to take and to take decisions where a trustee surrenders its discretion to the court as analysed in *Public Trustee v Cooper* . . . and as applied in *In re S Settlement* . . ."[32]

The court was not however able to find that a decision to adopt a neutral stance, which they were asking the court to bless, had actually been made by the council. Rather, the qualified member had proposed that the stance should be accepted by the foundation. Nevertheless the court felt able to direct the qualified member to use its reasonable endeavours as a council member to procure that the foundation adopt a neutral role in the Jersey proceedings.

37 The jurisdiction that enables the court to bless momentous decisions is a useful one. From the point of view of the trustees it can provide protection from beneficiaries who disagree with the decision. From the point of view of the beneficiaries it may overcome the inertia that can sometimes arise when a trustee is faced with a difficult or significant decision. There is however a cost to the trust in making an application. Long gone are the days when, to use the words of Lindley LJ in *In re Beddoe*, the trustee is "provided by the law with an inexpensive method of solving his doubts in the interest of the trust".

38 In a decision of the English Court of Appeal in respect of an appeal from a decision on a *Beddoe* application in 2011 (*Howell v Lees-Millais*[33]), Lord Neuburger referred to the judgments of Lindley LJ and Bowen LJ in *Beddoe* and continued—

> "the possibility that an application of that type would involve over 12 days of court time, which require more than 3000 pages of evidence, would take some five years (or more than 18 months if one ignores the costs issues) to resolve, and would incur the parties in costs exceeding the equivalent of £1million in present

[32] *Ibid*, at para 38.
[33] [2011] EWCA Civ 786.

> day value, would have seemed inconceivable to these two experienced judges. This should never happen again."[34]

39 Fortunately the Jersey and Guernsey courts have not thus far been faced with blessing applications where the costs are as disproportionate to the gravity of the decision. To some extent the matter is self-regulating: professional trustees are conscious of the fact that ultimately they are paid to take decisions and that they would be likely to lose the confidence of beneficiaries if they were to run to court each time they were faced with a decision. In addition the trustee's' legal advisers are likely to point out that a trustee who makes a needless application is likely to face criticism by the court and whilst judgments in such applications are usually anonymised the court may decide to identify the trustees.

40 Although the case that gave its name to these applications, *Public Trustee v Cooper,* was a decision of the English High Court, the courts of the Crown Dependencies and Overseas Territories have made a significant contribution to the development of the jurisdiction to bless momentous decisions.

41 And what of the Bishop of Durham? The Bishop's legal skirmish was but one event in a life of charitable endeavours. As a great friend of William Wilberforce, he was a supporter of Wilberforce's campaign to abolish the slave trade and he and Wilberforce set up just under 50 charities together. At the conclusion of the litigation, the residue of the testatrix's estate went to her heirs at law rather than charitable causes chosen by the Bishop of Durham. However in the scheme of the Bishop's charitable work it was but a minor set-back, unwittingly enshrining his name in legal history in addition to his reputation in the world of philanthropy.

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[34] *Ibid*, at para 44.