A BENEFICIARY'S RIGHT TO PRE-EMPTIVE COSTS IN ADVERSARIAL TRUST PROCEEDINGS: THE CASE OF *IN RE X TRUST*

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On the authority of In re X Trust, a discretionary beneficiary of a Jersey law trust may obtain a pre-emptive costs order (also known as prospective or protective costs orders) that the costs to be incurred by that beneficiary in adversarial proceedings against the trustee be paid out of the trust fund and that he be protected against costs orders which might be made against him in favour of the trustee or other parties to the proceedings. The authority was a bold step in extending the principle established under English law and followed in the Jersey jurisdiction. This article will examine whether it was soundly based on legal principle.

1 *In re X Trust*[1] arose from a representation made to the Royal Court by what were described as the principal beneficiaries of the X Trust (A and B; A it appears was also acting as guardian for a similarly placed minor beneficiary). A and B had issued separate proceedings for breach of trust against the current trustee, the first respondent to the representation (C). The second and third respondents (D and E) were also beneficiaries with a potential to benefit, though the impression gained (it could be clearer) is that their interest was somewhat more remote and contingent than that those of A and B. D and E took no part in the application. In any event, the Court found their interests were similar to A and B in that if the breach of trust action succeeded, it would be to their potential benefit. If it failed, any resulting reduction in the trust fund arising from the costs of the proceedings would not damage their interests. The fourth respondent was a beneficiary (her actual interest is unclear) and was represented in the application but remained neutral. The underlying breach of trust claim was large, it being alleged that investments made had resulted in losses of nearly £100m. Funding thus far for the claim had been made from trust distributions. C, however, was now of the view that there was a potential prejudice to the trust to continue funding a claim against it and others. A and B claimed they had no other source of funding and could not borrow to fund the litigation because they would get no

[1] 2012 (2) JLR 260.

benefit directly from the proceedings since if successful the likely outcome was replenishment of the trust fund.

2 A and B sought an order that their costs of the adversarial proceedings be paid out of the trust fund and that they be protected against costs orders which might be made against them in favour of the defendants in the main proceedings, should they be unsuccessful. The legal bases for such an order put forward on their behalves were, first, that their position should be viewed as analogous to that of a shareholder bringing a claim on behalf of a company by way of derivative action and secondly, and alternatively, the Court could make an order under art 51(3) of the Trusts (Jersey) Law 1984 to authorise payments to be made to A and B on the basis that such payments were for the benefit of the trust and were properly made.

3 The Court granted the order sought on the first basis. *Obiter*, the Court indicated that it would have granted it on the second basis also, but no explanation of why that might be so was provided. On the first basis, the Court took the view that it had an inherent jurisdiction to make the order in standard *Beddoe* form[2] because two beneficiaries were bringing the action in similar capacity to a trustee for the benefit of the trust and were therefore entitled to have the same protection offered to a trustee as a matter of law.

4 The jurisprudential basis for the decision is not as clear as it might be. Based on the authorities cited, it drew on two sources: the statutory jurisdiction to award costs and the extension of that jurisdiction by case law to make a prospective order as to costs; and the inherent jurisdiction of the Royal Court to supervise the administration of trusts. In relation to the former, it drew on the English authorities of *McDonald v Horn*[3] and to an extent on *Wallersteiner v Moir*.[4] As regards the latter, it drew on *Schmidt v Rosewood Trust Ltd*.[5] The Royal Court noted that the jurisdiction to make the orders sought had not previously been considered by a Jersey Court in a published judgment and, so it appeared, nor had it been considered in "absolutely comparable circumstances" in England and Wales either.[6]

5 The Royal Court cited *Wallersteiner v Moir* to illustrate its recognition that a legal consequence of the principle that a shareholder could sue in his own name on behalf of a company for a wrong done to

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[2] *In re Beddoe* [1893] 1 Ch 547.
[3] [1995] 1 All ER 961 (CA).
[4] [1975] QB 373 (CA).
[5] [2003] 2 AC 709 (Privy Council on appeal from the Isle of Man).
[6] Paragraph 6.

the company (known as a derivative action) was that the shareholder (as agent of the company in those circumstances) was entitled to be indemnified in the course of his agency. That indemnity extended to the costs of the action so brought. It arose from the operation of equity and was found to be analogous to the indemnity to which a trustee is entitled from a trust fund.[7]

6 The Royal Court cited *McDonald v Horn* as extending the *Wallerstein v Moir* position on a costs indemnity for shareholders in derivative actions to beneficiaries of an occupational pensions scheme where the beneficiaries brought an action against *inter alia* the pension fund trustees over their administration of the scheme. It recognised that *McDonald v Horn* had done so expressly distinguishing a shareholder and pension fund member from an ordinary trust beneficiary on the basis that the former had given consideration for their interests. It recognised that A and B, on the other hand, were recipients of the settlor's bounty and had provided no consideration for the discretionary interests in the trust fund.[8]

7 As to *Schmidt v Rosewood Trust Ltd*, that case concerned the right to disclosure of trust documents. There the Board, although not displacing earlier authority which analysed the question as a matter of proprietary right, invoked the Court's inherent jurisdiction to supervise a trust and a beneficiary's right to call in aid equity to protect his or her interests as the context within which to determine a beneficiary's right to seek disclosure of trust documents.[9]

8 The Royal Court obviously took the view that in inherent jurisdiction terms granting a prospective costs order was but a short step away from allowing access to trust documents:

> "If questions of disclosure of documents fall to be considered as an aspect of the Court's inherent jurisdiction to supervise the administration of a trust, why also should questions of the kind arising here not similarly be considered? . . . There is no logical reason why that exercise of jurisdiction should not extend in the Court's discretion in an appropriate case, to making an order that the costs of legal action against the trustee be met out of the trust fund. That inherent jurisdiction is supplemented by—or supplements, or perhaps merely reflects, and we do not have to decide which, if any of those options in this case—art 51 of the Trusts (Jersey) Law 1984, as amended. For the purposes of this

[7] Paragraph 8.
[8] Paragraphs 10–12.
[9] Paragraph 51 of *Schmidt v Rosewood Trust Ltd*.

> case, the relevant factors are the same. In the exercise of a discretion of this nature, the Court will clearly have to have regard to all the circumstances, and may have to balance the interests of different beneficiaries as well as the interest of beneficiaries and trustees, or conceivably the interests of beneficiaries and third parties. The existence of a contractual nexus as may apply in the case of a pension scheme may add weight to the argument, but the absence of that nexus does not imply that the beneficiary has no right to good administration of the trust. At the end of the day, the question is whether the order sought is in the best interests of the trust, and thus of the beneficiaries as a whole." [10]

9 In so finding, the Court took the view that what it labelled as a "derivative action brought by a beneficiary" is akin to what Lightman J in *Alsop Wilkinson v Neary*[11] described as a third party dispute, with "the beneficiaries . . . acting like trustees and the trustees are in effect a third party—if they lose, damages are payable by them to the Trust and not to the beneficiaries".[12] No doubt the Court felt compelled to address Lightman J's categorisation because it has been followed so often in this jurisdiction.[13] The three categories it will be recalled are: a trusts dispute, a dispute as to the trusts on which the trust fund is held; a beneficiaries dispute, a dispute between beneficiaries as to the propriety of any action which the trustees have taken or may take; a third party dispute, a dispute with persons other than in their capacity as beneficiaries in respect of rights or liabilities assumed by the trustees in the course of administering the trust. Even allowing for the fact that Lightman J was not intending to be exhaustive in his categories, it takes some mental gymnastics to transform a breach of trust claim by a beneficiary against a trustee into a dispute brought by a third party. On the facts, the two beneficiaries (A and B) clearly acting as such were suing the trustee for breach of trust. The dispute concerned their rights in that trust and the duties they alleged the trustee owes to them. *Lewin on Trusts* is clear that a breach of trust claim falls squarely within the ambit of a beneficiaries' dispute.[14]

10 The Royal Court's conclusion then was that an action by a discretionary beneficiary against a trustee for breach of trust could be

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[10] Paragraph 22.
[11] [1996] 1 WLR 1220.
[12] Paragraph 23.
[13] For example: *In re Den Haag Trust* 1995 JLR 150; *In re G* 2010 JLR *N* [27]; *Crociani v Crociani* 2014 (1) JLR 426.
[14] 19th edn, para 27–109.

seen as analogous to a derivative action on the basis that it was brought for the benefit of the trust fund and hence all the beneficiaries thereof. Accordingly, as part of the Court's inherent jurisdiction to ensure the proper administration of a trust, that beneficiary could obtain a pre-emptive costs order that the costs to be incurred by him in those proceedings be paid out of the trust fund and that he be protected against costs orders which might be made against him in favour of the trustee or other parties to the proceedings. In circumstances where A and B were the principal (albeit discretionary) beneficiaries, it was proper and correct for the risk of litigation to be borne by the trust. There was therefore no material difference from the situation where a trustee obtains a protective *Beddoe* order to sue the former trustee.[15]

11 As a Court typically would do in a *Beddoe* application, the Royal Court then went on to consider legal opinions as to the strengths and weaknesses of the claim against the trustee. Satisfied that the claims were well-founded in principle, the Court was persuaded to grant the order by recognising that without the order the proceedings would probably come to an end and that since A and B were the principal beneficiaries the risk of the litigation would be borne by the "right parties" if the trust carried the expense. The Court therefore authorised the payment of costs and disbursements of the legal action against the trustee out of the trust fund until two months after discovery, at which point there must be a further review of the merits of the case and an anticipated further application to the Court. For similar reasons, it also granted a protective order as to future adverse costs orders.

12 To analyse the jurisprudential basis asserted by the Royal Court in *In re X Trust*, it is therefore necessary to look at the Court's jurisdiction as to costs and the inherent jurisdiction.

13 In Jersey, as in England, the attribution of responsibility for costs incurred in proceedings is a jurisdiction generally exercised at the end of a process, be that process a discrete application to the Court or a trial. The jurisdiction for matters before the Royal Court and Court of Appeal arises from statute, art 2 of the Civil Proceedings (Jersey) Law 1956 and art 16 of the Court of Appeal (Jersey) Law 1961 respectively. The power to award costs is discretionary and the nature of the jurisdiction is well developed in local case law: *Watkins v Egglishaw*,[16] *Pell Frischmann Engr Ltd v Bow Valley Iran Ltd*,[17] *Flynn v Reid*.[18] In the adversarial context, the policy of the Courts can

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[15] Paragraphs 22, 28.
[16] 2002 JLR 1.
[17] 2007 JLR 479.
[18] 2012 (2) JLR 226.

be summarised as an overriding objective to do justice between the parties with a general starting point that the loser pays the costs of the winner (that is, costs follow the event) but which may be departed from in the circumstances of the case. Case law shows that in recent years the exercise of the discretion has become more sophisticated: *ibid*.

14 The advantages and correctness of determining who should be responsible for costs after the relevant process has unfolded and been determined by the Court are self-evident. To do otherwise is apt to serve as a fetter on a discretion only properly exercised in light of all the facts: *Wallersteiner v Muir*.[19] Adjudication after the event no doubt also reflects a general policy of the Courts that litigants are to be encouraged to settle their differences outwith the judicial process, in similar vein to the fact that even if awarded costs, the rules on recoverability ensure that a payee will rarely receive all of his actual incurred costs. The risks of an adverse costs order or non-recovery of costs acts as a useful nudge in the direction of alternative dispute resolution.

15 It is not however always just and fair for a litigant about to enter the fray of proceedings to do so at risk as to costs. In the context of trustees and other fiduciaries there is a long and well-established protection extended to trustees (and others) under English law which to a certain extent has been adopted under Jersey law. The source of this protection is the more general principle that a trustee is entitled to be indemnified out of the trust fund in respect of its reasonable costs and expenditure properly incurred whilst acting in his capacity as trustee.[20] This extends to costs incurred in Court proceedings, provided they were honestly and reasonably incurred. The principle is long established in English law.[21] As a matter of Jersey law, the general principle finds statutory expression in art 26(2) of the Trusts (Jersey) Law 1984 and the principle in relation to Court proceedings can be found in case law including *In re Den Haag Trust*.[22] In both jurisdictions, trustees can also protect themselves against allegations of having acted unreasonably and/or for their own benefit by applying for advance protection as to costs by way of an application to the Court: *In re Beddoe*,[23] *In re Den Haag Trust.* Provided the trustee makes full

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[19] At 403.
[20] Lewin on Trusts, *op. cit.*, para 21–003.
[21] See *ibid.*, para 27–118, on the evolution of the principle from the nineteenth century to the present.
[22] 1995 JLR 150.
[23] [1893] 1 Ch 547.

disclosure of the matter to hand, including the strengths and weaknesses of the case, a protective costs order will hold him harmless from the risk of being ordered personally to pay the costs incurred by the trust fund, both as to its own costs and the costs of an adverse party.

16 One can immediately see the rationale for the *Beddoe* protection: the trustee is planning on spending money which belongs to someone else; proceedings are often very expensive; the trustee wants to protect himself from after the event criticism and personal liability for the costs. As we have already seen, the principle has been extended to other parties in analogous circumstances. The leading case as to the extent to which an English Court is prepared to extend the parameters of advance protection as to costs in a trust context is *McDonald v Horn*. It requires some detailed analysis.

17 *McDonald v Horn* involved an action brought by seven individual members of a pension scheme against their employers, the pension fund trustees and others, concerning the administration of the trust funds. The members were for the most part men of modest means and their action had been initially funded by their trade union which, after significant outlay on legal costs, had decided it could continue no more. The individual members had no other way to fund the action. They applied for a pre-emptive costs order, to cover their own costs and any costs they might be required to pay to the defendants. The application was for costs to be paid on an indemnity basis out of the pension fund. The order was granted at first instance. The defendants appealed. The Court of Appeal, treating the appeal as the first time that such an order had been made, determined to consider the jurisdiction as a matter of principle and lay down some guidelines. The analysis by Hoffmann LJ proceeded as follows.

18 As a starting point, the Court took the view that it had to consider the normal costs jurisdiction and how it might be exercised.[24] The English High Court has a statutory jurisdiction to award costs. At the date of the judgment, this was enshrined in s 51 of the Supreme Court Act 1981. RSC O 62, r 3(3) set out how that discretion may be exercised—

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

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[24] At 694C–695A.

This broadly encapsulates a similar test to that applied to the exercise of the costs jurisdiction as a matter of Jersey law. This jurisdiction, the Court noted, as recorded in *Civil Service Co-operative Society v General Steam Navigation Co*,[25] presented a "formidable obstacle" to a pre-emptive costs order as between adverse parties in ordinary litigation because a Court cannot properly exercise its jurisdiction in advance.

19 The RSC, reflecting the well-established principle referred to above, expressly allowed for a variation on the issue of costs in the case of trustees and other fiduciaries. Order 62, r 6(2) stated—

> "Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by him in that capacity or out of the mortgaged property, as the case may be, and the court may order otherwise only on the ground that he has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund."

20 This principle of costs protection for a trustee had been extended in English case law to beneficiaries of a trust. The parameters of this extension, Hoffmann LJ said, are encapsulated in the "classic statement" by Kekewich J in *In re Buckton*.[26] There, the Court stated that trust litigation could be divided into three categories[27]—

> "First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund.
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> Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first.
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> Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in

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[25] [1903] 2 KB 756.

[26] [1907] 2 Ch 406, at 695G–697E.

[27] Albeit warning that it was "well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases."

> the same way as ordinary common law litigation and costs usually follow the event."

21 Kekewich J recognised it could "often be difficult" to discriminate between categories two and three, but that the threshold for inclusion in category three was the fact that the trial judge in charge of the relevant proceedings would be asked to determine rights between adverse litigants.[28] Hoffmann LJ added that it is also sometimes difficult to discriminate between categories one and two: not all actions started by a trustee for determination of some question as to entitlement to a fund fall within one, not least where the action does not involve construction but is rather a dispute over the beneficial ownership of trust property which is more akin to an interpleader.

22 In the Jersey jurisdiction, *In JP Morgan 1998 Employee Trust*,[29] the Court of Appeal considered what facts and circumstances would result in proceedings commenced by a beneficiary being classified as a Buckton category 2 case or a Buckton category 3 case[30]—

> "If it is a point which needs to be resolved sooner or later, then it does not matter that it is the beneficiary who starts the proceedings: this is Buckton category 2. Buckton itself was a case of that type: the will contained a difficulty of construction that would have had to be resolved eventually, at the latest on the plaintiff's death, and if the plaintiff had not brought the proceedings when he did, the trustees would no doubt have felt compelled to do so at that point. But in other cases when a beneficiary brings a claim, it is not necessary in this sense at all. If the beneficiary brings a claim for his own purposes and it fails, the court may well take the view that the proceedings would never have been brought unless the beneficiary wrongly conceived that he had some claim: this is ordinary hostile litigation in Buckton category 3, and the beneficiary who has brought the proceedings unnecessarily could not in such a case normally expect to recover his costs out of the fund."

23 Hoffmann LJ explained why a prospective costs order made in favour of those participating within the first or second category cases is not an interference with the trial judge's discretion over costs. It is

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[28] *In re Charge Card Services Ltd* [1986] BCLC 316 is given as an example of where the Court refused to grant a pre-emptive costs order on the basis that it was unclear whether the judge in the substantive proceedings would regard the case as falling within Kekewich J's first category or as hostile litigation.
[29] 2013 (2) JLR 239.
[30] Paragraph 43.

because it is clear from the outset that the discretion could only be exercised in one way. That, unsurprisingly, therefore required a high threshold for the Court to be suitably satisfied—

> "before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary, the judge must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant's costs to be paid out of the fund. Otherwise the order may indeed fetter the judge's discretion under Ord. 62, r. 3(3)."[31]

24 On the facts of *McDonald v Horn* however the Court found that the plaintiffs could not rely on O 62, r 6(2) as extended to beneficiaries by *In re Buckton* because it was unlikely that, if the plaintiffs failed at trial, the judge would order that their costs (their own and any costs ordered to be paid to the defendants) be paid out of trust fund. Why not? Because a case alleging dishonest breach of trust was "hostile litigation if ever there was".[32]

25 No doubt alive to this particular roadblock, the plaintiffs in *McDonald v Horn* adopted a different approach, drawing on *Wallersteiner v Moir* as the proper analogy for their circumstances. There, as we have seen, the Court of Appeal found that a minority shareholder bringing a derivative action on behalf of a company could be viewed, for prospective costs purposes, as analogous to a trustee taking action on behalf of a trust fund, and accordingly could be indemnified out of the assets of the company for his costs. A beneficiary suing on behalf of a fund in which he and others have interests, argued the plaintiffs in *McDonald v Horn*, was in a similar position. The difficulty with this argument, as identified by the defendants, was that in a derivative action the plaintiff pursued a cause of action which belonged to a different person, the company, and was allowed to do so as a procedural device to allow in effect the company to sue when it was under the control of the alleged wrongdoers. By contrast, in hostile trust proceedings, the beneficiaries had their own cause of action, pursued in hostile proceedings where case law made it clear that costs generally follow the event.

26 Hoffmann LJ bridged the gap between shareholder and pension fund beneficiary by identifying the common "economic relationship" involved.

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[31] At 697A.
[32] At 697D.

> "In both cases a person with a limited interest in a fund, whether the company's assets or pension fund, is alleging injury to the fund as a whole and seeking restitution on behalf of the fund."[33]

And he found that in terms of costs, one could distinguish between, on the one hand, a shareholder and pension fund member from, on the other hand, the ordinary trust beneficiary, on the basis that the former—

> "have both given consideration for their interests. They are not just recipients of the settlor's bounty which he, for better or worse, has entrusted to the control of trustees of his choice. The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a non-contributory scheme, the employer's payments are not bounty. They are part of the consideration for the services of the employee. Pension funds are such a special form of trust, and the analogy between them and companies with shareholders is so much stronger than in the case of ordinary trusts, that in my judgment it would do no violence to established authority if we were to apply to them the *Wallersteiner v Moir* procedure."

27 His jurisdictional basis for so doing was the costs jurisdiction in s 51 of the Supreme Court Act 1981. In response to the defendants' argument as to the limits of the Court's inherent jurisdiction over trusts, as expounded in *Chapman v Chapman*,[34] he rejected the argument that he was exercising a jurisdiction specific to trusts, a statement which can properly be interpreted as referring to the Court's inherent jurisdiction in relation to trusts.[35]

28 Both Hirst LJ and Balcombe LJ concurred with Hoffmann LJ, and Balcombe LJ added the following words of caution—

> "When a novel case comes up the court will, where necessary, lay down principles and will usually seek to derive those principles by analogy from existing rules or case law. Thus in *Wallersteiner*, this court applied the principles lying behind Ord. 62, r. 6(2) to the case of a minority shareholder's derivative action. We are now asked to extend the same principles to an action, primarily for breach of trust, by the beneficiaries of a pension fund. While I accept that this represents a further extension of the principle I agree with Hoffmann L.J. that it is a legitimate extension. I share

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[33] At 697H–698F.
[34] [1954] AC 429.
[35] At 698F.

> his view that there is a compelling analogy between a minority shareholder's action for damages on behalf of the company and an action by a member of a pension fund to compel trustees or others to account to the fund." [36]

29 One way of interpreting *In re X Trust* is that it cited *McDonald v Horn* simply to illustrate that it created a significant roadblock to the Court's jurisdiction being extended to provide a protective costs order to a volunteer. Hoffmann LJ is very clear as to the basis for his extension of the costs jurisdiction and that it does not extend to a beneficiary who is the object of the settlor's bounty. He was also very clear that the extension did not derive from the Court's inherent jurisdiction.

30 It has been recognised that the categories in *Re Buckton* are not closed: *Singapore Airlines Ltd v Buck Consultants Ltd*[37] and *IBM United Kingdom Pensions Trust Ltd v Metcalfe*[38]—

> "There is always room . . . for an exceptional case to be dealt with on its own facts; and, indeed, when a case does not fall neatly within any of the *Buckton* categories, the court must exercise its statutory jurisdiction in the way it considers best to achieve fairness and justice."

Nonetheless, as the latter judgment recorded, this did not leave the Court freedom to do as it chooses: the jurisdiction is one—

> "constrained by principles established in case-law but is, nonetheless, one which must be exercised to achieve fairness and justice."[39]

31 The aforesaid notwithstanding, the Royal Court in *In re X Trust* nonetheless purported to draw on English legal principle, a source signalled at the outset with the words: "the starting point for the analysis is the [English] case of *Wallersteiner v Moir (No. 2)*".[40] However it seemed to be in two minds as to the basis for its extension of the special principle. From *McDonald v Horn*, it appears to have drawn and extended the analogy with a derivative action, but ignored what was a very particular extension based on principle to go well beyond its ratio, albeit via the route of inherent jurisdiction. Notwithstanding the Court of Appeal's clear decision to the contrary,

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[36] At 701E.
[37] [2011] EWCA Civ 1542, para 75.
[38] [2012] EWHC 125 (Ch).
[39] Paragraphs 20, 28.
[40] Paragraph 8.

the Royal Court has in effect extended the principle of prospective costs to where a beneficiary actions for damages "not for himself but for the benefit of the trust fund as a whole."[41]

32 *Schmidt v Rosewood Trust Ltd* was, as we have seen, deployed as the springboard to extend the Royal Court's inherent jurisdiction to supervise the administration of a trust. It is very hard to see how the principle in *Schmidt v Rosewood Trust* could be expanded in this way. Furthermore, to take that view necessarily means the Court inferred that that *Schmidt v Rosewood Trust* (a case concerning disclosure of documents to beneficiaries) somehow swept aside the Court of Appeal decision in *McDonald v Horn.* In fact and unsurprisingly given the matter it was concerned with, the latter was not even cited before the Privy Council. As a matter of law the English Court of Appeal decision in *McDonald v Horn* would be binding on an English court, taking precedence over the Privy Council decision: see *Sinclair v Versailles*.[42]

33 Invoking the inherent jurisdiction has the propensity to be a precarious process for a Court. As Lord Simonds LC warned in *Chapman v Chapman*[43]—

> "We are as little justified in saying that a court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors . . .
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> The major proposition I state in the words of one of the great masters of equity. 'I decline', said Farwell J in *In re Walker*, 'to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible'." [44]

34 This statement finds a resounding echo in the Jersey case of *Mayo Associates S.A. v Cantrade Private Bank Switzerland (CI) Ltd*.[45] There, the Court of Appeal found itself examining the concept of inherent jurisdiction and, notwithstanding that it was able to draw on

[41] Paragraphs 23, 24.
[42] [2012] Ch 453.
[43] [1954] AC 429.
[44] At 444, 445.
[45] 1998 JLR 173.

two key articles on the subject,[46] it was still left with the conclusion that—

> "it emerges from even the most cursory scrutiny of these articles and the authorities that not only is there no agreement as to the aspects of the court's jurisdiction which may be properly called inherent, but also that there is no unifying principle from which the boundaries of inherent jurisdiction may be divined. Rather, there is an area demarcated by principle and, in addition, an assortment of powers exercised by the courts which have been described as forming part of the inherent jurisdiction."[47]

35 Citing *Halsbury's Laws of England*, the Court of Appeal defined inherent jurisdiction as being—

> "the reserve or fund of powers, no residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

It found that there were, in effect, two categories of powers under the inherent jurisdiction. First, a power based on necessity which exists to assist the Court in being effective as a Court. Secondly, a residual category of powers which may have precedent or be founded upon traditional legal precepts.[48] In relation to the latter, the Court accepted that it may not always be possible to point to a basis in authority for the power invoked, but reminded itself (citing *Dockray*) that the inherent jurisdiction was not—

> "an unlimited reservoir from which new powers can be fashioned at will . . . The general approach adopted in dealing with arguments about the existence of particular inherent powers is much the same as the approach to any other question of common law. That is, the case is recognised or rejected after argument in a conventional form about precedents which relates to the power in question and about the merits, consequences and alternatives to the particular power which it is claimed the Court possesses." [49]

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[46] Jacob, "The Inherent Jurisdiction of the Court", 23 *Current Legal Problems* (1970) and Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", 113 *Law Quarterly Review* 120 (1997).
[47] At 188.
[48] At 190.
[49] At 191.

36 The Court of Appeal reminded itself of the warning of Cardozo J[50]—

> "The Judge, even where he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system and subordinated to the 'the primordial necessity of order in the social life'."

37 On the facts in *Mayo v Cantrade*, counsel was unable to point to an incidence of Court on any previous occasion making an order similar to one that had been made by the Royal Court, nor was he able to identify any analogous case or any which might have been used as a stepping stone supporting a process of reasoning which should enable the Court of Appeal to endorse the Royal Court's order.[51] Finding that the relevant sphere of the inherent jurisdiction on the facts was that based on necessity, the Court of Appeal concluded was no basis to grant the order sought.

38 One might well argue that the Court's jurisdiction to supervise the administration of trusts is conceptually different from its inherent jurisdiction, but how so and why is not readily discernable from case law. One can certainly point to a number of circumstances or situations where a Court has exercised its supervisory jurisdiction—for example and to name but a few: where a trustee surrenders the exercise of its discretion to the Court (as in *Public Trustee v Cooper*[52]); in the removal and appointment of trustees and protectors (as in *Re Harrison's Settlement Trusts*,[53] *Steel v Paz Ltd*,[54] *In re A and B Trusts*[55]); in the authorisation for a trustee to be remunerated out of the

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[50] *The Nature of the Judicial Process* (1921), at 191.
[51] The plaintiffs were investment managers who had arranged investments via the first defendant bank and it was alleged that substantial losses had been incurred by the plaintiffs and the investors. The defendants wished to negotiate a settlement with the investors but the plaintiffs would not reveal their identity. The order in question, made by the Royal Court in the exercise of its inherent jurisdiction, was one ordering the Viscount to transmit a settlement offer made by the defendants to the investors.
[52] [2001] WTLR 901.
[53] [1965] 1 WLR 1492.
[54] 1993–95 MLR 426.
[55] [2012] JRC 169A.

trust fund (as in *Re Duke of Norfolk's Settlement*[56]); in the authorisation to a trustee to pursue proceedings at the trust's expense (as in *Re Beddoe*). However one will search in vain for a comprehensive explanation of the jurisdiction and its parameters. It cannot however be correct for a Court simply to pray the jurisdiction in aid as a basis for an order it wishes to make.

39 *In re X Trust* puts forward no precedent identifying a previous extension of the protective costs principle to a beneficiary of a discretionary trust actioning a trustee for breach of trust. In fairness, one can say the Court looked to draw on the analogy of the derivative action, but it did not address how it could move beyond the clear boundary to an extension of that principle in *McDonald v Horn*. It also overlooked three important points which, in fairness, were not raised by counsel. First, the Court of Appeal in *Alhamrani v Alhamrani*[57] held that a beneficiary has no general right to be indemnified out of a trust fund.[58] The Court of Appeal also reached a conclusion to similar effect in *Trilogy Management Ltd v YT Charitable Foundation (Intl) Ltd.*[59] Secondly, as we have seen, *McDonald v Horn* expressly considered whether the court had an inherent jurisdiction to make a pre-emptive costs order in favour of a beneficiary and preferred to found its jurisdiction in its statutory power to award costs, as distinct from its inherent jurisdiction over trusts. Thirdly, the costs jurisdiction is a statutory jurisdiction and is not part of the inherent jurisdiction.

40 The Royal Court's approach awaits a thorough examination by another Court. Interestingly, in *Trilogy Management v YT*[60] the Royal Court refused to grant a pre-emptive costs order in favour of a third party to trust proceedings on the basis that it was not certain that she would receive her costs at conclusion of trial. Some of its thought process is however hard to accept given the case law cited above and the fact it makes no reference to *In re X Trust*. The Court in *Trilogy Management* concluded that it—

> "does in principle have jurisdiction to make prospective or pre-emptive costs orders either under the statutory costs rules or under the inherent jurisdiction of the Court in the supervision of trusts, or by virtue of some combination of the two."[61]

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[56] [1982] Ch 61.
[57] [2007] JCA 198.
[58] Paragraph 5.
[59] 2012 (2) JLR 330, para 16.
[60] [2013] JRC 147.
[61] Paragraph 22.

41 With regard to cases that did not fall within categories 1 and 2 of *Re Buckton* and contentious trust cases that did not fall within the ambit of *McDonald v Horn*, the Court found that it nonetheless retained a discretion to make a pre-emptive costs order in favour of beneficiaries, but that "the jurisdiction is truly exceptional and will not be exercised lightly in favour of a beneficiary".[62] Its authority for this conclusion is unclear.

42 From a purist's point of view, then, based on precedent, it is wrong as a matter of principle to find that the Royal Court has such a broad discretion to award a protective costs order to a beneficiary engaged in litigation against his trustee. What is the disincentive to a litigious beneficiary who can litigate at the expense of the trust with no personal risk to himself? Yet, when one sits back and looks at *In re X Trust*,[63] it is hard to see what is really objectionable about the conclusion on the facts of the case. The obvious solution on the facts ought to have been for a new trustee to have been appointed, one able to review the cause of action impartially, weigh the advantages and disadvantages of proceedings and, if the decision is to proceed, bring the matter before the Court for a protective order on well-established grounds. But if for some reason that was not a result the beneficiary in question was able to bring about, one can indeed see the analogy between his position and that of the shareholder unable to persuade a company to bring an action because the company is controlled by the shareholders. Similarly the analogy between a new trustee bringing the action and a beneficiary bringing the action. Why should not a beneficiary in the circumstances of A and B be able to call on a trust fund from which he has a likely prospect of benefitting to assist him in bringing an action for the benefit of the trust fund? All the more so when the costs protection is monitored on an ongoing basis by the Court.

43 Much of course will turn on the facts. One can foresee how the Court in *Crociani v Crociani* might well have refused pre-emptive costs to the plaintiff-beneficiary.[64] There the adult plaintiff sued the trustees for breach of trust, one of whom was the settlor and her mother. The adult plaintiff was a principal discretionary beneficiary of a part of the trust, but so was the settlor (via an interposed structure). One of the claims made was that the settlor could not benefit from the

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[62] Paragraph 34.
[63] 2012 (2) JLR 260.
[64] An application for pre-emptive costs was made but withdrawn: see *Crociani v Crociani* unreported, noted at 2015 (2) JLR *N* [5].

trust. In those circumstances, it would be hard to conclude other than that costs ought to be determined at the end of the trial.

44 This begs the question as to what jurisdiction is being invoked to underpin such a prospective costs order. The obvious one is the costs jurisdiction. It is difficult to see how such an order is truly fettering the trial judge's jurisdiction as to who should pay costs. In an adversarial context, the trial judge is concerned to ensure that the winning party is properly compensated for the costs incurred in reaching that point. It is unclear why he (as opposed to a separate court earlier on the process) needs to be concerned as to where the funds to meet those costs are to come from.

45 In the final analysis, then, the criticism of *In re X Trust* is more a matter of how it reached its conclusion rather than as to the conclusion itself. Certainty is an important part of the law. Practitioners and their clients must accept that interpretation of the law evolves. But as exemplified in *McDonald v Horn*, the potential for that evolution ought to be within the realms of predictability by a rational application and extension of principle.

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