Trilogy Management Ltd v YT Charitable Foundation (International) Ltd; HM Attorney General; OM — LC2 Charitable Foundation International; The Empowerment Charitable Trust; The Saving Grace Charitable Trust; OM — VC5 Charitable Foundation; The Well Trust; Mrs C

Jurisdiction:	Jersey
Judge:	M. Herbert
Judgment Date:	29 July 2013
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Text

[2013] JRC 147

ROYAL COURT

(Samedi)

Before:

M. Herbert, **Q.C., Commissioner, sitting alone**.

Between
Trilogy Management Limited
Representor

and

(1) YT Charitable Foundation (International) Limited
(2) HM Attorney General
(3) OM — LC [2] Charitable Foundation International
(4) The Empowerment Charitable Trust
(5) The Saving Grace Charitable Trust
(6) OM — VC5 Charitable Foundation
(7) The Well Trust
(8) Mrs C
Respondents

Advocate P. C. Sinel **for the Representor**.

Advocate J. P. Speck **for the First Respondent**.

Advocate D. S. Steenson **for the Third to Seventh Respondents**.

Advocate N. F. Journeaux **for the Eighth Respondent**.

Authorities

In re Buckton [1907] 2 Ch 406 .

McDonald -v- Horn [1995] 1 All ER 961 .

In re Biddencare Limited [1994] 2 BCLC 160 .

IBM United Kingdom Pension Trust Limited -v- Metcalfe [2012] EWHC 125 (Ch) .

Re Westdock Realisations Limited [1988] BCLC 354, 359 .

Trust — application by the eighth respondent for a pre-emptive costs order.

THE COMMISSIONER:

1 This is an application by the 8th respondent Mrs C for a pre-emptive costs order. In this judgment I shall call her Mrs C. I have decided to reject her application, and my reasons for that decision are contained in the following paragraphs. I shall start by setting out the relevant background against which Mrs C's application is made.

Background facts

2 The proceedings relate to a charitable trust called the YT Charitable Foundation International (which I shall call the foundation) established on 28th May, 1987, by Mrs C's

late husband Mr C (the settlor). The trustee is the first respondent YT Charitable Foundation (International) Limited, which I shall call the trustee company. The original trusts of the foundation were, by clause 3 of the trust instrument, to pay or apply the income, with power also to pay or apply capital, for charitable purposes. There was no obligation to distribute capital, and there was power to accumulate income: paragraph (b) of the proviso to clause 3. Clause 7(a) conferred on the trustees a power to vary the trusts of the foundation, and that power was exercised in 2004 in a way which I shall describe.

3 The assets of the foundation include the issued share capital of an investment company called JY International Limited, which I shall call JY. I am told that its assets are currently worth some US $500 million. The share capital of JY is divided into A shares and B shares. The A shares carry the voting rights including the exclusive right to appoint, remove and replace directors. The B shares carry the rights to dividends and other distributions. Originally only the B shares were vested in the trustee company, with the settlor retaining the A shares in his personal ownership.

4 The settlor died on 10th December, 2001, leaving a Will which nominated four of his eight children as executors and trustees, namely LC, PC, AC and MC, together with no more than two of the then partners in the London solicitors Simmons & Simmons. Of those partners only Ms CG joined in taking the grant of probate. Clause 6 of the Will contained a specific gift of the A shares in JY and the shares in the trustee company to the Will trustees. The clause continued:–

> *"Please note that my trustees cannot sell them, but must hold them with a view to supporting the YT Charitable foundation (International), or any other trust succeeding or replacing it and having the same principles or character as the YT Charitable Foundation (International) and the trustees shall follow my wishes to them."*

5 That clause gave rise to issues of construction, and by 2004 a number of disputes had arisen in regard to the settlor's estate and in particular the disposition of his shares in JY and the trustee company. There are references in correspondence to threats to remove the trustee company from the trusteeship.

6 Proceedings were issued, and a compromise was negotiated and approved by the Royal Court as reflected in an Act of Court dated 11th June, 2004, though there remains a dispute on at least one aspect, as I shall mention later. The participants in that compromise were advised by well-known London solicitors, and in some cases at least by leading counsel, as well as being represented by advocates. The structure which was put in place by that compromise can be described as follows:–

Article 76 provided otherwise that decisions of the board must be unanimous. Article 96 also provided that the company was obliged to give effect to the directors' recommendation.

(i) A new purpose trust was to be established, with the four children of the settlor who were executors as its enforcers.

(ii) The purpose trust was to hold 96% of the share capital of the trustee company. 1% was to be held by Mrs C and the remaining 3% by another discretionary trust. The same four children were to be directors of the trustee company together with Advocate Alan Binnington.

(iii) 99% of the A shares in JY were to be transferred to the trustee company, which continued to hold the B shares. The remaining 1% of the A shares were to be transferred to Mrs C. The same four children and Mr Binnington were to be directors of JY.

(iv) Eight new charitable sub-trusts were to be established, each with one of the settlor's children as guardian.

(v) An instrument of appointment was to be made by the trustee company as trustee of the foundation, the effect being that the income and any capital distributions from JY (including any distribution received on the winding-up of JY) were to be paid to the trustees of the eight sub-trusts in equal shares.

(vi) In order to 'prime the pump' (PTP) JY was to declare and pay a dividend of $80 million and that sum was to be distributed equally amongst the sub-trusts.

(vii) The articles of association of JY were also to be amended. In particular my understanding is (though the detail of this may be disputed) that Article 96 was originally to be amended so as to include the following sentence:–

> *"Notwithstanding any other provision of these articles, the Directors shall, in any financial year in which profits are available for dividend, recommend to the Company a dividend of not less than 75% of such profits (or such greater amount as a majority of the Directors shall agree, notwithstanding the terms of Article 76)…"*

7 Those dispositions were made during the weeks following the approval of the compromise, broadly as previously agreed, including the PTP payment of $80 million. In its ultimate form JY's Article 96 requires the directors, "in any financial year in which profits of that year are available for dividend" (italics added), to recommend a dividend of at least 75% of those profits. There is some dispute, or at least uncertainty, about exactly who authorised the addition of those words "of that year", and as to whether the Act of Court of 11th June, 2004, and its annexes accurately reflected the terms of compromise agreed between the parties, but there has been no application to appeal against the Act of Court or to rectify the article. The effect of the added words, whether or not this was intentional, appears to be to exclude previous years' accrued profits from the calculation of the mandatory 75% dividend.

The current proceedings

8 The representor Trilogy Management Limited, which I shall call “Trilogy”, is the trustee of three of the eight sub-trusts, the guardians of which are three of the settlor's children, namely CC, JC and MLC, who were not nominated as executors and are not directors of the companies comprised in the structure. The first respondent is the trustee company as trustee of the foundation. Her Majesty's Attorney-General is the second respondent, representing the interests of charity generally, but he has taken no action in regard to the present application. Respondents three to seven are the other five sub-trusts, the guardians of which are PC, AC, LC, VC and MC. I have mentioned that Mrs C is the eighth respondent.

9 Trilogy's representation was dated 3rd November, 2010. In early 2011 Mrs C, who was not originally a party to the proceedings, applied to the Royal Court to become an additional respondent. That application was successful. At the risk of over-simplification, the Bailiff said in his judgment of 30th March, 2011, that the application was difficult, but he accepted submissions made on behalf of Mrs C that, as her late husband's widow, she was in a good position to give evidence and to make submissions about her late husband's intentions in regard to the foundation.

Preliminary issues

10 In August 2011 the Court identified three issues to be heard as preliminary issues: (1) the true construction of JY's Article 96, (2) a determination of the mandatory dividends payable for the years 2003 to 2009 and (3) the determination of the sums due to the eight sub-trusts accordingly.

11 The construction of Article 96 resolved itself into two main points relating to the 2005 and 2003 accounts:–

> (i) At the time of the compromise in 2004 the accounts of JY recorded all its investments at their historic cost. For 2005 and subsequent years this was later changed, at least partly on the advice of the company's newly appointed accountants KPMG and adopting the accounting standard known as IFRS, so that marketable securities were revalued at year-end. This became significant because in the year 2005 JY sold half of its large holding in HSBC. Trilogy argued that, by comparing the net assets shown at the end of 2004 (with the 2004 accounts prepared on the historic cost basis) with the net assets at the end of 2005 (with the accounts prepared under IFRS), a large profit should be recognized, leading to a large mandatory dividend. Mrs C argued that the change of accounting method for 2005 required the market value to be substituted also at the end of 2004, which resulted in no profit “of the year” 2005 at all, in fact a small loss.
>
> (ii) The second point was whether the regime for minimum 75% dividends agreed in the 2004 compromise applied also to the year 2003.

12 The second preliminary issue was in effect to determine the amounts of JY's profits for the years 2003 through to 2009 in the light of the Court's decisions on the construction of Article 96.

13 The contentious part of the third issue was whether the initial prime-the-pump payment of $80 million was intended to be separate from, and additional to, the provisions relating to the mandatory 75% dividends. Trilogy claimed that it was, and the trustee company claimed to apply it towards the mandatory dividend for 2004.

14 The Bailiff gave judgment on the preliminary issues on 10th May, 2012. In regard to the construction of Article 96 (paragraph 11 above) he decided in favour of Trilogy on both points, resulting in a large unpaid dividend for 2005 and a minimum 75% dividend for 2003. The order also contained declarations of the amounts of profits of the several years in question. Finally the Court decided that JY and the trustee company had been wrong to count the $80 million prime-the-pump payment against the mandatory divided for 2004. It was a separate and additional payment. However, it was also held that the board of the trustee company could, if they so decided, apply the sum of $80 million towards the mandatory dividend for 2003.

15 Mrs C appealed but only against the first of those points (see paragraph 11(i) above), and on 22nd August, 2012, the Court of Appeal allowed her appeal, holding that the profit of the year 2005, computed on IFRS terms, had to take account of a revaluation at the end of 2004, leading to no mandatory dividend for 2005. Trilogy applied for special leave to appeal to the Privy Council, but on 9th May, 2013, leave was refused.

The main proceedings

16 All those preliminary issues have therefore now been determined conclusively between the parties. Reverting to the other issues, I have mentioned that Trilogy's representation was dated 3rd November, 2010. It was amended on 7th December, 2011, and re-amended on 27th November, 2012, after the decision of the Court of Appeal on the last of the preliminary issues. The re-amended representation now contains a wide-ranging criticism of the management of the post-compromise structure and indeed of that structure itself. I shall paraphrase the relief claimed by Trilogy in this way — either to distribute three-eighths of the trust fund of the foundation to the three sub-trusts of which Trilogy is trustee; or to distribute the whole of the trust fund to all the eight sub-trusts in equal shares; or to remove the trustee company from the trusteeship of the foundation; or to make other directions to further its charitable purposes. Trilogy relies in its pleadings on the history of the trustee company's trusteeship, including its approach to the issues which were determined as preliminary issues, partly in favour of Trilogy.

17 On 11th December, 2012, the trustee company, finding that its board could not agree on the company's response to the re-amended representation, served its own representation

applying to surrender its discretion in this regard to the Court and seeking directions. On 29th January, 2013, the Court made an order accepting the surrender and gave directions that the trustee company should take a neutral role in the main proceedings, giving such assistance as the Court may require, and on that footing allowing its costs out of the trust fund. The Court also ordered that, if Mrs C should cease to take an active role in the main proceedings, the trustee company shall return to the Court for further directions.

18 Despite its neutral role, the trustee company's answer of 18th March, 2013, runs to 71 pages. The trustee company being neutral, Mrs C nevertheless wishes to defend Trilogy's claim. Her answer was served on 21st March, 2013. It is not limited to pleading her late husband's wishes and intentions, resisting the break-up of the foundation, but also defends the conduct of the trustee company. Some of this involves a defence of her daughter MC, who is one of the directors of the trustee company and of JY, and who is, rightly or wrongly, the focus of some at least of Trilogy's attack. The third to seventh respondents take a half-way position, supporting the removal of the trustee company but opposing the break-up of the foundation, either in whole or in part.

Mrs C's present application

19 It is in those circumstances that Mrs C applies now for a pre-emptive order that her costs of the proceedings are borne by the trust fund of the foundation, including any costs which the Court may order her to pay to other parties. In the alternative she asks for such other order as the Court thinks fit. In her evidence she concedes that her husband left her comfortably provided, but says that she will not continue to defend the proceedings if she does not obtain funding from the trust fund of the foundation.

20 All the parties, except for the Attorney-General who did not appear, were represented before me by advocates, Mr Journeaux for Mrs C, Mr Sinel for Trilogy, Mr Speck for the trustee company, and Mr Steenson for the non-Trilogy sub-trusts.

21 Much of Mr Journeaux's skeleton argument, and also his submissions before me, seemed to be directed at the logically prior question whether Mrs C was justified in becoming a party to the proceedings. That has already been decided in her favour. Her credentials for that purpose were accepted by the Bailiff in 2011 and are equally accepted by me. Her evidence and submissions as to her late husband's intentions are indeed likely to be relevant, because the Court will be required to have regard to those intentions (amongst much else) when considering the appropriate response to Trilogy's claims. In the briefest terms, and without in any way pre-judging the issues to be determined in the main proceedings, Mrs C's account of the settlor's intention was for the foundation to be run by his chosen nominees as a permanent endowment without distribution of capital.

22 Not only do I accept that Mrs C is a proper party, but I also have no doubt that the Court 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:–

(i) The well-known practice of so-called *Beddoe* applications is one type of case, where trustees (or other persons in a fiduciary position) are given permission to conduct third-party litigation with an indemnity for costs similar to the one which Mrs C is seeking for herself in the present case.

(ii) In less contentious cases (falling within the first two categories identified by Kekewich J in *In re Buckton* [1907] 2 Ch 406) trustees *and* some beneficiaries are also sometimes given pre-emptive costs orders. It was made clear in the *McDonald -v- Horn* case mentioned below that one of the pre-conditions for the exercise of this jurisdiction is that the court needs to be satisfied that the only proper costs order at the end of the trial itself will be an order for the costs of the applicants to be paid out of the trust fund. Often the beneficiaries in question are members of a pension scheme who could not otherwise be expected to fund specialist legal representation at their own expense.

(iii) There is also a special jurisdiction to grant a pre-emptive order in favour of beneficiaries in hostile litigation against trustees: *McDonald -v- Horn* [1995] 1 All ER 961. But the Court of Appeal emphasized in that case that this particular jurisdiction (adapted by analogy from shareholder actions brought in the name of a company against its directors) applies only to pension-scheme litigation. The justification for this favourable treatment of pension-scheme beneficiaries is that they are not ***"volunteers"*** in relation to the trust, having given consideration in the form of their employment: page 973b-d per Hoffmann LJ.

23 The main problem for Mrs C is, however, that she does not fall within any of these categories. She is not a trustee of the foundation. Even if she were, this is essentially a claim by beneficiaries against trustees, and an indemnity for costs under the Beddoe practice would not be appropriate. There are no doubt still points of construction to be decided at trial, but this is not a case falling within the first or second *Buckton* categories, and there is no practical certainty about the costs order at trial. Besides, Mrs C is not a beneficiary of these trusts. This is hostile litigation against the trustee company, but Mrs C is not a claimant, nor is she supporting the claimants. Nor is the foundation a pension scheme, and Mrs C has not given relevant consideration for any interest which she has in the corporate structure.

24 Mr Journeaux recognises these difficulties and puts his argument on a rather more general footing, referring first to the decision of Mary Arden QC as she then was, sitting as a Deputy Judge of the Chancery Division, in *In re Biddencare Limited* [1994] 2 BCLC 160. In that case she listed the four relevant considerations in the context of a Beddoe application: (1) the strength of the party's case, (2) the likely order as to the costs at trial, (3) the justice of the application and (4) any special circumstances. It should, however, be remembered that this case dealt with a Beddoe application, and is fully relevant only to similar applications by trustees, liquidators, receivers, personal representatives and other parties finding

themselves in similar situations. In particular the procedure for Beddoe applications is that they are heard by a different judge from the trial judge, so that the trustee can and does put before the court much confidential material about the merits of the case which he would not wish to share with the true opposition (or with the trial judge).

25 That is quite different from the present application, and it means that I cannot make sensible findings about either of the first two *Biddencare* criteria. As for the other two:–

> (i) Under the heading of justice, Mrs C has virtually no financial interest in the case, seeing that she is entitled to no more than 1% of the share capital of the trustee company and of JY. She submits that it is not just and fair for her to have to answer Trilogy's case at her own cost and at what she describes as the remote risk of having to pay other parties' costs. I certainly accept that she has virtually no financial interest in the case, but I do not accept the rest of this submission. It is she who has chosen to become involved in this action, and it would be her own choice if she were to take on the burden of answering the whole of Trilogy's case. *Prima facie* it is neither unjust nor unfair to require her to do so at her own expense.
>
> (ii) As for special circumstances, it is here, and here alone, in what I accept is likely to be a rare situation, that Mrs C's case gains some strength. In particular, as I put to Mr Journeaux in argument, the unusual circumstance that the trustee company is unable to decide whether or not to defend the proceedings, and has been given permission to take a neutral position, means that there is no other party available to defend the action, or indeed to assist the Court in considering the merits. That is certainly something to be weighed in the balance. As against that, even if Mrs C were the trustee, I repeat that a trustee in such litigation is not protected against adverse costs orders if it loses, and it may be that Mrs C should be in no better position herself.

26 It is hard to find another example of hostile litigation against a trustee in which a defendant beneficiary, not himself being a trustee, has been awarded pre-emptive costs. (I am aware of costs orders made in respect of the preliminary issues in the present case itself, but I regard those as different, being made in respect of issues which, though doubtless argued strongly on each side, fell within the first two categories of *Buckton* and being made after trial, not as pre-emptive orders.) One exceptional case of this kind is *IBM United Kingdom Pension Trust Limited -v- Metcalfe* [2012] EWHC 125 (Ch), an extempore decision of Warren J. The case concerned a Beddoe application in which the court had previously, and by consent, given directions to trustees to prosecute two separate claims against IBM in regard to pension schemes. The consent order had made provision also for Mr Metcalfe, a member of the scheme, to be joined as a defendant and to have his costs paid out of the scheme assets, subject to certain conditions. Paragraph 5.1(iii) of the consent order provided:–

> ***"(iii) [Mr Metcalfe's] costs so payable shall (in the absence of any further order) be limited to his costs of:–***
>
> ***(a) monitoring the Part 7 Proceedings [meaning one of the two***

> ***hostile claims] with a view to sharing information with and assisting the representative beneficiary defendants in the related proceedings [meaning the other such claim] … insofar as the Claims are relevant to those related proceedings; and/or***
>
> ***(b) supplementing (but not duplicating) the Trustee's case in the Part 7 Proceedings;…"***

It is clear therefore that it was the trustee which had the task of prosecuting the claim, and that Mr Metcalfe's pre-emptive order was conditional on him taking the two limited roles described in that paragraph.

27 The claim was duly issued by the trustee against IBM with Mr Metcalfe as a defendant. The particulars of claim included a request for a representation order, namely an order that the trustee would itself represent the scheme members for the purposes of the proceedings. There was nothing inherently wrong in that request. But in the later application IBM claimed that its understanding had been that the trustee would be seeking an order that Mr Metcalfe, not the trustee, would represent the scheme members for the purposes of the proceedings, and that its consent to the order made in the original Beddoe application had been given on a false premise, and that the pre-emptive costs order should be discharged. IBM submitted that, without a representation order, there was no jurisdiction for the court to make a pre-emptive order in such a case.

28 Warren J rejected that submission. The existence or not of a representation order was irrelevant, and indeed it would have been wrong to have made Mr Metcalfe a representative defendant if his task were limited to that set out in the quoted paragraph of the consent order. It was always the intention that the trustee would be the active party in prosecuting the claim against IBM.

29 The pre-emptive costs order therefore survived. Warren J declined to say whether it would have been appropriate for the original court, in the exercise of its discretion, to make the pre-emptive order in the first place. The original order had been made by consent, and the effect of the later judgment was that it could not be discharged unless IBM could show that there had been no jurisdiction for the previous court to have made the order, which IBM had failed to do:–

> ***"As I have said already, the jurisdiction is to be found in section 51 of the Senior Courts Act 1981; it is a jurisdiction which is constrained by principles established in case-law but is, nonetheless, one which must be exercised to achieve fairness and justice.*** The present case is unusual, perhaps unique, on its facts. The applicable principles do not, in my judgment, lead to a conclusion that the court would have no jurisdiction to make a costs order in favour of Mr Metcalfe in the absence of an order appointing him as a representative. Whether or not it would have been appropriate, in April 2011 when the Consent Order was made, for the court, in exercise of its discretion, to have imposed such a costs order in the face of opposition from IBM is not, as I

> have said, something which it is necessary to decide. The point is that there would have been jurisdiction to do so even if everyone had understood that Mr Metcalfe was not to be appointed as a representative under CPR 19.7."

30 What I derive from this *IBM* case is that the court has a discretion to award costs pre-emptively, in the interests of justice and fairness, even in a case which does not fall precisely within the existing classification. To that extent it assists Mrs C's argument. I regard Mr Metcalfe's participation as comparable, though not identical, to the position of a beneficiary who is party to proceedings in the first two *Buckton* categories. This is borne out by the limited nature of Mr Metcalfe's participation in the proceedings, and the fact that his entitlement to costs was conditional on that limit being observed. It is true that this limit was imposed by agreement, not by the court, but I think I can assume that Mr Metcalfe would have been represented by specialist solicitors and counsel of the highest standing who would not have felt it necessary to propose this limited role unless they regarded it as relevant to his prospects of obtaining the required funding.

31 Mr Sinel and Mr Steenson both opposed Mrs C's application. They referred me especially to *McDonald -v- Horn* [1995] 1 All ER 961 in which Hoffmann LJ gave the main judgment, with which Hirst and Balcombe LJJ agreed. At page 971 Hoffmann LJ approved a dictum of Browne-Wilkinson V-C in *Re Westdock Realisations Limited* [1988] BCLC 354, 359 when he had said:–

> ***"Unless satisfied that after trial a judge would be likely to make an order that the costs of all parties are to come out of the fund it cannot in general be right to make such an order at this stage."***

And Hoffmann LJ went on to put the matter a good deal higher:–

> ***"I respectfully agree.*** In fact, I would be inclined to put the matter rather more strongly. I think that 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)."

That was the sub-rule in the then Rules of the Supreme Court which expressed the basic rule for costs to follow the event but provided also for a discretion to make other orders depending on the circumstances of the case.

32 Specifically the submission of Mr Sinel and Mr Steenson is that the Court should not, or perhaps cannot, make a pre-emptive order in favour of Mrs C unless persuaded that the only possible order after the trial of the main proceedings would be for her to have her costs out of the trust fund in any event. That is an important point. It is true that, in the passage quoted above, Hoffmann LJ was speaking about cases in the first two *Buckton* categories (non-contentious cases), and he proceeded to uphold a pre-emptive order which had been

made in favour of a claimant in overtly hostile proceedings where the final costs order cannot have been certain. But the present case, though not falling neatly within the first two *Buckton* categories, and not falling within *McDonald -v- Horn* either, has more in common with the former than the latter.

33 I therefore asked Mr Journeaux in argument, on the hypothetical basis that the Court declines to give a pre-emptive order, what costs order he would expect the Court to make at the end of the trial if the Court were to order the trust fund to be divided amongst the eight sub-trusts, or if the Court were to order the removal of the current trustee company, in circumstances where Mrs C had vigorously opposed both of those orders. He was not able to satisfy me, firmly though he attempted to do so, that the only order which the court could make at trial would be to award Mrs C her costs. I have no wish to prejudge the position at trial, and all I do say is that there is no certainty that Mrs C would be awarded her costs from the trust fund. I would add that, although this may not be conclusively fatal to her present application, it is nevertheless a factor which the Court ought to have firmly in mind.

34 In my judgment the legal position can be summarised as follows. Even in a case which does not fall neatly into the first or second *Buckton* categories (in other words, if the case is not limited to questions of construction and similar matters), and even in a contentious case against trustees which does not fall within *McDonald -v- Horn*, the Court retains a discretion to make a pre-emptive order as to costs in favour of a trustee or beneficiary. So far as trustees are concerned, this is the classic Beddoe jurisdiction. However, when it comes to beneficiaries in such cases (meaning those not falling within the three categories so far mentioned), the jurisdiction is truly exceptional and will not be exercised lightly in favour of a beneficiary (or indeed in favour of a person who is neither a trustee or a beneficiary).

35 I am not going to lay down guidelines for use in other cases because, much as Warren J said in the *IBM* case, the present case is probably unique on the facts. But the underlying principle for the Court is to seek justice and fairness. In the present case the factors which strike me as significant are these:–

(i) There is a risk that, without a pre-emptive order, Mrs C will carry out her threat to take no further active part in the proceedings. Mr Sinel and Mr Steenson suggest that I should not take this threat too seriously, but I shall nevertheless take it into account for what it is worth.

(ii) The task of the Court, at trial, is likely to be more difficult in achieving justice and fairness if no advocate is present to cross-examine Trilogy's witnesses. But, if Mrs C does carry out her threat, there is provision for the Court to revisit the position of the trustee company.

(iii) At first sight there is an apparent element of unfairness between a *McDonald -v- Horn* case in which beneficiaries are encouraged (by the pre-emptive order) to prosecute certain claims against trustees, and the normal refusal of the courts to allow a defendant trustee to use trust funds for his defence.

(iv) Even so, in a hostile claim by a beneficiary against a trustee, the normal practice is for the trustee not to be permitted to fund his defence by using trust property, and it would be contrary to that practice for a third party to be given an advantage which the trustee himself does not have.

(v) A hostile claim against the trustees of a charitable foundation is not closely analogous to a shareholders' derivative action against directors, nor is it closely analogous to a claim against pension-scheme trustees. In regard to charitable trusts the Attorney-General is in a specially favoured position, but in other respects the closer analogy is to an ordinary private trust where the beneficiaries are volunteers. In such a case, unless it falls within the first two categories in the *Buckton* analysis, a pre-emptive order is not normally appropriate.

(vi) Now that the preliminary issues have been concluded, the remainder of the proceedings consists of little more than a family dispute about control of the settlor's benefaction, and in principle the Court should in my view be resistant to such a dispute being funded at the cost of funds held on charitable trusts. I understand that the trustees of the eight sub-trusts do have the benefit of Beddoe provision with some degree of indemnity from the funds of those sub-trusts (the detail of which I do not know). On the other hand the Court should be reluctant to take such funding further than it needs to go in the interests of fairness and justice.

36 Applying those considerations to the present application, my analysis is essentially that the first three of those factors are outweighed by the last three. This is now a family dispute about control, with the trustees of the sub-trusts mounting an attack on the foundation trustees, and the trusts are charitable trusts, not those of a pension scheme. Mrs C is not a trustee or a beneficiary of these trusts, and does not have any particular interest in the charitable objects of the foundation or of the sub-trusts. I accept that there is an exceptional discretion for the Court to make a pre-emptive order if the costs order at trial is clearly predictable (perhaps because of some explicit restriction on the party's participation in the proceedings). But the negative factors which I have mentioned in this and the preceding paragraph have led me to decide not to exercise that discretion in favour of Mrs C. She has therefore not persuaded me to grant her a pre-emptive order.

37 I do not rule out the possibility that, after trial, Mrs C may receive the benefit of a costs order in her favour, in regard to all or part of her costs. But pre-emptive orders are different. Without wishing to pre-judge the matter, I might go so far as to say that an order in her favour after trial might be more likely if her defence were limited to providing evidence and submissions as to her late husband's wishes and intentions in regard to the foundation. That was, after all, the purpose for which the Court gave her leave to be joined. But on examination of her answer, it appears that she is also actively defending the position of the trustee company. She is therefore substituting herself for the trustee company, which would not itself be entitled to claim a pre-emptive order, and in my judgment she should be in no better position than the trustee company itself.

38 At risk of repeating myself, Mrs C's application is really based on the proposition that in the present unique situation there is literally no other party in a position to resist any of the claims put forward by Trilogy, and that her threat to withdraw from an active part in the case is enough by itself to justify her claim for a pre-emptive order. Ultimately I do not accept that this is enough. I do accept that the task of the Court in scrutinising the merits of Trilogy's claim will be made more difficult, though by no means impossible. The fact remains, however, that she has a choice how to conduct her own case.

39 It is for those reasons that I have decided to refuse Mrs C's application.