Northern Trust Fiduciary Services (Guernsey) Ltd v Dejan Devic, Authorised Representative of the Republic of Serbia

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Sparrow, Thomas
Judgment Date:	06 May 2019
Neutral Citation:	[2019] JRC 78
Date:	06 May 2019
Court:	Royal Court

Text

[2019] JRC 78

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Sparrow **and** Thomas.

In The Matter of the Representation of Northern Trust Fiduciary Services (Guernsey) Limited

and

In The Matter of the Banayou Trust

And In The Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (as Amended)

Between

Northern Trust Fiduciary Services (Guernsey) Limited
Representor
and
Dejan Devic, Authorised Representative of the Republic of Serbia
First Respondent
Violeta Stojanovska Petrovska, Authorised Representative the Republic of Macedonia
Second Respondent
Ankica Kolobaric, Authorised Representative of the State of Bosnia and Herzegovina
Third Respondent
Slavko Tesija, Authorised Representative of the Republic of Croatia
Fourth Respondent
Metka Prevc, Authorised Representative the Republic of Slovenia
Fifth Respondent

Advocate E. C. P. Mackereth **for the Representor**

Advocate E. B. Drummond **appeared as amicus curiae**

Authorities

Trusts (Jersey) Law 1984

Re S Settlement [2001] JRC 154

Republic of Croatia v Girocredit Bank [1996] 36 ILM 1520

S v Bedell Cristin Trustees Limited [2005] JRC 109

Lewin on Trusts

HSBC Trustee (CI) Limited v Siu Hing Kwong and others [2018] JRC 051A

Jersey Evening Post Ltd v Al Thani [2002] JLR 542

RBC Trustees (CI) Limited v Appleby [2007] JRC 211

Désastre of Blue Horizon Holidays Limited [1997] JLR 124

In the matter of M and Other Trusts [2012] JRC 127

Trust — The Representor seeks the Court's blessing to the distribution of the assets.

The Attorney General appeared in person (on the issue of the publication of this judgment)

THE COMMISSIONER:

1 The Representor seeks the Court's blessing to the distribution of the assets of the Banayou Trust to the Republic of Serbia, the Republic of Macedonia, the State of Bosnia and Herzegovina, the Republic of Croatia and the Republic of Slovenia.

Background

2 The Banayou Trust was declared on 15 th December, 1988, by NMB Trust Company Limited (“the Original Trustee”) at the request of the National Bank of Yugoslavia, an institution of the Former Socialist Federal Republic of Yugoslavia. The Declaration includes the following provisions:-

(i) The proper law is that of the Island of Jersey.

(ii) The only beneficiary is the National Bank of Yugoslavia, which has the power to appoint further beneficiaries.

(iii) The capital and income of the trust fund were to be applied in accordance with the instructions of the National Bank of Yugoslavia and at the end of the trust period of 100 years, the trust fund was to be transferred to the National Bank of Yugoslavia.

(iv) The initial property over which the declaration was made was an account with NMB Bank Amsterdam, although no account number was specified. The evidence is that the National Bank of Yugoslavia was the economic/real settlor.

3 Difficulties arose as a consequence of the dissolution of the Former Socialist Federal Republic of Yugoslavia which was under way by mid 1991, and without going into the detailed history, by 1992 it had ceased to exist and had been succeeded by the Federal Republic of Yugoslavia (comprising Serbia and Montenegro), the Republic of Macedonia, the State of Bosnia and Herzegovina, the Republic of Croatia and the Republic of Slovenia. We will refer to these five States as “the Successor States” which covered all of the geographical area of the Former Socialist Federal Republic of Yugoslavia. Although there continued to be an entity calling itself the National Bank of Yugoslavia, that entity appeared to represent the Federal Republic of Yugoslavia alone.

4 On 21 st June, 2001, the Successor States entered into an agreement known as “the Succession Agreement” which regulates the division of the assets of the Former Socialist Federal Republic of Yugoslavia between the Successor States. Article 6 of Annex C provided for the appointment by each Successor State of a representative to form a committee (“the Distributions Committee”) tasked with arranging the modalities for the initial distribution of the foreign financial assets and to prepare a definitive list of all Socialist Federal Republic of Yugoslavia external debt.

5 Directions as to the status of the National Bank of Yugoslavia and the identity of the

beneficiaries of the Banayou Trust were first sought from the Court in 1998 and given on the 13 th January, 1999, from which point the trust has been administered under the directions of the Court. Those directions included an order that no distributions be made without the authority of the Court. The Original Trustee changed its name to ING Trust (Jersey) Limited before resigning in favour of the representor pursuant to permission given by the Court on the 25 th March, 2004. After a long, difficult and convoluted process the point has now been reached at which a proposal for the distribution of the trust assets, currently some £9.9 million, can be put to the Court for its blessing.

6 Private international law advice had been received by the Original Trustee on 25 th January, 2001, confirmed on 9 th June, 2003, and again on 12 th September, 2003, that the National Bank of Yugoslavia was an asset of the Former Socialist Federal Republic of Yugoslavia. Having been succeeded by the Successor States, they are *prima facie* the successor beneficiaries and are entitled to share the assets in the Banayou Trust in such equitable proportions as their authorised representatives may agree. There were, however, three residual issues which could impact on that analysis which on 25 th March, 2004, the Court directed be addressed by giving effect to a joint proposal from English counsel. We take those three issues in turn.

Provenance of the trust assets

7 The activities of the Banayou Trust have been complex, but the representation of the Original Trustee brought before the Court in 1998 gives this explanation:-

> *"Factual background of Trust Assets*
>
> > *5. On 20th September 1988, NBY and certain other Yugoslavian banking institutions entered into various refinancing agreements. These were described as the New Financing Agreement ("NFA"), the Trade and Deposit Facility Agreement ("TDFA") and the Alternative Participation Instrument ("API"). The agreements were, essentially, a scheme to "refinance" previous existing loans made to NBY in respect of which there had been defaults in repayments on the existing loans as a result of the weakness of the Yugoslavian economy.*
> >
> > *6. The NFA, TDFA and API allowed certain banking institutions around the world to inject liquidity into NBY, with the ultimate purpose being that NBY would then be able to maintain and ultimately repay the existing loans with interest.*
> >
> > *7. As pleaded above, on 15th December 1988 the Trustee received a written request from NBY to execute a declaration of trust in respect of funds transferred to NMB Curacao's account 2309/015/217 with NMB Bank Hamburg in favour of the Trustee together with other funds from time to time, and the declaration of trust forming the Banayou Trust was*

executed on the same day in accordance therewith. On the 16th December 1988 NMB transferred a sum of Deutschemarks to the Trustee to be held on the terms of the Banayou Trust. That purpose of the transfer was to enable the Trustee to purchase some of the loans made by external parties to NBY under the NFA, at a lower price than the "face value" of the loan. As the beneficiary of the Banayou Trust was NBY, the intention was to reduce the amount of borrowing owed to banking institutions outside of Yugoslavia.

8. Further arrangements were made by the Trustee of the fund to buy back the debt of NBY to various banks under the NFA, TDFA and API. A number of complex transactions were entered into.

9. In summary, as a result of the matters aforesaid, the fund of the Banayou Trust consisted of certain portions of the debt owed by the NBY to various banking institutions which were acquired by the Trustee, either by gift or purchase, in several tranches over a period of two years. Purchases of further debt under the NFA were enabled by revenue from portions of the loans already bought back. At present the trust fund assets are set out in a schedule attached to this Representation."

8 As Advocate Drummond, *amicus curiae*, put it, if the National Bank of Yugoslavia was struggling to meet its debt obligations in full, the Banayou Trust provided a means to buy its own debt on the secondary market at a discount to face value.

9 This issue was to be addressed through the Bank of England and, in short, the Bank of England confirmed that it had no concerns relating to the provenance of the trust assets, a confirmation which satisfied the Attorney General. The Distributions Committee also confirmed that the source of the funds was "re-purchased Yugoslav debt to the London Club creditors". The reference to the London Club is to some 100 external bank creditors of the Former Socialist Federal Republic of Yugoslavia, which also had debt with fifteen sovereign states known as the Paris Club.

The Paris and London Club Agreements

10 The concern here was whether the assets of the Banayou Trust were required to be dealt with under restructuring agreements entered into between the National Bank of Yugoslavia and the London and Paris Club members before the trust was created and in particular whether they might be creditors of the trust. Again, in short, both the Bank of England and the Distributions Committee confirmed that the assets of the trust did not require to be dealt with as part of the Paris or London Club agreements and that the trust assets did fall within the scope of the Succession Agreement.

Apportionment between the Successor States

11 The Successor States were invited to agree how the trust assets should be apportioned as between them. It is this issue that has taken years to resolve, but through the Distributions Committee they have now agreed on the apportionment and to the terms of a draft deed of appointment and indemnity which the representor seeks the Court's approval to enter into.

12 In our view all of the residual issues identified by the Court in 2004 have now been satisfactorily addressed.

Further developments

13 Whilst the five Successor States comprised the whole of the geographical area covered by the Former Socialist Federal Republic of Yugoslavia, following the Succession Agreement there have been further developments:-

(i) With effect from 4 th February, 2003, the Federal Republic of Yugoslavia became the State Union of Serbia and Montenegro.

(ii) In 2006, the State Union of Serbia and Montenegro separated into two states.

(iii) In 2008, Kosovo declared independence from Serbia, an independence which is only partially recognised internationally.

Relief sought

14 Under the representation, the representor seeks:-

(i) an order that the representor will be permitted to resume making payments out of the Banayou Trust;

(ii) a declaration that the Successor States are the proper beneficiaries of the Banayou Trust; and

(iii) the Court's approval to the representor entering into the deed of appointment and indemnity.

15 Advocate Mackereth submitted that the Court's jurisdiction to make a declaration as to the beneficiaries of the Banayou Trust arises under Article 51(ii)(c) of the Trusts (Jersey) Law 1984 (“the Trusts Law”), which gives the Court the power, if it thinks fit, to make a declaration, and under Article 51(2)(a)(iii) which provides that the Court may, if it thinks fit, make an order concerning a beneficiary, or any person having a connection with the trust at issue. He submitted that the scope of the beneficial class of the Banayou Trust is an issue in respect of which it would be fit to grant the declaration, as it was wholly unsatisfactory for the instrument governing a trust to identify an entity which no longer exists in its original

form as the sole beneficiary. It would assist the representor to have clarity as to the beneficial class before making distributions from the trust, and to have clarity as to the beneficial class following any such distributions, especially given the politically sensitive nature of issues surrounding the apportionment of the assets of the Former Socialist Federal Republic of Yugoslavia.

16 The application for approval to enter into the deed of appointment and indemnity was made under the second category identified in the case of *Re S Settlement* [2001] JRC 154:-

> ***"The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers*** ."

17 He submitted that there was no real doubt that the representor had the power to enter into the deed of appointment and indemnity, relying initially on Clause 5 of the declaration, which conferred upon the representor the "widest powers of investing, disposing of or dealing with the trust fund and of carrying out any transaction whatsoever in connection with the Trust Fund" and ultimately under the dispositive powers under Clause 7(a). It was also clear, he said, that the decision to enter into the deed of appointment and indemnity was momentous, given the long history of uncertainty relating to the beneficial class, and the fact that the deed of appointment and indemnity entails the appointment of all of the assets in the Banayou Trust which are substantial.

18 Advocate Drummond, in a helpful submission, raised a number of points, which we take in turn:-

Continued existence of the National Bank of Yugoslavia

19 The Federal Republic of Yugoslavia, later the State Union of Serbia and Montenegro, could have argued that the National Bank of Yugoslavia continued to exist (later re-named the National Bank of Serbia) and that it remains as sole beneficiary of the Banayou Trust.

20 This would no doubt have been disputed by the Original Trustee/representor and the other States, on the basis of the private international law advice received, citing in particular the Austrian Supreme Court decision in *Republic of Croatia v Girocredit Bank* [1996] 36 ILM 1520:-

> ***"As a result of the disintegration of the [Socialist Former Republic of Yugoslavia] by 'dismembratio' the legal personalities of that State and its National Bank ceased to exist (page 176)*** ."

21 This can perhaps be contrasted with the approach of the Badinter Commission, which was more circumspect than the Yugoslavian legal opinion of 21 June 2001, which states that the National Bank of Yugoslavia was not a state organ (merely an institution or organisation) and had its own legal capacity to sue and be sued.

22 Both counsel agree it is not necessary for the Court to reach a position on this because:-

(i) The State Union of Serbia and Montenegro is able to advance its own interests.

(ii) The authorised representative of the State of Serbia and Montenegro was alerted to this case at the latest in January 2005 and in the fourteen years of correspondence which followed, it has never been asserted that the National Bank of Serbia has a claim to 100% of the trust fund as the sole named beneficiary.

(iii) The authorised representative of the Republic of Serbia is prepared to sign a deed of appointment and indemnity in which it is stated in terms that the National Bank of Yugoslavia *"ceased to exist"* and to agree a split of the trust fund between the Successor States.

(iv) The Republic of Serbia, at least, has been given notice of this hearing, and has not appeared to argue the point.

Jersey Trust Law

23 Whilst extensive advice has been taken on matters of private international law, a number of Jersey Trust Law issues have not been addressed.

24 Assuming the Banayou Trust was validly created at the outset in favour of a sole beneficiary, the National Bank of Yugoslavia, the question as to what arises when the National Bank of Yugoslavia ceased to exist would, on the face of it, be governed by Article 42 of the Trusts Law, which is in these terms:-

"Failure or lapse of interest

(1) Subject to the terms of the trust and subject to any order of the Court, where:-

(c) there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust; …

The … property affected by such … lack of beneficiary… shall be held by the trustee …. in trust for the settlor absolutely .

(2) An application to the court under this Article may be made by the Attorney General .

(3) In paragraph (1) 'settlor' means the particular person who provided the interest or property affected as mentioned in that paragraph ."

It is arguable, therefore, that when the National Bank of Yugoslavia ceased to exist, and subject to any order of the Court, the assets would be held for the settlor absolutely.

25 What would be the position if the Banayou Trust was not validly created at the outset? There is reference in past correspondence to defects in the execution of the trust, although they are not particularised. If there are defects that go to the validity of the trust, then, subject to any orders the Court might make to remedy the same, the representor would be holding the assets in trust for the settlor. There is also reference to advice from Advocate Sugden, then of Ogier & Le Masurier, dated 2 nd May, 1996, over the extent of control exercised by the National Bank of Yugoslavia over the trust and its assets under the terms of the Declaration, which may well be a reference to the maxim ***"Donner et retenir ne vaut"***. The Trusts Law was subsequently amended twice to prevent a trust from being held invalid by application of this maxim, the latter amendment seemingly being retrospective in effect, but if the maxim applied or the National Bank of Yugoslavia has reserved too many powers to be consistent with a trust arising, the effect is that the gift into trust would be void, so that the representor would again be holding the assets on trust for the settlor. As Advocate Mackereth submits, whichever approach is taken, all roads lead back to the settlor of the assets, namely the National Bank of Yugoslavia.

26 It is the case that if the representor is not holding the assets pursuant to the terms of the Declaration, but on bare trust for the National Bank of Yugoslavia as settlor, this would usually have ramifications for the trustee's duties, such as in relation to the investment of the trust assets, distributions, remuneration etc but this is unlikely to have any impact in this case, as the Original Trustee and the representor have been administering the trust under the directions of the Court since January 1999.

Further separation of Montenegro in 2006 and Kosovo in 2008

27 Finally, Advocate Drummond submitted that the private international law opinions have not been updated since 2003, and therefore do not take into account the separation of Montenegro from the State Union of Serbia and Montenegro, and the declaration of independence of Kosovo, and the representor appears to have continued corresponding with an authorised representative of the State Union of Serbia and Montenegro until 2019. The draft deed of appointment and indemnity does not refer to Montenegro at all, and is to be executed by the Republic of Serbia alone, which will receive the *"Serbia appointed assets"*.

28 In terms of communication, the factual position appears to be as follows. Initially, there was only one authorised representative representing the State Union of Serbia and Montenegro,

but by 3 rd July 2009, if not earlier, the appointment of an authorised representative from Montenegro had been notified to the representor, and he was included as an addressee on one piece of correspondence to the Distributions Committee on 3rd July 2009. From 2007, it would appear that Serbia's correspondence made no reference to being sent on behalf of both States, and there is no evidence of any further correspondence to or from Montenegro post 2009. In 2014, the representor, through its legal advisers, took steps to confirm who it should be corresponding with on the Distributions Committee in relation to the Banayou Trust and no reference was made to Montenegro in the response received.

29 The representor is dealing with the Distributions Committee established under the Succession Agreement, which covered all of the States within the geographical area of the Former Socialist Federal Republic of Yugoslavia, and to which the Federal Republic of Yugoslavia (subsequently named the State Union of Serbia and Montenegro) was a party. It would seem arguable that it would be a matter as between Serbia and Montenegro as to how the funds to be allocated to the area covered by their two States should be shared as between them. What is clear is that there are no other claimants to the trust assets other than the Successor States and, arguably, those States that succeed them.

30 However, this and the position in relation to Kosovo introduces an element of doubt as to the proper beneficiaries of the Banayou Trust and this, in addition to the doubt raised by the question as to whether there is now any beneficiary at all, militates against the Court giving the declaration requested.

31 It would be possible for the Court to send the representor away to obtain further private international law advice on the position of Montenegro and Kosovo, involving yet more delay and cost. Against doing that are the facts that this trust has been administered under the supervision of the Court for some 20 years now and it is surely time for it to be wound up; the representor, as directed by the Court, has been dealing in good faith with the Distributions Committee established under the Succession Agreement to which all of the Successor States were parties; no claims have been intimated by either Montenegro or Kosovo and an agreement has now been reached with the Distributions Committee with considerable difficulty. To send the representor away in this way would, in our view, be disproportionate and inappropriate.

32 In terms of approving the decision of the representor to distribute the trust fund in this way and following *Re S Settlement*, we have to be satisfied that:-

We are in no doubt from the evidence before us that all three tests are well met in this case.

(i) the representor's decision has been formed in good faith;

(ii) the decision is one which a reasonable trustee properly instructed could have reached; and

(iii) the position has not been vitiated by any actual or potential conflict of interest.

33 Advocate Mackereth emphasised that there was no surrender of discretion here and that the Court was exercising a supervisory role. He referred us to this extract from the case of *S v Bedell Cristin Trustees Limited* [2005] JRC 109:-

> ***"A settlor does not choose the Court as a trustee; he chooses his appointed trustee.*** It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. … The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do) ."

34 However, the second category referred to in *Re S* is where there is no doubt as to the nature of the trustee's powers, but the decision is a particularly momentous one. The only power that can be relied upon, and the one relied upon in the deed of appointment and indemnity, is Clause 7(a) of the Declaration, Clause 5 containing administrative powers only. Clause 7(a) is in these terms:-

> *"TRUST OF INCOME AND CAPITAL OF THE TRUST FUND*
>
> *7(a) The Trustee shall during the Trust Period have the following powers of dealing with the capital and income of the Trust Fund:*
>
> > *(i) The Trustee shall pay or apply the whole or any part of the income to the Beneficiary in accordance with Proper Instructions from the Beneficiary*.
> >
> > *(ii) The Trustee shall pay, transfer, apply or deal with the whole or any part of the capital for the benefit of the Beneficiary in accordance with Proper Instructions from the Beneficiary*."

35 The term *"Beneficiary"* is defined in the Declaration in this way:-

> *"The "Beneficiary" means the institution specified in the Second Schedule hereto or such other institution or company as the institution shall by deed appoint*."

No other institution or company has been appointed. The Second Schedule names the National Bank of Yugoslavia.

36 These dispositive powers can only be exercised on the instructions of the Beneficiary, as defined, and the draft deed of appointment and indemnity is indeed premised upon the beneficiaries of the Banayou Trust giving that instruction. If validly given, the representor has no discretion in the matter for the Court to bless— ***"shall pay"*** not ***"may pay"***. This

only works if the Successor States are indeed now the beneficiaries of the Banayou Trust.

37 The Court has not been provided with any authority as to the basis under Jersey Law upon which the status of the National Bank of Yugoslavia as the only named beneficiary enures for the benefit of those who are entitled to its assets when it ceases to exist, but this is the route (what might be described as "the beneficiary route") the Court appears to have followed since 1999 without any analysis within the Acts of Court (there are no judgments) or within the supporting papers. This is, understandably, the route proposed in the deed of appointment and indemnity.

38 The more likely route under Jersey Law, it seems to us, is that upon the National Bank of Yugoslavia ceasing to exist as a legal entity, there was no beneficiary of the Banayou Trust and no person who could become a beneficiary, in which event, pursuant to the provisions of Article 42 of the Trusts Law, the property affected by the trust would be held by the representor for the settlor, namely the National Bank of Yugoslavia absolutely, unless the Court were to order otherwise. This might be described as "the settlor route". It is clear that the National Bank of Yugoslavia no longer exists and so it is a question of who, under private international law, is entitled to its assets, and that issue has been settled on advice. If the Successor States are not the beneficiaries of the Banayou Trust under the beneficiary route, then they are the beneficiaries of the assets held by the representor under the settlor route; in other words, the result is the same.

39 Advocate Drummond proposed that the Court could overcome these difficulties by proceeding by way of a Benjamin order, described in this way in *Lewin on Trusts*, 19th edition at paragraph 27–027 and 27–029:-

> ***"27–027 Benjamin orders and like orders***
>
> ***But where the question is one of fact, instead of declaring the existence of a particular state of facts, so as to bind all parties, the court may give the trustees liberty to distribute on a particular footing.*** Such an order was made in *Re Benjamin*, ***the decision which has given its name to this form of order, where executors were authorised to distribute the estate on the footing that a given person, who had not been heard of for some years, was unmarried and had not survived the testator.*** A Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. Its effect is therefore that the trustees are protected, in that they cannot afterwards be accused of a breach of trust as they have acted under the authority of an order of the court, but it preserves the right of any person actually entitled to follow the trust property if he later appears."
>
> ***"27–029***
>
> ***It has been said that the power to make a Benjamin order is not apt where the trustees are faced with a claim to a beneficial interest which the claimant fails to pursue.*** The reason is that a Benjamin order caters for a case

in which it is impossible or impracticable to establish a fact one way or the other, but if there is a claimant who has made a claim, the claim undoubtedly exists and it is in principle possible to decide it in such a way as to bind the claimant. Nonetheless, the court has jurisdiction to authorise trustees to distribute without regard to such a claim, by analogy to its jurisdiction to authorise a distribution despite an adverse claim to the trust assets from a third party, and will exercise it where there is reason to think that the claim is insubstantial. In a suitable case, such an order may be made in conjunction with a true Benjamin order, so that the trustees are authorised to distribute both despite known but insubstantial claims as a beneficial interest and despite unknown claims to such an interest .”

40 We are in no doubt that the assets held by the representor should be distributed in accordance with the proportions that have been agreed by the respondents in their representative capacities, and we will make a Benjamin order authorising the representor to do so. To the extent that Montenegro or Kosovo have claims to the assets by whatever route, they can follow the property into the hands of the States that have received them, but if the distribution is authorised by the Court, the representor is protected from claims in breach of trust. As we have said, from the Court's perspective it is more likely that the entitlement of the Successor States arises under the settlor route as opposed to the beneficiaries route and, as the outcome is the same, we suggest that the deed of appointment and indemnity be amended so that the distribution is made on both alternate bases.

41 We therefore propose to make the following orders:—

(i) That the prohibition on distributions be lifted.

(ii) That, in light of the investigations undertaken by the Representor, the Representor be permitted to distribute the assets currently held by the Representor (“trust assets”) to the Republic of Serbia, the Republic of Macedonia, the State of Bosnia and Herzegovina, the Republic of Croatia and the Republic of Slovenia upon the footing that (i) those entities are the current beneficiaries of the Banayou Trust or are otherwise entitled to the trust assets and (ii) there are no other entities with such claims to the trust assets.

(iii) That, in accordance with the order at paragraph (ii) above, the Representor's decision to enter into a Deed of Appointment and Indemnity in the terms, or substantially the terms, of the draft filed today with the Court and to be attached to the Act of Court (amended as appropriate in order to take into account the final valuation as at the date of distribution following deduction of fees and expenses) be approved.

Publication of this judgment

42 At the convening hearing on 24 th January, 2019, the Court (the Deputy Bailiff presiding) made this order:-

> ***"2 ordered that all hearings in relation to this Representation shall be in private, all supporting documentation in relation to this Representation shall be kept confidential to the Court and to the parties, and that the Royal Court file shall be sealed, and that no judgment in relation to this Representation shall be published*** ."

43 The application to the convening Court was made *ex parte* and was accompanied by a skeleton argument from the representor which, in relation to these privacy and no publication orders, referred to the general practice of the Court to hear administrative applications in private and put forward these reasons for the proceedings to be heard in private;-

> ***"25 It is submitted that there is no reason to depart from general practice in the present case.*** To the contrary, there are good reasons for hearing these proceedings in private: -
>
> > ***(a) The proceedings relating to the Trust before the Royal Court between 1998 and 2004 (see above) were heard in private*** .
> >
> > ***(b) The facts giving rise to this application are confidential to the parties*** .
> >
> > ***(c) The division of the assets of the [Former Socialist Federal Republic of Yugoslavia] is a politically sensitive issue in the Successor States*** ."

44 For the same reasons, the representor asked that no judgments be published in relation to this matter other than for the benefit of the parties, given that the unusual facts at issue would make it impossible to anonymise judgments effectively. The convening Court was referred to and given copies of the two leading cases on this issue, namely *HSBC Trustee (CI) Limited v Siu Hing Kwong and others* [2018] JRC 051A and *Jersey Evening Post Ltd v Al Thani* [2002] JLR 542. The transcript of the convening hearing shows that there was no discussion as to the making of these privacy and no publication orders.

45 At the outset of the substantive hearing on 18 th February, 2019, Advocate Mackereth reminded the Court that, as previously ordered, the hearing was taking place in private. The order against the publication of any resultant judgment was not discussed.

46 The Court issued its draft judgment on 28 th February 2019, and acknowledging that this was a judgment which could not sensibly be anonymised, expressed the initial view to counsel that there was a strong public interest in the judgment being published in full.

47 Advocate Mackereth responded that the Court was now *functus officio* in that the no publication order had been made to bolster a privacy order by the convening Court, which

had been addressed on the issue in the convening skeleton and given the relevant authorities. Even if the Court was not *functus officio*, he submitted that there was good reason to depart from the principle of open justice for the reasons canvassed in the skeleton argument. Advocate Drummond saw force in the arguments put forward by Advocate Mackereth, namely that the convening Court had already ruled on this point, and even if the matter could be decided afresh, there were good grounds not to do so in this case.

48 The Court's provisional response to these submissions was that it could not be *functus officio*, no final judgment having been handed down, and it remained concerned that although the Banayou Trust had the form of a private trust, the Court was dealing in substance with public money. The Court therefore convened a further hearing so that it could hear full argument and the views of the Attorney General, in particular on the issue of the public interest. That hearing took place on 25 th April 2019, with helpful skeleton arguments being filed in advance.

Functus officio

49 We are dealing here solely with the issue of publication of the judgment, not the privacy orders. There is no suggestion that any of the material filed with the Court or a transcript of the hearings, or indeed, any other material on the Court file will be publicly available.

50 In his skeleton argument, Advocate Mackereth maintained the view, admittedly on balance, that the no publication order of the convening Court was final, and therefore this Court was *functus officio*, but at the hearing and having considered the skeleton arguments of both Advocate Drummond and the Attorney General he conceded that the Court was not *functus officio*. The doctrine was explained by Sir Philip Bailhache, then Bailiff, in *Jersey Evening Post Limited v Al Thani* at paragraph 9:-

> ***"9… A court is functus when it has performed all its duties in a particular case.*** The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available ."

51 In the case of *RBC Trustees (CI) Limited v Appleby* [2007] JRC 211, the Court was asked to revisit a decision it had made in relation to the representation of a party and a preliminary question arose as to whether the Court was functus officio. Sir Michael Birt, then Deputy Bailiff, said this at paragraphs 17 and 18:-

> ***"17 It is agreed that, in this case, the order reflecting the outcome of the July judgment has been perfected and issued.*** However, the principle only applies to decisions which can be regarded as final. To be final a decision does not have to dispose fully and completely of the case. So, for example, in a personal injury claim, judgment on liability, even where consideration of quantum is deferred, cannot be revisited by the first instance court. The only remedy of a dissatisfied party is to appeal the court's decision on liability .
>
> ***18. The principle does not apply to a decision which, by its nature, is interim or requires continuing monitoring. Thus the Court regularly makes case management decisions in connection with the progress of a case to trial and then varies such decisions in the light of changed circumstances. Similarly, the court may vary from time to time the terms of an interim injunction and may indeed go so far as to discharge it and then re-impose it. A further example would be where the Court is providing ongoing guidance and direction in connection with a trust. This is a continuing obligation and the Court may re-visit its position from time to time in the light of new developments. The Al-Thani case itself is another example of a continuing obligation. The case concerned an order prohibiting the reporting of in camera proceedings and the Court held that the prohibition imposed a continuing obligation so that, if circumstances had changed, it was open to the Court to review or discharge its order*** ."

52 In our view the no publication order cannot be regarded as final. It was, by its nature, an interim or provisional one, subject to review by the Court hearing the substantive application. There had been no substantive hearing at the point that the convening Court sat, no judgment had yet arisen for it to consider and the convening Court had no evidence on the political sensitivities alleged. It was not in any sense a final order, susceptible to the doctrine of *functus officio*.

53 In the view of the Attorney General, such orders made by a convening Court were always provisional in nature, whether or not they were made *ex parte or inter partes*. At the convening hearing, the Court usually possesses limited information about the case, and whilst privacy orders are often made without the convening Court expressly stating that it is made on a provisional or interim basis (although it would be helpful if it did so) it is inevitable, in his view, that such a decision may be reviewed when the Court has more information available to it. He made a secondary and wider point that whether a hearing is in private or public, is an issue of a procedural nature, and orders in relation to privacy and publication of a judgment, publication of arguments ventilated and evidence heard can always be reviewed later. This, he said, was consistent with what Sir Philip Bailhache said in *Jersey Evening Post v Al Thani* at paragraph 11(a):-

> ***"If circumstances have changed, it must be open to the Court to review or to discharge its order"*** .

He went on to say at paragraph 11(c):-

> ***"Even if the first order is effectively dead, the Court has an inherent jurisdiction to discharge it if it is just to do so*** ."

54 The Attorney General submitted there are many circumstances in which a Court may need to review the decision it has made in relation to publication of a judgment or the evidence that led to that judgment being given, and this may occur weeks, months or even years after the judgment has been finalised.

55 We do not need to navigate the boundaries of this wider jurisdiction of the Court because, unlike the facts in *Jersey Evening Post v Al Thani* where the proceedings had been discontinued, this Court has yet to hand down its final judgment. The issue is whether the order of the convening Court that there should be no publication of any judgment is a final order binding upon this Court or whether it is susceptible to review by this Court in the circumstances now prevailing, namely, when there has been a substantive hearing and a draft judgment prepared. In our view it is not a final order binding on this Court.

56 Advocate Drummond made the further point that the no publication order was made by the convening Court at an ex parte hearing (by definition without any of the other parties being present) and without any (still less any adversarial) argument. He referred to this extract from the Court of Appeal decision in the case of In the matter of the *Désastre of Blue Horizon Holidays Limited* [1997] JLR 124 at page 135:-

> "…. ***Although there is no express provision for it in the Law or in the Rules, the court has an inherent jurisdiction to rehear, inter partes, any application which it has dealt with ex parte.*** This is the only basis on which a power to decide matters ex parte can be reconciled with the rules of natural justice."

Whilst Blue Horizon was concerned with a désastre which had been obtained ex parte, in his view the Court of Appeal set out a principle of general application.

57 Advocate Mackereth argued that the principle in *Blue Horizon Holidays* did not prevail in this case, because the Court was not determining the rights of the parties pursuant to Article 6 of the European Convention on Human Rights ("the Convention") and there are no litigants who wish to challenge the order made by the convening Court. However as Advocate Drummond pointed out, the Court is asking for submissions on a point of principle, and it was precisely because of the absence of anyone to put a contrary view that he was appointed *amicus curiae* for the substantive hearing and the Attorney General convened on this specific publication issue.

58 We incline to the view that this principle does apply to the facts of this case and it goes simply to reinforce our decision that the no publication order was not in any sense a final order, susceptible to the doctrine of *functus officio*.

Should the judgment be published?

59 Advocate Makereth's arguments for the no publication order continuing in force can be summarised as follows:-

(i) Such an order should only be changed if the circumstances have changed, or there are new developments or where the factual basis of the decision had changed, relying on the extract of the judgment in *RBC v Appleby* cited above. He was not aware of any such changes or new developments.

(ii) Privacy orders, he said, gave the parties a legitimate expectation of privacy, so that they can come to the Court and speak candidly, as explained in the case of In the matter of *M and Other Trusts* [2012] JRC 127 at paragraphs 13 – 15:-

> ***"13. It is common for trustees in Jersey to seek the directions of the Court in relation to matters concerning the administration of trusts. These are brought under Article 51 of the 1984 Law. Usually the trustee will have reached a decision itself but will seek the Court's blessing on the grounds that the decision is of a 'momentous' nature … In other cases the trustee will surrender its discretion to the Court. Some applications are Beddoe applications properly so called, in the sense that they seek directions as to whether the trustee should institute or defend legal proceedings. Others concern decisions in relation to a variety of matters relating to the administration of a trust e.g. whether to sell a major asset*** …
>
> ***14 Such applications are an important part of the supervisory jurisdiction of this Court in relation to trusts.*** They are invariably held in private. This is because the application will often concern legally or commercially sensitive matters and they are of course administrative rather than adversarial proceedings. They do not usually determine civil rights for the purposes of Article 6 of the ECHR .
>
> ***15. It is of vital importance that, if such applications are to serve the purposes to which they are intended, information and documents received by those who are convened as parties to such proceedings should be held in confidence. The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed*** ."

(iii) Although this application concerned the interests of the Successor States and not the interests of private individuals, the States have the right to conduct some of their affairs in private and the trustee's duty of confidentiality applies to beneficiaries of a trust that are States.

(iv) The Successor States had chosen to conduct their business in private, and in the

context of the Court's administration of Jersey trusts and in the absence of contentious litigation, it is for the Successor States to set the public or private nature of the outcome of the case and as a matter of comity, the Court should respect the Successor States' wishes. In this respect, Advocate Mackereth had written to the authorised representatives on 27 th March 2019, asking why privacy was important to the Successor States, and in particular, asking for details of the political sensitivities that may exist around the matter or the division of the assets of the Banayou Trust. Two questions were asked; whether the meetings of the Distributions Committee were in private or open and were there any concerns with the judgment being published, to which he received the following response:-

> *"2. Committee meetings for Annex C are not public by nature and are convened by nominated authorized representatives of all Successor States. The decisions reached are forwarded only to the persons concerned.*
>
> *3) The same principle would be applied when the public announcement of the court decision is in question – that decision should not have an element of publicity, as is the case with the meetings of the Committee for Annex C."*
>
> Accepting that this response did not highlight any political sensitivities, the issue he said was one of comity, in that they had requested that their privately conducted business be allowed to be continued in private.

(v) He acknowledged that the existence of two potential contenders for a beneficial interest in the trust fund, namely Montenegro and Kosovo, addressed by the Court by the use of a Benjamin order, *prima facie* justified the judgment being published. However, this is not a case, he said, where there are unknown potential claimants who might come to hear of the judgment if it were published and take action. If any mischief arises from the non-publication of the judgment in respect of Montenegro and Kosovo, the most effective way to negate the mischief will be not to publish the judgment, news of which may or may not reach the authorities in those jurisdictions, but to bring the judgment to the attention of those authorities via the appropriate channels.

60 Assistance in considering the issue of publication can be derived from the case of *HSBC Trustee (CI) Limited v Kwong*, where the trustee sought the Court's blessing as to the exercise of its powers at a hearing held in private. The high profile of the family and details of the proceedings which were already in the public domain made it impossible to anonymise the judgment effectively, so the choice rested between non publication or publication in full. The Court's analysis started with the well established principle that open justice is fundamental to the rule of law and went on to explain the practice of the Courts in applying that principle to applications made in the administration of trusts. Sir Michael Birt, Commissioner, reached these conclusions at paragraphs 33 to 35:-

> ***"33 However, subject to exceptions such as these, this Court's policy is clear, namely that although direction applications will normally be heard in private,***

any reasoned judgment should be published subject to anonymisation so as to protect the privacy of those involved and to ensure that full disclosure to the Court is given by the parties as described in the passages cited above from *In the matter of M and Other Trusts and The C Trust*.

34 In our judgment, this policy strikes the appropriate balance between, on the one hand, the privacy rights of the beneficiaries under Article 8 European Convention of Human Rights ("ECHR") (respect for private life) and the interests of justice as summarised at paras 24 and 25 above and, on the other, the importance of public justice and the Article 10 ECHR rights in respect of freedom of expression .

35 The policy is also consistent with article 6 ECHR (right to a fair trial) for two reasons. First, such applications are administrative in nature and do not usually constitute 'the determination of … civil rights …' as required by Article 6 – see para 14 of *In the matter of M and Other Trusts* ***(supra): para 12 of*** *Re Trusts of X Charity* [2003] 1 WLR 2751 ***'an application to the court by trustees for directions may well affect but does not normally determine the civil rights of anyone'; and paras 19–27 of the judgment of Lindsay J in 3*** *Individual Present Professional Trustees of 2 Trusts v An Infant Prospective Beneficiary* [2007] EWHC 1922 (Ch). ***Secondly, even if an application does amount to the determination of civil rights so that Article 6 applies, the anonymisation of the judgment is necessary and proportionate both to protect the private life of the beneficiaries and to prevent (as set out at paras 24 and 25 above) the prejudice which publicity would cause to the interests of justice if an unanonymised judgment were published***."

61 Where, however, it would be pointless to issue an anonymised judgment because it would be wholly ineffective in preventing the identification of the beneficiaries, the choice was between not publishing a judgment at all, or publishing the judgment without anonymisation. Any decision in that respect would be fact specific. It had been argued in that case (at paragraph 42) that the outcome for high profile beneficiaries should be the same, and that they should not end up in a worse position than other beneficiaries, simply because of their high profile. The judgment concluded at paragraph 48:-

> ***"48 In our judgment, any decision must be fact specific.*** Whilst we can accept that in some cases, for the reasons set out at para 42 above, the right course will be not to publish at all where anonymisation is not possible, that will not necessarily be the case. The Court must have regard to all the circumstances of the particular case ."

62 Both Advocate Drummond and the Attorney General submitted that in all the circumstances of this case the judgment should be published and we agree. We would summarise the arguments in favour of publication as follows:-

> ***"It is the case, as asserted by Mr Kelleher and other counsel, that submissions were made on the basis that the Court was sitting in private.*** If

the Court is to change the rules of the game after the final whistle has blown, the court should be careful not to cause unfair prejudice to any party ."

In our view publication of the judgment would not cause any unfair prejudice to any of the convened parties.

"In all cases where the court is sitting in private, it should consider whether it is appropriate for a judgment to be given in open court announcing the order which is being made and giving some account of what has happened at the private hearing" .

(i) The starting point is the principle of open justice, a principle which is subject to qualification. A key factor the Court in *HSBC v Kwong* weighed in the balance against publication (paragraph 34 cited above) was the privacy rights of the beneficiaries under Article 8 of the Convention. Article 8 of the Convention has no application to a State. In this case the settlor and only beneficiary of the Banayou Trust, the National Bank of Yugoslavia, itself a State asset, no longer exists. The representor is left holding what are in essence public funds to be divided between the Successor States.

(ii) The only other factor weighed in the balance against publication in *HSBC v Kwong* is the need for applications by trustees for directions to be held in confidence for the reasons explained in *M and Other Trusts* cited above. That factor carries limited weight on the facts of this case because, firstly the privacy orders will remain in place and so we are only concerned with the information disclosed in the judgment, and secondly Advocate Mackereth confirmed that there was nothing in the judgment that revealed sensitive or other information provided by the convened parties to the Court on the basis that it would be treated confidentially. No political sensitivities over the publication of the judgment have been raised by the authorised representatives when invited to do so. As it was said in *Jersey Evening Post v Al Thani* at page 566:-

(iii) As Advocate Drummond asked, to whom are the affairs of Banayou Trust sensitive? The live activity in relation to this trust took place a long time ago, the assets being settled in 1988 and the trust being the subject of court directions for over twenty years. The Successor States involved have known about the issues for at least fifteen years. The matter is already in the public domain, in that we were shown a copy of an article in the Sarajevo Times of 1 st February, 2016, concerning the share of the trust fund the State of Bosnia and Herzegovina anticipated it would receive.

(iv) The argument in relation to comity is weak in that the authorised representatives ask that the judgment should not have "an element of publicity" for no reason other than consistency with the way the meetings of the Distributions Committee are conducted which are not open to the public, although presumably the Distributions Committee is fully accountable for its work. We accept that States have the right to conduct some of their affairs in private and that the trustee's duties of confidentiality apply to beneficiaries that are States, but privacy and confidentiality of their internal affairs is not the issue here. The request contrasts with *Jersey Evening Post v Al-Thani* where the State of Qatar filed affidavit evidence setting out the dangers to Qatar

national security if information were published (paragraph 43). As the Attorney General submitted, if national security issues arose from the facts, then non publication would be permissible and specifically permitted under Article 6(1) of the Convention.

(v) In terms of the need for consistency with previous orders of the Court, in our view that assumes that the previous order was made *inter partes*, but in this case this Court, unlike the convening Court, has now held a substantive hearing *inter partes* and has an actual judgment to consider for publication; the circumstances have changed. We are reminded of what the Court said in *Jersey Evening Post v Al-Thani* at page 557:-

63 The Attorney General felt it was wholly undesirable that Montenegro and Kosovo, who were not parties to the proceedings, should learn about the judgment by way of private communication from one of the parties, presumably on the footing that they would elect to keep the judgment confidential. He said it would be unattractive and unhelpful from the point of view of this jurisdiction for the judgment to enter the public domain other than by way of being published by the Court. He struggled to identify any sufficient reason which displaces the presumption in favour of publication in full, and having read the draft judgment, was unable to identify any significant factor which ought to impede its publication. It is likely that this judgment, or news of it, would leak into the public domain, which could lead to inaccurate reporting of a case held in secret. In his view, it was unhelpful to the reputation of the Island for it to deal with this kind of case in secret.

Conclusion on publication

64 In conclusion, having regard to the unusual circumstances of this case, the right course is for that part of the order of the convening Court of 24 th January, 2019, that no judgment in relation to the representation shall be published be set aside and for this judgment to be published without anonymisation. The remainder of the order of the convening Court, and in particular that the hearing be conducted in private, remains in place, so that we are only concerned with the publication of the judgment. In this respect, we are satisfied that there is nothing contained within the judgment that discloses information of a confidential or sensitive nature provided to the Court by the convened parties in reliance upon the privacy order, and that publication will not undermine the ability of the Court to supervise trusts in the manner described in the case of *Re M and Other Trusts*.

65 The judgment will therefore be published in full.