© Copyright 2024, vLex. All Rights Reserved.
Copy for use in the context of the business of the vLex customer only. Otherwise, distribution or reproduction is not permitted

A Trust Company (“A”)

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Bailiff, Jurats Olsen, Thomas, William Bailhache
Judgment Date:	08 September 2017
Neutral Citation:	[2017] JRC 142
Reported In:	2017 (2) JLR 26
Date:	08 September 2017
Court:	Royal Court

vLex Document Id: VLEX-793140941

Link: https://justis.vlex.com/vid/trust-company-a-793140941

Text

[2017] JRC 142

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, and Jurats Olsen and Thomas.

In the Matter of the F Charitable Trust (“the Trust”) and in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (“the Law”)

Between
A Trust Company (“A”)
First Representor
B
Second Representor
C
Third Representor

Advocate J. Harvey-Hills **for the Representors**.

M Attorney-General, **partie publique**.

Authorities

Trusts (Jersey) Law 1984.

Public Trustee v Cooper [2001] WTLR 901.

Re S Settlement [2001] JLR Note 37.

Re S Settlement 2001/154.

Lewin on Trusts 19th Edition.

Clore v Stype Trustees (Jersey) Limited and Others [1984] J.J.13.

Alhamrani v J P Morgan [2007] JLR 527

Trust — Beddoe application in relation to proceedings brought to recover a substantial debt owed to the Trust.

[This is the approved redacted judgment in respect of a hearing which took place in private]

THE BAILIFF:

Introduction

1 This matter arises out of a Beddoe application pursuant to Article 51 of the Law, in relation to some proceedings brought [elsewhere] to recover a substantial debt ("the debt") owed to the Trust….and a principal asset of the Trust.

2 The Trust was established …. [many years ago with the First Representor as sole trustee. The Second and Third Representors were appointed as additional trustees more recently.] The proper Law of the Trust is the Law of Jersey. The Trust is exclusively charitable …. and the First Representor has made a number of distributions in accordance with the charitable objects of the Trust. It is because it is an exclusively charitable trust that the Attorney General has been joined as the *partie publique*.

[The judgment has been heavily redacted to protect the interests of the Representors in any ongoing litigation but it is published for the points of principle contained in it.]

3 …

4 …

5 ….

6 …

7 ….

8 By the present Beddoe application, the Representors asked the court to sanction and bless the conduct of the various proceedings to date, and to direct the Representors to maintain and pursue those proceedings until the conclusion of the discovery process, or the conclusion of the proceedings, whichever is the earlier. The Second and Third Representors [have sought other procedural relief.]

9 This court has had the opportunity of reviewing two affidavits with exhibits, sworn …[in support of the application].

10 We have also had the advantage of having been addressed by H M Attorney General in his capacity as *partie publique*, representing the general charitable interest.

The Law

11 Advocate Harvey-Hills submitted that the test on a Beddoe application of this nature was well established, namely that, on the application of the dicta in *Public Trustee v Cooper* [2001] WTLR 901, approved in Jersey in *Re S Settlement* [2001] JLR Note 37, JRC 2001/154, the question for the court was whether it was appropriate to bless the action of the trustees in circumstances where there was no real doubt as to the nature of their power, but the decision was particularly momentous. It was said, relying upon Lewin on Trusts (19th edition 2015 at 27–079) that the court's function was a limited one. The trustees were not surrendering their discretion as they had no conflict of interest, and all the Court had to do was to satisfy itself that the proposed exercise of trustee power was lawful and that it did not infringe the duty to act as ordinary, reasonable and prudent trustees might act. If the trustees could properly form the view that the proposed transaction was for the benefit of the beneficiaries or the trust estate, and they had in fact formed that view, the court should not interfere because it was only concerned with the limits of rationality and honesty.

12 In this court we have seen numbers of Beddoe applications of this kind. The test set out in *Re S* [supra] has been applied on many occasions. Having said that, we think the position, established in practice and by the cases, is slightly more nuanced than is contended by

Advocate Harvey-Hills. In our view, it is right to have regard to the substratum of the decision which the trustee seeks to have blessed. Frequently this will be a decision where the court would not normally claim to have any more expertise than the trustee, and indeed very possibly less – a decision to realise a majority interest in a family company, or to make an appointment to a particular member of the class of beneficiaries; or to exercise a power contained in the trust deed to reduce the trust period. There will be many other examples of cases where one could expect the trustee, with its greater knowledge of the family or of acting as a trustee, to be in at least as good a position as the court to take a decision, if not a better one. In those circumstances, there is every reason for thinking that as the settlor had conferred the relevant power or discretion on the trustee, he was satisfied that the trustee was the right person to exercise it, and it is unsurprising in those cases that the court exercises only a supervisory power in blessing a momentous decision, restricting itself to a review, as has been said in the cases, based on honesty (lack of conflict) and rationality.

13 Where the substratum of the decision is the question of litigation however, it appears to us that the court is not in quite the same position. One thing that can firmly be said about litigation is that it is something with which the court is familiar, probably in most cases more familiar than the trustee. Where the trustee therefore seeks to have a decision to litigate blessed by the court, it should expect the court to exercise a more direct, inquisitorial role, and be ready to form its own judgement as to whether it is sensible for the trust estate to be put at risk by the litigation in question. Clearly the court does not give advice in the sense that the trustee will have gained advice from its professional advisers in relation to the prospects of litigation — and it is entirely appropriate that the court should consider the advice carefully and certainly have a good reason if it should not be willing to bless the trustee's decision where it is based on that advice. Equally clearly, the Court's view cannot guarantee the outcome of a hearing before a different court. We make this distinction where the substratum of the decision is litigation because there are many cases in which this court has followed that approach, still applying *Re S*, but in the more nuanced way as described above.

14 The other question which arises as a matter of law is whether it is absolutely necessary that the Beddoe application brought by the trustee should be so brought before the relevant litigation is commenced, or if not before, then as soon as possible thereafter. Clearly the trustees will not always know in advance if they are to be actioned in court, but in those circumstances, it might have been argued that it is the trustees' duty to come to court as quickly as possible.

15 We note that in *Clore v Stype Trustees (Jersey) Limited and Others* [1984] JJ 13, Crill DB said this at page 17:-

> ***"Having looked at the decisions of the English courts which were placed before us by all counsel we have come to the conclusion that during the time between the filing of Mr Alan Clore's Order of Justice in October, 1979, and today, a sufficient explanation has been given to us as to why the application of Stype Trustees (Jersey) Limited had not been made earlier,***

> ***and we asked ourselves this question; had the applicant come before us, as appears to be the practice in the United Kingdom, immediately or very soon after the service on it of Mr Alan Clore's Order of Justice, would we at that time, faced with such facts as we have had before us today, granted the application?*** We think we would have done. We think it was a proper case then and is a proper case now in which the application would have been granted. We are not, therefore, satisfied that the trustees have acted in any way that would justify us disentitling them to their prayer."

16 So there we have a case where the Royal Court has not treated the delay in making a Beddoe application as a conclusive reason why the application should be dismissed.

17 *Lewin* (op cit) says this at 27–257:-

> ***"Although it is prudent for a trustee to make a Beddoe application before he brings proceedings, or as soon as proceedings are commenced against him, a Beddoe application may be made during the course of or after the main action, and in such a case he will be allowed to retain his costs out of the trust property if, had he applied at the outset, he would have been directed to take the steps he did, but not otherwise [see*** *re Wilkie's Settlement* [1914] 1 Ch 77]. ***However, it not infrequently happens that at the outset of litigation, the issues involved seem straightforward and it is anticipated that a summary judgment or a speedy compromise will be achieved, but later on it becomes apparent that the litigation is likely to be more complex or protracted than was at first appreciated.*** Trustees are understandably – and rightly – reluctant to incur the costs of a Beddoe application at the outset in such circumstances since the costs of the Beddoe application would be out of all proportion to the costs likely to be at stake in the main action. In such circumstances, provided that the trustee makes a prompt application as soon as it appears that the litigation is likely to be complex or protracted, it is thought that the court would be very sympathetic to an application by the trustees for an indemnity to cover their past as well as future costs."

18 We think there is no doubt as to the practice in this court, namely that, even if the application brought by the trustee comes late, the court has a discretion to grant it. Of course, the drawback to the trustee in coming to court at a later stage is that more water will have passed under the litigation bridge, and it may be that the court will be more critical of the steps which have been taken en route. Nonetheless, that does not affect the principle, which is that the court can receive an application which comes later than perhaps it might have come, and that is no reason of itself to refuse it.

19 We note that at paragraph 27–258, *Lewin* indicates that where a trust is a private trust and all the principal beneficiaries are not numerous and are mainly adults identified and traceable, the court will have expected the trustees to have canvassed with the adult

beneficiaries the proposed course of action. It would be different if there are a large number of beneficiaries, and in particular numbers of those who are minors or unborn – even so it would be generally expected that there would be some adult beneficiaries who might be regarded as principal beneficiaries and whom the court would expect the trustees to have consulted.

20 What then is the position in relation to consultation where there is an exclusively charitable trust? It was submitted by the Attorney General that, as guardian of the charitable interest, he should have been consulted in advance. Given that this was an exclusively charitable trust where there was a real and not longstop or insignificant charitable interest, we agree that he should. It would have been better had the First Representor sought the Attorney's guidance at the outset and indeed some of the difficulties which have arisen in this case now might well have been prevented. We will consider below the extent to which this has an impact on the order on which we make.

The …. Proceedings

21 ….

22 …

23 …

24 The court has had the opportunity of looking at the pleadings and the material put before it, and we are unsurprised by the firm advice which counsel has given. At this stage, the case for recovery seems strong. That may need to be reanalysed when discovery has been completed and the pleadings closed, but that appears to us to be the right conclusion on the papers as we have them at the moment. The court is satisfied therefore that there is a strong case that the trustees will succeed […].

25 We think we ought to emphasise that the starting point in relation to proceedings of this kind is that the trustees of a charitable trust do have a duty to gather in the assets of the Trust – in this case a [substantial] debt…. It would be surprising if a court permitted the trustee metaphorically to sit on its hands rather than seek to recover those assets.

The …. Proceedings

26 …

27 …

28 …

29 We … consider that it is right in principle that the trustees should have their costs of the … proceedings out of the Trust fund for the reasons we have given. However, we need to turn now to the submissions made by the Attorney General.

Level of Expenses

30 The Attorney General prefaced his submissions by reminding us that this was an exclusively charitable Trust, that no beneficiaries had consented to the issue of any proceedings, and that the proceedings were issued without reference to him as the *partie publique*, representing the general charitable interest. He reminded us [of the extent] of the Trust assets …. There appeared to have been no negotiation with the relevant lawyers over charge out rates, and the risk was that the Trust fund might be completely exhausted and the action simply fall as a result. He submitted that none of the lawyers had yet been asked to reduce their charges nor to produce reduced charge out rates for this small charitable Trust.

31 His criticisms then turned more directly to the fee notes which had been submitted to the trustees. He pointed to the account of Messrs E [some foreign lawyers], in connection with the proceedings. The time recorded was shown as having a bill cost of £9,250, and there had been no discount at all. Internal photocopying charges had been added to the bill which he thought was rare, and there was no detailed breakdown. It was impossible for the trustees appropriately to challenge the bill which was delivered. He turned next to the bill dated to …, where, although photocopying charges had not been included, it was clear that the other two major criticisms, namely no discount for the time recorded, and no detailed breakdown, were equally applicable to this bill. He looked at a bill of Messrs Mourant Ozannes …. It covered professional services for approximately six weeks, where once again there had been no discount for time charges, and there was no letter from the trustee indicating that this was a small charitable Trust and challenging the rates which were applied.

32 …

33 … he submitted that although Advocate Harvey-Hills described the claim as a fairly simple claim, one arising simply out of enforcement of debt recovery, the costs estimate which was produced showed provision of £107,000 for pleadings, £65,000 for witness statements and total costs of £600,000, if the matter went to trial. The Attorney queried whether £600,000 represented any attempt by the trustees to obtain best value for the litigation and he submitted that one should not treat a charity as less important than any other beneficiary – individual beneficiaries would be astonished at the lack of effort on the part of the trustee to drive a proper bargain.

34 The Attorney also noted that no cost provision had been apparently made in relation to the cost of appeals or the enforcement of any judgement which had been obtained. … In addition to all those costs, other lawyers now represented the Second and Third Representors.

35 In summary, the Attorney's position was that the trustees should first have come to court to seek approval for the commencement of the … proceedings, and should have consulted him, representing the general charitable interest in any event. He would have expected to be able to raise issues around fee estimates. This was not just academic. There was, in the Attorney's view, a serious issue as to whether the … defendants might be able to escape either a judgment being taken against them or the enforcement of such a judgement merely by stringing out the proceedings until such time as the Representors could no longer afford to continue them. It was because there was this real risk that the comments of the Court of Appeal in *Alhamrani v J P Morgan* [2007] JLR 527 at page 550 are so important. Vos J A said this:-

> ***"66*** .
>
> ***……***
>
> ***(ii) A trustee's duty embraces an obligation to consider whether a particular lawyer or firm of lawyers is appropriate to the problem upon which advice is sought and the scale of the trust assets.*** Some firms may be more expensive than others. A trustee should be alert to the necessity of employing advisers whose skills and charges bear a proper relationship both to the nature of the problem and to the size of the trust fund. Provided that the hourly rates charged are not out of line with those charged by other comparable firms at an appropriate standing for the job they are asked to undertake, the hourly rate allowed should be the standard rate of charge for the fee earner in question .
>
> ***(iii) The Greffier is therefore likely to be concentrating on two aspects, namely whether a particular matter is one upon which it was reasonable to spend time; and secondly, whether the degree of time spent on a particular matter was reasonable."***

36 When the court asked the Attorney what order he thought the court should make, his response was that the most the court could do was to decline relief in relation to the steps taken by the trustees prior to the application for Beddoe relief, and in respect of future steps, direct the trustees to invite the lawyers to re-engage at rates which were more appropriate to the nature of the claim and the extent of the Trust fund.

37 In response Advocate Harvey-Hills submitted first of all that the delay in making an application has not given rise to any prejudice. Secondly, he submitted that there was a reasonable opportunity to enforce the judgment [elsewhere]. … Thirdly, he thought that the First Representor's annual charge was a relatively small trustee fee. He went on to submit

that Messrs E were cheaper to engage than a larger firm in London, and the trustee had already therefore acted reasonably. He submitted that in Jersey the charge out rates of Messrs Mourant Ozannes were not out of the way, and most other firms were similar.

Discussion

38 Having found, as we have, that the trustee of a charitable trust should gather in its assets and therefore seek repayment of substantial sums due to the trust, unless there is some very good reason not to do so, and also that the defence appears to be flimsy, the next step is to identify whether there are in fact any sufficient reasons for not blessing the decision of the First Representor to commence the … proceedings.

39 We do not think the risks of failure in the proceedings are at this stage significant enough to take into account, although it is essential that a review takes place at the conclusion of the process of … discovery. … The only live question for consideration therefore is whether the potential risks on costs are such that the court should not sanction the decision of the trustees to commence or continue the … litigation. On that point, we accept the submissions of the Attorney General that there are some serious questions which need to be answered. There is no schedule of rates for Messrs E. There is no case management plan. Perhaps most worrying is that the litigation … is being run by trustees of a Jersey Trust, two of whom are resident in [jurisdiction Y] and one [jurisdiction z] and there is no substantial evidence of what one would call a “real client” exercising real monetary control. … We do not get the impression from looking at the correspondence that the First Representor has been engaged with the lawyers in the same positive way in which one would expect a private client to be engaged with his lawyers, challenging proposals, and satisfying himself that the costs being charged were appropriately charged. We have not been addressed to any great extent in relation to this aspect of the matter, and we make no formal findings, but it is right to record our sense of unease that there is no real control over spending and we understand why the Attorney General, as *partie publique* anxious to ensure that charities receive benefit from this Trust, has made the submissions which he has. We are also conscious from what we have read so far that … the … defendants generally, … may do all that can be done to make it uneconomic to pursue them for repayment of the [debt], and in the circumstances the judgment of the [trial] court, even if obtained, may end up as unenforceable, simply because the Representors have by then run out of money.

40 Advocate Harvey-Hills described this claim as a *“fairly simple debt claim”* and we think he was right to do so. In those circumstances, a provisional sum of £600,000 to take the matter to trial does seem very high indeed.

41 Having three trustees resident in different jurisdictions has the additional potential disadvantage that there may be some lack of coordination between them. In our judgement it is essential that the trustees take client control of the costs of the litigation if it is to continue. We are not entirely satisfied that they have taken such control so far but as we do

not have full evidence on that matter, we make no formal finding in that respect. The unease which we have expressed does, however, indicate why we are not prepared to endorse the costs orders which have been requested. We think the trustees should ensure that they obtain formal budgets for the work which is to be done over the next billing period; that as far as possible they ensure that the number of lawyers retained to advise is restricted to that which is necessary for the purposes of the claim which is being brought; that there is a schedule of rates which identifies the fee earner and the respective rate, and that it is properly negotiated having regard to the relative simplicity of the claim, the lack of extensive assets in the Trust and the ultimate charitable objects of the Trust. If the trustees are in doubt about their position having had that discussion with their respective lawyers, they can of course apply to the court for approval for the rates which they have agreed, but this court as presently constituted would consider that professional trustees ought to be able to reach agreement with professional lawyers on such matters without recourse to court. We would recommend that the trustee engages in some consultation with the Attorney General in Jersey as representative of the charitable interest, and this may well provide the comfort which the trustees need in relation to the rates which are settled with the different lawyers.

42 The draft order which Advocate Harvey-Hills put before us deals also with further potential proceedings in [other jurisdictions]. … In our view it is very probable that the Representors would be authorised to defend any such proceedings and certainly the Representors are directed to take such steps as are necessary if served with such proceedings to ensure that no judgment in default is taken against them. At the same time, the court does not wish to give a blanket approval to defend proceedings which it has not yet seen. Accordingly, if any such proceedings were to be initiated against the Representors as trustees, it would be their obligation to return to court as soon as reasonably possible for further directions.

43 Having regard to the foregoing the Court's judgment is that:

(i) The First Representor was right to bring the … proceedings. The court sanctions its decision to do so.

(ii) …

(iii) The Representors are directed to maintain and pursue the … proceedings on the grounds set out in the particulars of claim or on such other grounds as they are advised until two months after the conclusion of discovery. At that point, the Representors should return to this court with a short application for approval of the trustees' decision either to continue with or not to continue with those proceedings. The application should:

(a) Be supported by an updated opinion from … counsel;

(b) Indicate the costs incurred to date;

(c) Indicate a budget for costs to trial;

(d) Have this judgment annexed to it;

(e) Have been discussed in advance with H M Attorney General in Jersey;

(f) Contain such other information, if any, as the court ought to have for the purposes of taking the decision then put before it.

44 The Representors are entitled to be indemnified out of the assets of the Trust in respect of the costs of and incidental to the present representation. They are also entitled in principle to be indemnified out of the assets of the Trust in respect of costs incurred in pursuing the … proceedings and in defending the [other] … proceedings. … The words “in principle” have been added because the court does not necessarily sanction payment out of the Trust fund of all the costs which have so far been incurred or may be incurred in the future. As has been made clear above, the court expects the trustees and its various lawyers to negotiate a proper settlement of past costs and a proper formula for incurring costs in the future. If that is agreed with H M Attorney General, this court will not exercise any other jurisdiction to consider further the quantum of the costs in question.