X (Trust) 01-Oct-12

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Judge:	The Deputy Bailiff
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[2012] JRC 171

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and**Jurats Le Breton**and**Crill.

IN THE MATTER OF X (TRUST)

A
Representors
B
and
C
First Respondent
D
Second Respondent

E
Third Respondent
F
Fourth Respondent

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

Advocate B. R. Lincoln **for the First Respondent**.

Advocate A. D. Hoy **for the Fourth Respondent**.

Authorities

Trusts (Jersey) Law 1984.

Wallersteiner -v- Moir (No. 2) [1975] 1QB 373 .

Foss -v- Harbottle [1843] 2 Hare 461 .

McDonald and Others -v- Horn and Others [1995] 1AER 961 .

Smith -v- Croft [1986] 2AER 551 .

Schmidt -v- Rosewood Trust Limited [2003] UKPC 26 .

Schmidt -v- Rosewood Trust Limited [2003] 3AER 76 .

Re Internine and the Intertraders Trusts [2004] JLR 325 .

Bastiaan Broere Trust and the Cornelis Broere Trust [2004] JLR N 2 .

Internine Trusts [2006] JLR 195 .

O'Rourke -v- Darbishire [1920] AC 581 .

Re Londonderry's Settlement [1965] CH 918 .

Alsop Wilkinson -v- Neary 1 WLR 1220 .

Trust — application by the representors for a direction that they may prosecute breach of trust claim against the first respondent and others.

The Deputy Bailiff

1 This is an application by the representors for a direction that they may prosecute a breach of trust claim which they have issued against the first respondent and others in effect at the expense of the trust fund itself. The first respondent is currently the sole trustee of the X

Trust. The representors are principal beneficiaries of the X Trust and the first representor acts also as guardian ad-litem of her minor child who is, too, a principal beneficiary of the Trust. The second and third respondents have been served with these proceedings. There is some doubt as to whether they are likely ever to receive benefit from the Trust, but the first respondent asserts that depending upon movement in stock values in the underlying investments, this is far from impossible, and they should be treated as potential principal beneficiaries. They have not appeared before us today, but they have been in touch with the first respondent, which has confirmed that if they wish to make submissions in relation to the current application, they should appear either personally or through an advocate. We consider their absence does not cause us any particular difficulty as their interest is very similar to that of the representors in the sense that if the action succeeds, it will be to their possible benefit, but it is different in that if it fails, the reduction in value of the corpus of the Trust fund from which they are currently not expected to benefit, will not damage them. The fourth respondent has in effect a fixed interest, although being ostensibly a discretionary object of the Trust, and Advocate Hoy who appeared on her behalf told us that her interest was unlikely to be affected by this litigation and his instructions were to remain neutral in it.

2 The Trust is a discretionary trust, governed by the proper law of Jersey, and the trustees have wide powers of appointment and of investment. There seems no doubt that there have been some substantial losses in the value of the Trust due to a number of factors – relevant to this application is that the share price in relation to a publicly quoted company in which the Trust has invested has plummeted. No claim against the defendants in the hostile trust proceedings has been made in this respect, but the investment is relevant for reasons we will come on to later in this judgment. There are however other investments which the defendants are alleged to have made which have resulted in substantial losses of just under £100m. The defendants in those proceedings deny liability, we are told, but are not due to file their defence until 5 th September.

3 The representors have to date funded their claims from distributions which they have received from the Trust. These distributions have been made by the first respondent as trustee without reference to the Court. However the first respondent now takes the view that there is potential prejudice to the Trust from the maintenance of the proceedings against it. For this reason, it is not persuaded that it should continue to make distributions to the representors. For their part, the representors assert they do not have any alternative source of funding, nor can they borrow money to see them through the litigation, because they get no benefit directly from it. They will not themselves have the benefit of their success in the form of an order for damages in their favour, because theirs is akin to a derivative action, in that if they are successful in it, the defendants will be charged to replenish the trust fund rather than pay damages to the representors.

4 The letter from Advocate Lincoln to Advocate Mackereth sets out the first respondent's position this way:-

> ***"… the Trustee believes that the proceedings that your clients have brought could be damaging to the Trust's assets, a belief that is supported***

by independent expert evidence obtained by the Trustee. The Trustee does not see how, in those circumstances, it can agree to make a distribution to your clients to fund the very proceedings that it regards as potentially damaging. Nor does it consider that "the ship has sailed" in this respect – it is of course true that proceedings have now been commenced and therefore are, in theory, in the public domain; however, as matters stand, all that has happened is that the names of the parties have appeared on the Table; so far as we are aware, the substance of the allegations is not yet a matter of public knowledge .

On the other hand, the Trustee could be criticised for refusing to make the distributions when it is clearly also in its personal interests not to fund the claims against it .

We do not see how this situation can be managed appropriately other than by way of an application to Court. In all the circumstances and, in particular, in light of the position of conflict in which the Trustee finds itself, we consider that the most appropriate way to deal with this would be for your clients to make the application, to which our client would be convened but would remain neutral (its only role being to ensure that all matters are appropriately drawn to the Court's attention)."

5 It appears to us that this approach, which was followed by Advocate Lincoln in his submissions before us, was a proper one for the trustee, the first respondent, to adopt. Assuming that we have a jurisdiction to do what is being asked of us by the representors, the first question we are therefore called upon to consider is whether the independent report which the first respondent has put before us raises such concerns that we should conclude that it is not in the interests of the Trust that the payments be made out of the trust fund to the representors to enable them to continue the hostile litigation. Advocate Mackereth has put before us a draft order which also raises the issue of a Beddoe style protective costs order.

Jurisdiction

6 Although the hearing on this matter was in private, this judgment is being published, albeit with anonymity applied, because the jurisdiction to make these orders has not, we are told, previously been a matter considered by the Royal Court in a published judgment. Indeed it has not, apparently, in terms, been considered in absolutely comparable circumstances in England and Wales either. Put shortly, the Court is asked to make an order that because the representors bring the hostile proceedings against the trustee in a derivative action to recover monies for the benefit of the trust fund, the Court should order that their expenses be paid out of the trust fund and that they be protected against costs orders which might be made against them in favour of the first respondent, the trustee and/or other defendants in the main proceedings, if they should be successful. In order words, the representors are, it is said, acting as a form of trustee and should have the same protection a trustee would have. Advocate Mackereth submitted there was an alternative jurisdiction under Article

51(3) of the Trusts (Jersey) Law 1984 to authorise payments to be made to the representors as beneficiaries on the basis that such payments were for the benefit of the Trust and were properly made. On that alternative approach, Advocate Lincoln made it plain that the trustee would surrender its discretion to the Court in the context of any exercise of power to make distributions from the fund, because it had an obvious conflict of interest.

7 We are satisfied that Article 51(3) of the Trusts Law does give us jurisdiction to make orders for distributions out of the trust fund, and we would have been prepared to make such orders on that basis had it been necessary to do so. However, for the reasons which we will give shortly, we consider that we have also have an inherent jurisdiction to make the order in the standard Beddoe form because we accept the representors, although beneficiaries, are in effect bringing the claim as trustees for the benefit of the Trust.

8 The starting point for the analysis is the case of *Wallersteiner -v- Moir (No. 2)* [1975] 1QB 373. That case involved a counterclaim by the defendant, a minority shareholder in two companies, seeking payment of some £500,000 by the plaintiff to the two companies. The defendant joined the companies to the action. It is plain that the defendant's counterclaim was in effect a derivative action brought under the exceptions to the rule in *Foss -v- Harbottle* [1843] 2 Hare 461. The Court of Appeal agreed that the defendant's counterclaim was in effect a claim brought on behalf of the companies in question. The Court of Appeal held that it was open to the court in a minority shareholders action to order that the company should indemnify the plaintiff against the costs of the action, and Lord Denning put it in this way at page 391 G:-

> ***"Now that the principle is recognised, it has important consequences which have hitherto not been perceived.*** The first is that the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of the agency. This indemnity does not arise out of a contract express or implied, but it arises on the plainest principles of equity. It is analogous to the indemnity to which a trustee is entitled from his cestui que trust who is sui juris…Seeing that, if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf…
>
> ***But what if the action fails?*** Assuming that the minority shareholder had reasonable grounds for bringing the action – that it was a reasonable and prudent course to take in the interests of the company – he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well-known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails."

9 As to process, Lord Denning suggested that the minority shareholder should apply ex parte to the Master for directions, supported by an opinion of counsel as to whether there was a

reasonable case or not. It was not intended that this application should result in any lengthy trial. It was simply a question, on a review by the Master, as to whether there was a reasonable case for the minority shareholder to bring at the eventual expense of the company. Although Buckley and Scarman LJ did not agree with the conclusions of Lord Denning that contingency fees ought to be allowed in derivative actions, they did agree with the remainder of his reasoning.

10 The principles in the derivative action case brought on behalf of a company by a minority shareholder were extended to beneficiaries bringing an action on behalf of a trust in the case of *McDonald and Others -v- Horn and Others* [1995] 1AER 961. That case concerned an occupational pension scheme where the plaintiffs, as members of the scheme, brought an action against their employers, the pension fund trustees and others concerning the administration of the scheme. The plaintiffs applied for a pre-emptive costs order requiring that their costs, and any costs which they might be ordered to pay to the defendants, should, win or lose, be paid on an indemnity basis out of the pension fund. That application succeeded at first instance and was then considered by the Court of Appeal which applied the principles of *Wallersteiner -v- Moir (No. 2)*. The lead judgment was given by Hoffmann LJ. The argument concerned whether the principles of *Wallersteiner -v- Moir (No. 2)*, where the court agreed a minority shareholder could make a Beddoe application in the same way as a trustee, should be re-exported to trust law to cover the position of a beneficiary suing on behalf of a fund in which he and others had interests. The appellants asserted that such re-exportation was illegitimate because the beneficiaries were not bringing an action on behalf of the trust, but as plaintiffs with their own cause of action and the proceedings were simply hostile litigation between beneficiaries and trustees; thus the usual rules should apply.

11 The Court of Appeal rejected that argument, although on a narrow basis. Comparing the minority shareholders action on behalf of the company and the action by a member of the pension fund to compel trustees to account to the fund, Hoffmann L J said this at page 973a:-

> ***"In both cases a person with a limited interest in a fund, whether the company's assets or a pension fund, is alleging injury to the fund as a whole and seeking restitution on behalf of the fund.*** And what distinguishes the shareholder and pension fund member, on the one hand, from the ordinary trust beneficiary, on the other, is that the former have given consideration for their interests. They are not just recipients of the settlor's bounty which he, for better or worse, has entrusted to the control of trustees of his choice. The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a non-contributory scheme, the employer's payments are not bounty. They are part of the consideration for the services of the employee."

12 Hoffmann LJ clearly placed importance on the fact that this was not an ordinary volunteer relationship which he was considering but a commercial arrangement where, on the facts of

that case, the pension fund beneficiaries were actually paying into the fund and had rights arising out of their contractual position as employees. That is, of course, a different position from that which the Court faces today, where the representors are merely recipients of the settlor's bounty, and have provided no consideration which confers separate rights upon them.

13 We were advised by Advocate Mackereth that the principles of *McDonald -v- Horn* have not in terms been extended in decisions before the English courts, as far as he is aware, to cases where the plaintiff beneficiaries are not in a special class of beneficiaries such as pension fund beneficiaries. This may well be because in most cases, an action for reinstatement of the trust fund with damages reflecting the maladministration of a trustee would usually be brought by a successor trustee and the relief which beneficiaries might seek might well be an order that the court replace the trustees with new trustees in order that this claim can be brought. Nonetheless, even in that sort of application, the putative plaintiff beneficiaries might be faced with an objection from the trustees that they had not been guilty of any maladministration and that therefore they ought not to be replaced; so one might have expected to see some more recent statements of authority in England and Wales on this point. It appears to be the first time it has arisen for decision in Jersey too.

14 Advocate Mackereth's proposition was not contested by either Advocate Lincoln or Advocate Hoy, which makes our finding upon it perhaps less reliable, but we have no doubt that the Court does have jurisdiction to make an order of this kind in an appropriate case, and we now wish to set out our reasons why.

15 Any decision by Hoffmann LJ on a matter of this nature needs to receive the most careful consideration. There seems to us to be little doubt that an important factor influencing Hoffmann LJ in his judgment was the possibility of beneficiaries all too easily litigating with trustees at the cost of the trust, and this to the detriment of other beneficiaries. There is a reference to the salutary reminder of the dangers of such an approach in derivative actions, as set out by Walton J in *Smith -v- Croft* [1986] 2AER 551. Where a pension fund beneficiary brings a claim against a trustee, he is in a special position, because his contractual rights as employee, whether he has made a contribution or not, although clearly if he has made a contribution his position is stronger, enable him to assert that there would be a lack of equity if he could not enforce the claim against the trustee on behalf of the trust fund in which he had a firm entitlement.

16 Yet the position of course might be different with a discretionary beneficiary or the object of a mere power. In either such a case, other beneficiaries or potential objects may well resist what they perceive to be the squandering of the trust fund in unnecessary litigation with the trustee, adversely damaging their interests. They are indeed even in a position there to say that the putative plaintiff beneficiary is not even sure of receiving any benefit from the trust, and on that analysis, it might be said that it could not matter less as far as the putative plaintiff beneficiary is concerned whether the trust fund is worth £x or £5x.

17 Such considerations may well be relevant to the exercise of judicial discretion on an application of this kind and in our judgment it is no answer to them to say that a discretionary object of a trust or of a potential exercise of a fiduciary power of appointment has a right to be considered for benefit; and we remind ourselves indeed that in this case the representors are merely some amongst a class of potential objects of the trust, and the trustee has a power of appointment in circumstances where there are default trusts if the power is not exercised. There may be other potential recipients of the trust bounty whose interests also need to be considered.

18 The rights of beneficiaries were considered in the context of disclosure of trust documents in *Schmidt -v- Rosewood Trust Limited* [2003] UKPC 26, [2003] 3AER 76. The Board's judgment in that case was delivered by Lord Walker of Gestingthorpe, and some of the dicta within that judgment have been cited with approval in the Royal Court and Court of Appeal since – in discovery cases, see in *Re Internine and the Intertraders Trusts* [2004] JLR 325 and in the matter of the *Bastiaan Broere Trust and the Cornelis Broere Trust* [2004] JLR Note 2; and the Board's judgment was cited also in a further venture into the Court of Appeal in the matter of the *Internine Trusts* at [2006] JLR 195.

19 With that background therefore we turn to *Schmidt -v- Rosewood Trust Limited* because Advocate Mackereth submitted on behalf of the representors that in effect that case had made plain that Lord Justice Hoffmann's view in *McDonald -v- Horn* that ordinary beneficiaries have no entitlement to be satisfied that the trust assets were being properly administered was clearly wrong and can be disregarded. We note that the *McDonald* case was not cited in *Schmidt -v- Rosewood Trust Limited*, and indeed that Lord Hoffmann, as he then was, was not a member of the Board considering the appeal in that case.

20 As we indicated earlier, the question in *Schmidt -v- Rosewood Trust Limited* was whether or not the petitioner should be granted disclosure of documents relating to two settlements of which his late father had been co-settlor and under which he claimed discretionary interests both in his own capacity and as the administrator of his father's estate. It is clear that much of the argument in the Privy Council took place on the issue of whether the petitioner had a proprietary right to see the documents, that argument being based on the dicta of Lord Wrenbury in *O'Rourke -v- Darbishire* [1920] AC 581, and on the case of *Re Londonderry's Settlement* [1965] CH 918, which at that time was probably regarded as the leading authority in England on disclosure in trust cases. However although the Privy Council did not dissent from Lord Wrenbury's observations, the Board approached the issue on a different basis namely as an aspect of the Court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. Importantly at paragraph 51, Lord Walker said this:-

> ***"The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest.*** The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's

discretion…."

21 In his conclusion at paragraph 66, Lord Walker added this:-

> ***"There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character).*** The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in Re Baden 1971 AC 424, 448 to 449) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction .
>
> ***67. However, the recent cases also confirm….that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties."***

22 This case was not dealing with a similar issue to that raised in *McDonald -v- Horn*, or the issue raised in the present case, but the overall approach and rationale appears to us to be extremely helpful. If questions of disclosure of documents fall to be considered as an aspect of the Court's inherent jurisdiction to supervise the administration of a trust, why also should questions of the kind arising here not similarly be considered? In our judgment, they can be similarly considered. The Court's inherent jurisdiction to supervise the administration of a trust is self-evidently a jurisdiction which the Court should exercise in the best interests of the trust. There is no logical reason why that exercise of jurisdiction should not extend in the Court's discretion in an appropriate case, to making an order that the costs of legal action against the trustee be met out of the trust fund. That inherent jurisdiction is supplemented by – or supplements, or perhaps merely reflects, and we do not have to decide which, if any of those options in this case – Article 51 of the Trusts (Jersey) Law 1984, as amended. For the purposes of this case, the relevant factors are the same. In the exercise of a discretion of this nature, the Court will clearly have to have regard to all the circumstances, and may have to balance the interests of different beneficiaries as well as the interest of beneficiaries and trustees, or conceivably the interests of beneficiaries and third parties. The existence of a contractual nexus as may apply in the case of a pension scheme may add weight to the argument, but the absence of that nexus does not imply that the beneficiary has no right to good administration of the trust. At the end of the day, the question is whether the order sought is in the best interests of the trust, and thus of the beneficiaries as a whole.

23 It appears to us that the same qualification in this type of case should be entered as was entered in *Schmidt -v- Rosewood Trust Limited*, namely that no beneficiary, and least of all a discretionary object, has any entitlement as of right to bring a derivative action at the expense of the trust fund. To the extent that it was submitted by Advocate Mackereth that

there was any general principle that the costs of a derivative action brought by a beneficiary should always be met from the trust fund, this Court would not go so far. We think a derivative action by the beneficiaries against the trustee is akin to what was described in Lightman J in *Alsop Wilkinson -v- Neary* 1 WLR 1220 at p 1224 as a "third party dispute" where essentially it is the nomenclature rather than the nature of the action which is different. Thus the beneficiaries in such a case are acting like trustees and the trustees are in effect a third party – if they lose, damages are payable by them to the Trust and not to the beneficiaries. The identity of the potential recipient of damages is critical – Lightman J when considering hostile litigation in what he determines a "beneficiaries dispute" says at page 1224:-

> ***"… [a beneficiaries dispute] may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust"*** .

However, he did not go on to consider the impact of a beneficiary suing for damages not for himself but for the benefit of the trust fund as a whole. In our judgment, this takes the action out of the ***"beneficiaries dispute"*** where costs in ordinary hostile litigation usually follow the event, and takes it into a "third party dispute" even though the parties are nominally beneficiaries and trustees.

24 Such cases need careful attention because the line between authorising the beneficiary to sue at the expense of the trust and authorising the trustee to defend at the expense of the trust will not always be clear to see. In cases such as the present, however, it is clear that the trustee is defending itself and not the Trust. Accordingly, our only task is to assess whether it is in the interests of the Trust to make the order sought. In this case we do think it is right and we now give our reasons for that judgment.

25 The representors have produced to us for consideration two opinions respectively dated 8 th April, 2011, and 16 th July, 2012, from English leading counsel. We have had the opportunity of reading those opinions. As one would expect from their different dates, more information was available at the time of the second opinion than was available at the time of the first. Nonetheless, the opinion concludes that in counsel's view the claims presently made against the trustees should be retained and prosecuted. Other comments are made in relation to the claims emphasising different aspects of the probabilities of success, having regard to all the facts. What is clear is that the claims are not fanciful, but are considered to be well-founded in principle. Counsel of course will be able to form an even better view when the answer has been filed by the defendants, and when discovery has taken place, such that all relevant documents are available for consideration.

26 The second relevant factor appears to us to be that the substantive proceedings are very much akin to a derivative action. In saying this, we recognise of course that the representors are likely to receive some benefit from the main litigation if it is successful. An order that the trust fund be replenished would be likely to benefit people who have a reasonable expectation of benefitting from the trusts themselves. Advocate Mackereth

described the representors as principal beneficiaries, and that description was not challenged by the trustee. There was an issue as to whether the second and third respondents should be regarded as principal beneficiaries as well, although even then, it seemed to be the consensus that they did not have an immediate probability of benefit. Advocate Mackereth said that there were a number of what he called “stipendiary beneficiaries”. We took this to mean that there were some beneficiaries, albeit discretionary objects, who generally received a relatively small annual stipend. With a trust fund the size of this one, even given the very substantial losses which have been sustained, and even taking into account the further potential drain on the trust fund in the costs of litigation, it does not seem to us that the interests of the stipendiary beneficiaries are likely to be affected one way or another by this litigation.

27 The third relevant factor is that it appears from the material put before us that it would be likely that if the Court does not make the order which is sought, the funding for the litigation will dry up and there is at least a reasonable possibility that the litigation will have to be discontinued. In the circumstances that leading counsel endorses the claim as a proper claim to bring at this stage, it would appear to us that such a conclusion would be unfortunate and not in the interests of the beneficiaries as a whole.

28 In a sense the final relevant factor in favour of making the orders sought is that because the representors would be the main principal beneficiaries of the Trust, the risk of litigation would in fact be borne by the right parties if the Trust carries that expense; the result of orders being made against the Trust will not leave the trustees in a position that they are unable to pay stipendiary beneficiaries, but it will leave them in the position that the amount due to the representors may be much reduced. Such an outcome would also not affect the second and third respondents who would not expect to benefit from the Trust unless its investment performance is materially better then a parallel trust in which they also have an interest. It follows that the prospect of success and the risk of failure both substantially vest in the representors if the litigation is funded out of the Trust. We share the view expanded by Advocate Mackereth that if new trustees were appointed and commenced proceedings, it is likely that a Beddoe application by them seeking leave to discharge the costs of litigation against the former trustees would be met out of the funds held on trust.

29 If there were no other factors involved, we would be satisfied on the strength of those recited above that it would be right to make the orders which the representors have sought.

30 However we are required to have regard to an independent report which has been put before us by the trustees, who recognise their position of conflict as has been set out above but who feel obliged to draw the attention of the Court to the content of the report. In essence two points are raised. Firstly it is said that the substantive litigation, whether successful or not – and it is right to emphasise that the defendants deny liability – is likely to damage one of the directors of the public company in which the Trust has a significant investment, that director being not only a defendant but also a former trustee. The independent report indicates the importance of that director's position within the company for the purposes of its future growth and commercial success, and asserts that there would

be a real risk to ongoing success, and therefore to the value of the trustees' shareholding if the litigation were made known to the public. In the ordinary course of events, members of the public are entitled to see the pleadings on request to the Judicial Greffier, but only after the answer has been filed.

31 Nonetheless there are cases where the Court directs the greffier not to follow this practice and not to make the pleadings available to the public at that early stage. There are a number of potential reasons for such an order – sometimes there are children or vulnerable people involved, and sometimes the pleadings contained scandalous material which in this small Island would be unfairly and inappropriately published. It seems to us that a complete answer to this objection in the independent report would therefore be to order the Judicial Greffier not to publish the pleadings without leave of the Court, and any application in that connection would almost certainly result in the parties being convened in order that further representations might be made. Of course nothing could prevent any of the parties to the litigation from publishing the proceedings, but it does not seem to us obviously to be in the interests of any party to do so at this stage, firstly because it might affect the shares in the public company investment of the Trust, and secondly because it might inhibit the possibilities for settlement or informal resolution of the claims.

32 The other argument which is contained in the independent report is that the claims in the Order of Justice, albeit defended by the defendants, might have an effect on market perceptions of the value of the public company which is a substantial investment of the Trust. The argument here is that even though the pleadings are not themselves available, word of the claims might nonetheless emerge. The thrust of the independent report was that the value of shares in a fully rational market would be dependent upon the future expectations of the benefits obtainable by the purchaser from ownership of the shares, namely the company's earnings, dividends and net assets, but that stock markets do not always behave rationally. Accordingly share prices are subject to change for irrational reasons, sometimes indeed based on general perceptions and market rumours rather than hard facts. Specific to the public company in which the Trust had its substantial investment was the fact that the company was highly operationally leveraged. Accordingly there was the possibility of a market perception that the Trust was short of liquid resources which might lead to an expected change in its relationship with the investee company, and a belief that the Trust might seek payment of dividends, or a share buyback, which would affect the long term strategy of the company which in turn might adversely affect the share price both in the short and the long term. Conversely, the market perception might be that the trustees would sell all or part of their shareholding in the company, thereby causing the share price to fall as a result of the market factoring the possible sale into the share price. Any fall in share price would of course affect the Trust's remaining shareholding in the company and potentially its ability to sell its shares in the future. Furthermore, the market perception that the company was delivering on its growth strategy might result in a rise in the share price. Accordingly, the proposed litigation had either the risk of a fall in the share price, or in a rise in the share price not being achieved, in either event causing the trust loss.

33 It is not for the Court to second guess market perceptions of what might or might not be the case in relation to any particular company. We accept that there may be something in the conclusions of the authors of the independent report – but of course the share price in the investee company might be affected by all manner of outside factors, whether the litigation or anything else. It appears to us to be impossible to say what the impact of all external factors might be on the share price in the company in 12 months' time. Some may work in favour of an increase in that price, others in a reduction. All that one can really be certain about is that there is a probability that the share price will not behave as currently expected.

34 If this claim is worth what is asserted to be its value, the Trust fund will go up by some £96m plus any interest and possibly costs as a result of the proposed litigation. There would have to be some fairly significant downward movements in the share price of the investee company to outperform in the opposite direction such an increase in the value of the Trust fund. Given the advice which we have seen from leading counsel, based as it is on the facts which are known at this stage, it would appear that the balance lies in favour of approving the ongoing litigation as being in the interests of the Trust, and that is indeed our view. The orders which we have made in relation to not making available to the public the pleadings in the case until further order should also significantly reduce the risks inherent in this litigation as contemplated in the independent report. The orders which we make are based on the premise that there should be a full review at a later stage before trial, when we would anticipate that in order to have the costs orders maintained, a further application will have to be made to the Court. That application should be made a reasonable time after discovery has taken place so that counsel can advise again on a more informed basis as to the prospects of success. The orders which we make therefore authorise the payment of costs and disbursements of the legal action against the trustee out of the Trust fund to the representors until two months after discovery has been made, and we direct the trustee to make such payments accordingly. To the extent that the representors' costs of the litigation are paid out of the Trust fund then the benefit of any costs order in their favour at the end of proceedings should also be held for the Trust by them (or a suitable proportion of that benefit if not all funding by trial has come from the Trust).

35 The representors ask us in effect to backdate this order so that costs and disbursements incurred to date in this connection are reimbursed to them out of the Trust Fund. Once the principle of making the future payments is established, as we think it is, there is no basis for distinguishing past payments made by the representors for the same purpose and we agree therefore that the backdating order should be made.

36 Similarly, we are asked to make a protective costs order such that the representors will not personally be at risk for any potential adverse costs orders during the same period. Once again, having regard to the principle that who stands to gain bears the risk, an order that any adverse costs order against the representors in the main proceedings should be met from the Trust Fund seems to us to be right and we direct the trustee accordingly.

37 The costs and disbursements incurred by all the convened of and incidental to this parties application shall be paid out of the Trust Fund.