In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2013: No XXX

BETWEEN:-

TRUSTEE L AND OTHERS

Plaintiffs

-and-

THE ATTORNEY GENERAL AND OTHERS

Defendants

RULING (redacted version)

(In Chambers)

Date of hearing: 23rd – 27th March 2015
Date of ruling: 15th May 2015

Mr Alan Boyle QC, Mr Jonathan Adkin QC and Mr Narinder Hargun, Conyers Dill & Pearman, for the Plaintiffs

Mr Michael Furness QC, Mr Dakis Hagen and Mr Rod Attride-Stirling, ASW Law Limited, for the Second Defendant

The other Defendants did not appear and were not represented

Introduction

1. This is a ruling on the substantive hearing of the Plaintiffs' application for Beddoe relief with respect to proceedings ("the Main Action") brought against them by the Second Defendant ("D2"). The application was novel in several respects. So far as the Court or counsel are aware: (i) this is the first time that Beddoe relief has been sought by the trustees of a non-charitable purpose trust, albeit the purposes of the trusts in question do include some charitable purposes; and (ii) there has not previously been a claim made to trust assets of such high value as those with which the present case is concerned without any beneficiaries to defend the claim.

2. The Plaintiffs are the Trustees ("the Trustees") of certain Bermuda purpose trusts ("the Trusts") established under the Trusts (Special Provisions) Act 1989 ("the 1989 Act").

3. The total value of the Trust assets is very large. A substantial part of those assets consists of shares in a group of companies ("the Companies") founded by S and T. Both men are now deceased, although T was alive at the start of the Beddoe proceedings. They were very successful industrialists in country Z.

4. The directors of the Trustees include Child 1 and Child 2, who are children of S, and two children of T. I shall refer to them collectively as "the Family Directors". The remaining director is X, a trusted senior employee who was instrumental in setting up the trust structure.

5. D2 is a child of S. D2's claim in the Main Action has gone through various iterations, including most recently a draft re-amended statement of claim. In

preparing this ruling I have considered both the extant statement of claim and the proposed amendments.

6. D2 sues in D2's proposed capacity as administrator in Bermuda of S's estate ("the Estate"); in D2's capacity as one of the heirs of S under the law of country Z (and purportedly on behalf of all the heirs); and as a person beneficially interested in the Estate.

7. D2 claims as D2's primary case in the Main Action that all the Trusts are void, or alternatively that the transfers of assets into the Trusts should be set aside, and that the assets form part of the Estate. However, if D2's challenge were successful some of the assets might also (indeed almost undoubtedly would) form part of the estate of T as well.

8. Specifically, D2 alleges that the Trusts are void for uncertainty; that they were not properly constituted; that some of the Trust assets were transferred into the Trusts without instructions; that insofar as assets were transferred into the Trusts on instruction, those instructions were not properly complied with; that S was under a fundamental mistake as to the effect of S's instructions; and that any such instructions were given as a result of undue influence exerted by Child 1 and/or X.

9. If D2's primary case in the Main Action fails, D2 claims as D2's secondary case that the Trustees should be removed due to alleged conflicts of interest and the fact that their philanthropic activities on behalf of the Trusts have been allegedly desultory.

10. D2 intends to seek leave in the Main Action to join Child 1 as a defendant. However no Beddoe relief was sought at the hearing in relation to this prospective claim.

11. There are three main issues arising on the Beddoe application: (i) whether the Trustees should defend D2's primary case in the Main Action – no Beddoe relief was sought at the hearing in relation to D2's secondary case – and have an indemnity in respect of their costs of doing so; (ii) whether the

Trustees should be permitted to continue to purchase shares in the Companies in accordance with what the Trustees contend is the practice which has prevailed since the Trusts were formed; and (iii) whether pending trial the Trustees should be permitted to make certain specified charitable donations of a relatively limited character from one of the Trusts.

Directions and indemnity

The law

12. The outcome of the Trustees' application for directions authorising them to defend the Main Action and for an indemnity if they do is in part at least dependent on what test for Beddoe relief the Court adopts. The resolution of that question is dependent upon the interplay of the Court's Beddoe jurisdiction with its jurisdiction to make a pre-emptive order as to costs.

13. In Trustee 1 et al v The Attorney General et al [2014] CA (Bda) 3 Civ, which was an interlocutory appeal on a Beddoe application, Baker JA (as he then was) at para 3 of his leading judgment summarised Beddoe proceedings as:

> "*separate proceedings in which trustees are permitted to seek advice and direction from the court as to the position they should take in an action concerning the trust, including whether they should defend an action brought against a trust at the expense of the trust fund*".

14. In STG Valmet v Brennan [1999 – 2000] Gib LR 211, a decision of the Gibraltar Court of Appeal, at para 30, Waite JA described a pre-emptive costs order, at least in the context in which one is typically sought, as an order that regardless of the outcome of the proceedings a party holding the legal title to the disputed assets shall be indemnified for his costs by an order that they are to be paid out of such assets in any event.

15. There is therefore clearly an affinity between these jurisdictions, which both arise under Order 62 of the Rules of the Supreme Court 1985 ("RSC"). The relevant provisions of RSC Order 62 are in all material respects the same as the corresponding provisions of Order 62 of the former Rules of the Supreme Court of England and Wales (EWRSC).

16. The Court's Beddoe jurisdiction derives from Order 62, rule 6(2) of the RSC. This provides:

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

17. The jurisdiction takes its name from the seminal case of In re Beddoe [1893] 1 Ch 547, although that case did not in fact involve a Beddoe application. The case was concerned with Order LXV, rule 1 of the Rules of the Supreme Court 1883. This was the predecessor of EWRSC Order 62, rule 6(2). It provided:

> "*Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: ...*"

18. The question before the Court was whether the surviving executor and trustee of the deceased's will ("the trustee"), was entitled to retain and be paid out of the trust estate the costs of and relating to an action ("the main action") brought against him in the Queen's Bench Division by the tenant for life under the will. The court in the main action had given judgment for the tenant for life and ordered that the trustee should pay her costs. The

trustee then issued an originating summons in the Chancery Division against a person appointed to represent the other persons interested in the residuary estate of the testatrix ("the representative beneficiary") in which he sought, and obtained, an order from Kekewich J that he could recover the costs which he had paid in the main action from the trust estate as costs, charges and expenses properly incurred.

19. The representative beneficiary appealed against the order of Kekewich J. Section 49 of the Judicature Act 1873 provided that as an order as to costs lay in the discretion of the court or judge, it was not subject to appeal except by leave of the court or judge who made it. The trustee maintained that as Kekewich J had not given leave to appeal against his order the Court of Appeal had no jurisdiction to interfere with his discretion.

20. The Court rejected this submission. Order LXV, rule 1 provided that the costs of the main action were in the discretion of the judge who tried that action. The Order had nothing to say about an application of the kind made by the trustee before Kekewich J, and there was therefore no bar to the representative beneficiary bringing an appeal. As Lindley LJ, who gave the leading judgment, stated at 554 – 555:

> "*It does not mean that the costs in a proceeding are to be in the discretion of the Court or Judge before whom these costs may incidentally come, upon an application to have them borne by some fund or some person not before the Court in the proceedings in which they have been incurred — that is not the meaning of the rule. Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses, and when once you get them into the category of charges and expenses this rule and this enactment do not apply to them.*"

21. On the face of it, Order LXV, rule 1 might be read as conferring a general discretion as to costs upon the court or judge hearing an action, and then carving out an exception to that discretion in the case of an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings. But according to the Court in In re

Beddoe, that was not the case. It held that the jurisdiction of the court in separate proceedings to grant an indemnity to a trustee etc out of a fund was not a jurisdiction to award costs but to allow charges and expenses. That distinction is not determinative of any of the issues arising on this application. But neither, as appears later in this judgment, is it wholly irrelevant.

22. Lindley LJ, when at 558 he explained what is now known as a Beddoe application, elucidated another point which is germane to the present case:

> "*I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred.' This view of a right of a trustee to indemnity is in conformity with the settled practice in Chancery and with Turner v. Hancock 20 Ch. D. 303, the latest decision on the subject.*
>
> *But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred.*"

23. Although Lindley LJ referred to the words "*properly incurred*" occurring in "*the ordinary form of order*" whereas Order LXV, rule 1 refers to a trustee etc who has acted "*not unreasonably*", there appears to be no material distinction between the terms. The passage emphasises that the focus of the court's enquiry on a Beddoe application is whether the trustee's proposed course of action is reasonable. If it is, then his costs will be deemed to have been properly incurred and he will be entitled to an indemnity for them from the trust fund. Of course, when deciding what is reasonable the court will have regard both to the context in which the application is made and to how reasonableness has been interpreted in other cases. There are, as we shall see, particular considerations which apply to cases involving a dispute as to

the trusts on which the assets are held, which In re Beddoe was not, as in such cases there is a risk that the grant of Beddoe relief will result in the trustee spending trust monies to resist the claims of those to whom the trust estate actually belongs. In such a case factors such as whether there is someone with a real interest in defending the action, and the merits of the trustee's case, will be highly material. But they are nonetheless subsidiary factors which go to help resolve the primary question: what ought the trustee reasonably to do?

24. I was referred to two cases quite early in the modern life of the Beddoe jurisdiction, at least so far as reported cases are concerned: In re Dallaway, decd [1982] Ch D 756, Ch and In Re Evans [1986] 1 WLR 101, EWCA. They involved applications from an executor and an administrator respectively, who both sought directions as to whether to defend and counterclaim with respect to a hostile action against the deceased's estate and an indemnity from the estate for the costs of the action.

25. The cases turned on their particular facts. In In re Dallaway Sir Robert Megarry V-C directed the executor to carry on the litigation and granted an indemnity as to all costs for which the executor was liable, even if the defence, or counterclaim, or both, were unsuccessful. The order was made subject at 761 H to any order of the trial judge. This was because although as matters stood the executor, on the material before the Court, was fully justified in defending and counterclaiming, matters might emerge subsequently which made it unreasonable for the executor to continue to defend or counterclaim. Thus the Beddoe order was to take effect only until further order. It is important to appreciate that Sir Robert Megarry was not suggesting that the trial court might undo the Beddoe order with retrospective effect, merely that a time might come when the Beddoe order would cease to have effect going forward.

26. In In re Evans Nourse LJ, giving the judgment of the Court, criticised the deputy judge below for allowing an appeal against the decision of the master, who had refused to make a Beddoe order, but left it to the parties as

to how to proceed. The learned judge suggested that the preferable course might be to let the order stand until after discovery, when under the terms of the order the parties would have to go back before the master in any event.

27. Although the facts of both cases were at first sight strikingly similar – a family dispute over which of the deceased's relatives should inherit a farm – Nourse LJ found that there were three points on which they could be distinguished. "*First and foremost*", as he stated at 106 H:

> "*every application of this kind depends on its own facts and is essentially a matter for the discretion of the master or judge who hears it*".

28. A Beddoe application took place in private and might include material which the court accepted on instruction and without formal proof. Thus, in exercising its discretion, the court might act on the basis of facts and matters which were not fully expressed in a judgment delivered, as it was by Sir Robert Megarry in In re Dallaway, in open court.

29. Second, Nourse LJ noted at 107 B – C that Sir Robert Megarry clearly had serious reservations about the prospects of the claimants' success in the action:

> "*This is a most important question to be considered in deciding whether the action or its defence should be financed at the cost of the estate. To take an extreme example, suppose that it was clear that the action was a blackmailing one, although not one which could be struck out before trial. The court might well take that as a powerful reason for making the order sought.*"

30. Nourse LJ did not attempt to formulate the merits test which an applicant for Beddoe relief had to satisfy. He stated at 107 G – H that the Court had not so far considered the evidence as to the merits of the action, but that it was possible, although unlikely, that it was so far against the chances of the plaintiffs' success as to satisfy the Court that the order made by the deputy judge below was correct. If it did not go that far, the Court was of the opinion that it could not be sustained.

31. Third, the proposal in In re Dallaway was not, as in In re Evans, that the other beneficiaries should be joined as defendants to the main action, but rather that they should give the executor an indemnity against its costs. Nourse LJ stated at 107 C – D that whereas he could see no real objection to the former proposal, the latter proposal was clearly unworkable.

32. Nourse LJ explained the rationale for joining the beneficiaries at 107 D – G in a passage on which both parties before me relied:

> "*The injustice argument was summarised by Mr. Asprey, for the first plaintiff, in this way. He said that it would be most unjust if his client were to succeed in the action only to find that the farm and the house which ought to have been his must be sold in order to meet the unsuccessful party's costs of the action while, on the other hand, the deceased's other nephews and nieces, who were in truth the losers, would have started by risking nothing and would have ended by losing nothing. It seems that the master, who was very experienced in these matters, regarded that as a powerful argument. I am entirely of the same opinion. In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds as to whether the claim should be resisted or not, there must be countervailing considerations of some weight before it is right for the action to be pursued or defended at the cost of the estate. I would not wish to curtail the discretion of the court in any future case but, as already indicated, those considerations might include the merits of the action. I emphasise that these remarks are directed only to cases where all the beneficiaries are adult and sui Juris. The position might be entirely different if, for example, one of the beneficiaries was under age.*"

33. There are other types of dispute in which, by parity of reasoning, the Court will apply a Beddoe type procedure. One such is a derivative action, where the minority shareholder plaintiff may apply to the court at the commencement of proceedings for an order that the company indemnify him against the costs incurred in the action. See Wallersteiner v Moir (No 2) [1975] 1 QB 373, EWCA. In that case, Buckley LJ stated at 404 A – B that it would be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs down to judgment:

> "*... if it would have been reasonable for an independent board exercising the standard of care which a prudent businessman would exercise in his own affairs to continue the action to judgment.*"

34. I appreciate that, as Buckley LJ stated at 399 D, the analogy between the plaintiff in a minority shareholder action and a trustee is "*far from being an exact one*" and that his test cannot simply be transposed into a Beddoe application, still less one involving a trust dispute. I also note that Lord Denning MR formulated the test differently. But what I find resonant in Buckley LJ's form of words is the idea that a board of directors or, by parity of reasoning, the trustees of a trust, should exercise no less commercial prudence when carrying out their professional duties than they would when conducting their own affairs.

35. There are certain circumstances in which the court will extend the protection afforded to trustees under the Beddoe jurisdiction to other parties to trust litigation. However the basis of such protection is not RSC Order 62, rule 6(2), which only applies in a limited range of circumstances, but RSC Order 62, rule 3(3), which provides:

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

36. Thus the general rule is that costs should follow the event, but there are exceptions to the rule. These include the power of the court, where it appears just to do so, to make a pre-emptive costs order in favour of a litigant. Ie an order made before an action is concluded as to how the final costs of the action should be borne.

37. The pre-emptive costs jurisdiction was reviewed by the Court of Appeal of England and Wales in McDonald v Horn [1995] 1 All ER 961, EWCA, which was an action for breach of trust by the beneficiaries of a pension fund. In England and Wales, the court's jurisdiction to award costs has since the Judicature Act 1890 been expressly conferred by statute. Hoffmann LJ (as he then was) noted at 969 *b – d* that whereas the Court has a broad statutory discretion, this must be exercised in accordance with the rules of court and established principles.

38. In Bermuda, the RSC, which were promulgated by the Chief Justice pursuant to section 62(1)(e) of the Supreme Court Act 1907, are not a filter through which an underlying statutory discretion is to be applied but are themselves the source of the Court's discretion, although they too must be interpreted in accordance with established principles. There is no underlying statutory discretion analogous to that conferred by the Judicature Act 1890 and its successors. However its absence makes little practical difference, and does not detract from the persuasive force of the English authorities that are considered below.

39. Hoffmann LJ stated at 969 *g – h* that in the course of ordinary litigation it was difficult to imagine a pre-emptive costs order between adverse parties because it would not be possible for a court properly to exercise its discretion in advance of the substantive decision. Although as Browne-Wilkinson V-C (as he then was) had pointed out in the earlier case of Re Westdock Realisations Ltd v Another (1988) 4 BCC 192, Ch D, at 197, this was a question of discretion not jurisdiction.

40. Whereas pre-emptive costs orders are not in principle limited to any particular field of litigation, in practice one field in which they have tended to occur is trust litigation. This is no doubt in part because there is a trust fund available from which such costs can be met. The courts have, as Hoffmann LJ noted in McDonald v Horn at 970 *h – j*, been willing in certain circumstances to make pre-emptive costs orders in favour of other parties to trust litigation by analogy with the Beddoe protection given to trustees.

41. Eg, as Hoffmann LJ explained at 970 *j* – 971 *b*, where the trustees or others seek guidance as to the construction of the trust instrument, or some question arising in the course of administration, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and are ordered to be paid out of the fund. However where a beneficiary is involved in hostile litigation the court will generally decline to make a pre-emptive order in his favour, leaving costs to follow the event. As the learned judge

acknowledged at 971 *d*, it is sometimes difficult to decide how any particular case should be categorised.

42. A court will generally be reluctant to make a pre-emptive costs order in the case of hostile litigation because the outcome of the litigation will often be uncertain, and so a pre-emptive costs order will risk interfering with the costs discretion of the trial judge. Thus Hoffmann LJ, with whom Hirst LJ agreed, stated at 971 *j* – 972 *a*:

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

43. The court will not run the same risk if it makes a pre-emptive costs order in non-hostile litigation as it will be clear that the discretion can only be exercised in one way.

44. In McDonald v Horn the Court analysed the court's jurisdiction to grant trustees an indemnity under RSC Order 62, rule 6(2) as but a particular application of the court's statutory discretion to award costs. The point is implicit in the judgment of Hoffmann LJ at 970 *c* – *g* and explicit in the judgment of Balcombe LJ at 975 *h* – *j*. Their observations on this matter, while they are to be treated with great respect, are *obiter* as the Court was not concerned with an application for an indemnity by trustees, and they did not address the ostensibly contrary analysis in In re Beddoe. It will be recalled that in that case the Court held that the question of interfering with the discretion of the trial judge as to costs does not arise on a Beddoe application, because the indemnity conferred by the Beddoe court relates not to costs but to charges and expenses incurred in the execution of the trust.

45. The distinction is relevant to this extent: if the court's jurisdiction to award an indemnity to trustees with respect to hostile litigation on a Beddoe application and its jurisdiction to grant beneficiaries and others a pre-

emptive costs order are both examples of the court's general discretion to award costs, then that is arguably a reason – although not the only reason or necessarily a decisive one – for holding that both jurisdictions are governed by the same or similar principles. Another reason, which stands irrespective of the theoretical justification for making Beddoe orders with respect to hostile litigation on the one hand and pre-emptive costs orders on the other, is the similarity of both forms of relief.

46. The trustees' application for an indemnity was treated as an application for a pre-emptive costs order in Alsop Wilkinson v Neary [1996] 1 WLR 1220 Ch. The plaintiff firm of solicitors had obtained judgment for more than £1 million against the first defendant, a former partner of the firm. The first defendant had settled two trusts, the principal beneficiaries of which were himself, his wife and their issue, into which he had transferred some shares in two private companies. The plaintiff sought a declaration pursuant to section 423 of the Insolvency Act 1986 that the transfers were void as against the plaintiffs as transactions entered into for the purpose of putting assets beyond the reach of the first defendant's creditors.

47. The remaining defendants were the trustees. They issued two summonses in the action: one for directions whether or not to defend the action, which the Court termed the Beddoe summons, and one for an order that their costs of and incidental to the action be discharged in any event, on an indemnity basis, from the settled assets, which the Court termed an application for pre-emptive costs.

48. Lightman J stated that trustees might be involved in three kinds of dispute. In summary, what acting reasonably involved, and hence whether an indemnity was available and what it would cover, depended on the kind of dispute at hand. Although subsequent experience has found that not all trust litigation readily lends itself to this categorisation, and that some disputes may fall within more than one category, the threefold classification has stood the test of time.

49. The kind of dispute with which the Court in Alsop Wilkinson v Neary was concerned, like the Court in the present case, was what Lightman J described as a trust dispute, ie a dispute as to the trusts on which the trustees held the subject matter of the settlement. He addressed the circumstances in which a trustee would be entitled to an indemnity for costs pursuant to RSC Order 62, rule 6(2), at 1225 C – F:

> "*I do not think that the view expressed by Kekewich J. in the Ideal Bedding case that in case of a trust dispute (as was the dispute in that case) a trustee has a duty to defend the trust is correct or in accordance with modern authority. In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry's case [1898] 1 Ch. 306) offer to submit to the court's directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred e.g. in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an idemnity [sic] and lien. If the trustees do actively defend the trust and succeed, e.g. in challenging a claim by the settlor to set aside for undue influence, they may be entitled to their costs out of the trust, for they have preserved the interests of the beneficiaries under the trust: consider In re Holden, Ex parte Official Receiver (1887) 20 Q.B.D. 43 . But if they fail, then in particular in the case of hostile litigation although in an exceptional case the court may consider that the trustees should have their costs (see Bullock v. Lloyds Bank Ltd. [1955] 1 Ch. 317) ordinarily the trustees will not be entitled to any indemnity, for they have incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries e.g. the express beneficiaries specified in the trust instrument, over another e.g. the trustees in bankruptcy or creditors, and so have acted unreasonably and otherwise than for the benefit of the trust estate: consider R.S.C., Ord. 62, r. 6; and see National Anti-Vivisection Society v. Duddington, The Times, 23 November 1989 and Snell's Equity, 29th ed. (1990), p. 258.*"

50. Lightman J dismissed the Beddoe application as (i) it should have been brought in separate proceedings and (ii) the necessary parties to the Beddoe application, in particular the First Defendant's wife and their issue, were not parties to the main action and were therefore not before the court.

51. However Lightman J went on to consider the pre-emptive costs application on the merits, deciding it against the trustees. It is not clear whether the

learned judge considered that it was an application under RSC Order 62, rule 6(2) or alternatively under RSC Order 62, rule 3(3). The fact that he did not mention which order suggests that he thought it did not matter as the applicable test would in either case have been the same.

52. When discussing trustees' indemnities in the passage cited above, Lightman J stated that in hostile litigation in an exceptional case the court may consider that the trustees should have their costs. When considering the pre-emptive costs application he indicated at 1226 F – H what those circumstances were by reference to the principles which had evolved in pre-emptive costs cases generally. It should be noted that none of them had involved consideration of an application for a pre-emptive costs order in favour of a trustee:

> "*The court has an exceptional jurisdiction in hostile litigation to make an order at an early stage in the proceedings regarding the ultimate incidence of costs. For the purpose of this application, all parties are agreed that the relevant principles are sufficiently set out in the judgment of Miss Mary Arden Q.C. (sitting as a deputy High Court judge in the Chancery Division) in In re Biddencare Ltd. [1994] 2 B.C.L.C. 160 and that the four relevant considerations for this purpose are (1) the strength of the party's case; (2) the likely order as to costs at the trial; (3) the justice of the application; and (4) any special circumstances. I would only add that since the decision of the Court of Appeal in McDonald v. Horn [1995] I.C.R. 685, the second requirement has been tightened up and (save the presently recognised exceptions namely derivative actions and actions relating to pension funds), it must appear that the judge at the trial could properly exercise his discretion only by ordering that the applicant's costs be paid out of the trust estate.*"

53. Writing extra-judicially about his decision in Alsop Wilkinson v Neary in the journal Trusts Law International (2006) Tru LI 151, Lightman J offered a gloss as to the principles applicable to a trustee's application for an indemnity in a trust dispute. The extra-judicial comments of a judge about one of his decisions carry no special weight merely because he is a judge but fall to be evaluated on their merits like those of any other academic commentator. Nonetheless I find Lightman J's observations helpful. He stated at 153:

"*Generally speaking if the validity of the settlement is to be defended, it should be left to the beneficiaries under the settlement to do so … There is however no absolute rule. The merits of individual cases may require some other course being taken. The rule will generally be held applicable when the beneficiaries are all ascertained, of full age and capacity. Different considerations may apply if the beneficiaries are infants or unascertained and there are no other available sources for funding the defence. In such a situation a balancing exercise may be required of the court …*"

54. The foregoing authorities have been cited many times in cases heard in both onshore and offshore jurisdictions. A number of those cases were cited to me. I do not propose to review them all. However D2 relied on one particular case and the Trustees on another as a summation of the principles which they invite me to apply in the instant case.

55. D2's favoured case was STG Valmet v Brennan, which was mentioned earlier in this judgment. The case concerned three trusts, the beneficiaries of which were the settlor, his family, and a charitable foundation. The trustee sought directions as to whether to defend an action brought by the settlor's trustee in bankruptcy, who sought declarations that the settlements were void as dispositions in fraud of creditors and/or that, having knowingly assisted in the concealment of assets through the trusts, the trustee held the trust assets on constructive trust for the creditors. The trustee was given leave to defend the proceedings against both the trust and the trustee personally until the close of discovery and authorised to take its costs of doing so, and of its application to strike out the statement of claim, from the trust assets. The Gibraltar Court of Appeal held that the order authorising the trustee to defend the action to the close of discovery might have been premature. It accepted an undertaking from the trustee's counsel to apply for further Beddoe relief once the outcome of the strike out application had been clarified, and hinted strongly that a further pre-trial costs indemnity would not be appropriate.

56. The judgment of the Court was given by Waite JA. The other members of the court were Neill P and Glidewell JA. In the section of his judgment dealing with the law, Waite JA began by considering pre-emptive costs

orders generally. Having reviewed the statements of principle contained in Re Biddencare Ltd, McDonald v Horn and other cases, he summarised them at para 31 in similar terms to the summary of the relevant principles given in Alsop Wilkinson v Neary:

"*In deciding whether to make a pre-emptive order for costs, the court should have regard to -*

(a) the prospect or success of the claim or defence sought to be made or resisted;

(b) the general reluctance of the court to make a prospective costs order unless satisfied that it is clear that the judge at trial would be bound to make an order in favour of the applicant;

(c) the degree of risk that such an order might work injustice; and

(d) the existence of any special circumstances."

57. Waite JA went on at para 32 to draw a parallel between the Beddoe jurisdiction and the pre-emptive costs jurisdiction:

"*Beddoe applications are acknowledged to have much in common with applications in other contexts for pre-emptive costs orders, but they still stand in a class of their own because of the special relationship with the court that is carried by the status of trusteeship.*"

58. As to the probable outcome of a Beddoe application, the learned judge stated at para 36:

"*In a case where the dispute in substance lies between rival claimants to the entire trust fund (whether such claimants be creditors of the settlor on the one side and beneficiaries on the other, or one or more of several beneficiaries in contest with the remainder) there must be a probability that the court will direct the trustee to take a passive role, namely, to file a defence pleading (or amending any existing defence to plead) that the trustee submits to act as the court directs. The burden is then thrown upon* ***the persons with a real interest in resisting the claim*** *to continue the defence of the proceedings at their own risk as to costs if unsuccessful. If they forbear to do so, the claim may succeed by default.*" [Emphasis added.]

59. Waite JA noted at para 37 that a Beddoe application was by its nature brought at the beginning or a very early stage of the litigation, at which time the court might have insufficient material to reach an informed judgment on the merits of the case. It was therefore not uncommon for the court to make an order in the first instance authorising the trustee to defend the main action down to the close of pleadings, or the conclusion of discovery.

60. The learned judge concluded at para 42:

> "*Orders that the trustee is to have his costs paid out of the trust fund in any event should be made sparingly, and with due regard to the principles which apply to the analogous case of pre-emptive costs orders sought in the general jurisdiction.*"

61. I agree with Michael Furness QC, counsel for D2, that this is a most helpful overview of the principles applicable to the Beddoe jurisdiction. However what strikes me about the judgment, although this is not quite the emphasis that Mr Furness placed upon it, is its meticulous avoidance of absolutes. Beddoe applications are said to have much in common with pre-emptive costs applications, but are not the same; the Beddoe court is to have due regard to the pre-emptive costs principles, but not apply them slavishly; and whereas on a pre-emptive costs application the court will generally be reluctant to make a prospective costs order unless satisfied that the trial judge would be bound to make an order in favour of the applicant, that does not mean that there are no circumstances in which it would be appropriate for the court to do so.

62. The Trustees' favoured case was Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42 ("the Macedonian Orthodox case"). The leading judgment, which is the one upon which the Trustees rely, was given jointly by Gummow ACJ, and Kirby, Hayne and Heydon JJ. Kiefel J gave a short judgment concurring in the result.

63. This was a decision of the High Court of Australia, which is the highest appellate court in that jurisdiction. Unlike any of the cases considered

above, it involves a purpose trust, albeit a charitable one, rather than a trust with beneficiaries. It is also, as Alan Boyle QC, counsel for the Trustees, pointed out to me, the highest court in any jurisdiction to have considered a trustees' application for an indemnity from the trust estate to fund the cost of litigation.

64. The court had previously held in the main action that land owned by the Appellant was held on a charitable trust:

> "*to permit it to be used by the [Appellant] as a site for a church of the Macedonian Orthodox Religion and for other buildings and activities concerned with or ancillary to the encouragement, practice and promotion of the Macedonian Orthodox Religion*".

This left for future resolution the terms of the trust on which the property was held. In the main action those terms were fiercely contested between the Appellants and the Respondents.

65. The Appellants applied for advice from the court in separate proceedings brought under section 63 of the Trustee Act 1925 (NSW). That was a statutory equivalent of a Beddoe application and indeed both at first instance and in the High Court the court relied upon English Beddoe cases as persuasive authority. However the plurality stated several principles as applicable to the section 63 jurisdiction which might be considered contentious in the context of the Beddoe jurisdiction.

66. Specifically, the plurality accepted at para 60 a submission that the discretion of the court to consider an application brought under section 63 "*should not be yoked to a general first principle that, where there is a contest or where there are adversaries, it is not appropriate to give advice*", which, considered in context, I take to mean advice that the trustees should actively prosecute or defend the main action. At para 72 the Court stated that a section 63 application was not directed only to the personal protection of the trustee:

> "*Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust*".

67. Neither of those observations sit altogether happily with the English authorities cited above. There is no reason why they should do. But the fact that they do not suggests that I should be mindful that the approach of the High Court in the Macedonian Orthodox case does not necessarily translate automatically into the right approach for a Beddoe application.

68. On the other hand, none of the English cases mentioned above concerned a purpose trust. The plurality stated at para 73:

> "*The fact that one of the purposes of proceedings for judicial advice is to protect the interests of the trust has particular importance where, as in this case, the trust concerned is a charitable purpose trust … Unless some other party will act as contradictor, the burden of defending the suit will fall upon the trustee. If, as will often be the case with a charitable purpose trust, there is no other party that will act as contradictor, the claims made about the terms of the trust will go unanswered unless the trustee can properly resort to the trust funds to meet the costs of defending the litigation.*"

Mr Boyle invites me to extend this approach by analogy to non-charitable purpose trusts and to trusts that have mixed charitable and non-charitable purposes, at least where those purposes are beneficial to the public.

69. In the section 63 application, Palmer J gave the Appellants leave to defend the main proceedings on the issue of the terms of the trust and, subject to a cap on past and future costs, to fund the defence from the trust property. See para 5. Subject only to a later finding against them of fraud, wilful concealment or misrepresentation, the Appellants could not later be ordered in the main proceedings to restore to the trust property the costs that it had thus paid or retained. See para 166.

70. Palmer J held that such an order was in the public interest and for the benefit of the trust estate as the main action would resolve once and for all the terms of the trust and the disputes as to the administration of the trust property would be ended. See para 20. He also held that the opinion of counsel demonstrated that there were sufficient prospects of success to warrant the Appellants funding their defence on the terms of the trust issue.

71. The Respondents successfully appealed against Palmer J's order to the Court of Appeal. The Appellants appealed against that decision to the High Court, which approved both Palmer J's decision and his reasoning. In a passage which was cited by the plurality at para 84 and impliedly approved by them at para 88, and which Mr Boyle invites me to adopt as the right approach in the instant case, the learned judge set out his approach to the grant of a trustee's indemnity from the trust estate.

"*Where a trustee seeks an order that it is justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the question will be whether it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out among themselves, at their own risk as to costs and leaving the trustee as a necessary but inactive party in the proceedings, or whether it is more practical and fairer, that the trustee be the active litigant with recourse to the trust fund for the costs of the litigation. What is* ***'practical and fair'*** *will depend on the particular circumstances of each case and will include:*

- *whether the beneficiaries of the trust estate have a substantial financial interest in defending the claim;*
- *what are the financial means of the beneficiaries to fund the defence;*
- *the merits and strengths of the claim against the trust estate;*
- *the extent to which recourse to the trust estate for defence costs would deprive the successful claimant of the fruits of the litigation;*
- *if the trust is a charitable trust rather than a private trust, what, if any, are the considerations of public interest.*" [Emphasis added.]

72. The plurality noted at para 85 that, when dealing with the particular facts of the case, Palmer J spoke of "*fairness*" he was not speaking only of fairness to the Appellants:

"*but also of fairness 'to individuals, who are not beneficiaries of the trust and have no financial interest in the trust property' and who, if the trust assets could not be employed, would have to fund the litigation if there were to be litigation.*"

73. Under Order 62, rule 6(2) trustees are entitled to their litigation costs unless they have acted unreasonably or for their own benefit rather than that of the trust estate. I agree with Mr Boyle that asking what is practical and fair is a helpful way to approach the question of what is reasonable. Mr Furness did not disagree with that. However he submits that, in resolving that question in the context of the present application, the Court should be guided by the factors relevant to the making of a pre-emptive costs order, as summarised by Waite JA in STG Valmet v Brennan, rather than the factors identified by Palmer J as relevant to a section 63 application. There is, however, some overlap between these two sets of factors, and the section 63 set did not purport to be exhaustive.

74. One difference between the two sets of factors is in their respective approaches to the appropriate merits test. Under the pre-emptive costs orders line of cases, the court will generally be reluctant to make an order as to costs pre-emptively unless the judge in the main action would be bound to make the same order retrospectively. However the approach stated by Palmer J, as set out at para 162 of the plurality judgment of the High Court and impliedly approved at paras 163 – 164, is more flexible:

> "*In a judicial advice application in which the trustee asks whether it is justified in prosecuting or defending litigation, all the Court does is to reach a view as to whether the Opinion of Counsel satisfies it that there are* ***sufficient prospects of success*** *to warrant the trustee in proceeding with the litigation. Counsel's Opinion must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are* ***properly arguable****. Whether, in the light of Counsel's Opinion, there are* ***'sufficient' prospects of success*** *calls for another judgment, founded upon such considerations as:*
>
> - *the nature of the case and the issues raised;*
> - *the amounts involved, including the likely costs*
> - *whether the likely costs to be incurred by the trustee are proportionate to the issues and [the] significance of the case;*
> - *the consequences of the litigation to the parties concerned;*

- *in the case of a charitable trust, any relevant public interest factors.*" [Emphasis added by the High Court.]

75. Mr Furness would doubtless argue that in the case of a hostile trust dispute, "*sufficient prospect of success*", insofar as the test is one of which the Court ought to take cognisance, should mean "*bound to succeed*".

76. The "*practical and fair*" test approved by the High Court in the Macedonian Orthodox case was applied at first instance in Application of Uncle's Joint Pty Ltd [2014] NSWSC 32. The trustees sought advice on a section 63 application as to whether to defend a claim that they had not been duly appointed and were not trustees of two discretionary family trusts. Brereton J declined to give the advice sought.

77. First, the learned judge found at para 30 that it was not in the interests of the trusts for the trustees to defend the action as the interests of the trust were not significantly affected by the identity of the trustee. Second, adopting the classification of trust disputes in Alsop Wilkinson v Neary, he found at para 31 that it was a dispute between the beneficiaries, who were the children of the deceased, and that it was therefore the duty of the trustees to remain neutral.

78. Third, Brereton J found at para 32 that if the applicants did not defend the trust proceedings, that did not mean that the proceedings would go undefended. The appointors who appointed the trustees, and/or a representative of the class of discretionary beneficiaries who wanted them to remain in office, would be proper contradictors.

79. This case is therefore an example of how the presence of a proper contradictor, who need not be a beneficiary, can be a reason for refusing section 63 – and, by parity of reasoning, Beddoe – relief.

80. I was also referred to the two leading English textbooks on trust law.

81. Lewin on Trusts, 19th Edition, deals with Beddoe applications in Chapter 27. The principles applicable where a trustee becomes involved in proceedings

against the trust or trust property are addressed at paras 27-212 – 27-214 read in conjunction with para 27-237(5). Para 27-214 provides in material part:

"… the court may give the trustee leave to defend at the expense of the trust. Factors which point towards leave to defend are the strength of the defence and the absence of adult beneficiaries with a substantial financial interest in defending the claim and the means to do so. We consider that it is sufficient, but not necessary, to satisfy the requirements for a prospective costs order. But where the requirements for a prospective costs order cannot be satisfied, we consider that, having regard to the injustice factor, the court is likely to require a substantially stronger case for the defence than would be needed if the claimant were not exposed to the risk of bearing costs even though successful;…"

82. Underhill and Hayton: Law of Trusts and Trustees, Eighteenth Edition, states at para 85.49:

"*Where there are reasonable doubts as to whether the case is an exceptional one for the trustee to take active defensive steps against a rival claimant to all or part of the trust fund as where, otherwise, there is no viable defendant, a Beddoe application should be made, though such application is quite different from the ordinary Beddoe application, having a close affinity with a prospective costs order.*"

Discussion

83. Returning to first principles, under RSC Order 62, rule 6(2) a trustee who participates in that capacity in trust litigation is entitled to an indemnity as to costs from the trust estate, insofar as the costs are irrecoverable from elsewhere, unless he has acted unreasonably or for his own benefit rather than the benefit of the trust estate. When deciding whether to give the trustee advance authorisation to incur such costs, the question for the court is whether in incurring them the trustee would be acting reasonably and for the benefit of the trust rather than for his own benefit.

84. As stated above, when deciding what is reasonable, I find it helpful to ask what is practical and fair. This formulation serves as a reminder that what is

reasonable will depend upon the particular factual context in which an indemnity is sought.

Proper contradictor

85. In the present case, the particular factual context is that the Trustees are confronted with an attack upon the validity of the Trusts. The first question is therefore whether there is anyone with a real interest in defending the Main Action. In the language of the Australian authorities, such a person would be called a "*proper contradictor*". This is a convenient term which in the context of hostile trust litigation I take to mean an appropriate person to play an active role in defending the trust. The Trustees submit that there is no one with a real interest in defending the Main Action, and that consequently the proper contradictors would be the Trustees.

86. The "*real interest*" test derives from STG Valmet v Brennan. There, albeit in the context of a beneficiaries dispute, the Court held that where the dispute in substance lies between the rival claimants to the entire trust fund, the defence of the claim should be left to "*the persons with a real interest in resisting the claim*". By that, the Court meant the beneficiaries.

87. Jonathan Adkin QC, who appeared with Mr Boyle, submits that a person with a real interest in defending hostile trust litigation must be either a beneficiary or someone in an analogous position: ie either a *de jure* or a *de facto* beneficiary. He gave the example that if a trust were set up with the purpose of providing someone with a mansion and a lavish lifestyle, then it could be said with some force that that person had a real interest in defending the trust, even though he was not strictly speaking a beneficiary. I agree.

88. However, in other circumstances, what constitutes a "*real interest*" might assume a broader meaning. For example, in Application of Uncle's Joint Pty Ltd the Court held that the appointors who appointed the trustees would

have been appropriate contradictors to defend a claim that the trustees had not been duly appointed.

89. I conclude that a person with a real interest in defending the action will include *de jure* and *de facto* beneficiaries, but will not necessarily be limited to them. I am inclined to say that a real interest is a bit like an elephant: a court will know it when it sees it. But the interest will have to be compelling.

90. Ability to pay may be relevant when deciding whether a person or class of persons should be held to be the proper contradictor(s). Eg the persons with a real interest in defending a trust for the purpose of exerting political pressure upon a particular regime to release one or more of its political prisoners would be the political prisoner or prisoners in question. But it would be fanciful to suggest that they were the proper contradictors in circumstances, where, amongst other obstacles, they had no access to their assets or their assets had been expropriated. (In the case of a charitable trust which would otherwise go unrepresented the Attorney General would be the proper contradictor, but on account of its avowedly political purposes this hypothetical trust would not be charitable.)

91. The willingness or otherwise of a person or class of persons to assume the role of contradictor is not relevant to the determination of whether they are in fact the proper contradictor. On the other hand, a person or class of persons who are not the proper contradictor may be prepared to assume the role of contradictor gratuitously. Eg, in the case of a purpose trust, a person or class of persons who have no real interest in resisting the claim but are nonetheless supportive of the purposes of the trust. Whether it would be appropriate for the Court to permit them to do so would depend on the particular facts of the case.

92. Mr Furness submits that in the present case the proper contradictor is Child 1. On the facts, as set out in the private ruling I have handed to the parties, I have found that the Trustees are the proper contradictor in this case.

Merits

93. I agree with Nourse LJ in In re Evans that the plaintiff's prospects of success in the main action is a most important question to be considered in deciding whether the defence of the action should be financed at the cost of the Trust estate. In approaching this question I am mindful of the editorial comment in Lewin on Trusts that the court is likely to require a substantially stronger case for the defence than would be needed if the plaintiff were not exposed to the risk of bearing costs even though successful.

94. Mr Furness invites me to find that – both in the instant case and in the case of purpose trusts generally – the Court must be satisfied that the defence of the claim is bound to succeed. I accept Mr Boyle's submission that in this context "*bound to succeed*" means "*would succeed on an application to strike out the claim*" and I did not understand Mr Furness to demur. I cannot see that it can sensibly mean anything else.

95. Where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, the imposition of such a test may be perfectly reasonable. If the test is not satisfied, with the result that the trustee takes a neutral role in the main action, the claimants can take a commercial view as to whether to fund their respective claims from their own resources.

96. But in the case of a purpose trust, there are by definition no beneficiaries and – as I have found to be the position in the present case – there may be no persons with a real interest in resisting the claim. It would be unreasonable to expect the trustees to do so from their own resources. It is seldom in litigation that a court can be satisfied that a defence is bound to succeed, even if the claim appears a weak one. Particularly if the case involves complicated issues of law and fact, and the likelihood of conflicting evidence.

97. The imposition of a "*bound to succeed*" test would therefore leave a purpose trust which had no proper contradictor vulnerable to opportunist claims, notwithstanding that there may be a strong defence to the claims. The case

of the hypothetical blackmailing action posited by Nourse LJ in In re Evans is a case in point.

98. However, it is pertinent to ask whether, if there had been any persons with a real interest in defending the claim, they might reasonably have decided to do so at their own expense. When deciding what is reasonable in this context, I attach particular weight to what is commercially prudent. Without elevating that question into a test, it is something which I have taken into account. In so doing, I have been influenced by the test propounded by Buckley LJ in Wallersteiner v Moir (No 2) in the admittedly different context of a plaintiff's right to an indemnity in a derivative action. The relevance of the question is that the absence of a person with a real interest in defending the claim should not result in a greater likelihood of the claim being defended than would have been the case if there had been such a person.

99. I reject the "*bound to succeed*" test. Applying the approach of the High Court in the Macedonian Orthodox case, it suffices that there are in my judgment sufficient prospects of success to warrant the Trustees in defending the claim. To be clear, I would have reached that conclusion irrespective of the question as to whether, if there had been any persons with a real interest in defending the claim, they might reasonably have decided to do so at their own expense.

100. I find support for this conclusion, although I have reached it independently of such support, on policy grounds. A purpose trust under the 1989 Act is, among other things, a commercial product. The utility of the product, and hence the purpose of the legislation, would be undermined if a purpose trust or the appointment of its trustees could be successfully attacked as easily as it could were the Court to adopt the "*bound to succeed*" test.

Risk of injustice

101. I have found that there is no one with a real interest in defending the claim and that there are sufficient prospects of success to warrant the Trustees in doing so. If I decline to grant them an indemnity from the Trust estate the claim is likely to go undefended. There would be a risk of injustice in that D2 would be likely to succeed on a claim which, had it been contested, might have failed.

102. On the other hand, if I grant the Trustees the indemnity which they seek, there is a risk of injustice in that D2 may succeed on the claim. In that event, property to which D2 and the other heirs are entitled, namely the Trust estate, would have been depleted by the amount of the Trustees' legal fees. Moreover, if the Court ordered that the Trustees pay D2's costs, then by reason of the Trustees' indemnity the Trust estate would be further depleted.

103. In assessing what weight to give the possible injustice to D2 and the other heirs if I grant the Trustees an indemnity, I bear in mind both the likely amount of the legal fees to be incurred by the parties and the value of the Trust estate. The Trustees estimate that their legal fees down to the conclusion of the trial would be very substantial. It is reasonable to infer that D2's legal fees are likely to be similar. These are very considerable sums. However, they are relatively small in relation to the value of the Trust estate. The Trustees calculate that their estimated costs represent only some 0.04% of the Trust assets, and that if D2's probable costs are taken into account their combined costs would still be less than 1% of the value of those assets. These sums could probably be met from the income generated by the Trust assets without any need to have recourse to capital.

104. I accept that the litigation costs will consume no more than a small part of the value of the Trust estate. That is not a reason to grant the Trustees an indemnity, although if the litigation costs were likely to consume a large part of the Trust estate, that would be a reason not to do so.

105. There is, however, an unusual feature of the Main Action in that, if D2's claim succeeds, Child 1 and (assuming that the Trust assets would be divided between the estates of both S and T) all the other Family Directors would inherit a portion of the Trust estate. It would therefore be open to the Court to order that the costs of the Main Action should be allocated solely to their respective portions – or entirely to Child 1's portion. Thus, if in the Main Action the Court concludes that in the interests of justice Child 1 and possibly the other Family Directors should pay some or all of the costs incurred, or ordered to be paid, by the Trustees, the Court will be able to make such an order.

106. I conclude that in the circumstances the risk of injustice to D2 and the other heirs should an indemnity be granted is not a sufficient reason not to grant one.

Other factors

107. Mr Boyle has drawn my attention to a number of other factors which he submits support the grant of an indemnity.

108. First, Mr Boyle submits that the Trustees' attorneys have written to the heirs of S and that none of the heirs has objected to the provision of an indemnity to the Trustees. On the other hand, none of them has stated that they support an indemnity. The heirs have not replied to the Trustees' letters, and I cannot properly draw any conclusions from their silence, whether supportive of the Trustees or supportive of D2.

109. Second, Mr Boyle submits that, particularly given the complexity of the legal and factual issues likely to arise in the Main Action and the value of the Trust assets, the Court would require the assistance of the Trustees in order to adjudicate the matter fairly. The short answer to that is that if the Court required the Trustees' assistance it could ask for it. It is not a persuasive reason for the *Beddoe* Court to grant the Trustees a costs indemnity from what might turn out not to be Trust assets.

110. Third, in a more narrowly focused version of this argument, Mr Boyle submits that D2's claim in the Main Action raises an important issue of principle regarding the application of the certainty test in the 1989 Act, and that the Main Action will be a test case on the issue, which is likely to go the Privy Council. I accept that the Court in the Main Action will require assistance from counsel on both sides of the argument to resolve the issue. Were I not minded to grant an indemnity in the terms sought, I should have granted the Trustees an indemnity for the limited purposes of arguing this particular issue.

111. Fourth, Mr Boyle submits that the purposes of the Trusts, although not exclusively charitable in nature, are nevertheless public purposes, and that there is therefore a public interest in the Trusts being defended. I accept that there is a public interest in the charitable aspects of the Trusts' purposes, as exemplified by the charitable donations made by one of the Trusts. However it is not clear to me how the purchase of shares in the Companies serves the public interest, although I appreciate that S and T believed that it did.

112. Although I have taken them into account, none of these additional factors has proven decisive in my reasoning.

Conclusion

113. I am satisfied in all the circumstances that the Trustees should if so advised defend D2's primary case in the Main Action as it is reasonable for them to do so and I grant them an indemnity from the Trust assets for that purpose. They are in my judgment the proper contradictors. In so concluding I attach particular importance to the absence of any person with a real interest in defending the claims and the fact that there are in my judgment sufficient prospects of success to warrant the Trustees in defending them. I am satisfied that these factors outweigh the risk of injustice to D2 and the other heirs should D2 prevail in the Main Action. There are other factors which

offer some support for the grant of an indemnity, but on the particular facts of this case they are of relatively small importance.

114. This Beddoe application has been unusual in the extent of disclosure provided by the Trustees and the lengthy and detailed nature of the submissions from the parties as to the merits of the plaintiff's case in the Main Action. In the circumstances I am satisfied that I have a sufficiently firm grasp of the merits of D2's case to authorise the Trustees if so advised to defend the claims brought by D2 in the Main Action down to the conclusion of the trial at first instance. For the avoidance of doubt, such authorisation extends to making and defending interlocutory applications and to bringing and defending appeals relating to them.

Expenditure

115. The expenditure proposed by the Trustees was largely uncontroversial. D2 did not object to the purchase of shares, provided that there was a satisfactory mechanism in place to safeguard against any possible risk of insider dealing. D2 raised this concern as the Family Directors of the Trustees are also directors of the Companies.

116. Neither did D2 object in principle to monies being applied for the charitable purposes envisaged in the proposed donations from one of the trusts. D2 merely queried whether the donations might not more appropriately be made by another trust which D2 had identified which was not the subject of the Beddoe proceedings.

117. I am satisfied with respect to the proposed acquisition of shares in the Companies that the Trustees have put in place a satisfactory mechanism to safeguard against any possible risk of insider dealing. I am satisfied that the proposed charitable donations, which are consistent with the Trust's pattern of charitable giving prior to the commencement of the Main Action, are an appropriate use of Trust monies. I therefore approve the proposed

expenditure of Trust funds as to both the acquisition of shares and the charitable donations to be made by that Trust.

Implementation

118. I have been asked in this ruling to address a number of miscellaneous points relating to the implementation of the Beddoe order and related matters.

119. Although I am satisfied that I have a good grasp of the merits of D2's claim in the Main Action I appreciate that matters may change on discovery. I therefore direct that as soon as reasonably practicable after the Main Action is set down for trial the Trustees shall provide the Court with a confidential written report setting out the state of the proceedings and any material developments, together with a confidential opinion of counsel updating the Court on the merits of the claim. For the avoidance of doubt, these documents need not be disclosed to D2 or any of the other parties in the Main Action.

120. However, at that stage of the proceedings I invite D2, if so advised, to make written representations to the Court of D2's own regarding the merits of the claim. These should be served on the Trustees. This is an opportunity for the parties to address any new material which has come to light since the Beddoe application, not for them to go over old ground. I do not wish to hold a further Beddoe hearing on these issues if that can be avoided, and anticipate that I shall be able to deal with these new submissions without one.

121. For the avoidance of doubt, nothing in this ruling shall affect the discretion of the judge trying the Main Action to make such order as to costs between the parties to the Main Action (other than the Trustees) and, if appropriate, third parties, as he sees fit. Eg ordering one or more such parties, other than the Trustees, to indemnify the Trust estate in respect of some or all of the costs incurred by the Trustees in defending the Main Action. Further, and as noted above, in the event that it is found that some or all of the Trust assets

are held for the benefit of the heirs of S and/or T, it would be open to the judge trying the Main Action to apportion the Trustees' costs between the assets to which the heirs would severally be entitled in such manner as he thought just.

122. I am keen to ensure that there are adequate cost controls in place, bearing in mind that the Trustees may be spending what turns out to be the heirs' money. Having considered the parties' various proposals, I am satisfied that this can best be achieved by providing that if D2 succeeds on all or part of D2's claim in the Main Action, the Trustees' costs may be taxed at D2's option on an indemnity basis, and D2 shall have the opportunity to attend at the taxation and make representations.

123. D2 has invited me, should I find that the Trustees are entitled to an indemnity with respect to the defence of the claim that the Trusts are void for uncertainty, to make a pre-emptive order for costs in D2's favour in relation to prosecuting that claim. This is on the basis, noted above, that D2's claim raises an important issue of principle regarding the application of the certainty test in the 1989 Act, in relation to which it will be a test case. However, in my judgment D2's application for a pre-emptive costs order is a matter for the judge trying the Main Action.

124. I shall hear the parties as to costs.

DATED this 15th day of May, 2015

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Hellman J