

Judgment 32/2013

**In Re: F
Court of Appeal
Appeal No 462
10th September, 2013**

Appeal from an order made in the Royal Court on 30 May 2013 concerning a family trust.

Redacted Judgment

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO 462

21st June 2013

Before: **The Hon Michael Beloff QC
Sir John Nutting Bt QC
John Martin QC
Judges of Appeal**

Between: **Re F**
(1) A1
(2) A2
(3) A3
(4) A4
(Acting by their Joint Liquidators)

Appellants

and

(1) R1
(2) R2
(3) R3
(4) R4
(5) R5

Respondents

Decision handed down: 10th September 2013

Advocates

**Advocates JP Greenfield and E.R. Gray appeared for the Appellants
Advocate J.M. Wessels appeared for the 1st Respondent
Advocate S.H. Davies appeared for the 2 Respondent
Advocate I.C. Swan appeared for the 4th Respondent**

Authorities, laws & texts referred to:

The Trusts (Jersey) Law 1984
The Trusts (Guernsey) Law 2007
Re Beddoe [1893] 1 Ch 547
Public Trustee v Cooper [2001] WTLR 901
Lewin on Trusts, 18th ed
Re Evans [1986] 1 WLR 101
Court of Appeal (Civil Division) (Guernsey) Rules 1964
Connelly v DPP [1964] AC 1254

MARTIN JA:

1. On 21 June 2013 we dismissed an appeal from an order of Lieutenant Bailiff Talbot QC made on 30 May 2013. These are my reasons for concurring in that dismissal.
2. These proceedings concern a family trust. It is governed by Jersey law but administered in Guernsey. The [Trust], itself one of a number of related trusts, has since its creation in 2007 operated through a complex arrangement of companies which have accumulated a very substantial portfolio of investments. The investments have been financed by extensive borrowing, in particular from [a bank]; and with the collapse of that bank, and the general economic downturn, many of the operating companies have become insolvent.
3. Among those companies are the four appellants. They are in liquidation, and act by their joint liquidators. They claim to be entitled to repayment out of the assets of [the Trust] of loans amounting to about £180 million. These loans are said by the appellants to be due under deeds of novation entered into by the first and second respondents (“the Former Trustees”), who were the trustees of the [Trust] until July 2010. They were then replaced by the third respondent (“the Current Trustee”).
4. The status of the loans is the subject of separate proceedings in Guernsey, known as “Guernsey 1”. In those proceedings, the Former Trustees have admitted that they are liable to the appellants on the loans; but the Current Trustee asserts that undertaking liability on the loans constituted gross negligence by the Former Trustees, with the consequence that they are not entitled to indemnity out of the assets of the [Trust]. The Current Trustee also claims that the Former Trustees have been discharged by a further novation of the loans; and it resists the appellants’ argument that Article 32 of the Trusts (Jersey) Law 1984 gives the appellants a right of recourse to the assets of the [Trust].
5. The issues in Guernsey 1 were tried in June 2012 by Lieutenant Bailiff Sir John Chadwick. His decision had not been given at the time of Lieutenant Bailiff Talbot’s order: it was expected in the early part of July 2013, but was not available to us. That means that the application which gives rise to this appeal has had to be decided against a background of uncertainty about the financial situation of the [Trust]. What is clear, however, is that the loans far exceed the assets of the [Trust]: so that, if the Former Trustees or the appellants are held in Guernsey 1 to be entitled to have recourse to those assets, the [Trust] will be heavily insolvent.
6. The current proceedings – sometimes known as Guernsey 2 – were commenced by the Former Trustees in May 2010 for the purpose of seeking directions from the Court. Two of those directions are relevant: directions as to the defence of a claim brought in the English High Court relating to a trust [“the Y Trust”]; and directions as to the refinancing of a loan secured on a substantial building in London which is an asset of the [Trust] [“the building”].

7. It is the latter application that is the subject of this appeal. On 30 November 2012 the Former Trustees applied to the Court for (among other things) directions as to whether they should investigate refinancing options in relation to [the building]. [The building], which is owned indirectly by the [Trust] through two companies, is occupied by the fourth respondent as his family home. It was acquired with the aid of a secured loan from [a bank (“the lender”)]. What prompted the Former Trustees' application was that [the lender] had indicated that it would not renew the loan beyond 30 April 2013 (although in the event the loan was renewed for at least a further two months). An alternative lender has been found, but the costs of refinancing (consisting of legal and valuation fees, an arrangement fee, prepayment of one year's interest and the deposit of a further year's interest) come to about £720,000. Neither the company that owns [the building] on behalf of the [Trust], nor its parent company, is itself insolvent, but they cannot, whether singly or together, meet those costs. In essence, the application by the Former Trustees was for approval of the use of other [Trust] assets to pay the refinancing costs.
8. The Lieutenant Bailiff finally disposed of the application by his order of 30 May 2013, which authorised the Former Trustees to pay the arrangement fee, to provide the interest prepayment, and to make the interest deposit. The legal and valuation fees had been dealt with by a previous order, which has not been the subject of any appeal. The order of 30 May 2013 contains three other points of relevance: undertakings by the fourth respondent to make certain payments while he or members of his family remained in occupation of [the building]; a declaration that the costs of refinancing fell within the ordinary course of business for the purpose of certain undertakings (referred to below) given to the court in Guernsey 1; and what was described as an "indication" by the court that the order should not be issued by the Greffe pending receipt of written confirmation, in terms satisfactory to the court, of the position of the fourth respondent in relation to the proceedings relating to the [Y Trust]. As regards this last point, the order was subsequently issued in circumstances which form one of the appellants' grounds of appeal.
9. On 11 June 2013, the appellants applied to the Lieutenant Bailiff for leave to appeal. Leave was refused; and when the matter came before us the application was renewed, in case leave should be necessary. We took the view that the appellants were entitled to appeal as of right; and to explain why that is so, and to provide context for a consideration of the grounds of appeal, it is necessary to explain the nature of the proceedings that were before the Lieutenant Bailiff.
10. The application by the Former Trustees was made under section 69 of the Trusts (Guernsey) Law 2007, which gives statutory effect to the court's supervisory jurisdiction over trusts. It was not suggested to us that that section, or section 68 (which permits a trustee to apply to the court for directions) gave the court wider or different powers of interference in trust matters than are traditionally exercised by the courts in England and Wales; and for the purposes of this judgment I assume that they do not. One aspect of the court's supervisory jurisdiction is the ability of trustees to apply for directions in case of difficulty. A common instance of such difficulty relates to the question whether trustees should institute or defend legal proceedings; and applications for directions in that context are usually known as *Beddoe* applications (after *Re Beddoe* [1893] 1 Ch 547). The application made by the Former Trustees on 30 November 2012 included a *Beddoe* application in relation to the proceedings concerning the [Y Trust]. Applications under the supervisory jurisdiction relating to the exercise by trustees of duties or powers concerning matters other than litigation are sometimes known generically, although strictly inaccurately, as *Beddoe* applications. Such applications may be of four main types, of which the first and fourth are applications to determine the scope of a duty or power, and applications (whether by trustees or beneficiaries) to determine whether a duty has been properly discharged or a power properly exercised. It is the second and third types which are of relevance to the present appeal. The second type, sometimes known as a category 2 application (following the classification set out in *Public Trustee v Cooper* [2001] WTLR 901), is an application by trustees for the "blessing" by the court of a "momentous" decision which the trustees are proposing to make. The third type of application is one where the

trustees are unable to decide how to exercise a power – perhaps because of conflict of interest, or because the trustees are genuinely deadlocked. The primary difference between the second and third types is that in the second type the trustees intend to exercise their own discretion, whereas in the third type the trustees want the court to exercise the discretion for them (and therefore surrender their discretion to the court). Although it is not always immediately apparent whether a given application is of the second or the third type (because, for example, trustees ask for directions whether or not they should pursue some course of action), it is important to note that the function of the court in each of the second and third types of application is entirely different.

11. In the third type, the court is exercising a discretion: it acts as a reasonable trustee would do in all the circumstances, arriving at a decision which is merely one of a range of potentially acceptable solutions. In the second type of application, however, the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision. It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a way different from that proposed by the trustees. To the extent that the court has any discretion, it is in whether or not to admit the application: if, for example, the court considers that the trustees' decision is of insufficient moment, it may refuse to entertain the application at all. Once it has decided to deal with the application, however, it has no more discretion than in the making of any other declaration, and will make it once satisfied of the propriety of the proposed exercise of the power. It may nevertheless be that the court will sometimes engage in a dialogue with the trustees as a result of which the trustees' decision is modified; but, properly analysed, that is no more than a process by which the court identifies the circumstances in which it will be satisfied that the proposed exercise of the power is within the proper range of such exercises. It is not indicative that the court is exercising a discretion; and any attempt by a court to do so in circumstances where the trustees had not surrendered their discretion would infringe the general principle that a court will not enforce the exercise of a power against the wish of the trustees.
12. There is no doubt that in the present case what the Lieutenant Bailiff was asked to do was to bless a momentous decision. There was no surrender by the Former Trustees of their discretion. In consequence, and in the light of what I have said, it seems to me that the order made by the Lieutenant Bailiff on 30 May 2013 amounted to a final declaration on the refinancing application. Since the order was not an interlocutory order, and the value of the matter in dispute exceeded the statutory amount, leave to appeal was not required.
13. Before I turn to consider the grounds of appeal, it is necessary to make a preliminary comment about the way in which the appeal is to be approached. In dealing with the application made to him for leave, the Lieutenant Bailiff appears to have considered that an appeal would involve a challenge to an exercise of his own discretion; and the written arguments before us proceeded on the same basis. However, as I have pointed out, this is not the case. In order to succeed on the appeal, the appellants would have had to establish that the Lieutenant Bailiff was wrong in law to hold (as he impliedly did) that the proposed exercise by the Former Trustees of their discretion was within the range of proper exercises of the power. It was not necessary for the appellant to satisfy the well established criteria by which a discretionary decision of a judge may be attacked at appellate level, for example that he ignored relevant considerations, took into account irrelevant considerations, or reached a decision that no reasonable judge could have reached. However, what the appellants had to establish was not in substance significantly different from what they would have had to show had the Lieutenant Bailiff's decision indeed been a discretionary one. In order to succeed, they

would have had to show that the Lieutenant Bailiff had been wrong to hold that the Former Trustees were acting honestly and within the ambit of the power (neither of which they sought to do); or that he had been wrong to hold that the Former Trustees had taken into account all relevant considerations, disregarded any irrelevant considerations, and reached a decision that reasonable trustees could have reached. The appellants claimed that the Lieutenant Bailiff had been wrong on each of these three points; but in doing so they were in effect asserting that *somebody* had wrongly identified the relevant considerations and had reached an unreasonable decision. It does not seem to me much to matter whether such a challenge is directed at the judge himself, or at the trustees whose decision the judge is franking.

14. The revised notice of appeal contained nine grounds of appeal. They may be summarised as follows.

- (1) The Lieutenant Bailiff failed to have proper regard "to the fact that the [Trust] is hopelessly insolvent"(ground 1); he was wrong in law to make any order under the supervisory jurisdiction to the prejudice of "creditors to the trust" (ground 9); and he failed to consider properly how an insolvent trust would be able to fund the costs of refinancing (ground 8) - "the insolvency points".
- (2) Having made the order subject to a "condition precedent", the Lieutenant Bailiff was wrong to allow the order to be drawn up notwithstanding that the condition precedent had not been met (ground 3); and he failed to take proper account of the fact that he had been misled as to the fourth respondent's position on the [Y Trust] proceedings (ground 5) – "the condition precedent points".
- (3) The Lieutenant Bailiff was wrong to hold that the Former Trustees' decision did not involve a breach of the undertakings given in Guernsey 1 (ground 7) – "the undertakings point".
- (4) The Lieutenant Bailiff made a number of factual errors. He was wrong to deal with the matter on the basis that a "fire sale" would ensue unless the loan were refinanced (ground 2); he failed to have proper regard to a change in the factual basis on which he was being asked to act, relating to the way in which the loan had previously been financed (ground 4); and he failed to take proper account of the fact that the fourth respondent was unwilling to continue a previous level of funding (ground 6).

The insolvency points

15. The insolvency points appear to me to betray a misunderstanding of the appellants' position. The loans of which the appellants have the benefit are not secured by any charge over any assets of the [Trust]. That being so, the appellants have no direct interest in the trust or its assets. A person who contracts with trustees has a remedy against the trustees, and the trustees (but not the other contracting party) ordinarily have a right to be indemnified out of the trust assets. Thus the appellants have a claim against the Former Trustees on the loans, as the Former Trustees acknowledge; and the Former Trustees prima facie have a right over against the trust assets, that right having priority over the interests of the beneficiaries. However, the Former Trustees' right of indemnity is being challenged in Guernsey 1; and if the challenge succeeds neither the appellants nor the Former Trustees will be entitled to have recourse to the trust assets, and the appellants will be left to their claim against the Former Trustees. Even if the challenge fails, the appellants will have no direct right to the trust assets: their claim will initially be against the Former Trustees, and only if it is unsatisfied will the appellants be entitled to be subrogated to the Former Trustees' right of indemnity. For these propositions, see Lewin on Trusts, 18th ed., 21-38 to 21-41.

16. This misunderstanding pervaded the appellants' skeleton argument. In relation to ground 1, for example, it was said that "in light of the insolvency of the [Trust], the only basis upon

which the Court could decide upon the Proposed Refinancing is whether or not it is necessary to maintain the value of the [Trust] assets available to the creditors. [The Lieutenant Bailiff] failed to do this and took the view that he had a general discretion in the matter, leaving him free to take account of the interests of the beneficiaries, even though there is no net trust fund available to them and even though, in so doing, he was acting to the prejudice of creditors". Similarly, in relation to ground 9, the appellants contended that "the Court's exercise of purported *Beddoes* jurisdiction should not be used to adversely affect the position of creditors to a trust, particularly where that trust is insolvent and where there is or is highly likely to be no net fund available for distribution to beneficiaries"; and, more curtly, "the court has no power to authorise the expenditure of or any dealing with the [Trust] assets to the detriment of a creditor".

17. In my view, these submissions are wrong both as a matter of principle and on the facts of this case. As to the principle, I consider that the fact (if it be such) that a trust is insolvent does not have the consequence either that the trustees cease to have any powers to deal with the trust property or that the court has no jurisdiction to supervise the exercise of those powers. It is no doubt the case that the trustees cannot adversely affect any security (such as a legal charge) that a creditor may have over some or all of the trust assets, or make a disposition with intent to defraud creditors, or cause a company controlled by them to make a payment which would amount to a preference; nor could the court properly give its blessing to an attempt by trustees to do any of those things. Subject to considerations of that sort, however, it seems to me that the court nevertheless in principle has jurisdiction to bless an application of trust property that is not of benefit to creditors. The critical point to note is that the claims of unsecured creditors to the trust assets are derived from the trustee's right of indemnity. This has the consequence that the trustees and the court are dealing with claims that derive from privies to the trust; and that in turn has the consequence that any order made by the court approving a dealing with trust property will bind the unsecured creditors just as much as it binds the trustees through whom they claim. A not uncommon situation in which the jurisdiction is invoked concerns an adverse claim which, if successful, would exhaust the trust property. In such a case, the court undoubtedly has jurisdiction to make an order on a *Beddoe* application that the trustee be indemnified out of the disputed property in respect of his costs of defending the proceedings (although other considerations, such as the strength of the defence and the possibility that the proceedings may be defended by one or more beneficiaries, come into play, because of the potential injustice to the claimant of having to pay the costs of an unsuccessful defence of his claim): see the English Court of Appeal case of *Re Evans* [1986] 1 WLR 101. This is by no means to say that the interests of the creditors are irrelevant: in many cases their interests are likely to be the predominant factor. But in every case the court's task is to consider the matter with regard to the interests of all those who have or may have an interest in the trust property.

18. When he refused leave to appeal on 11 June 2013, the Lieutenant Bailiff said this in relation to the appellants' contention that the *Beddoe* jurisdiction did not apply:

"This is a point which appears to me to strike at the essence of the jurisdiction of the Royal Court to give direction and guidance to trustees in circumstances where very substantial claims are made against either existing or former trustees, like in Guernsey 1. The jurisdiction of the court is in my view unlimited and rightly so; trustees must not be limited in their ability to come to the court to seek directions where they consider either it is necessary to do so or that proposed decisions are of such momentous or other considerable importance to the trust, or might be, that they require protection from the court before the decisions are implemented".

In substance, I agree with that approach.

19. So far as the facts of this case are concerned, the Lieutenant Bailiff had to decide the matter at a time when the unresolved issue in Guernsey 1 meant that he did not know whether or not the indemnity would be upheld, and therefore did not know if the appellants had an indirect interest in the trust assets or not. He cannot himself have been expected to resolve an issue

which was before another Lieutenant Bailiff (and, as may be inferred from the delay in giving judgment, proving not entirely easy to resolve). In this position of uncertainty, the Lieutenant Bailiff was obliged and entitled to deal with the matter on the basis that the relevant question was whether what was proposed by the trustees was in the collective interests of those who were or might be interested in the trust assets. On the face of it, the effect of the refinancing would be to preserve a trust asset for the benefit of anyone who turned out to be entitled to the assets; and, so long as he was satisfied that the trustees had properly taken into account the interests of all those potentially interested, the Lieutenant Bailiff was in my view in principle entitled to declare that the refinancing would be a proper exercise of the power. He had taken entirely appropriate steps to ensure that the views of the appellants were known, to the extent of joining them as full parties to those aspects of the Former Trustees' application that related to [the building]; but, contrary to the appellants' submissions, he was not obliged to treat their opposition to the refinancing as determinative of the application.

20. The Lieutenant Bailiff's reasons for approving the Former Trustees' decision appear from a ruling given by him on 23 May 2013, and from the grounds on which he refused leave to appeal on 11 June 2013. It was only in the second of these that he appeared to have regarded himself as having exercised a discretion; in the first of them, he set out entirely accurately the nature of the exercise that he was undertaking. He noted that he was being asked to give his blessing to the refinancing on the basis, which he accepted, that it was a momentous decision. He made clear that neither the Former Trustees nor the Current Trustee had sought to surrender their discretion to the court: on the contrary, they had formed their own views that the proposed refinancing would be in the best interests of the [Trust] and had obtained relevant advice from well-known London chartered surveyors. Finally, he noted that he must not replace the views of the trustees with his own views: it was not for him to take any decisions on the investment of the assets of the [Trust], nor was it for him to replace the decision of the Former Trustees and Current Trustee about the suitability of the terms of the proposed refinancing with his own decision. Unless, therefore, it can be said that the Lieutenant Bailiff's decision was wrong as a result of his failure to recognise that the trustees had taken into account irrelevant considerations or ignored relevant ones, or had reached a conclusion no reasonable trustees could have reached, it appears to me that he has approached entirely correctly the exercise of a jurisdiction which he undoubtedly had, and his decision should be upheld.

21. The appellants' main complaint was that the Former Trustees, and the court, had failed properly to take into account the effect that the refinancing would have on the only assets of the [Trust] (apart from [the building] itself) that had substantial value. This point was put in the appellants' skeleton argument in the following way:

"The funds authorised to be expended are to be taken from other companies holding a valuable asset on behalf of the [Trust] known as [the Z Companies] without any consideration of the substantial funding requirements in relation to this investment, which is clearly being put at risk".

22. [The Z Companies] hold commercial properties which produce a substantial rental income. UK tax is payable on that income. What was proposed was that the refinancing costs would be met from a tax rebate due to [the Z Companies]; and the appellants' principal objection was that there had been insufficient attention paid to the potential need for that rebate to be used to fund future tax liabilities. In the course of submissions on the appeal, it turned out that the assertion that there had been no consideration of this matter was wrong. It was raised and discussed in the course of a hearing before the Lieutenant Bailiff on 25 April 2013; and it was at the heart of the ruling made by him on 23 May 2013. In paragraph 13 of that ruling, the Lieutenant Bailiff said this:

"Furthermore, on 16 May 2013, the day on which I had said that I had intended to deliver my ruling, [the appellants' advocates] asked me not to approve any Order until they had had an answer to questions raised by them in their letter dated 15 May 2013

about the tax position of [the Z Companies] and about a meeting between HMRC and representatives of the [Trust] or [the Z Companies]. On 16 May 2013 [the Current Trustee's advocates] replied to [the appellants' advocates] on this topic, expressing the hope that their replies satisfied the concerns of the joint liquidators".

The Lieutenant Bailiff declined to make an order on that occasion, instead inviting the Former Trustees and the Current Trustee to submit their current proposal in the form of a draft order. That in fact was done, and the order drawn up on the 30 May 2013 constituted the Lieutenant Bailiff's approval of it.

23. The appellants' concerns about the tax position of [the Z Companies] were clearly set out in the letter of 15 May 2013, and in a letter of the previous day copied to all parties. The answer from the Current Trustee was to the effect that negotiations were continuing with HMRC about the tax liabilities, and that "until such a time as this avenue has been exhausted, and it is confirmed that there is no prospect of outside funding to meet future tax liabilities (either from the [Trust] or elsewhere), there is no question of [the Z Companies]' insolvency". In the circumstances, it is clear that the matter had been squarely raised with the trustees and with the court; that the trustees had properly considered the appellants' objections before putting their draft order before the court; and that the Lieutenant Bailiff was satisfied with the position when he came to approve the order. In those circumstances, it cannot be contended by the appellants that a material consideration was ignored; and it seems to me that it was not unreasonable for the trustees and the court to take the view that the desirability of refinancing [the loan] justified using assets currently existing within [the Z Companies] and leaving the tax liabilities to be dealt with later, since to take that line would not have the consequence that [the Z Companies] were insolvent.

24. For these reasons, the insolvency points fail.

The condition precedent points

25. The order of 30 May 2013 contained the following paragraph:

"AND UPON the Court indicating that this Order should not be issued by the Greffe pending receipt of written confirmation, in terms satisfactory to the Court, of the Protector's position as regards [the Claim] in the Chancery Division of the High Court of Justice of England and Wales".

The Protector is the fourth respondent; and the proceedings are those relating to the [Y Trust]. The claim in those proceedings is that the shares in the company which owns [the building], are in fact an asset of the [Y Trust], not of the [Trust]. If that claim succeeded, the consequence would be that [the building] itself would cease to be an asset of the [Trust]. In circumstances where the proposal was to use other assets of the [Trust] to discharge the refinancing costs, it was a matter of obvious relevance that if the [Y Trust] proceedings succeeded [Trust] assets would have been spent on maintaining an asset of another trust entirely. The Lieutenant Bailiff was plainly concerned about this potential threat. In the course of the hearing on 30 May 2013, he addressed the point on a number of occasions. Addressing the fourth respondent's advocate, he said this:

"The joint application made to me is on the basis, in relation to the refinancing, ... that [the building] is a [Trust] asset and needs protecting. I know that that is a position shared by your client who is a party to Guernsey 2 both as an adult beneficiary, a full agent in that capacity, and as the protector. If there were any condition to that support in the light of the English proceedings I would expect your instructions to be clear and for you to have obtained them because otherwise I would be being asked to proceed on a false basis or a possibly false basis which I should never do in my role in assisting the trust. So I hope that's clear. Please get instructions, urgently. At the

moment we are proceeding on the basis that he is fully on-side with the proposed refinancing".

Later, he said this:

"I would require any order giving effect to my sanction and approval to lie in the court in the Greffe office until evidence has been received which can be in the form of a letter to the court making the position of [the fourth respondent] on the new English proceedings clear. If as I of course expect, bearing in mind the way in which Guernsey 2 has progressed, it is clear that [the fourth respondent] supports the position unequivocally that the shares in [the company] form part of the assets of the [Trust]..., then the order giving effect to my sanction and approval may issue forthwith".

Finally, addressing the advocate for the unborn, unascertained and minor beneficiaries, he said "we have got to wait and see just to make sure I have no concern about where the protector of the [Trust] stands on the claim made against the [Trust]".

26. In these circumstances, the appellants contended that the Lieutenant Bailiff had in effect made a release of his order conditional upon confirmation that the fourth respondent was opposed to the claim in the [Y Trust] proceedings; and that when, contrary to his expectation, it became clear that the fourth respondent in fact supported that claim, the Lieutenant Bailiff had been wrong to authorise the release of his order without further argument or at all.

27. When the application for leave to appeal was made to the Lieutenant Bailiff, he said this:

"To describe that as a condition precedent is... wrong. It was no such thing, and courts on occasion direct that an order reflecting a decision already made by the court should not be released to the parties, it should lie in the court office, in this case the Greffe, until the court is satisfied of one thing or another. I wanted to be satisfied as to the view of the protector [the fourth respondent], the protector under the [Trust], about the prospects of success on the [Y Trust] oral contract proceedings in England and quickly on reading a careful letter from [his advocate] in which it was said that the personal view – in summary, the personal view of [the fourth respondent] was that he supported the proceedings in England, I was satisfied that it was appropriate for me to lift the restriction on the dissemination of the court's order to the parties in Guernsey 2...".

28. This aspect of the matter has caused me considerable concern. The main justification for the refinancing proposal was that it would have the effect of preserving a major asset of the [Trust]. It was plainly relevant that the asset so preserved might turn out not to be an asset of the [Trust] at all. The Lieutenant Bailiff had expressed this view repeatedly at the hearing on 30 May 2013. Although the fourth respondent's views of the merits of the English proceedings would not of course be determinative of them, any lack of commitment on his part in opposing them might indicate that he would attempt to arrange for them to go by default. In these circumstances, it is at first sight perturbing that the Lieutenant Bailiff should permit the release of his order when the fourth respondent's attitude turned out to be the opposite of what he had assumed it would be.

29. In the end, however, it seemed to me that this was not a ground for overturning the Lieutenant Bailiff's order, for two reasons. In the first place, the Lieutenant Bailiff had already made an order authorising the Former Trustees to defend the [Y Trust] proceedings; and that meant both that he had some understanding of the merits of the claim, and that he could have reasonable confidence that they would be properly defended. In those circumstances, the significance of the fourth respondent's support of the proceedings was something that the Lieutenant Bailiff was in a position properly to assess. Moreover, the apparent change in the fourth respondent's position was something of which he could not fail to be aware. Secondly,

it appears that the Lieutenant Bailiff's underlying concern is likely to have been to ensure that the fourth respondent was aware of his duties as protector of the [Trust]. In the course of the hearing on 11 June 2013 at which the Lieutenant Bailiff refused leave to appeal, there occurred the following exchange between the Lieutenant Bailiff and Advocate Swan for the fourth respondent:

"Advocate Swan: What the order required was as we see from its face, that it will not be issued by the Greffe pending receipt of written confirmation in terms satisfactory to the court of the protector's position. It did not say he had to clarify it in any particular direction. What you had indicated orally was that if he did not support the Chancery Division proceedings, then that was it – the order can just go automatically. If he did support the Chancery Division proceedings, then you would have to look at his letter and decide whether to release or not.

Lieutenant Bailiff Talbot: Yes. And in summary, that is right. What was clear was – it seems to me that as protector – particularly bearing in mind the helpful guidance of the Royal Court of Jersey on issues relating to the role and performance of protectors – it is his role to take all appropriate steps in support of both the Current and the Former Trustees to maintain the net value of the Trust. But, he is entitled to hold a view about the merits of claims made.

Advocate Swan: And that is what he very openly expressed in the letter.

Lieutenant Bailiff Talbot: But he doesn't, it seemed to me, in your firm's letter – [the fourth respondent] was not seeking, as it were, to throw out of the window and not comply with his duties as Protector.

Advocate Swan: Sir, no. He was simply expressing his personal view about the outcome of the Chancery Division proceedings. He may be right. He may be wrong.

Lieutenant Bailiff Talbot: Yes. Very good."

30. Although, as I have said, I do not regard this as a ground for overturning the order, I do not regard what happened as satisfactory. The purpose of a direction that an order is not to be drawn up or issued immediately is to allow the judge to retain jurisdiction over the case pending some event. Once a final order is perfected, the judge becomes *functus officio* and may change the order only on very limited grounds; and the only way to change the substance is by an appeal. It sometimes happens that a judge wants to be satisfied on some matter or wants to give a non-party a chance to make representations, or for some other reason wants to defer finality until some uncertainty is resolved. The judge is reserving the ability to react to the new circumstances in any way that is suitable, and for that reason (and others) it is not technically right to say – as the appellants did – that the order is subject to a condition precedent. However, a judge may not simply defer perfection of an order for no good reason; and if he does decide to direct that the order be not drawn up immediately, he should identify what the reason is for his direction. In the present case, the Lieutenant Bailiff did go some distance towards this: he identified that he wished to be satisfied of the fourth respondent's position, but did not state what criteria needed to be met if he were to be so satisfied. The remarks he made when directing that the order should not be drawn up strongly indicated that the criterion was the fourth respondent's expression of support for the proposition that [the building] was an asset of the [Trust]. Once it became clear that that was not the position, it would in my view have been better for the Lieutenant Bailiff to explain his reasons for allowing the order to be released, preferably after first inviting additional submissions on the matter.

The undertakings point

31. In an order made on 6 July 2011 in Guernsey 1, the Former Trustees gave an undertaking:

"not to cause or permit any payments or transactions or dealings which relate to the assets of the [Trust] outside the ordinary course of business and which individually or in total exceed an aggregate value of £100,000 ... without the prior written consent of the [appellants] or having first obtained a direction from the Court sitting in Guernsey 1".

32. The Lieutenant Bailiff took the view that the proposed refinancing was within the ordinary course of the Former Trustees' business, and that accordingly neither the consent of the appellants nor a direction of the court in Guernsey 1 was necessary before the refinancing could go ahead. The appellants contended that the Lieutenant Bailiff was wrong, and that their consent or a direction was necessary unless a transaction was both in the ordinary course of business and of a value less than £100,000.
33. In my view, that is plainly not what the undertaking says. What it prohibits is any transaction outside the ordinary course of business *and* which exceeds £100,000 in value. The appellants' argument involves reading the word *and* as meaning *or*; and there is simply no justification for doing that. The undertaking is designed to catch transactions which are both outside the ordinary course of business and in excess of the value of £100,000; put the other way round, transactions are permitted if they are either in the ordinary course of business or are outside the ordinary course of business but individually or in aggregate do not exceed the value of £100,000. The Lieutenant Bailiff was accordingly correct to take the view that, once he had decided that the transaction was in the ordinary course of business (as to which there was no appeal), the undertakings had no further relevance.

Factual points

34. I can deal shortly with the matters of fact in respect of which the appellants say that the Lieutenant Bailiff was in error. They are identified in paragraph 14(4) above. The first of them is that he was wrong to approach the matter on the basis that a "fire sale" would ensue if there were not a refinancing. As to that, the whole point of the refinancing was to deal with a situation in which the existing creditor had said that it was not willing to continue providing finance. Although it had granted a succession of monthly extensions of the loan facility, that was against a background of circumstances in which an alternative lender had been identified and steps were being taken to put the trustees in a position to obtain a new loan. It is hardly surprising that [the lender] was willing to refrain from enforcing its security while there was a real possibility of its being paid; but it was also overwhelmingly likely that, once it became clear that there was no possibility of refinancing, [the lender] would be left with no alternative but to realise its charge. The Lieutenant Bailiff was, in my opinion, justified in taking the view that, if the charge were realised, it would be done to a timetable to suit [the lender] rather than to ensure an orderly marketing of [the building]; and he had evidence that that would cause the price to be depreciated by up to £3 million. Ground 4 relates to an alleged failure by the Lieutenant Bailiff to have regard to a change in what he was being told about how the loan had previously been serviced. There was such a change: the Lieutenant Bailiff had originally been told that the costs of servicing the loan had traditionally been provided to [the company owning the building] by the trustees of the [Trust], whereas in fact they had been met from monies found by the fourth respondent or another company. The problem for the appellants, however, is that this change had become apparent to, and had been considered by, the Lieutenant Bailiff well in advance of the order that is the subject of this appeal. The Lieutenant Bailiff referred to it in his ruling of 23 May 2013 in the following terms:

"I gave my approval to the *then* proposed refinancing of [the building] on the second detailed hearing in the Royal Court on 24 April 2013; but very soon afterwards I was forced to have my decision recalled since, in circumstances where I do not wish to level any criticism in any direction, I had not been given a fully accurate picture of the way in which the facility from [the lender] had been obtained or the parties and companies which had provided financial assistance to the [Trust] to enable it to be obtained".

It follows that the Lieutenant Bailiff was fully aware of the true position by the time he made his order of 30 May 2013. The appellants nevertheless contend that the Lieutenant Bailiff should have insisted upon the fourth respondent continuing to provide funding equivalent to that which he had previously made available. Again, this contention seems to me to be wrong: the order of 30 May 2013 contained undertakings by the fourth respondent, the Current Trustee and the Former Trustees to make payments or maintain or make available deposits or loans, and it is accordingly clear that the Lieutenant Bailiff was fully aware of what was being provided otherwise than by way of a refinanced loan. In reality, here as elsewhere the appellants are contending that there should have been no refinancing at all at the expense of the [Trust]; but, for the reasons I have given, I am satisfied that the trustees were entitled to conclude that refinancing should be sought and the costs of it met so far as possible out of assets of the [Trust], and the Lieutenant Bailiff was entitled to frank that decision.

Costs

35. At the conclusion of the hearing, we indicated that, if the appellants wished to resist an order that they pay the costs of the appeal, they should provide submissions in writing on that point to us, with the respondents being given an opportunity thereafter to reply. We have had such submissions.
36. The appellants' first submission is that the question of costs should be held over until after we have given our reasons for dismissing the appeal. I would not accede to that submission: nothing in the way in which I have dealt with the issues seems to me to give the appellants any additional reason for suggesting that we should depart from the ordinary rule that the successful parties should have their costs.
37. The appellants' substantive points on costs are as follows. First, they say that no decision on costs should be made until the extent of the undertakings can be clarified in Guernsey 1; secondly, they say that the appeal was made necessary by failings in the way in which the Royal Court dealt with the issues for which the appellants cannot be held responsible; thirdly, they say that they were forced into appealing on an accelerated timetable that deprived them of the opportunity to consider carefully whether they should appeal or not; and fourthly, they say that if costs are to be awarded to the respondents they should have only one set between them since their interests on the appeal were identical.
38. As to the first of these points, the meaning of the undertakings is, as I have said, clear; and the Lieutenant Bailiff was entitled to act on that clear meaning. As to the second point, I do not accept that there have been any such failings. The question of the accelerated timetable will be dealt with by Beloff JA, President, in his judgment; but it seems to me that, having decided to persist with the appeal on the accelerated timetable, the appellants cannot complain of the consequences of losing. Finally, although it is certainly true that the respondents had a community of interest in resisting the appeal, the conduct of each of them was under attack at different points in the appeal and they were in my view entitled to separate representation to reflect their differences in position.
39. There is a subsidiary question as to whether all of the respondents, or merely the Current Trustee, should be entitled to an indemnity from the assets of the [Trust] in respect of their irrecoverable costs. The Current Trustee is entitled to such an indemnity by virtue of its position as the current trustee; the Former Trustees are not entitled as of right to such an indemnity, but given that they are prime movers in Guernsey 2 and are seeking to preserve the assets of the [Trust] (albeit potentially for their own benefit) it seems to me that it would be wrong to draw a distinction between them and the Current Trustee. I have some hesitation about applying the same principle to the fourth respondent, who had a strong personal interest in the preservation of [the building]; but in the end I have concluded that it would be wrong that any of the respondents should be put to expense personally as a result of this appeal.

40. We have already dismissed the appeal itself; for the above reasons, I would do so with costs, and direct that all the respondents are entitled to indemnity out of the assets of the [Trust] to the extent that they cannot recover them from the appellants.

BELOFF JA, PRESIDENT:

41. I entirely agree with Martin JA both as to the outcome of the appeal and as to the proper order for costs.
42. I wish to add only a few words on a procedural aspect alluded to in paragraph 38 above. The need for the Court of Appeal to deal with the matter urgently sufficiently appears from paragraph 7, and was emphasised by the Lieutenant Bailiff; there was therefore good reason to believe that a decision was required before 30th June. The Former Trustees applied to me sitting as a single judge for directions designed to accelerate the hearing.
43. An issue was, however, raised by the Respondents to that application (the present Appellants) as to whether I had jurisdiction to give such directions, and in particular to abbreviate the usual timetable given that they had not filed any notice of appeal.
44. I considered that I did have jurisdiction, by reason of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 Rule 3 which provides, so far as material, as follows:

“Every notice of appeal shall be served within one month from the date on which the judgment or order of the court below was pronounced”;

and of Rule 17 which provides, so far as material, as follows:

“The Court or a judge thereof may, on such terms as the Court or judge thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any order or direction, to do any act”.

45. It seemed to me that there is no reason why the specified time for service of a notice of appeal should not be abbreviated prospectively. There is nothing in the regulatory language which is inconsistent with such a construction and much to be said in its favour. Otherwise it would be open to a litigant, defeated before the Royal Court, in certain circumstances to delay for tactical reasons filing a notice of appeal until the expiry of the presumptive period for such exercise to the prejudice of the other side and to the disablement of the Court of Appeal in seeking to do justice.
46. Had it been necessary to do so, and absent any provision of the Court of Appeal law or rules to contrary effect, I would have concluded that the inherent jurisdiction of the Court to make its own (potential) orders effective could have been deployed. See *Connelly v DPP* [1964] AC 1254 per Lord Morris at p.1301.
47. In the event, taking account of all the circumstances and applying the crucial test of the interests of justice, I exercised that jurisdiction to make an order nisi on 13th June 2013 requiring the putative Appellants to file a full notice of appeal to stand as their case by 1 pm on 18th June and gave consequential directions. My decision was endorsed by the full Court on 21st June, and the Appellants did not take up our invitation to renew their challenge to jurisdiction at the full hearing.

NUTTING JA:

48. I have had the advantage of reading in draft the judgments of Martin and Beloff JJA. I agree with what they say and have nothing to add.