

Appeal against the decision to grant *Beddoe relief* to the Trustees of certain family trusts and against the decision that the *Beddoe order* be extended to the costs of dealing with the appeals against the decision concerning construction of the principal family trust and against the *Beddoe relief* decision.

[2020]GCA067

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 539

24 July 2020

Before:

**Clare Montgomery QC, President
George Bompas QC
Helen Mountfield QC**

Between:

D

Appellant

-v-

**(1) A
(2) B
(3) C**

**(5) – (12); (15)-(19) THE MINOR AND UNBORN BENEFICIARIES AND THEIR
REPRESENTATIVES
(13) THE INCUMBENT PROTECTOR
(14) A TRUSTEE COMPANY**

Respondents

**And
THE TRUSTEES**

Trustee Respondents

-AND-

**IN THE MATTER OF
THE TRUSTS (GUERNSEY) LAW 2007 (AS AMENDED)**

-and-

**IN THE MATTER OF
RA TRUSTS
AND**

IN THE MATTER OF R TRUSTS

AND IN THE MATTER OF THE W TRUST

Advocate Paul Richardson for the Appellant
Advocate Simon Davies for A
Advocate Cole for the trustee Respondents (the Trustees)
Advocate Jeremy Wessels for C
Advocate Konrad Freidlander for The Protector

JUDGMENT OF THE COURT

(in Camera)

HELEN MOUNTFIELD JA:

- 1 This is D’s appeal against two decisions of Judge Finch, later Lieutenant Bailiff Finch:
 - 1.1 a decision of 16 January 2020 to grant Beddoe relief to the Trustees of certain family trusts (hereafter “the Trustees”), on an application which had been brought by the Trustees on the same day; and
 - 1.2 his confirmation, in a judgment of 12 May 2020, (in response to a further application by the Trustees dated 24 February 2020) that his 16 January 2020 Beddoe order extended to the costs of dealing with appeals against a decision of 29 January 2020 concerning construction of the principal family trust, the R Trust, and against his 16 January decision.

- 2 The 16 January 2020 order which is the principal subject of this appeal provided that until further order or directions, the Trustees should:
 - 2.1 continue to hold the R trust assets and to deal with them as if they remained undisputed trustees under the R Trust and
 - 2.2 be entitled to be indemnified, on a re Beddoe basis, for their engagement in proceedings then underway concerning the partition of the family trusts, and as to the validity of the purported appointment of new Protectors of the R Trust and the purported appointment of the Purported New Trustees of that trust. (The detail of the argument concerning the basis for the appointment of the New Protectors is set out in our judgment in Appeal 539/2020 which was given yesterday, on 23 July 2020, explaining our reasons for having the previous day dismissed the appeal then before us).

- 3 The Appellant (supported by A, the First Respondent) accepts that these were orders which it was open to Judge Finch to make in exercise of his judicial discretion; but submits that he ought not to have made them. In short, the Appellant submits that it was procedurally unfair for the application to have been determined without service of evidence or statements of claim in advance, without disclosure of the material correspondence with the Greffe, without affording the Appellant more time to receive and respond to papers supporting the Trustees’ application, and without requiring costs budgets to have been submitted. The Appellant also complains about the lack of reasons.

- 4 The Trustees, supported by C (the Third Respondent), submit that Judge Finch’s exercise of discretion was unimpeachable in the circumstances in which his order was made, and the reasons for his decision were more than sufficient; moreover, that in the light of events since the orders which are the subject of this appeal, it is academic in any event. They make the same submissions in relation to the appeal from the second Beddoe order, that of 12 May 2020.
- 5 The uncontested factual background to this appeal is as follows:
- 5.1 The Trustees had applied to court for blessing of a decision of the Trustees of 7 October 2019 to distribute the funds of the family R Trusts, whereby the trusts would be partitioned so that part of them would constitute a separate fund for the benefit of C and her children. The proceedings had been in train since 2013. The hearing was listed to be heard six weeks later before the Deputy Bailiff for three days on 21 – 23 November 2019.
 - 5.2 On 6 November 2019, separate applications were made by B and A on the one hand and D on the other, to adjourn the blessing hearing, saying that more time was needed to prepare. In B’s and A’s case, this was having belatedly replaced advocates due to the continued unavailability of their earlier advocate. In D’s case, it was due to having belatedly parted company with B’s and A’s legal team due to an asserted conflict of interest which was said only recently to have emerged. On 8 November 2019, the Deputy Bailiff somewhat reluctantly acceded to the adjournment request, and relisted the blessing hearing for 10-12 February 2020.
 - 5.3 On 18 December 2019, A executed deeds which purported to appoint British Virgin Islands and Bahamian companies, as additional protectors of the R Trust alongside the Incumbent Protector, a senior partner at a trust company in Jersey (“the Purported Additional Protectors”). She took this step without consulting any of the incumbent Protector, the Trustees or her daughter, C.
 - 5.4 On 14 January 2020, the Purported Additional Protectors in turn – again without consulting the Incumbent Protector, the Trustees or C – purported to replace the Trustees as trustees of the RTrust with a Swiss trust company, the Purported New Trustee.
 - 5.5 The Incumbent Protector was spoken to in confidence by A later on the same day. A did not tell him the details and has not released him from the obligation of confidence. He was on holiday. He and the Trustees were told of their purported replacement, for the first time, on the next day – 15 January 2020. This was two days before skeleton arguments were due to have been lodged and served for the re-listed blessing hearing, and of course, further preparation was required after that, since the hearing was listed less than a month later. A has never explained her failure to consult with the Incumbent Protector, the Trustees, or C before purporting to take these steps. She has had ample opportunity to do so since, in particular, once Judge Finch had at the 16 January 2020 hearing commented that the manner in which the steps had been taken appeared in the nature of a ‘Commando raid’, a reasonable and obvious inference in the circumstances. The professional Purported New Trustee and the would-be Protectors have not explained their failure to consult the Incumbent Protector or the beneficiaries.
 - 5.6 On the same day as the Trustees were informed of their purported replacement by the Purported New Trustee, the Purported New Trustee wrote to the Greffier on 15 January 2020 to seek an adjournment of the deadline for service of skeleton arguments in the blessing hearing *sine die*, which application immediately garnered the support of D, B

and A, in letters to the Greffier of the same date. The Purported New Trustee also wrote to the Trustees asking them to hand over the trust assets.

- 6 In the light of these uncontested facts, Judge Finch’s observation (in his 16 January 2020 judgment at p21H) that the replacement of the Trustees was conducted “more in the mode of a night-time Commando raid than a normal procedural step” cannot be faulted, unless perhaps for being too generous to A and those advising her. What had been done was an attempted coup, to displace before there could be any response both the Protector and the Trustees appointed when the Trust was established. It is hard to avoid the inference that at least part of the purpose of the cloak-and-dagger approach to purporting to add additional legal persons to the office of Protector, who then purported to take a majority decision without consultation (in the Incumbent Protector's absence on holiday) to appoint the Purported New Trustee as a replacement of the Trustees, was to de-rail the blessing proceedings which had been re-listed for 10-12 February 2020.
- 7 In any event, these unheralded steps certainly left the Trustees in a very difficult position, with urgent procedural steps in preparation for forthcoming litigation to be fulfilled, if, as they believed (correctly as it later transpired) they remained the properly appointed Trustees of the R Trust.
- 8 It was in those circumstances that the next day, 16 January 2020, the Trustees made, and Judge Finch granted, applications under section 69 of the Trusts (Guernsey) Law 2007 that they should continue to hold and deal with the assets of the R Trust as if they were undisputed trustees until further order or direction, and that they should continue to be afforded Beddoe relief, meaning that they would be entitled to claim an indemnity for their costs of so acting from the trust funds.
- 9 On 16 January 2020, B and A applied for the blessing application to be adjourned. This application was not granted at a case management hearing on 22 January 2020, and was formally rejected by the Deputy Bailiff at the conclusion of a hearing on 29 January 2020.
- 10 The main purpose of the 29 January hearing was to determine the question of whether, on proper construction of the Declaration of Trust for the R Trust, A indeed had the power she had purported to exercise on 18 December 2019 to add the Purported Additional Protectors to the office of Protector. The Deputy Bailiff gave judgment in the construction appeal ex tempore on the same day, holding that on true construction, paragraph 1 of Schedule C of the Declaration of Trust had not afforded A power to purport to appoint the Purported Additional Protectors to the office of Protector. It followed that the purported removal of the Trustees was also of no effect. That decision was subject to an appeal which the Court of Appeal heard on 22 July 2020 and dismissed with reasons given the following day, this being the appeal referred to earlier in this judgment.
- 11 On 5 February 2020, D (supported by B and A) again applied for an adjournment of the blessing application, on the basis that they had not received the hearing bundles. This application was rejected on 12 February 2020, which was by then the first morning of the hearing.
- 12 On the afternoon of the third day of the blessing hearing, the application went part heard due to illness of a family member of D's advocate. It was relisted for 25 March, following rejection of an application by A dated 23 March to adjourn because she may have contracted Covid 19, and an application by D to adjourn on the basis of various technical difficulties. Following video conference test hearings on 23 and 25 March, the blessing hearing was relisted for 2 April 2020. Further applications for adjournment on 26 March were rejected on 30 March 2020, and the substantive blessing hearing was concluded on 2 and 3 April 2020. Judgment is awaited.

- 13 We regard as entirely hopeless the attempts to impugn Judge Finch’s decisions to grant the Trustees Beddoe relief (on 16 January 2020) and to confirm that this relief should extend to the construction appeal and the present appeal (on 12 May 2020). We consider his brief reasons including his reference to a ‘Commando raid’ pithily encapsulate the problem that confronted him and the reasons for his decision. The brevity of the reasons did not preclude a further application to the court should it be required for the purpose of understanding his orders and the reasons for them.
- 14 It was common ground that Judge Finch had jurisdiction to determine these applications; and, as Advocate Wessels rightly observed, the fact that these were applications under section 69 of the Trusts (Guernsey) Act 2007 meant that there was no error in the applications having been determined without service of Statements of Claim.
- 15 It is true that the applications were determined at very short notice, at the end of a court day on 16 January 2020, with little time for the Appellant, A and B to respond to the documents lodged earlier that day. But the chronology above shows that it sits ill in their mouths to complain that the Trustees had failed to give them longer notice of the applications.
- 16 The Trustees had been taken by surprise by being notified on 15 January 2020 that they had purportedly been replaced by the Purported New Trustee. This was only two days before skeleton arguments were due to be served for the blessing hearing, and four weeks before the blessing application was due to be heard - but almost a month after A had purportedly exercised a power to appoint the Purported Additional Protectors.
- 17 The Trustees needed to continue to exercise their fiduciary duties, they needed to meet a court deadline for service of skeleton arguments in the long-drawn-out blessing proceedings, they needed to respond to the request for the transfer of the trust assets and they considered (rightly as it turned out) that they needed to challenge the construction of the Declaration of Trust under which they had purportedly been replaced, to establish whether (as they believed) they continued to be trustees. They needed to take these steps as a matter of extreme urgency, given the forthcoming proceedings, and they needed proper indemnity for the costs of taking those steps, to determine what constituted the proper administration of the R Trust in the interests of all its beneficiaries. They really had little option but to make an immediate application to court on 16 January 2020, and it is scarcely surprising that they had not produced written arguments in support of the application in advance, nor that they had not, at that date, drawn up costs budgets.
- 18 We agree with the submission made on behalf of C, that the urgency of the matter was caused by the last-minute tactics on the part of those who opposed the partitioning of the Trust.
- 19 We see no possible basis for allowing the appeal against the 16 January 2020 decision, especially bearing in mind the high threshold for setting aside an exercise of discretion by a court in a case management context. This operates in Guernsey on the same basis as articulated by the Court of Appeal of England and Wales in *Royal & Sun Alliance Insurance plc v T & N Ltd (In administration)* [2002] EWCA Civ 1964, [2003] PIQR P26 at [38]. Although this may require modification in the context of trusts administration, there must necessarily be a recognition by any appellate body that the standard of review as respects the exercise of discretion in relation to the management of trusts applications under section 69 involves the grant of considerable deference to the Royal Court. In particular, where factors have to be balanced and where procedural orders need to be made on an urgent basis, the Court of Appeal will not interfere with

the orders of the Royal Court unless its conclusion was clearly wrong. But we consider that Lieutenant Finch's decisions were clearly right.

- 20 First, the points taken against the making of the order are entirely technical ones. It was said that the Appellant did not have time to prepare a response to the Trustees' application. But despite our invitation to do so, Advocate Richardson was quite unable to say what substantive submissions could have been made to oppose the grant of Beddoe relief, other than that the Appellant might have insisted on seeing detailed costs estimates or budgets from the Trustees. But in this regard, we consider it telling that no application ever was made to set aside or vary the Beddoe relief, notwithstanding the fact that Judge Finch's order was expressly made "subject to further order or direction", and no request was ever made to ask the Trustees to quantify their likely costs. Had the Appellant had any substantive points to make against the award of Beddoe relief to the Trustees pending determination of the validity of the Purported New Trustee's purported appointment, but which he had not had time to develop on 16 January 2020, the obvious step would have been to have applied to the court thereafter for a further order varying or limiting the relief sought. The fact that there was no such application indicates, in our judgment, that the objection to the 16 January 2020 decision is entirely technical and without any substantive merit.
- 21 Secondly, although complaint is made about late service of documents and a breach of the obligation to make full and frank disclosure in connection with the communications with the Royal Court prior to the making of the application, there is no evidence that these matters could have made any material difference to the decision. As we have already pointed out, if there was considered to be any real merit in these points, they could and should have been dealt with by using the liberty to apply provision.
- 22 Thirdly, this appeal is academic. Any trustee purportedly removed in circumstances which appeared ultra vires the Declaration of Trust would act properly in participating in proceedings to determine that issue, and in seeking an indemnity for the legal costs of doing so. The Trustees did participate in the construction hearing on 29 January 2020 and in the appeal against the Deputy Bailiff's decision. They were entirely vindicated. So they were entitled to their costs of doing so in any event, and an indemnity from the Trust funds of any costs not recoverable from another party.
- 23 Any trustee properly appointed and taking proper steps in performance of their office would have been entitled to be indemnified from the trust property for the legal costs of participating in blessing proceedings conducted to resolve a question concerning the proper administration of the trust. Since, it transpired, the Trustees were properly appointed, they were entitled to be indemnified for the costs of participating in the blessing proceedings in any event.
- 24 Nor do we accept the final submission made for the Appellant that the application of 24 February 2020 was a futile waste of costs. In the highly contested and charged circumstances of the various overlapping sets of proceedings concerning the administration of the Trusts, we consider it was prudent of the Trustees to clarify that the re Beddoes orders of 16 January 2020 extended to the costs of dealing with the construction and Beddoes appeals as well as the first instance hearings.
- 25 In those circumstances, we dismiss this appeal.