Neutral Citation Number: [2020] EWHC 18 (Ch)

Case No: PT-2018-000391

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 14/01/2020

Before:

CHIEF MASTER MARSH

- -

Between:

HM Attorney General	**Claimant**
- and -	
Zedra Fiduciary Services (UK) Limited	**Defendant**

- -
- -

William Henderson (instructed by the **Government Legal Department**) for the **Claimant**
Robert Pearce QC (instructed by **Macfarlanes LLP**) for the **Defendant**
Giles Richardson (instructed by **Forsters LLP**) for the **Applicant**

Hearing date: 12 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. The 'National Fund' ("the Charity") is a charity registered under the Charities Act 2011. By virtue of section 37(1) of that Act, it is "for all purposes other than rectification of the register, conclusively presumed to be and to have been a charity at any time when it is … on the register."

2. The Charity was created following the deposit of approximately £500,000 in cash and securities with Barings Brothers & Co. Limited ("Barings") in November 1927 and by Barings executing a deed ("the Deed") on 9 January 1928 setting up the Charity with its initial funding. The funds were provided on the basis that the identity of the benefactor was to remain private and the name has remained out of the public domain.

3. This claim is brought by HM Attorney General seeking directions about whether the court has jurisdiction to make a scheme altering the trusts contained in the Deed, either under its administrative jurisdiction concerning charities or under the cy-pres jurisdiction, and consequential directions. The defendant ("Zedra") is the current trustee of the Charity.

4. The Part 8 claim was issued on 22 May 2018 and on 22 January 2019 directions were given to enable the claim to be heard by a High Court Judge. The disposal hearing was fixed for a 5 day window commencing on 18 November 2019. On 11 November 2019 the Applicant applied for an order joining him as an additional party to the claim and for an order that he should be appointed to represent a class of persons with a similar interest in the claim. It is accepted that the Applicant is a relative of the benefactor and will be entitled to a portion of his residuary estate if the original gift fails. The application was opposed by HM Attorney General. It was neither supported nor opposed by Zedra.

5. In view of the proximity of the disposal hearing, an order was made on 13 November 2019 vacating the date of the disposal hearing and fixing a date for the hearing of the application. In the event, the application was re-listed and heard on 12 December 2019 and judgment was reserved. The disposal hearing of the claim will now take place in October 2020.

Joinder

6. Under CPR 19.2(2) the court has power to add a person to a claim if:

> "(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

7. Four points arise concerning the jurisdiction under CPR 19.2(2):

   (1) The term "in dispute" should be read widely so as to include 'in issue': see *In Re Pablo Star Limited* [2017] EWCA Civ 1768 at [50] – [51] per Sir Terence Etherton MR.

(2) The Master of the Rolls also observed in *In Re Pablo Star Limited* at [60] that when a court considers an application for joinder "… two lodestars are the public policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the Overriding Objective in CPR Part 1".

(3) The parties are agreed that the Applicant must be able to demonstrate that the issue in dispute that forms the basis for joinder must be an issue that has adequate prospects of success. Mr Richardson who appeared for the Applicant submitted that the 'real prospect of success' test should be applied. Mr Henderson, who appeared for HM Attorney General submitted, against himself, that the test under CPR 3.4(2)(a) should be applied. If the "no reasonable grounds" test is applied in the way it has been construed in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 and other cases, the Applicant need only show that the issue has some prospect of success or, put the other way around, that it is not bound to fail.

(4) The thrust of both limbs of CPR 19(2) concerns the desirability of all the parties involved in or affected by a dispute being before the court. This avoids a multiplicity of proceedings[1] and has the benefit of all relevant parties being bound by the court's determination.

8. The test as it is set out in the rule is rather wider than considering whether there is an issue in dispute. The court must be satisfied that it is desirable to join the additional party. Those two elements need to be considered together. Here the Applicant says it is desirable for him to be joined because, as the claim is currently proceeding, the interests of those who wish to assert that the original gift failed may not be adequately represented. The Applicant has a strong motivation for pursuing that issue in light of the size of the Charity's current assets.

9. It seems to me that Mr Henderson's approach to whether or not there is an issue between the Applicant and the existing parties is the right one in this case. The Applicant seeks to be joined because he wishes to benefit from the possibility of a substantial addition to the residuary estate of the benefactor. It should not be necessary for the Applicant to show that he has a real prospect of success. Rather he must show he has an arguable case, a case that has some prospect of success, and that it is desirable he should be joined as a party.

Background

10. The Charity was set up in the following way:

(1) On 10 November 1927 cash and securities with an approximate value of £500,000 were deposited in an account with Baring Brothers & Co. Limited ("Barings") by the benefactor. It need hardly be said that in 1927 £500,000 was an enormous sum of money.

(2) At around the time of making the deposit, the benefactor wrote a letter to Barings explaining the reason for making the gift:

[1] See section 49(2) Senior Courts Act 1981.

> "Gifts to the Nation of historic sites, buildings and works of art, are happily frequent; gifts to repay debt comparatively rare, this last being a dull objective but bringing its accomplishment certain comforts of its own. To repay the National Debt may be thought to be beyond the reach of individual effort, but as a beginning towards this end I am placing at your disposal, as Trustees for the Nation, some £500,000 as the nucleus of a fund to accumulate in your hands, and to be applied eventually to this object.
>
> I am entrusting this fund to your house in order to secure the benefit of your long experience in finance: and in the hope that others may from time to time be prompted to add to it, or on similar lines to set up funds of their own, citizens and City uniting in an attempt to free their country from debt."

(3) On 22 December 1927 the Superannuation and Other Trusts (Validation) Act 1927 ("the 1927 Act") received the Royal Assent and came into immediate effect.

(4) On 9 January 1928 Barings executed the Deed.

(5) On 26 January 1928 Lord Revelstoke, who was then the Chairman of Barings, wrote to Winston Churchill as Chancellor of the Exchequer to formalise earlier communications about the Charity and to convey the terms of the benefactor's letter.

(6) The Chancellor of the Exchequer then made a public announcement in which he acknowledged the government's gratitude for the gift and expressing regret that he could not thank the benefactor by name. In describing the National Fund, he said:

> "The capital is to accumulate at compound interest over a long period of years. Ultimately, with all its accrued proceeds swelling progressively with the passage of time, it is to be applied to the reduction of the National Debt. In order to facilitate this gift Parliament was invited last session to make an exception to the law forbidding Perpetuities and to declare long accumulations lawful when they had this especial object in view."

11. The last sentence of the announcement is a reference to section 9(1) of the 1927 Act which, including the general heading that precedes it, provides:

> "*Provisions as to Funds for the reduction of the National Debt*
>
> 9 Validation of trust funds for the reduction of the National Debt
>
> (1) Where by any instrument directions are given for any property being held upon trust and the income thereof being wholly accumulated … for any period to be determined under the provisions of the instrument, and for the property and accumulations being transferred at or before the expiration of that period to the National Debt Commissioners to be applied by them in reduction of the National Debt, then unless the Treasury within three months after they receive notice of the taking effect of the instrument disclaim the interest of the National Debt Commissioners under the said directions, notwithstanding any Act or rule of law

> to the contrary, the directions shall be valid and effective and no person shall be entitled to require the transfer of any part of the property, income or accumulations otherwise than in accordance with the provisions of the instrument."

12. The long title to the 1927 Act is:

> "An Act to amend the law relating to perpetuities and accumulations, as respects certain benefit funds and as respects trust funds for the reduction of the National Debt."

13. Sections 1 to 8 of the 1927 Act provide a scheme for the registration of trusts of a type that are described in section 2. Broadly they are superannuation and widows' pension schemes and life assurance schemes for employees. By registration, the trust could avoid the rule against perpetuities and thereby accumulate income for beneficiaries of registered schemes over a lengthy period. Section 9 has the appearance of a provision that was tacked on to a draft Bill at a late stage because it follows after the interpretation provisions for the entire Act that are contained in section 8.

The Deed

14. Under clause 2 of the Deed, the Trustees were required to hold the National Fund:

> "… upon trust until the date of application to accumulate the net income and profits thereof in the way of compound interest by investing such income and profits and all resulting income and profits from time to time and on and from the date of application shall stand possessed of the National Fund including the accumulations Upon trust then to transfer and pay the same to the National Debt Commissioners to be applied by them in reduction of the National Debt."

15. The "date of application" is defined in clause 3(a):

> "The date of application shall be the date fixed as such by the Trustees as being the date upon and after which effect can be given to the desire of the founder of this trust that the National Fund shall be retained and accumulated until either alone or with other Funds then presently available for the purpose it is sufficient to discharge the National Debt …".

16. There is an exception to the requirement that the funds are to be accumulated until they are sufficient to discharge the National Debt. Recourse to the funds could be made in the case of national exigencies, although this power has never been exercised by the Trustees.

17. Clause 2 of the Deed contemplates "reduction" of the National Debt on the 'date of application' whereas clause 3(a) contemplates discharge of the National Debt on that date. The two apparently inconsistent provisions can be reconciled because the Trustees were entitled, when setting the date of application, to have regard to other funds then available for the purpose of discharging the National Debt. There were indeed other funds. The Elsie Mackay Fund was set up in 1928 with an initial gift of slightly in excess of £527,000 and the John Buchanan Fund was set up in 1932 with

bequests totalling slightly in excess of £4,000. Both funds were subject to a trust period of 50 years and have been paid to the National Debt Commissioners.

18. Although the initial gift of £500,000 forms the largest share of the fund, there were numerous other smaller donations to the Charity. Zedra has produced a list of donations to the Charity (excluding bequests under wills and settlements). The majority were made before the Second World War (and most were in 1928). There were, however, donations made to the Charity up to 1982.

19. The value of the fund held by Zedra is now approximately £520 million. In 1928 the National Debt stood at £7.6 billion. At the end of the financial year 2018/2019 it was £1,821.3 billion.

The Application

20. The Applicant applies to be joined on the basis that he is a relative of the benefactor. Zedra is aware of the identity of the benefactor and both HM Attorney General and Zedra accept for the purposes of the Application that he was one of three brothers of the Applicant's great-grandmother. The Applicant is not able to claim title to the money held by Zedra. He is, however, by his blood relationship with the benefactor able to show, subject to demonstrating some prospect of success on the legal issues, an interest in that part of the fund that relates to the initial donation.

21. The Application was made at a late stage of the claim, but nothing now turns on this. The Applicant only became aware of the claim on 2 October 2019 and from that point onward he acted promptly. He seeks to be joined so that he may file evidence, including expert evidence, on two questions. First, whether it was practicable to carry into effect the purpose for which the trust was set up as expressed in the Deed or whether there was any reasonable prospect that it would become practicable at some later time and, secondly, whether the benefactor had a general charitable intention when he established the trust. The Applicant wishes to contend that the trust was void ab initio and that the Fund, or a part of it, belongs to the benefactor's residuary estate.

22. The Application needs to be set in the context of the claim. In Zedra's evidence that was before the court when directions were given on 22 January 2019, Zedra stated that it had not taken any steps to identify and locate the personal representatives of the benefactor or any other donors and suggested that in the case of the additional donors it was not practical to locate all the donors or their personal representatives. Zedra said that it regarded the prospect of any person making a claim to part of the assets forming the National Fund as being "exceedingly remote".

23. This evidence was the subject of discussion between the court and Mr Pearce QC who appeared both then and on the hearing of the Application for Zedra because it was of some concern to the court that there existed the possibility, even if it was thought to be a remote one, of the gift failing in whole or in part. As a consequence, provision was made in paragraph 13 of the order dated 22 January 2019 as follows:

> "Subject to any further order of the court:
>
> (1) The court does not see fit to direct the Defendant to take any steps to identify any persons now representing or interested in the estates of persons who

> donated assets to the Fund, or to give notice of the claim to such persons or to join such persons as Defendants. Notwithstanding this, the Defendant is to be prepared to present arguments at the trial of the claim (if required to do so by the trial judge) in support of the interests of persons who would be beneficially interested in the Fund if the trusts declared by the deed dated 9 January 1928 are in whole or part ineffective."

24. Paragraph 4 of the order also made a direction that the parties were to attempt to agree a list of issues. They were successful in doing so and they included as an issue "whether the trusts declared by the Deed dated 9 February 1928 … are in whole or in part ineffective." Mr Richardson, who appeared for the Applicant, relies on the existing parties to the claim having identified this issue as being one to be determined and submits that it is now difficult for HM Attorney General to oppose the joinder application on the basis that this issue is not one with which the court will need to be concerned. But of course, it is right, as Mr Pearce pointed out, that it is necessary for the court to proceed logically through all the relevant stages and sometimes it is helpful to start the process with a step that is thought to be uncontentious. In any event, Mr Richardson does not submit that the list of issues is determinative of the joinder issue.

25. The Applicant faces what appears to be a major hurdle in the way in which section 9(1) is drafted. Ignoring the elements of the section that are immaterial, it applies where there is an instrument that gives "directions" (plural) for:

> (1) Any property being held upon trust and the income being wholly accumulated for any period to be determined under the provisions of the instrument;
>
> (2) The property and accumulations to be transferred at or before the expiration of that period to the National Debt Commissioners to be applied in the reduction of the National Debt.

26. The final part of section 9(1) contains dual provisions in terms that:

> (1) Notwithstanding any Act or rule of law to the contrary, the "directions" shall be valid and effective; and
>
> (2) No person shall be entitled to require the transfer of any part of the property, income or accumulations otherwise than in accordance with the provisions of the instrument.

27. The "directions" that are referred to at the outset of section 9(1) appear to include (i) the holding of the fund on trust, (ii) the accumulation of all the income, (iii) the period of the accumulation and (iv) the transfer of the fund at the end of the period. The final part of the section appears to validate not just the direction to accumulate income but all the directions; and the words that follow appear apt to bar any claim of the type the Applicant wishes to make.

28. Mr Richardson makes a number of submissions and in doing so relies on various passages in *Bennion on Statutory Interpretation* 7th edition. He submits that:

(1) The long title to the Act, which is an aid to interpretation[2] not just in cases of ambiguity, points towards the Act having the function of amending the law relating to perpetuities and accumulations, inter alia, as they relate to trust funds for the reduction of the National Debt.

(2) The provision in section 9(1) that refers to the accumulation of income for any period determined by the instrument is consistent with the long title.

(3) The need for the 1927 Act arises from section 164(1) of the Law of Property Act 1925 ("LPA 1925"). He points to the stipulation in section 164(1) LPA 1925 that any accumulation other than in accordance with the provisions of section 164(1)(a) to (d) LPA 1925 is void. He submits that the drafting of section 9(1) of the 1927 Act mirrors that in section 164(1) LPA 1925 in order to make valid the accumulation of income for a period other than one permitted in that section.

(4) The two final parts of section 9(1) are to be read conjunctively to the effect that the prohibition on any person being entitled to require the transfer of the property, income or accumulations should be read with the validation of the directions.

29. Mr Richardson also points to the need to consider the 1927 Act as a whole, including the long title, and to seek out the mischief to which it is directed[3]. He submits that despite the apparently clear words in section 9(1) of the 1927 Act, when looked at as a whole and in its context, the proper construction of the provision leads to an interpretation that does not have the effect as he put it in his skeleton argument of "… immunising the Fund and all other such trusts from any and all rules of law and Acts of Parliament which would otherwise cause sums contributed to them to fail and/or be recoverable by third parties." Properly construed section 9(1) of the 1927 Act permits accumulations within a trust such as the Charity that would otherwise fall foul of section 164(1) LPA 1925.

30. It is permissible to refer to the record in Hansard of the debate of the Bill which became the 1927 Act.[4] The debate in the House of Lords on 22 November 1927 records the then Lord Chancellor introducing new clause 9 to the Bill. The debate is short but it lends some weight to the Applicant's case that the primary objective of clause 9 of the Bill, which became section 9 of the 1927 Act, was to permit accumulation for longer than was allowed under the law as it then stood. This emerges from the speech of Lord Danesfort who proposed an amendment to the Bill to put a limit of 50 years on the accumulation of income and expressed concern that very lengthy accumulation could be dangerous or objectionable.

31. Mr Henderson who appeared for the Attorney General submitted that the Applicant's case is bound to fail. He points to key weaknesses in the Applicant's approach.

(1) Insufficient weight is placed on the words of section 9(1) and the need to place the text at the centre of attention. He relies on a passage from the

[2] Bennion 16.3
[3] Bennion 10.4
[4] Bennion 24.12 and 24.13

judgment of Lord Neuberger in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [72]:

"When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used."

(2) The Applicant has not formulated a way in which section 9(1) of the 1927 Act should be read. He relies on the following passage in *Bennion*:

"When a particular meaning is being contended for, the advocate and thereafter the court should express this in specific words, if not necessarily words in all respects suitable for insertion in the enactment."[5]

(3) The Applicant's approach cannot be derived from section 9(1) of the 1927 Act even accepting that accumulation was at the heart of the provision. The section goes further than dealing with accumulation of income. The "directions" deriving from the instrument that are referred to in the opening words of the section relate not just to accumulating income but also to (a) property and income being held in trust and (b) the period of accumulation. The former is of particular importance. Where the section validates "the directions" it must refer back to the directions (plural) at the outset of the section. The Applicant's construction relies on only the direction to accumulate being validated; and the final words of the section prevent not just a transfer of the accumulations but also the property and income of the fund.

32. Mr Henderson also submits that Parliament may not have been only concerned about section 164(1) LPA 1925. He refers to the decision of the House of Lords in *Wharton and another v Masterman and others* [1895] AC 186. The decision concerns the Thellusson Act, a predecessor to section 164(1) of the LPA 1925. The House of Lords held that where there is an out and out gift to a charity with a direction for accumulation of income, the principle in *Saunders v Vautier* applies and the charity may call for the income and capital.

33. There is very considerable force in Mr Henderson's submissions. His construction of section 9(1) gives effect to the full wording of the section and it is understandable that Parliament may have been concerned not only to permit accumulation of income for a longer period than the perpetuity period permitted but also to ensure that no challenge could be made to trust funds that were very substantial and were expected to have the potential, when taken together, of paying off the National Debt.

34. Zedra did not oppose joinder of the Applicant. However, in the course of his submissions, Mr Pearce described the analysis of section 9(1) put forward by Mr Henderson as "unanswerable".

[5] Bennion 8.3

35. It suffices for the purposes of the Application for Mr Richardson to be able to meet the low threshold of having some prospect of success on the issue of construction. It is not my task to calculate in arithmetical terms what those prospects might be. It appears to me that there are very significant difficulties that face the Applicant. I am, however, satisfied that the Applicant has crossed the merits threshold. It would be wrong to conclude that he has no prospect of success at all. Were it to have been necessary to do so, I would also have concluded that the Applicant has a real prospect of success. Put shortly, it seems to me on an issue of construction of this type, in relation to a statutory provision that is wholly untested, it would be hard to conclude that the carefully crafted submissions made by Mr Richardson are bound to fail or are fanciful.

36. It is also necessary to consider whether there are any other legal principles that might preclude the Applicant from bringing his claim. The Applicant will have to establish that:

    (1) the Deed does not show a paramount charitable intention but rather was a gift for particular purposes;[6] and

    (2) there was no reasonable prospect of the object of the gift being carried into effect; that there was initial impossibility or impracticability.[7]

37. Taking these points in turn:

    (1) The question of whether a paramount charitable intention was present is a question of objective construction of the Deed in its context. It is clear that the Applicant has some prospect of success on this point.

    (2) As to initial impossibility or impracticability, it is unnecessary to go further than the report of HM Attorney General's expert, Professor Portes, who opines that the prospect of the benefactor's donation becoming sufficient to extinguish the National Debt was "in retrospect … hopelessly optimistic, <u>but it was perhaps not implausible at the time</u> …". [my emphasis] The Applicant wishes to call his own expert on this subject. However, it is clear that he has at least some prospect of success.

38. There is clearly a link between the merits and desirability. The stronger an applicant's case on the relevant issue, the more desirable it is likely to be that an order for joinder should be made. Here there are a number of factors that point strongly in favour of joinder. These include:

    (1) Section 9 of the 1927 Act has not been considered by the court in any previous case (as far as the parties are aware).

    (2) The fund is very substantial.

    (3) At an earlier stage of the claim, Zedra was willing to contemplate the possibility of persons who might be able to claim that the gift failed. The direction made by the court is only explicable on this basis.

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[6] See *In re Wilson* [1913] Ch 314
[7] Tudor on Charities 10th ed. at [9-015]

(4) It is preferable that the court has the benefit of submissions about whether the gift failed by a party who has a real interest in seeking that outcome.

39. It is right for me to add that nothing in this judgment should be seen as giving the Applicant any encouragement about the ultimate outcome on the issues he wishes to pursue.

Representation order

40. There is no dispute between the parties about the Applicant being appointed to represent for the purposes of this claim all persons who are or may be or become entitled to share in the residuary estate of the benefactor.

41. I do not see a basis for the class of persons represented by the Applicant being wider so as to include other donors to the Charity, if living, and those interested under their estates (if dead) because:

(1) The circumstances of each other donor could differ on the issues of impracticability and general charitable intention;

(2) There is no way of knowing whether the Applicant would have the support of other donors and those who benefit under their estates; and

(3) The provisions of sections 63, 64(2) and 66 of the Charites Act 2011 could reduce the class of persons who would be affected by the claim but would fall outside the scope of a representation order limited to persons interested in the estate of the benefactor.

Costs

42. HM Attorney General has invited the court to consider whether it should make a costs capping order under CPR PD3F in respect of the cost of obtaining and providing evidence of the benefactor's subjective intention. Paragraph 1.1 of PD3F provides the general rule that a costs capping order will only be made by the court in exceptional circumstances. That general provision plainly applies to section II of the Practice Direction that deals with costs capping in relation to trust funds.

43. The Applicant has filed a budget as is required by PD 3F para. 5.4 (a requirement that is more honoured in the breach than in observance). Mr Henderson drew attention to the total of the budget at £459,000, and the figures for particular phases in particular, and expressed concern about the level of anticipated costs. At the hearing, however, I indicated I did not consider that this claim fell within the small class of cases that can properly be regarded as being exceptional. I do not consider costs capping is necessary as a measure to replace or supplement the powers of a Costs Judge on a detailed assessment in this case. A Costs Judge will be in the best position to assess an appropriate level of costs, if the Applicant obtains an order for costs, on the basis of the costs that are incurred.

44. The Applicant applies for a prospective costs order. The application is opposed by HM Attorney General and Zedra. It seems to me there are two key principles for the court to consider that are related:

(1) The court should not make a prospective costs order unless it is satisfied that the judge at the trial "… could properly exercise his jurisdiction only by ordering the applicant's costs to be paid out of the fund": per Hoffmann J in *McDonald v Horn* [1995] 1 All ER 961 at 971j to 972a. This principle is expressed slightly differently in *Lewin on Trusts* 19th ed. at 27-150 where it is said that a prospective costs order will not be made "unless the judge at trial would inevitably, or almost inevitably, make an order for costs in favour of the beneficiary seeking the order." [my emphasis]

(2) The court will not usually make a prospective costs order unless the litigation falls within Buckton category 1 or 2: see *Lewin on Trusts* 19th ed. at 27-150 and 27-151 and *Re Buckton*[8].

45. The Buckton categories are long established and generally helpful. The analysis set out in *Re Buckton* by Kekewich J at p 414 to 415 is well known and does not need to be set out in full in this judgment. It is not, however, always easy to determine into which category a case falls and the circumstances of this claim are some distance from those that might be regarded as routine.

46. Buckton categories 1 and 2 are closely aligned. Category 1 concerns applications made by trustees and category 2 concerns applications made by the beneficiaries, or some of them. They both focus on the application to the court being made in order to obtain guidance as to the meaning of the trust instrument or about a question that has arisen in the administration of the trust. In essence, it does not matter who makes the application if its essential character is for the benefit of the trust, rather than the applicant. The way it is put by Kekewich J in relation to category 2 is that:

> "The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole."

47. Kekewich J described a Buckton category 3 case in the following way:

> "There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs of the trustees …".

48. The editors of Lewin on Trusts at 27-139 explain category 3 proceedings as having "… the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust

[8] [1907] 2 Ch 406

fund" and that "… the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason."

49. In *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 at [75] Arden LJ accepted the suggestion in the then current edition of Lewin on Trusts that the *Re Buckton* categories are not closed. The current edition proposes that there is a fourth and fifth category of case but neither is relevant to these proceedings. However, it is clear that the original three categories are not to be regarded as being fixed and since the award of costs involves the exercise of a wide discretion it will be open to the court to depart from the usual outcome that would arise from a case falling into one category or another if there are good reasons for doing so.

50. Mr Richardson relies on passages in Tudor on Charities 10th ed. and Lewin on Trusts:

(1) Tudor on Charities at 16-127:

> "There is an increasing recognition that in essentially non-hostile litigation [i.e. Re Buckton category 1 and 2 litigation] where questions have to be determined for example **as to the validity** and effect of wills or trusts, **where representative defendants**, including the Attorney General … **are required in order to bind their interests and to assist the court in coming to an appropriate decision**, that the representatives should not be out of pocket as a result of their participation and that, accordingly, if they have acted reasonably and properly, they should be awarded their costs on the indemnity basis [from the fund]." [Mr Richardson's emphasis]

(2) Lewin on Trusts 19th ed. 27-198:

> **"Claims by or through settlor based on failure or revocation of express trusts**
>
> Questions commonly arise whether express trusts fail in whole or in part as a matter of construction or law, for example by reason of the operation of the rule against perpetuities, and whether in consequence the trust fund is wholly or partially undisposed of by the express trusts so as to become held by way of resulting trust for a settlor or his estate or a testator's next of kin. In this kind of case there is no challenge to the trust, irrespective of whether or not the express trusts can take effect according to their terms, but rather a claim that the express trusts fail in whole or in part with the consequence that a resulting trust takes effect… In the ordinary course the trustees will seek the determination by the court of the validity or otherwise of the express trusts … and the proceedings will in substance and in form fall within Buckton category (1), though they may fall within the fourth category with the consequence that the claimants to the beneficial interest, though not the trustees, are at risk as to costs."

51. In this case, the claim was not brought by Zedra or a beneficiary but by HM Attorney General. The Applicant applies to be joined to persuade the court, no doubt with more vigour than might otherwise have been the case, that the answer to a question that was articulated in the claim at an earlier stage should be decided in favour of the class of persons he is to represent. It is common ground that it is unnecessary for him to

pursue a counterclaim. On one view, the claim, both in its pre and post joinder form, is not a comfortable fit within any of the Buckton categories. The Applicant is not the claimant and is only a claimant in an indirect way. However, the form of the claim, and the manner of the Applicant's involvement, is not central to the question of whether a prospective costs order should be made.

52. Although a prospective costs order may be made in exceptional cases where the usual principles are not satisfied, it will be rare for the court to do so because the court takes away the discretion of the judge at the trial to award costs in accordance with the normal rules that are applicable. It seems to me that there might be circumstances in which an inability to bring or be a party to a claim due to impecuniosity might be a relevant factor. Here there is no evidence to suggest that the Applicant is unable to become a party to the claim, or face the risk of an adverse costs order, due to his financial circumstances.

53. The claim as it was constituted by the claimant and defendant is properly seen as one falling within Buckton category 2 despite the terms of paragraph 13 of the order dated 22 January 2019 because it merely gave Zedra a role it might perform, if required to do so, by the judge at the disposal hearing. Neither HM Attorney General nor Zedra considered there was anything other than a remote possibility of the gift by the benefactor failing. The Applicant wishes to make a positive claim that the gift fails and falls into the benefactor's residuary estate and I have determined that he has some prospect of success.

54. I consider it is right to see the Applicant's case as hostile litigation that falls outside Buckton categories 1 and 2. He is seeking to be joined not for the benefit of the Charity but for the benefit of himself and other members of the class he will represent. In any event, even if that analysis is wrong, it is impossible to conclude that the judge at the disposal hearing could only properly exercise his discretion by ordering the Applicant's costs to be paid out of the fund. Or indeed, adopting the lower test proposed in Lewin, that it is almost inevitable that the court will make such an order. It is possible that the role played by the Applicant at the disposal hearing will be seen to be useful to the court. On the other hand, the court may form the view that the Applicant's case has always been tenuous and pursued with only self interest in mind. But on any view, there must be a real likelihood that the court will wish to exercise its discretion by making an adverse costs order against the Applicant, or ordering the Applicant to bear his own costs.

55. I will dismiss the application for a prospective costs order.

Directions

56. At one point, HM Attorney General proposed that the effect of section 9(1) of the 1927 Act as it applies to the Applicant should be dealt with as a preliminary issue. Such a course of action did not appear to me to be either wise or attractive. There is clearly benefit to the parties for all the issues in the claim to be disposed of at the same time, save for the terms of a scheme if in the event the court decides the claim as HM Attorney General proposes. To proceed otherwise would risk considerable delay and increased cost.

57. Directions are needed to amend the claim form joining the Applicant and permitting the Applicant to serve evidence. The Applicant will also be permitted to serve expert evidence. This will be followed by additional reports from the claimant's and defendant's experts.

58. I do not consider it is necessary for the Applicant to pursue a formal counterclaim and for there to be pleadings, or points of counterclaim and defence. It suffices for the order that is produced to define the additional issue or issues the court will have to determine.

59. I invite the parties to agree an order. If there are issues between them, it is likely they can be dealt with on paper or at the hearing when this judgment is handed down.

The benefactor

60. The parties (including the Applicant) do not invite the court to make any order protecting the identity of the benefactor. I accept Mr Henderson's submission that the court should as a general principle respect a donor's wish to remain anonymous because a failure to protect anonymity might positively discourage other persons from making charitable donations. There is clearly a public interest in encouraging charitable giving. However, it is now 90 years since the gift was made and the benefactor died many years ago. In the circumstances of this case, I do not consider it would be right to make an order that protects the benefactor's identity. It has not been necessary to name the benefactor in this judgment because his identity has no bearing on the issues before the court. The parties have agreed, as Mr Henderson put it, to exercise 'self-restraint' in dealing with the case in future. Whether this leads to the benefactor's wish for anonymity being respected remains to be seen.