IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 0085 OF 2017 &
CAUSE NO. FSD 0248 OF 2017 (RPJ)

IN THE MATTER OF a trust known as the Stingray Trust settled on 5 July 2005 by an Irrevocable Declaration of Trust by MBT Trustees Ltd as amended by the Deed of Retirement and Appointment of New Trustee dated 20 September 2014, the Deed of Addition of Beneficiary dated 21 May 2015 and the Deed of Appointment Retirement and Indemnity dated 31 August 2015 appointing Rawlinson & Hunter Trustees SA as Trustee

AND IN THE MATTER OF THE TRUSTS LAW (2017 REVISION)

BETWEEN:

RAWLINSON & HUNTER TRUSTEES SA

Plaintiff

AND:

(1) IDF
(by her Court Appointed Guardian GM)

(2) MF

Defendant(s)

IN CHAMBERS

Appearances: Mr Hector Robinson QC, Mr Christopher Levers and Ms Jessica Bush of Mourant on behalf of the Plaintiff.

Mr Ian Paget-Brown QC instructed by Ms Reshma Sharma of the Attorney General's Chambers on behalf of the Second Defendant

Ms Rachael Reynolds of Ogier on behalf of First Defendant

Before: The Hon. Justice Raj Parker

Heard: 4 September 2018

Draft Judgment Circulated: 11 September 2018

Judgment Delivered: 17 September 2018

HEADNOTE

Cayman Islands trust-section 48 Trusts Law (2017 Revision) - GCR Order 85 rule 7 -Beddoe relief-prospective and retrospective relief-approach of Court-indemnity as to costs and expenses incurred and to be incurred-Trustee involved in a dispute which also involves a charity.

JUDGMENT

Introduction

1. Rawlinson & Hunter Trustees SA (the "Trustee") of a Trust known as the Stingray Trust (the "Trust") applies for relief in relation to two separate proceedings commenced by one of the beneficiaries (IDF) of the Trust (by her Milan court-appointed guardian (the Guardian)) against the Trustee and others. The Trust is a Cayman Islands trust, the proper law of which is Cayman Islands law and the Declaration of Trust provides that the courts of the Cayman Islands are the forum for the administration of the Trust (clause 10).

2. The first of those proceedings was brought in the District Court of Lugano, Switzerland and then the Appeal Court of the Republic and Canton of Ticino, Switzerland (the "Swiss proceedings") and were concluded on 14 November 2016.

3. The Trustee seeks retrospective directions that it was entitled to defend those proceedings and that it may be indemnified out of the Trust fund against costs and expenses arising out of those proceedings.

4. In the second set of proceedings brought on 16 May 2017 before the Court of Milan, Italy (the "Milan Proceedings") the Trustee seeks similar directions. The Milan proceedings are ongoing.

5. The defendants to this application are the two discretionary beneficiaries of the Trust namely IDF represented by the Guardian and MF, an Italian charitable foundation.

6. Following communication between the Trustee and the Attorney General and the submissions of Leading Counsel for both at the hearing, there are essentially three issues to be determined.

7. First, whether the Trustee was entitled to defend the Swiss Proceedings (including the appeal) in which it was named as a defendant together with an indemnity as to the costs of defending the Swiss Proceedings.

8. Second, whether the Trustee was entitled to and may continue to participate in the Milan Proceedings brought by the Guardian and again in which it is named as a defendant for the purposes of challenging the jurisdiction of the Milan court, including any appeal and thereafter if necessary defending the Milan Proceedings on their merits, including any appeal, together with an indemnity as to the costs of defending the Milan Proceedings.

9. Third, whether these applications should be adjourned until after the Milan court has determined the validity of the transfer of monies (the "Transfer") from an account referred to herein as the S Account at Deutsche Bank, Geneva to Panamanian corporation, referred to herein as the EM Corporation, at the same location and/or generally to allow the parties to attempt to reach an accommodation and/or for the Trustee to give disclosure of information.

Essential facts

10. The Trust is a Cayman Islands discretionary irrevocable trust settled by a Declaration of Trust dated 5 July 2005. The main settlor of the Trust was CDF (now deceased) and the co -settlor was her sister IDF (although neither is named in the Declaration). Both were citizens and residents of Milan, Italy. Both were elderly when they settled the Trust. The trust funds came from an inheritance from their respective husbands, the lions share from CDF's husband. Neither sister has or had any children or heirs.

11. CDF was born on 2 December 1921 and IDF on 29 February 1924. CDF died on 11 April 2008. IDF is still living.

12. By an affidavit dated 12 April 2017 Mr Antonio Travisano gives an account of how the Trust was settled by IDF for herself and on behalf of her sister CDF. Mr Travisano is an old friend of the family and in particular CDF's late husband.

13. Mr Travisano manages assets for wealthy clients and acts as a 'family officer' in Lugano, Switzerland. He has had a career in private wealth management at various banks. He is also the Protector of the Trust and has been since its inception when he was the head relationship manager at Deutsche Bank, Lugano.

14. He explains at paragraphs 28 and 29 of his affidavit how it came to be that the trust, which was to be settled by both sisters, in fact was settled only by IDF. The reason he gives is because CDF was ill, sitting in a wheelchair and unable to travel, so IDF travelled alone to the office of a Lugano law firm and settled the trust both for herself and on behalf of her sister.

15. Mr Giovanni Stucchi, of the Lugano law firm and the lawyer retained to provide legal advice in this regard did not apparently consider that if IDF signed both documents alone on behalf of the two sisters that it would create any problems, according to Mr Travisano. No one could say whether CDF would recover sufficiently to be able to make the trip to Lugano in the future to sign the documents and all the relevant documents identified CDF as the co-beneficial owner of the trust funds.

16. Mr Travisano exhibits a letter at "AT1" from Mr Stucchi dated 9 September 2015 stating that IDF settled the trust with the explicit agreement of her sister CDF and confirmed the amounts at the time of the settlement were to be transferred from the S account at Deutsche Bank to the account of a Panama Corporation, EM Corporation, also with Deutsche Bank, pursuant to a letter of instruction dated 30 June 2005.

17. He also gives certain details about the Trust. The Trustee was appointed on 31 August 2015 when the previous trustee had declared that they wished to reduce their activities in the trust business. The named beneficiaries of the trust were CDF and IDF as well as a charity, MF. MF were also identified in the Letter of Wishes which he exhibits. This charity has as its objective the relief of suffering of Alzheimer's patients and their families. It had been nominated as the default beneficiary in the original Declaration of Trust and was added as a beneficiary in its own right on 21 May 2015. He goes on to detail certain challenges that were made in the past by IDF's family members to gain control of the Trust.

The Swiss proceedings

18. Attorneys acting on behalf of the Guardian wrote to the Trustee on 2 October 2015 asking for copies of the Declaration of Trust as well as all documentation concerning the assets of the Trust. The Trustee's Swiss lawyers, Schellenberg Wittmer (SW) responded on 26 November 2015 setting out details of the amounts contributed to the Trust by IDF together with details of the amounts she had received as distributions. On 4 December 2015 the Guardian's lawyer, Alberto Banfi, wrote to SW explaining that they had filed an application of voluntary disclosure of foreign capital with the Italian revenue authorities the Trustee on the basis that the Trust was not genuine and that all the assets belonged to IDF. It was pointed out by Mr Banfi that IDF was subject to a procedure of court appointed guardianship as she was suffering from the final stages of Alzheimer's disease and was therefore incompetent.

19. After some further correspondence on 16 December 2015 the Guardian acting on behalf of IDF issued the Swiss proceedings, details of which are set out at paragraphs 32 to 39 of the first affidavit of Andrew McCallum dated 1 December 2017, who is a director of the Trustee.

20. The Swiss Proceedings were far-reaching and as well as seeking disclosures regarding the assets of the Trust, also applied for relief preventing the Trustee from making decisions in respect of the management of the Trust and requiring delivery up of

assets to the Guardian. In addition it was alleged that the Trust was invalid and it was asserted that the Trust assets were the property of IDF.

21. The Guardian's application was dismissed on 7 March 2016 and the District Court of Lugano affirmed the validity of the Trust and found that the assets were Trust assets, and were not the sole property of IDF. The Guardian appealed to the Appeal Court of the Republic and Canton of Tricino and on 11 November 2016 the Appeal Court dismissed the appeal and confirmed the validity of the Trust. It also held that the assets were validly transferred into the Trust and were not IDF's sole property, and that IDF was not entitled to the orders for disclosure and delivery up which were sought. The Swiss Proceedings are effectively now at an end.

Milan proceedings

22. On 16 May 2017 the Guardian issued the Milan Proceedings in the Court of Milan and like the Swiss Proceedings they challenge the validity of the Trust. More particularly they seek orders and/or declarations that the Trust is invalid, MF holds no interest in the assets of the Trust or in the income it generates, and that the Trustee should transfer to the Guardian any assets now under the Trustee's control.

23. The Guardian asserts that IDF did not consent to the settlement of the Trust in that she did not read or could not have understood the Declaration of Trust prior to the settlement and that the contract entered into with Mr Stucchi's law firm (referred to above) was not sufficiently particular to inform IDF of the terms of the Trust. The Guardian asserts that IDF did not understand the manner in which the Trust was intended to operate and she could therefore not have had the necessary "certainty of intent".

24. Among the grounds on which the Trustee is defending the Guardian's claim is a challenge first to the jurisdiction of the Milan court. Such a challenge may be accelerated under Italian procedural court rules for determination by the Court of Cassation, Italy's highest court. Such a request for determination was filed and is now pending. In the interim the Milan Proceedings have been stayed.

Contentions of the parties

25. Mr Ian Paget-Brown QC appeared on behalf of the Attorney General. Whilst on a previous occasion (December 18 2017) when these applications were adjourned he appeared as *amicus curiae,* it became clear he appeared *parens patriae* on this occasion primarily protecting the unrepresented interests of the charity MF. He was concerned to ensure that the good name and interests of MF be represented on the application which he argued would, if granted, deplete the Trust fund by US$1million in respect of legal fees and expenses.

26. He resisted the Trustee's applications and suggested that the matter ought to be further adjourned so that compromise discussions could continue between the Trustee and two beneficiaries to agree, inter alia, the costs and expenses claimed by the Trustee as a sensible way forward and the court should exercise its supervisory jurisdiction to monitor the outcome in the best interests of the beneficiaries. Alternatively an adjournment should be ordered so that full disclosure can be given by the Trustee of all the matters brought into issue by the Guardian and the Attorney General in correspondence.

27. Mr Paget-Brown QC also said that the two page spreadsheet produced by the Trustee to justify its costs and expenses in the Swiss Proceedings and Milan Proceedings was clearly insufficient for there to be a determination that the costs, adding up to approximately US$1 million, were reasonably and necessarily incurred by the Trustee, which he argued was the test to be adopted in Beddoe applications. He submitted that what ought to have happened was the Trustee ought to have made an application to the Grand Court for directions when the Guardian first sought trust and accounting information which, if it had done and been granted, may have avoided the Swiss Proceedings and the Milan Proceedings.

28. He submitted that if the Cayman court now allowed the applications it would deprive the beneficiaries of the ability to challenge the fees (which he submitted were unreasonable in amount) and if the Milan court then determines that there had been an invalidity for any reason, for example relating to the mental capacity of either or both of the sisters, then the Trustee would have converted funds that it should have held for the estate of CDF, as opposed to the Trust fund.

29. In passing I note that this would be the effect of any ultimate ruling on the merits in favour of the Guardian, which of course would have wider consequences than just as to costs and expenses. If this proposition was applied more generally it would make any *Beddoe* application very difficult, which is why upon such an application the Court examines the strength and merits of the claim.

30. Mr Paget-Brown QC argued that if this court grants the relief sought in relation to the Milan Proceedings it would unjustifiably interfere with that court's resolution of the matter. The particular form of interference was not made clear to me and I do not accept that this would be the case.

31. He then pointed to the paucity of particulars in relation to the fees and expenses incurred to date by the Trustee as well as the estimates as to future fees and submitted that it was inappropriate to grant the relief sought without a proper particularisation by the Trustee to show that fees and expenses were properly and reasonably incurred.

32. He pointed out that the Trustee was not a licensed Cayman trust company and it did not administer the trust in and from the Cayman Islands. The court ought to be cautious before granting the relief sought in the circumstances of this case.

33. Mr Paget-Brown QC went so far as to suggest at one stage that the court ought to be concerned as to the integrity of the Trustee as a result of the observations of Chivers J in the recent BVI case *Tchenguiz Family Trust BVIHCM2017/00026) 21 March 2018* at page 16. He raised concerns as to the case presented by the Trustee in the Swiss Proceedings, in particular with regard to the place from where the Trust was administered - which was not the Cayman Islands (as he implied was submitted), the jurisdiction arguments relating to the administration of the Trust- that the Cayman courts have exclusive jurisdiction and the Trustee's submission to the Swiss Court that IDF, as discretionary beneficiary had no right to obtain information from the Trustee (see Exhibit AM-1 of the Affidavit of Andrew McCallum sworn on 13 April 2017 at p 300) (which he argued was wrong), and that the sisters were suffering from Alzheimer's (which he implied was not revealed).

34. He also criticised the failure to provide information. He pointed out that in the recent BVI case of *Tchenguiz Family Trust* (above) involving the same Trusteeit was held that it was not a good reason to withhold documents from a beneficiary simply because they may disclose a claim against the Trustee since the very purpose of the disclosure is to hold the trustee to account. Had that been done he submitted the Swiss Proceedings and Milan Proceedings would not have been necessary.

35. He also raised concerns as to the mental capacity of both CDF and IDF in 2005 which he said may well be an issue to be determined by the Milan Court, should it accept jurisdiction. He submitted that there was a question whether under Italian law IDF had the capacity to authorise the transfer relating to the S Account and to sign the relevant documents as well as the capacity of CDF to agree to the arrangements made.

36. In relation to IDF's mental capacity he referred to several of the documents exhibited at 'AM2' of Andrew McCallum's affidavit at pp 390 and 405 which are before the Milan Court.

- Dr Pierluigi Bertora a specialist in neurology said on 8 February 2012:

> *"Based on the aforementioned medical reports, the Court Appointed Expert Witness first established that the clinical conditions of (IDF) began to appear to be precarious from 2005- 2006, namely since the death of her sister, who had dementia of an unclear nature; since that time there were signs of personality changes and progressive cognitive impairment, which is currently very severe and irreversible."*

In fact CDF died in 2008.

- A note of a meeting with Dr Attilio Belloni and the court-appointed expert witness which was held on 16 June 2015:

"The Doctor remembers that from 2005/2006 the mental state of (IDF) slowly and progressively deteriorated."

- He also referred to a document exhibited at 'AM2' page 389 detailing IDF's admission to a clinic between 5 September and 8 September 2011:

"... 87 years of age.... and reported cognitive impairment for at least three years."

37. Mr Paget-Brown QC also referred to a letter dated 21 November 2005 and signed by IDF to Mr Stucchi purporting to revoke her instructions to him on 9 July 2005 which he said supported his concern that she was suffering from an advanced state of senile dementia and that her mental state was such that she could not have understood what she had been presented with in July 2005.

38. As can be seen not all of the submissions Mr Paget-Brown QC made seem to relate to the Attorney General's role as protector of charity, and indeed some would seem to conflict with the interests of MF which the Guardian contends in the Milan Proceedings is not entitled to any of the trust assets as a beneficiary. However, he explained that it was necessary in a Beddoe application not only to put before the court the strength of the trustee's case but also the weaknesses.

39. Mr Hector Robinson QC appeared for the Trustee. He submitted that applying the principles governing the proper approach to *Beddoe* applications the court should grant both the Swiss and Milan applications. There are sufficient grounds for the Trustee to be granted retrospective approval in relation to the Swiss proceedings, to be indemnified at the expense of the Trust fund having defended those proceedings to a conclusion and to defend the Milan proceedings to a conclusion with a similar indemnity. There is no basis on which either application should be adjourned whether until after the determination of the Milan proceedings or on some other basis.

40. He referred to the first affidavit of Tobias Reinmann dated 30 July 2018 which outlines material developments in the first half of this year. He is another director of the Trustee.

41. He states that the Guardian has not sought to challenge the validity of the transfer of monies from the S Account in the Milan proceedings - see paragraph 48. Therefore if the Attorney General's proposal for an adjournment was accepted (see the Third issue above) the Trustee's application would never be determined as the matter is not an issue in the Milan court.

42. Mr Reinmann also sets out at paragraphs 50-54 details as to how the transfer was effected with the authority of CDF and why there should be no concerns regarding its validity.

43. Having referred to the relevant documents, which he exhibits, he concludes at paragraph 54:

"In circumstances where both the Letter of Instruction to Citibank directing the transfer and the letter of instruction to Deutsche Bank instructing the transfer to [EM

Corporation] were executed by (IDF) and (CDF), I do not believe that there can be any suggestion that (CDF) was unaware of both transfers and did not authorise them."

44. Mr Robinson QC rejected the submission that the Guardian brought the Swiss Proceedings because of the Trustee's refusal to provide requested information. The real motive for the Swiss Proceedings was to have title to the Trust assets transferred to the Guardian on the basis that, as claimed, the Trust was invalid.

45. He submitted that the Trustee was entirely justified in resisting the claim. It was the only means by which it could have protected the Trust assets from being transferred to the Guardian. The Trustee's decision to fight the case has been completely vindicated by both Swiss courts.

46. As to the disclosure of information he candidly conceded that there had been a delay in responding to the first request made by the Guardian's lawyer by letter dated 1 October 2015, but that could be explained as the Trustee had only been appointed on 31 August 2015. When it did respond through SW on 26 November 2015 it was explained that the transfer of assets and files from the previous trustee was still ongoing. It was clear from the Milan Proceedings that the Guardian began to assert that the documents were not requested on the basis of IDF's capacity as beneficiary, but on the basis that she is the rightful owner of all of the assets.

47. In this regard he submitted that *Tchenguiz* rightly concludes that *"A beneficiary can only seek disclosure in their capacity as a beneficiary"* see page 3 at [4] d Chivers J.

48. Mr Robinson QC explained why the Trustee had not applied for relief prior to taking steps in the Swiss proceedings. An immediate ex parte application was obtained by the Guardian to freeze the Trust's assets and the ability of the Trustee to manage the affairs of the Trust. The Trustee had had no time to make the *Beddoe* application before the proceedings had commenced. The Trustee spent time and resources in defending the proceedings.

49. He pointed out that only a small proportion of the Trust assets were contributed by IDF - US$986,000, whereas US$7.5m and Eur 6m had been contributed by CDF. It would have been unjust, just looking at the relative contributions, for all the Trust assets to be deemed to belong to IDF without a challenge on the merits.

50. He argued that since the relief sought can be granted if it can be shown that, if an application had been made prior to the commencement of the proceedings it would likely have been granted, failure to make such an application is not a bar to relief. Self-evidently given the complete vindication of the Trustee's actions by the two Swiss courts such relief is appropriate.

51. As to the argument that insufficient details have been given in relation to the fees and expenses incurred in the Swiss Proceedings and incurred and to be incurred in the Milan Proceedings he submitted that the purpose of the *Beddoe* applications was to confirm the Trustee's right to an indemnity from the court, which already existed by

Statute (Trusts law (2018 Revision) s. 47(2)) and under the terms of the Trust Deed (Schedule 1, clause 8.2 and clause 12.2). He accepted that the Trustee's right of indemnity can only be with respect to costs which have been reasonably and properly incurred.

52. Ms Rachael Reynolds from Ogier appeared at short notice for the Guardian. As the Guardian had not obtained approval from the Guardianship Court in Milan, Ms Reynolds could not make any substantive submissions during the hearing and only appeared to provide what assistance she could in the circumstances. In any event, Ms Reynolds had been provided with a redacted copy of the bundles which did not include some of the material before the court which also meant that she was not in a position to make any substantive submissions. She supported the submissions made for an adjournment for discussions to progress between the parties.

53. It is worth noting that MF has chosen not to take part in these proceeding, did not take part in the Swiss Proceedings and takes an essentially neutral position in the Milan Proceedings, which is entirely understandable.

The law

54. The court has an inherent and statutory jurisdiction to give directions to supervise trustees and to give directions binding on the trustees and all beneficiaries of the trust see *X v Y (unreported) 15 March 2017* per Smellie CJ at paragraph 17. The statutory jurisdiction arises out of section 48 of the Trusts Law (2017 Revision).

Section 48 provides:

> *"Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the court shall think expedient; and the trustee or personal representative acting on the opinion, advice or direction given by the court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee or personal representative in the subject matter of the application….."*

55. By virtue of that section the court may give directions as a matter of discretion and if the trustee acts in accordance with them it is deemed to have discharged its duty so far as its own responsibility is concerned, unless of course there has been fraud, wilful concealment or misrepresentation. The trustee must give full disclosure of the strength and weaknesses of the case and of all other relevant information.

56. As is well known the wisdom of applying to the court for directions specifically on the question of engagement in litigation follows from the decision of the Court of Appeal in *Re Beddoe [1893]1 Ch 547.* It has been clear from that case (for well over a century

now) that a trustee who without the sanction of the court commences or defends an action unsuccessfully does so at his own risk as regards costs, even if he acts on counsel's opinion.

57. It will only be in exceptional circumstances that he will be granted an indemnity by the court if he has not obtained the sanction of the court. Obtaining the court's sanction also removes the risk that an allegation will be made by a beneficiary that the trustee had acted in breach of duty, imprudently or improperly in engaging in litigation.

58. As recognised by the authors of Lewin on Trusts (19th Edn) at paragraph 27-257 although it is prudent for a trustee to make a *Beddoe* application before proceedings are engaged in, an application can be made later and if so made the trustee will be allowed to retain his costs out of the trust property if, had the application been made at the outset, it would have been granted.

59. The court also has an exceptional jurisdiction, which is analogous to that exercisable on an application for a pre-emptive costs order in hostile litigation, where a trustee has become involved in a trust dispute which amounts to an attack on the validity of the settlement - see *Alsop Wilkinson v Neary [1996] 1 WLR 1220* at 1224 D Lightman J. The court will look carefully at the merits of the case and the relative costs to the overall value of the trust assets.

60. For example in *Bridge Trust v Attorney General [2001] CILR 132* Smellie CJ permitted a trustee to participate in a hostile trust dispute to ensure justice was done and in the particular case where a beneficiary was a charity whose interests would go unrepresented without the participation of the trustee, there was an exceptional circumstance which would militate in favour of the grant of relief.

61. Before giving my reasons on the three questions for determination which have been identified for determination I would like to make the following observations.

62. I have found no evidence to suggest that the Trustee in this case has behaved in any way improperly. I make this point because it was suggested that there had been a lack of integrity in the way, in particular, that the Swiss Proceedings had been presented. I do not agree. The Trustee has acted in accordance with the advice of reputable external law firms and in my view reasonably.

63. Nothing turns on the fact that the Trustee is not a Cayman Islands registered trustee. There are many instances of foreign based trust companies which carry out the administration of Cayman Islands trusts.

64. As to the arguments relating to the impaired mental capacity of the sisters in 2005, I note that there is no allegation in the Milan Proceedings to this effect. The grounds argued by the Guardian appear to relate to the ability of IDF to understand the various documents, rather than any suggestion that there was any mental incapacity of either sister.

65. I accept in any event the submission of Mr Robinson QC that in addition to the isolated examples from medical records and the letter of 21 November 2015 identified by Mr Paget-Brown QC as reasons to call into question the mental capacity of the sisters, there is the evidence of Mr Antonio Travisano and the correspondence from Mr Stucchi to the Trustee which points the other way.

In a letter dated 12 April 2018 Mr Stucchi says:

> "3. *I showed (IDF) the Trust Deed and the LoW in English and we went through the documents paragraph by paragraph, in presence also of Mr Travisano. (IDF) signed each page of each document and perfectly understood the concept of the trust and the specific documents. To be noted that the discussions with IDF were ongoing since several months..... .By the way if you consider the details of the Letter of Wishes, it is rather clear that all this could only be the expression of IDF's will and instructions. As I believe I already mentioned, IDF was almost annoyed by the fact that I showed her each paragraph in detail because she indicated that she perfectly knew trusts, and in particular Cayman trust, because she had been beneficiary of the similar trust in the past for many years: nevertheless as already mentioned we went through the documents fully."*

By a further letter dated 23 April 2018 he states:

> "2...*The setup of the trust was the object of discussions for many months. I spoke with IDF more than once per telephone together with Mr Travisano. When she came to Lugano, on 9 June 2005, not only the basic structure of the trust and its features, as well as the position of each individual with respect to the trust, but also all the details had already been discussed and agreed upon. It is also worth underlying that after the establishment of the trust, in at least two occasions, the trustees themselves met IDF in Milan together with Mr Travisano in order to discuss issues related to the trust. In other words in such occasions IDF de facto confirmed again and "ratified" the establishment of the trust and the respective features.*"

66. There is also the fact that both Swiss courts declared that the trust is valid.

67. As to the application to adjourn these matters for the reasons put forward, there is no good reason in my judgement to do so. It has already been nine months since the matter first came on before me on 18 December 2017. To adjourn further to an indeterminate date in order for negotiations to continue between the Attorney General, the Guardian and Trustee in order to reach a compromise on these applications or for unspecified disclosure to be given is unwarranted.

68. The Trustee has already incurred considerable expense in the Swiss and Milan Proceedings and is entitled to know whether or not it has the court's approval both

with regard to the engagement in those proceedings and as to the indemnity it seeks in relation to costs and expenses.

Approach

69. *Beddoe* applications do not have to be unnecessarily involved or complicated.

70. In this case there has been and is no clear rival to The Guardian's claim except for the Trustee. MF takes a neutral position, which as I say is understandable. CDF is deceased.

71. The Trustee is under a duty to protect the Trust fund for the benefit of the beneficiaries. There is no alternative funding available to the Trustee to fight the claims apart from the disputed trust property or its own personal resources.

72. The usual rule is set out at paragraph 27-260 of Lewin on Trusts (19th Edition) which provides that:

> "*The costs of the parties to a Beddoe application, like the costs of other applications by trustees to the court for directions, will normally, in the absence of improper conduct, be paid from the trust fund*."

73. I have considered the merits and strength of the claim against the Trust property and the benefits of defending the claim, and having reviewed the external legal advice obtained by the Trustee in both sets of proceedings, including in particular the Opinion exhibited at page 27 of "AM3" in relation to the Milan Proceedings, I am satisfied that the Trustee is acting and has acted properly. Both the Swiss and Milan Proceedings involved claims to the assets of the Trust and attacks on the validity of the Trust and there is and was no beneficiary prepared to defend those assets. Moreover, there is a likelihood that any judgment obtained by the Guardian in the Milan Proceedings would be enforceable against the Trustee and MF.

74. As to the challenge to the fees incurred and to be incurred it is not necessary to set out at this stage the costs and expenses item by item. It goes without saying that it is only those costs and expenses that have been reasonably and properly incurred that will be indemnified, as Mr Robinson QC accepted. The estimated costs of defending the proceedings when viewed against the size of the trust fund are justified especially if the proposed jurisdictional challenge is successful.

75. The procedure is governed by *GCR Order 85 rule 7* and makes no reference to the need for particularisation of the Trustees costs and expenses. The affidavit in support of such an application must of course give full and frank disclosure of all facts material to it and a material fact will be the extent of the legal costs and expenses incurred or to be incurred in general terms. In that way the court can assess the proportionality of costs against the merits and value of the case. But the court does not engage in a 'taxation- like' exercise before deciding whether or not in its discretion the trustee has a right to an indemnity. If any beneficiary wishes to challenge the reasonableness or

basis upon which costs and expenses were incurred in the litigation they are at liberty to do so. The trustee has a duty to account to the beneficiaries for those monies expended and to provide the necessary justification.

Decision

First issue

76. In my judgement the Trustee was entitled to defend the Swiss Proceedings and is entitled to be indemnified against the costs and expenses arising out of the Trust fund. I reach that conclusion on the basis that I accept as reasonable the position put forward by Andrew McCallum at paragraphs 42 and 43 of his affidavit sworn on 13 April 2017. The urgency of the case and in view of the interim relief obtained by the Guardian the failure to apply for *Beddoe* relief at that stage is explicable. The engagement of resources to protect the Trust assets in my view had to take priority. It was reasonable for the Trustee to have conducted the case without the benefit of obtaining the relief it now seeks before doing so and I am of the view that had it applied for such relief beforehand that it would have been granted.

77. The Trustee was entirely successful in the case and it was established, at least in the Swiss proceedings, that IDF had lost any rights to the trust property upon creation of the Trust and that the beneficiaries of the Trust do not have any entitlement to administer or dispose of the Trust assets. In particular the Guardian having made allegations that the Trust was a sham failed to prove that the Trust had been used in some artificial manner- see the decision of the Second Civil Chamber of the Court of Appeals dated 14 November 2016 at exhibit "AM 1" Page 353.

78. Had the Trustee not defended the case there is a risk that the Trust would have had its assets transferred to the Guardian. MF was not named as a party or served with the proceedings and therefore had no opportunity to take steps to defend its position. This meant that it fell to the Trustee to defend the Trust assets and it is clear from the outcome that the Trustee had a strong case against the claims of the Guardian. The Trustee only recovered a small amount in costs from the Guardian and it is right in my view that it should obtain a full indemnity.

79. It is also clear from my review of the documents in the Swiss Proceedings that the main purpose of the Guardian's case was to obtain a transfer of all the Trust assets. The disclosure application which started the proceedings became ancillary to that main purpose. The arguments were based on assertions that IDF and the Guardian were free to revoke the Trust since they had no connection with the Cayman Islands and the Trust was intended to conceal assets held abroad by IDF, an Italian citizen, to ensure that they were not disclosed to the Italian tax authorities. That it was argued, resulted in the position that IDF had control of the Trust and was able to dispose as she saw fit of the assets.

80. In the result all these arguments failed and the Trust was declared valid. IDF had effectively transferred to the Trustee any ownership interest she held in the assets that had been transferred by both IDF and her sister into the Trust.

Second issue

81. In my judgement the Trustee is entitled to an order that it was entitled to participate in the Milan Proceedings for the purpose of challenging the jurisdiction of the Milan court in the Court of Cassation. At that stage if unsuccessful the Trustee should return to this court for specific approval of any engagement to defend the case on its merits and to seek further directions. It is entitled to be indemnified out of the Trust fund for costs and expenses arising out of the Milan Proceedings up to the conclusion of the case in the Court of Cassation to challenge the jurisdiction of the Milan court.

82. I do not accept that granting relief of this kind to the Trustee in any way interferes with the Milan court.

83. Applying the legal principles I have set out above it seems to me that this is a case where the Trustee has become involved in proceedings against Trust property and it is appropriate to grant relief in those circumstances. There is no other party which is able to contest the Guardian's claims for the assets to be transferred to IDF.

84. MF has understandably sat on the fence and will not actively contest the Guardian's claims. It seems to me that it would be unjust especially to the interests of this only other beneficiary, a charity, to allow the claim to go undefended.

85. If a judgment was obtained by the Guardian it could, on the advice of the Trustee's Swiss attorneys be enforced against the Trustee in Switzerland under the Lugano Convention For the Recognition and Enforcement of Foreign Judgments (to which Switzerland is a party) and there is also a risk of confiscation of any distributions made by the Trustee to any beneficiary of the Trust resident in Italy.

86. On the jurisdiction point to be determined by the Court of Cassation the Trustee argues that the validity of the Trust has already been determined between the Guardian and the Trustee by virtue of the Guardian's submission to the Swiss jurisdiction and the final and conclusive judgments obtained in the Swiss proceedings. It also argues that there is an insufficient connection between Italy and the issues arising in the case and the parties to the dispute, and that the Cayman Islands is a more appropriate forum for the resolution of the issues in dispute.

87. Having reviewed the pleadings in the Milan Proceedings it is clear that both the Guardian and the Trustee accept that the main questions to be determined are governed by Cayman Islands law, which is expressed to be the governing law of the Trust.

88. By section 90 of the Trusts Law (2018 Revision) questions regarding the validity or capacity of the settlor in relation to a trust governed by the laws of the Cayman Islands, or with regard to any disposition of property upon the trust, are to be

determined in accordance with Cayman Islands law, without reference to the laws of any other jurisdiction with which the trust or disposition may be connected. The Trustee anticipates therefore that the Italian courts will interpret and apply Cayman Islands law to the matters in issue.

89. The Trustee has argued that IDF and by extension the Guardian is bound by the exclusive jurisdiction clause in the Trust Deed. The Trustee also argues that if Cayman Islands law is properly applied to the jurisdictional question it should be determined in favour of giving effect to the exclusive jurisdiction clause in the Trust Deed so that the issues between the parties should be decided by the Cayman Islands courts rather than by the Italian courts.

Third Issue

90. I accept Mr Reinmann's evidence that the Transfer is not an issue in the Milan Proceedings and it would make no sense for me to adjourn this application on that basis.

91. I also accept the evidence of Mr Travisano that funds from two previous trusts settled by the sisters, namely the Elephant Trust and the Gaia Trust, were the precursors to the Stingray Trust and until that was established the funds were deposited in the S Account, first with Citibank, Lugano and then with Deutsche Bank, Geneva. Those funds were then transferred by written instructions signed by both sisters dated 30 June 2005 to the account of EM Corporation for the purpose of establishing the Stingray Trust. Mr Stucchi's letter of 9 September 2015 explains that on 11 July 2005 the shares of that company were gifted to the Trust (see page 15 of "AT1"). It seems to me plain on the evidence that both sisters signed both authorisations to the banks to effect the transfers and that the transfers were made by them both acting jointly.

92. There is no basis for adjourning these applications for any reason relating to the Transfer nor for the reasons I have expressed above for any other reason.

93. I will therefore make the orders accordingly.

THE HON RAJ PARKER
JUDGE OF THE GRAND COURT