

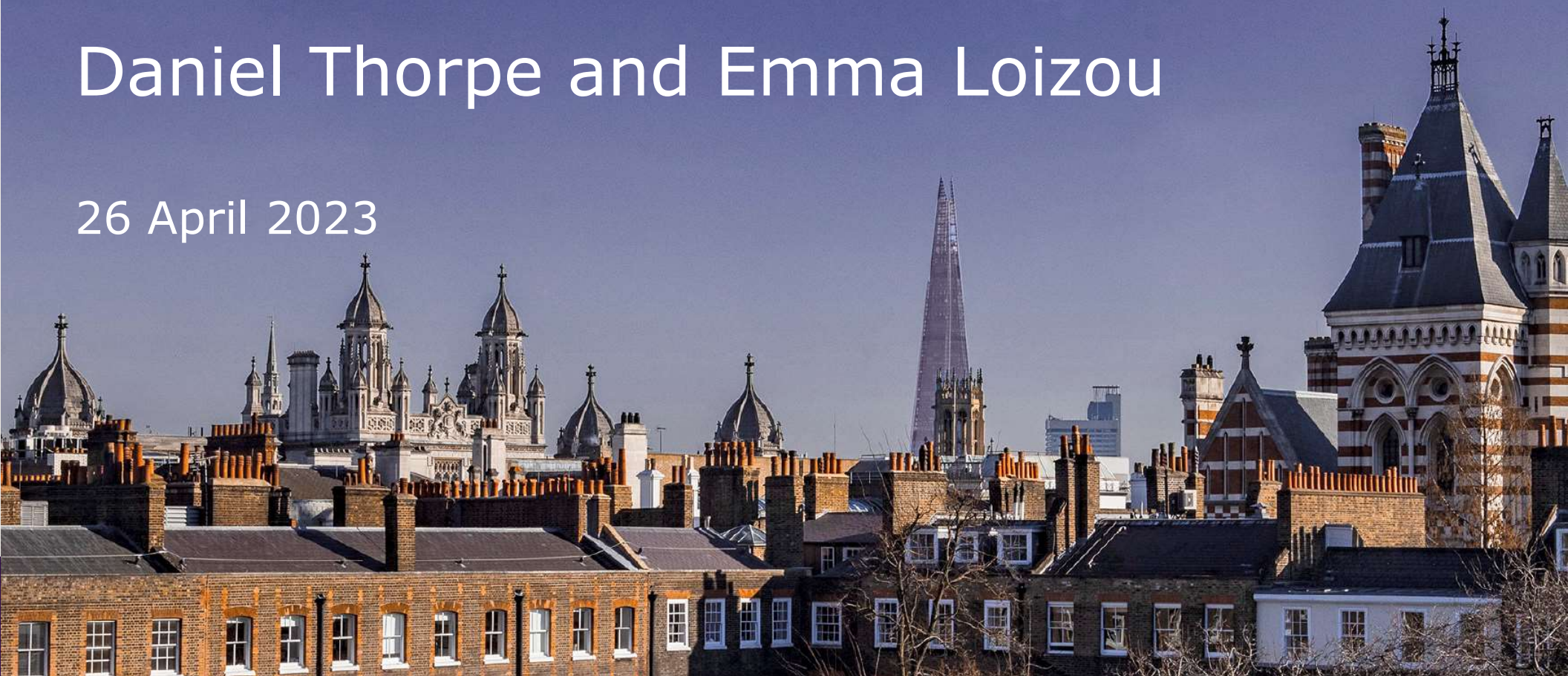
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Beddoes and Blessings: Back to Basics

Daniel Thorpe and Emma Loizou

26 April 2023

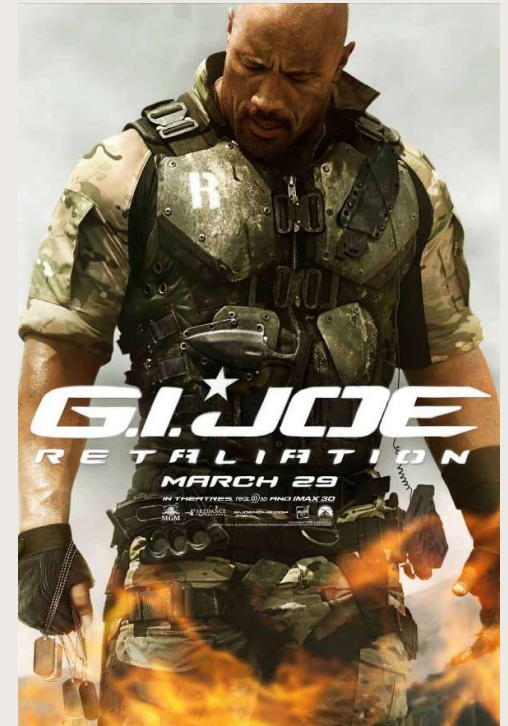


Forgiveness vs. Permission

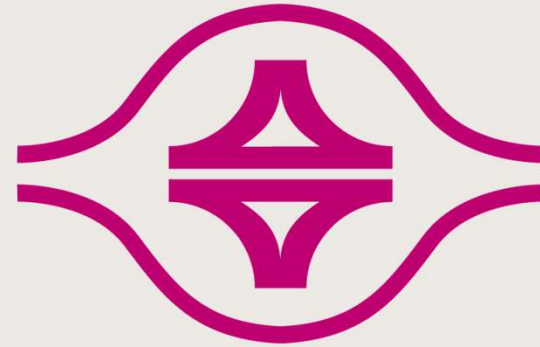
'Soldier, don't you know you are not supposed to be using this vehicle for such a purpose?'

Taking a nervous gulp, the young GI replied, 'Yes, sir. But sometimes forgiveness is easier to obtain than permission.'

(Humor in Uniform, The Reader's Digest, February 1971)



Momentous decisions



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“Although the steps taken by the GRT trustee in September 2005 clearly amounted to **“a momentous decision”** ... the GRT trustee did not make any application to the court for approval. In any event, a trustee who is in **genuine doubt about the propriety of any contemplated course of action in the exercise of fiduciary duties and discretions is always entitled to seek the guidance of the court** ... No application for guidance was made.”

per Lord Richards in ***Grand View v Wong* [2023] WTLR 149** at [27]

***Public Trustee v Cooper* [2001] WTLR 901**

"... [W]hen the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well). ...

- (1) The first category is where the issue is **whether some proposed action is within the trustees' powers**. That is ultimately a question of construction of the trust instrument or a statute or both ...
- (2) The second category is **whether the proposed course of action is a proper exercise of the trustees' powers** and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court ...
- (3) The third category is that of **surrender of discretion** ... The most obvious good reasons being either that the trustees are deadlocked ... or because [they] are disabled as a result of a conflict of interest ...
- (4) The fourth category is **where the trustees have actually taken action, and that action is attacked** as being either outside their powers or an improper exercise of their powers ..."

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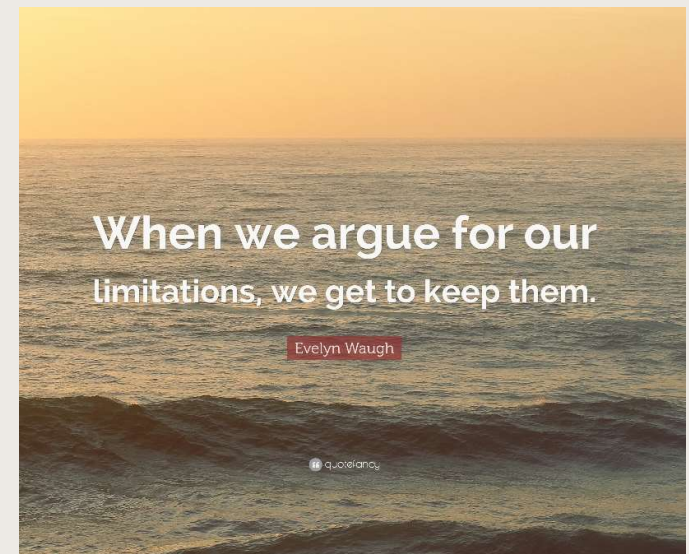
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Public Trustee v Cooper [2001] WTLR 901

(1) Extent of trustees' powers

The first category is where the issue is **whether some proposed action is within the trustees' powers**. That is ultimately a question of construction of the trust instrument or a statute or both ...

- Do Ts have the power to act in this way
- Often heard in open court with the benefit of argument – consider necessary parties
- Section 48 Administration of Justice Act 1985 procedure – can avoid argument in court
- Section 57 Trustee Act 1925 – in the alternative, give Ts a particular power potentially confined to a specific purpose or transaction



***Public Trustee v Cooper* [2001] WTLR 901**

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***Public Trustee v Cooper* [2001] WTLR 901**

(4) Attack on the exercise of trustees' powers

The fourth category is **where the trustees have actually taken action, and that action is attacked** as being either outside their powers or an improper exercise of their powers ...”

- Fraud on a power
- Mistake / *Re Hastings-Bass*
- (Ir)relevant considerations
- Defective / excessive execution
- Duress, undue influence, misrepresentation
- Breach of fiduciary duty or other duty of care



***Public Trustee v Cooper* [2001] WTLR 901**

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***Public Trustee v Cooper* [2001] WTLR 901**

(3) Surrendering discretion

The third category is that of **surrender of discretion** ...



- The Court is not keen to accept a surrender
- Trustees have been appointed and have accepted office under the terms of the trust
- There must be a good reason – last resort

See ***AB v CD* [2019] WTLR 1083**

- Go away and reconsider
- Deadlock persisted – court stepped in

***Public Trustee v Cooper* [2001] WTLR 901**

(2) and (3): Blessings vs. surrendering discretion

The second category is **whether the proposed course of action is a proper exercise of the trustees' powers** and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court ...

The third category is that of **surrender of discretion** ...



"If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court ..."

(Marley v Mutual Security Merchant Bank and Trust Co [1991] 3 All ER 198 at 201)

However, see by way of examples:

- ***Re Sova Capital* [2023] EWHC 452 (Ch)** at [188] (insolvency context)
- ***Re ABC Trusts* [2015] SC (Bda) 29 Civ** (offshore approach)

***Public Trustee v Cooper* [2001] WTLR 901**

(2) and (3) Blessings vs. surrendering discretion

A blessing and a surrender?

- Trustees apply to court for blessing of their decision (already made) to sell trust asset. Strong opposition from beneficiaries.
- Blessing not given – what next?



***Public Trustee v Cooper* [2001] WTLR 901**

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Blessings – when?

Examples from case law

- Disposal or sale of trust assets
***South Downs Trustees v GH* [2018] WTLR 673**
- Where allegations or concerns of self-dealing arise
***Brown v Brown* [2019] EWHC 138 (Ch)**
- Where a charity trustee seeks to adopt a membership policy to exclude certain persons from membership
***RSPCA v AG* [2002] 1 WLR 448**
- The exercise of a power of advancement to apply trust funds to charitable causes
***X v A* [2006] 1 WLR 741**

Blessings

Approach of the Court – 3 stages

See ***Cotton v Earl of Cardigan* [2015] WTLR 39** at [12] and [13]
and ***Public Trustee v Cooper*** itself at 925

1. Have the trustees in fact formed the opinion that they should act in the way for which they seek approval?
2. Is this opinion one which a reasonable body of trustees, properly instructed as to the meaning of the relevant clause (i.e. the scope of their powers), could properly have arrived at?

Two aspects to this test (see *Airways Pension Scheme Trustee v Fielder* [2019] EWHC 3027 (Ch) at [5]):

- a. Process: has the trustee taken into account relevant matters and disregarded irrelevant matters?
- b. Outcome: is the decision one which a rational trustee could have come to?

3. Has the opinion been vitiated by any conflict of interest?

Blessings

Approach of the Court – generally

***Re MF Global UK* [2014] Bus LR 1156 at [32]**

- The court's function is limited (cf. Beddoes?)
- Scope of the power → limits of rationality and honesty
- Not interested in re-making the decision

But:

- The court will act cautiously – beneficiaries cannot complain post-blessing (***X v A* [2006] 1 WLR 741** at [30])
- No cross-examination or disclosure of trustees' records (cf. breach of trust proceedings)
- If in doubt as to propriety, it will refuse to bless

***Tamlin v Edgar* [2015] WTLR 485**

"The court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such..."

Blessings

Key points (i)

Disclosure – see *Tamlin v Edgar* [2015] WTLR 485

- Decision of the trustees, not the court
- Full and frank disclosure to put the court in possession of all relevant facts
- The trustees must satisfy court that they have properly considered their proposed action (see e.g. ***Re Piedmont Trust and the Riviera Trust* [2021] JRC 248**)

Each stage is important – see *A1 v R1* [2015] WTLR 683

- Proposed decision not unreasonable and consistent with memorandum of wishes
- Guernsey court could not be satisfied that trustees had approached process satisfactorily

“It was impossible to discern what the trustees had in their minds at the relevant times.”

The failure of disclosure was “*unforgiveable*”.

Blessings

Key points (ii)

Assessment of rationality

- The Court will assess reasonableness and rationality on the basis of the facts as at the date of the hearing.
- The trustees should therefore consider filing further evidence to update the court as to changes in circumstances and resultant changes to their proposed decision – full and frank

Background and context is relevant (fitness to act) – *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [281]

- Court was justified in refusing to bless (inter alia) by the trustees' *"collective and individual unfitness"*

"... the relatively limited role which the court has hitherto chosen to adopt in category (2) cases ... may well have been developed in the context of ... trustees whose general fitness was not in dispute"

Blessings

Key points (iii)



Beneficiaries' views

- Liaise to the maximum extent with beneficiaries
- Obtain views / consents

Beneficiaries' options

- If decision blessed, consider timing of application: delay can constitute a breach of trust
- Injunctions? ***Brown v New Quadrant Trust Corporation* [2021] EWHC 1731 (Ch)**

Blessings

Procedure & Costs

- CPR Parts 8, 64
- Is the application really necessary? Costs risk
- Parties
- Cost capping – Practice Direction 3E

"Any party ... who intends to apply for an order for payment of costs out of the trust fund must file and serve on all other parties written notice of that intention with a budget of the costs likely to be incurred by that party."



Conclusions?



Questions?

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Beddow Applications: Back to Basics

Emma Loizou

26 April 2023



General framework

- Trustee Act 2000, section 31
- CPR 46.3
- CPR 46PD 1.1

Re Beddoe [1893] 1 Ch. 547

- Lindley LJ:
 - *"a trustee who, without the sanction of the Court, commences an action or defends an action, unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion"*

Re Beddoe [1893] 1 Ch. 547

- Lindley LJ:
 - *"But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to shew that the costs so incurred were properly incurred."*

Re Beddoe [1893] 1 Ch. 547

- Bowen LJ:
 - *"If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people."*

What is a Beddow application?

- Application for directions in relation to litigation
- Usually concerns disputes with a third party
- Beddow order secures trustees' indemnity
- Otherwise risk of trustees being personally liable
- Does not determine who pays costs between parties to the litigation

Is an application necessary?

- Indemnity in trust deed
- Indemnity from beneficiaries
- Insurance
- Proposed action so clear

What will the court consider?

- Is the proposed action in the interests of the trust?
- Fact sensitive
- May give a limited indemnity

Procedure

- Part 8 claim made under Part 64
- Made in separate proceedings
- With or without hearing
- Usually heard in private

Parties

- Usually made by trustee with beneficiaries as defendants
- May not be necessary for all beneficiaries to be joined
- Can apply to the court to issue without naming any defendants
- The Attorney General is the defendant for charitable trusts

Evidence

- Witness statement
- Full disclosure of all relevant matters
- Advice from qualified lawyer as to prospects of success
- Estimate of the value or significance to trust estate
- Costs likely to be incurred by trustees and other parties
- Known facts concerning other parties' means

Evidence

- Steps in relation to pre-action protocol
- Mediation
- Consultation with beneficiaries

Costs

- Usually paid from the trust fund
- Give notice of intention to apply for order: CPR 3EPD para 5.4

“ease and comparatively small expense”?

- Howell v Lees-Millais [2011] EWCA Civ 786
 - *"The possibility that an application of that type would involve well over twelve days of court time, would require more than 3,000 pages of evidence, would take some five years (or more than eighteen months if one ignores the costs issue) to resolve, and would incur the parties in costs exceeding the equivalent of £1m in present day value, would have seemed inconceivable to those two experienced judges. This should never happen again"*

If you want more

- Beddoes and blessings – whether and whither? (Private Client Conference 2021): <https://radcliffechambers.com/insights/video-4/>

Questions?

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