Neutral Citation Number: [2022] EWHC 193 (Ch)

Case No: PE 2020 000006

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/02/2022

Before :

CHIEF MASTER SHUMAN

- -

Between :

PUNTER SOUTHALL GOVERNANCE SERVICES LIMITED	**Claimant**
- and -	
(1) NIGEL J BENGE **(2) KAY MARGARET BARRETT**	**Defendants**

- -
- -

Paul Newman QC (instructed by **Mills & Reeve LLP**) for the **Claimant**
Elizabeth Ovey (instructed by **Walker Morris LLP**) for the **First Defendant**
Michael Ashdown (instructed by **Boodle Hatfield LLP**) for the **Second Defendant**

Hearing dates: 28.9.21, 4.11.21

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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.

.....

CHIEF MASTER SHUMAN

CHIEF MASTER SHUMAN:

1. The claimant is the independent trustee of a pension scheme called the B. S. T. Group Pension Scheme (the scheme). It brings this claim by Part 8 claim form issued on 14 September 2020, as amended on 21 September 2020 and re-amended on 30 December 2020, seeking approval of the court, pursuant to the jurisdiction under *Public Trustee v Cooper*, for the trustee's decision to pay a death benefit from the assets of the scheme to the second defendant.

2. The claim is opposed by the first defendant, who is a deferred member of the scheme and a son of the deceased member Thomas Stanley Benge (Mr Benge). It is not opposed by the second defendant, who is also a member and trustee of the scheme, and is the intended recipient of the death benefit.

3. The claimant relies on three witness statements made by Mark Homer, a director of the claimant, dated 8 September 2020, 31 December 2020 and 4 March 2021. The second defendant has also filed a witness statement dated 5 February 2021.

4. The first defendant relies on his witness statement dated 5 February 2021.

5. The agreed issues before the court are whether:

    i) the decision of the trustees of the scheme made in or about November 2017 to exercise their powers pursuant to provision 56 of the supplemental trust deed dated 10 July 2009 to pay to the second defendant a death benefit from the assets of the scheme referable to Mr Benge (the death benefit) (the decision) was one which a reasonable body of trustees, correctly instructed as to the meaning of the said provision, could properly have arrived at in the light of the information available to them at the time;

    ii) the decision was vitiated by any conflict of interest under which any of the trustees were labouring;

    iii) the trustees of the scheme have acted and are acting properly in refusing to reconsider the, as yet, unimplemented decision, alternatively pursuing the present application, in light of the information provided to them, alternatively to the claimant, since the decision was made; and

    iv) in all the circumstances should the court grant the relief sought in the claim form.

THE FACTUAL MATRIX

6. Given the serious allegations made by the first defendant in this case against the second defendant it is necessary for me to set out the factual matrix in detail.

7. In the 1960's Mr Benge incorporated a company, which changed its name to B.S.T. Warehouses Limited (the company) in 1968.

8. By a deed dated 27 March 1987 the scheme was established to provide pension and death benefits to members and beneficiaries of the scheme on a defined contribution basis. The founder and employer of the scheme was the company. The original trustees

were Mr Benge and, Denton and Cotrustees Limited (Dentons). Mr Benge was originally the only member of the scheme. A company associated with Dentons carried out the administration of the scheme.

9. On 7 July 1988 Mr Benge's wife, Sheila, became a member of the scheme and from 1 June 1994 received a pension from it.

10. Mr Benge had 3 children, the first defendant, Christina Hull, and Glynne Benge. Christina does not wish to contest the claim and signed a waiver agreement on 22 December 2020 agreeing not to defend, contest or oppose the claim or otherwise do anything to challenge or interfere with the implementation of any order made by the court. Glynne was a member of the scheme from 20 May 1997 to 8 October 2019, when his benefits were transferred out of the scheme to another retirement benefits arrangement. He does not contest the claim.

11. The first defendant is a member of the scheme. He was a director of the company from 21 December 1991 to 31 July 1997.

12. On 19 December 1997 the second defendant became a member of the scheme. On 23 August 2005 the second defendant was appointed as trustee of the scheme.

13. On 1 July 2007 Mr Benge purchased a property in Switzerland known as La Margarita for CHF 2,100,000. It was purchased in the joint names of Mr Benge and the second defendant.

14. On 14 February 2008 Mrs Benge died.

15. On 18 August 2008 Mr Benge purchased the property known as Oakridge in Shedfield, Southampton for the price of £1,400,000. It was purchased in the joint names of Mr Benge and the second defendant.

16. On 21 August 2008 Mr Benge made a new will. Under clause 4.1 he provided for a pecuniary legacy to the second defendant in the sum of £100,000, as the third codicil dated 5 July 2005 to his 2001 will had done. Clause 6.1 declared that any inheritance tax due in respect of Oakridge, which would pass to the second defendant outside of the will, should be paid from his residuary estate. Under clause 6.2 all furniture and household effects in Oakridge are gifted to the second defendant.

17. On 5 February 2009 Mr Benge was formally diagnosed with moderately severe Alzheimer's disease. The first defendant says that he was showing mental decline from 2004.

18. On 5 June 2009 Dentons wrote to Mr Benge asking him whether he elected to receive an alternatively secured pension (ASP) from the scheme. On 25 June 2009 the second defendant wrote to Dentons confirming that Mr Benge did not wish to purchase an annuity from a life assurance company and that he chose to receive an ASP.

19. A supplemental trust deed made on 10 July 2009 was executed by Mr Benge and the second defendant, as trustees (the 2009 deed). By provision 47(A) a member, on attaining the age of 75, may elect for the whole of the assets referable to their benefit to be applied to provide an ASP.

20. Reference was made by Ms Ovey, counsel for the first defendant, to an opinion of Professor Jacoby, a well-known Professor Emeritus of old age psychiatry and often called upon, before his retirement, to give opinions on testamentary capacity to the court. His opinion, prepared for litigation contemplated but never pursued, was that Mr Benge lost capacity to make financial decisions by no later than May 2009. In fact, Ms Ovey has confirmed that despite the first defendant's allegations about Mr Benge's mental state at this time he does not pursue any claim for relief from the court in respect of the election by Mr Benge to take an ASP, and the validity of the 2009 trust deed. Although as to the latter Ms Ovey notes that the 2009 trust deed is in the same terms as a previous supplemental trust deed dated 23 July 2007.

21. On 10 July 2009 Mr Benge attained the age of 75 and commenced receipt of an ASP pursuant to provision 47(A) of the 2009 deed. At that date Dentons calculated that the value and distribution of Mr Benge's share of the pension fund totalled £764,162.

22. In August 2009 Mr Benge moved into Oakridge. At the same time the second defendant moved from her property in Boyatt Wood, Hampshire to Oakridge to live with Mr Benge.

23. On 8 October 2009 Mr Benge was sectioned under the Mental Health Act 1983. On 31 December 2009 an enduring power of attorney was registered.

24. Mr Benge died on 5 March 2010. At the date of his death the scheme was governed by the provisions of the 2009 deed. The claimant's and second defendant's position is that at the time of his death, his partner was the second defendant. The nature of Mr Benge's relationship with the second defendant remains disputed by the first defendant.

25. The scheme is now governed by a supplemental trust deed dated 18 March 2013 (the 2013 deed), although it is the provisions of the 2009 deed that are relevant to this claim.

The 2009 deed and the death benefit issue

26. The 2009 deed provides four ways in which the assets of the scheme, referable to Mr Benge, could be distributed on his death.

    i) Pursuant to provisions 53 to 56, the provision of an annuity or drawdown pension to a dependant;

    ii) Pursuant to the augmentation power in provision 13, the payment of benefits to a non-dependant member of the scheme;

    iii) Pursuant to provision 58(A), and in the event that a member died without a surviving dependant, the payment of a lump sum to a charity selected by the trustees;

    iv) In default, pursuant to provision 71(D), the payment of the surplus assets back to the employer of the scheme.

27. The second option would attract an unauthorised payment tax charge of 40%: section 208(5) Finance Act 2004 (FA 2004). The fourth option would similarly incur a substantial tax charge, an authorised employer payment charge of 35%: section 207(4) FA 2004.

28. Under section A of the 2009 trust deed "**dependant**" is defined as,

> "**in respect of a Member means:**
>
> (i) his widow, widower, or Civil Partner
>
> (ii) this child, either natural or adopted, under 23, or over 23 and in the opinion of the Trustees at the date of death of the Member dependent on the Member because of physical or mental impairment.
>
> (iii) **such other person who in the opinion of the Trustees is (or was at the date of his death) dependent or interdependent on him for all or any of the necessaries of life.**" [my emphasis]

29. On 28 October 2011, Dentons wrote to the children and the second defendant, as the members of the scheme, informing them that after payment of inheritance tax, a fund of £423,468, referable to Mr Benge, remained in the scheme. They asked if any of them were potential beneficiaries.

30. By a letter dated 30 November 2011, Boodle Hatfield, acting on behalf of the second defendant, advised Dentons that the second defendant considered that she was a dependant of Mr Benge within the meaning of the 2009 trust deed, and therefore entitled to the death benefit.

31. By letter dated 6 January 2012, Penningtons, acting for the administrators of Mr Benge's estate, on behalf of the first defendant and Glynne as members of the scheme and on behalf of the directors of the company, said Mr Benge had no dependants and the death benefit should be paid to Christina and her son, as Mr Benge's nominated beneficiaries.

32. Indeed, during the course of the hearing Ms Ovey has sought to emphasise that the second defendant has described herself to medical practitioners and to Mrs Mason, a housekeeper, as Mr Benge's "business manager" and "personal assistant".

33. Boodle Hatfield were asked to provide evidence of the second defendant's dependency, which is set out in their letter to Dentons dated 18 January 2012. They made 6 points:

    i) Mr Benge and the second defendant had been in a relationship for around 10 years before they started to live together. At the date of Mr Benge's death they had been living together for approximately 18 months.

    ii) Mr Benge and the second defendant owned their main residence, Oakridge, equally as joint tenants. They also owned property in Switzerland known as La Margharita equally. Mr Benge purchased Oak Ridge for £1,400,000 on 18 August 2008 and purchased La Margarita for CHF 2,100,000 on 1 July 2007. They considered that both properties were their homes, and Mr Benge contributed 100% of the purchase price for both.

iii) Mr Benge paid the majority of the outgoings in relation to La Margharita, including taxes, and these costs are estimated to have been between at least £5,000 to £7,500 per annum.

iv) Mr Benge paid for the majority of the refurbishment work to Oakridge and the costs of furniture, approximately £600,000.

v) Mr Benge paid for the majority of the couples' day-to-day living expenses, including food and clothing. Whilst they were living together at Oakridge household expenses were just over £14,000 with Mr Benge paying £8,000 and the second defendant paying the balance. In addition there were other expenses relating to the property which were funded by Mr Benge.

vi) Mr Benge made provision for the second defendant in his last will, particularly in relation to the properties.

The solicitors concluded by stating that, "our client and Mr Benge lived a lifestyle substantially supported financially by Mr Benge".

34. There was a clear conflict between the second defendant's position as trustee and her claim to be a dependant of Mr Benge for the purposes of the 2009 trust deed. Quite properly Dentons sought independent advice on whether the second defendant was Mr Benge's dependant or not. They instructed Mr Taylor of Downs solicitors by letter dated 20 March 2012. In that letter they set out a short summary of the background facts, identified the conflicting positions and said, "it is for this reason that the professional trustee is seeking an independent opinion on whether or not Mrs Barrett is considered to be a bona fide mutual dependant". There were 5 enclosures to that letter including Boodle Hatfield's letter dated 18 January 2012, an extract of the 2009 trust deed and HMRC's definition of a dependant, RPSM 10104040, (the HMRC technical pages).

35. In a letter dated 28 March 2012 Mr Storar of Downs set out his opinion. He identified that Dentons was seeking an independent opinion on whether the second defendant was considered to be "a bone fide mutual dependant" for the purposes of the 2009 trust deed. He set out the relevant definition from the 2009 trust deed and said, "the trustees are required to form an opinion as to whether or not Mrs Barrett is a dependant or interdependent of the late Mr Benge." The material parts of that opinion are as follows,

> "Mr Benge and Mrs Barrett owned two properties jointly, one in England comprising two titles and another property in Switzerland. Both properties are held by the parties as joint tenants.
>
> Mrs Barrett's solicitors maintain that whilst Mr Benge provided the purchase price for both properties, they were held jointly. The properties were considered as the homes of Mr Benge and Mrs Barrett. Messrs Boodle Hatfield explained that Mr Benge paid the majority of the outgoings on the Swiss property, and he also bore £8,000 of the outgoings of the UK property expense of £14,000.

> The fact that the properties were jointly owned does not of itself lead me directly to the conclusion that there was interdependence between Mr Benge and Mrs Barrett. However, the fact that Mr Benge provided the entire purchase price of both properties does offer some support to the notion of dependency by Mrs Barrett upon M[r] Benge.
>
> Boodle Hatfield indicate that Mr Benge paid for the majority of the living expenses including food, clothing utilities heating and cleaning. It is not suggested that Mrs Barrett had sufficient funds to bear these costs on her own, but the fact that she did not cover those costs herself, suggests that she was to an extent dependant upon Mr Benge for those necessaries of life.
>
> On the information that has been supplied, to reach a conclusion would be in order for you to form the opinion that Mrs Barrett was a dependent of Mr Benge as at the time of his death. However I do feel that it would be appropriate and necessary to ask Mrs Barrett to prepare and sign a witness statement complete with a statement of truth setting out the facts that Boodle Hatfield refer to in their letter."

36. Pursuant to that letter Dentons asked Boodle Hatfield to provide a witness statement from the second defendant, complete with a statement of truth, setting out the material facts upon which she relied. On 8 October 2013 the second defendant's witness statement was provided to Dentons. The witness statement dated 7 October 2013 sets out the information referred to in Boodle Hatfield's letter dated 18 January 2012 and goes further by setting out more information, in particular, about the relationship between Mr Benge and the second defendant. Dentons made a decision in principle to pay the death benefit to the second defendant.

37. During 2013 and 2014 Mr Benge's children made a series of complaints to the pensions ombudsman about the trustees' conduct in relation to the scheme, these did not include the death benefit issue.

38. On 25 July 2014 Dentons retired as trustee of the scheme. This left the second defendant as the sole trustee.

39. On 26 August 2016 Boodle Hatfield, on behalf of the second defendant as trustee, wrote to each of Mr Benge's children stating that the second defendant needed to make certain decisions, including determining the death benefit issue. They asked whether there are any matters not contained or referred to in previous correspondence that the second defendant should take into account before making a decision. In a letter from the first defendant to Boodle Hatfield dated 7 September 2016 he contended that Christina was the legitimate beneficiary of the pension, stating that the second defendant had an overwhelming conflict of interest and that she was not a dependant for the purposes of the 2009 trust deed. He went on to make serious allegations about the second defendant's conduct, in particular between 2009 and Mr Benge's death.

40. On 11 July 2017 the claimant was appointed as trustee of the scheme. It carried out its own investigations of the steps taken by Dentons to determine whether the death benefit

was payable and to whom. The investigations did not involve the second defendant. It was satisfied that the second defendant was a dependant for the purposes of the 2009 trust deed and that the only authorised payment it could make from the scheme, that is a payment that would not incur substantial tax penalties, was to pay the death benefit to the second defendant. The claimant made the decision in or around November 2017.

41. By an announcement dated 27 November 2017 the claimant notified the members of the scheme of the decision (the announcement). It might, with hindsight, have been more helpful if the announcement had included the language of the 2009 trust deed rather than just the definition of "dependent" in the FA2004 but this was a statement to members of the scheme, not lawyers,

> "someone other than the above[1] who was financially dependent on the member, had a financial relationship with the member which was one of mutual dependence, or who was dependent on the member due to physical or mental impairment".

The announcement goes on to conclude that,

> " we have clear and unambiguous evidence that Kay Barrett had a direct financial reliance on the deceased in their day to day living arrangements."

42. On 5 December 2017 Walker Morris LLP acting on behalf of the first defendant and Christina wrote to the claimant stating that they had failed to take relevant considerations into account in coming to the decision. These can be summarised as,

i) The failure to take into account Mr Benge's mental health, both on 5 February 2009 when he was diagnosed as suffering from Alzheimer's disease but also for a number of years prior to that, since 2004.

ii) The failure to make enquiries or consider whether anyone else, in particular Christina, may be considered to be a dependant.

iii) "Our clients have evidence of Mrs Barrett (a) concealing evidence of Mr Benge's illness and the issues with his capacity from his family and attorneys, (b) falsifying documents and (c) obtaining blank cheques from Mr Benge which she completed with her name as 'payee'.

They stated that they would be writing more fully in due course with evidence to support their client's concerns.

43. Given the serious allegations, albeit very generalised in nature, it is surprising that Walker Morris produced no evidence.

44. The first defendant confirmed in an email dated 19 March 2018 that Walker Morris no longer acted for him. I am told that there was no further correspondence with Walker Morris until 2020, when they acted for Christina alone. In their letter dated 5 May 2020 Walker Morris simply rehearse the four points made in their letter dated 5 December

[1] a spouse, civil partner, child under age 23, or a child of the member who is 23 or over, but due to physical or mental impairment is still dependent on the member

2017. No further evidence is produced. The focus thereafter turned to how Mr Benge came to elect to take an ASP, but that had already been raised historically.

45. I also consider it noteworthy that the first defendant wrote to the claimant in around June 2018. The letter is undated, stating that the 2013 trust deed governed the scheme and that the death benefit had to be paid to Mr Benge's estate. There is no mention in that letter of the allegations made against the second defendant, only 6 months before.

46. The claimant wrote to the first defendant by letter dated 15 June 2018 stating that it intended to treat his letter as a complaint under the scheme's internal disputes resolution procedure. The claimant explained that it had applied the correct rules and invited him to provide evidence that Christina was a dependant at the date of Mr Benge's death. Whilst the first defendant responded by email on 6 July 2018 stating that he hoped to respond early the following week, nothing further was sent by the first defendant.

47. On 1 October 2018 the claimant wrote to the first defendant stating that he had had a reasonable time to make representations, his complaint was rejected, and the claimant would proceed to settle the death benefit in accordance with the decision.

48. On 4 October 2018 the first defendant responded in an email, which comprises 4 pages in the hearing bundle before me, stating that he was disappointed with the decision and setting out the reasons why he still considered that the death benefit should not be paid to the second defendant. He made serious allegations against the second defendant including her fraudulently signing documents and cheques, suppressing Mr Benge's illness for her own personal gain and arranging for him to sign cheques and documents whilst he was unwell. These are and remain unsubstantiated and serious allegations. The first defendant has had ample opportunity to adduce evidence to support these accusations; he has failed to do so.

49. There was no further communication between the claimant and the first defendant before the claim was issued.

THE LAW

50. In *Public Trustee v Cooper* [2001] WTLR 901 Hart J described four categories of case where the court might be asked to adjudicate on a proposed course of action taken or proposed by trustees. He referred to an extract of Walker J, as he then was, taken from a case heard in chambers. At pages 922-923 Hart J said,

> " (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature 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 for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees

> want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

51. This is the category that I am concerned with in the case before me. Although slightly differently worded in their respective skeleton arguments both counsel agree that approval will be given by the court where the court having considered the evidence is satisfied that,

    i) The trustees have in fact formed the opinion that they should act in the way for which they seek approval;

    ii) The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant provision, could properly have arrived at; and

    iii) The opinion was not vitiated by a conflict of interest under which any of the trustees had been labouring.

52. There are two parts to the second requirement. First, whether the trustee has properly taken into account relevant matters and as a corollary not taken into account irrelevant matters. This does not mean that the trustee is required to take every conceivable factor into account. A point emphasised by Mr Newman QC, counsel for the claimant. In Lewin on Trust at paragraph 29-042 in the context of exercising powers the editors say,

> "Most decisions, whether taken by trustees or by any other person, could be better informed. To hold the trustees to be in breach of duty for failing to consider every matter which they might sensibly regard as relevant would at best be burdensome on the trustees and, in cost and delay, on the beneficiaries; at worst it would paralyse decision-making The range of circumstances which require to be taken into account will depend upon the context. … The duty to take relevant matters into consideration is in our view best regarded as an element in the duty to act responsibly, so that the trustees must have a rational basis for a decision but will be in breach of duty only if a given matter is so significant that a failure to take it into account would be irrational."

    Second, whether the decision is one which a rational trustee would have come to. If the court is satisfied in respect of both of these then it is not open to the court to interfere with the decision, even if it would have come to a different decision.

53. The exercise to be carried out by the court is described in Lewin on Trusts, 20th Ed, at paragraph 39-095 as,

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

54. It follows that a court must be careful in exercising the jurisdiction because the beneficiaries are unlikely to be able to obtain full disclosure or to test the evidence by way of cross-examination: *X v A* [2005] EWHC 2706 (Ch). The consequence of approval is that the beneficiaries will be unable to challenge subsequently that the exercise carried out by the trustees was in breach of trust or to seek to set aside the relevant transaction. Additionally, the trustee must make full and frank disclosure to the court of all relevant facts and documents: *Tamlin v Edgar* [2011] EWHC 3949 (Ch).

55. If new facts come to light that may cast doubt on the decision yet to be implemented the trustee must reconsider matters to see if the decision still stands. That is so even if the trustee has issued proceedings seeking approval of its decision by the court.

56. Ms Ovey referred me to the decision of Briggs J, as he then was, in *Jones v Firkin-Flood* [2008] EWHC 2417 where at paragraph 269 he said,

> "It is therefore not the type of case contemplated by Hart J in *Public Trustee v. Cooper* at pages 933H to 934D where trustees, appreciating the existence of a conflict affecting one or more of their number, considered themselves nonetheless able fairly and reasonably to take the decision. Even in such a case, a reference to the court specifically on the grounds of conflict would throw on the remaining trustees the onus of proving the transaction was indeed fair and reasonable, rather than merely honest and free from apparent irrationality. In my judgment, a decision reached entirely ignoring Mr Bramley's conflict vitiated the exercise of the Trustees' discretion."

57. From that she submitted that the correct test for the court, where conflict arises, is that the trustees must prove that the transaction was "fair and reasonable" rather than "merely honest and free from apparent irrationality." Ms Ovey said that the test applied to the claimant in this case.

58. It is important to place *Jones v Firkin-Flood* in its factual context. Mr Flood under his will divided his estate into two parts and created a trust in respect of the first part and the second formed the residue of his estate and was divided between his three children:

60% to Ian, 30% to Daniel and 10% to Louise. Apart from a specific trust of income, to be paid in the same shares, the trust fund was settled on a broad discretionary trust both as to capital and income. The trust fund consisted of Mr Flood's shares in two companies.

59. It was only during the cross-examination of Mrs Levy, a trustee, that she revealed that Daniel was given less than the 30% default share because the trustees had taken into account Ian's children and the employees who had been with the company for many years. She also explained that they had looked into Ian taking the business forward with the employees that had worked for Mr Flood and Ian for many years. Briggs J described the evidence of Mr Bramley, who followed, and was also a trustee in this way,

> "during examination-in-chief [Mr Bramley] revealed for the first time, without any apparent embarrassment, that he was one of the employees to whom Mrs Levy had referred. Mr Bramley was by then in his 70s and had been a very longstanding employee and friend of Mr Flood. He therefore fell fairly and squarely within the category of employees whom Mrs Levy described as needing to be taken care of, because of their age, and their consequent difficulties in finding other employment."[2]

60. Mr Bramley was conflicted, directly involved in the decision-making process, and the trustees appear to have been blissfully unaware of that conflict until it was pointed out to them during the course of the trial. That is in stark contrast to the case before me where the claimant, as did Dentons, appreciated that there was a conflict with the second defendant and took positive steps to manage that conflict so that the second defendant played no part in the decision-making process. The latter point has been acknowledged by Ms Ovey, but she maintained that the court should adopt a more stringent test for the claimant.

THE ISSUES

(i) Was the decision one which a reasonable body of trustees, correctly instructed as to the meaning of the said provision, could properly have arrived at in the light of the information available to them at the time?

61. The first defendant alleges that the wrong dependency test was applied by the claimant.

62. Section A of the 2009 trust deed provides that a dependant in respect of a member means,

> "(iii) such other person who in the opinion of the trustees is (or was at the date of his death) dependent or interdependent on him for all or any of the necessaries of life."

63. Ms Ovey forensically examined the announcement to support her submission that the claimant applied the test under the FA 2004, and that this test is materially different to the test under the 2009 trust deed. I am told by Mr Newman QC that the first time this argument was raised was in her skeleton argument.

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[2] Paragraph 181 of the judgment.

64. Section 164 of the FA 2004 sets out what payments a registered pension scheme is authorised to make, which includes at (a), pensions permitted by the pension rules or the pension death benefit rules. The significance of authorised and unauthorised payments from a pension scheme is that they will attract different tax charges. Section 167(1) permits payment of a drawdown pension (the death benefit in this case) to be paid to a "dependant". The definition of dependant is found in Schedule 28 paragraph 15 of the FA 2004 which provides,

> "(3) A person who was not married to [, or a civil partner of,] the member at the date of the member's death and is not a child of the member is a dependant of the member if, in the opinion of the scheme administrator, at the date of the member's death—
>
> (a) the person was financially dependant on the member,
>
> (b) the person's financial relationship with the member was one of mutual dependence, or
>
> (c) the person was dependant on the member because of physical or mental impairment."

65. The effect of this is that a payment to a dependant, as defined by the scheme's governing documentation, will be an authorised or an unauthorised payment according to whether the dependant falls within the statutory definition of dependant or not. In cases of mutual dependency, the HMRC technical pages state,

> "This does not require that a person is entirely or even predominantly dependant on another financially, nor does it require an equal level of financial dependence between the parties. Clearly some element of reliance on each other financially is involved, but it is for scheme rules to set out the criteria to be used by the scheme to determine dependency in these circumstances."

66. The announcement identifies that authorised payments are subject to a narrow HMRC definition and that is not the same definition as is used to distribute discretionary lump sum death benefits.

67. Ms Ovey argues that the "necessaries of life" test in the 2009 trust deed was an additional qualification, over and above the test of dependency in the FA 2004. Having said that the phrase had received little judicial discussion she did go on to accept that "necessaries of life" is frequently included in the definition of "dependant" in pension scheme documentation.

68. In *Simmons v White Brothers* [1899] 1 QB 1005, the Court of Appeal considered the definition of dependants for the purposes of the Workmen's Compensation Act 1897, which referred to a member of the workman's family who was wholly or in part dependent upon the earnings of the workman at the time of his death. The statutory definition did not expressly refer to the "necessaries of life". Romer LJ said at 1008,

> "I agree with the passage in Minton-Senhouse and Emery on Accidents to Workmen, that in my judgement a "dependant", in order to get compensation, must be dependent in the proper sense of that term, and that it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent on him for the ordinary necessaries of life, having regard to his class and position in life. "

69. That seems to me to be a very useful analogy to draw with the position of a dependant under pension schemes. "Necessaries of life" are those things that a person needs to maintain their life. In a narrow sense that could simply mean shelter, food and medicine. Although then the better description would be "necessities" not "necessaries". In a legal context it is clear that the term is wider, Romer LJ specifically said "having regard to his class and position in life". It will therefore be fact sensitive. I consider that being dependant on someone for the necessaries of life, per the 2009 trust deed, is materially the same as the definition of dependant under the FA 2004. Support for that position can be found in the HMRC technical pages which refers to the concept of mutual dependency.

70. The first defendant goes on to argue that, in any event, the evidence did not support the conclusion that the second defendant was a dependant.

71. Whilst it is correct that the claimant referred to the FA 2004 definition in the announcement rather than the 2009 trust deed, that does not vitiate the decision. There is a fundamental difference between the principles that the claimant applies when exercising its power and the notification of the decision to scheme members. The announcement is for information purposes and is not a formal minute of the decision.

72. In *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312 Vos LJ, as he then was, reflected on the role of the court when trustees seek approval of a momentous transaction. At paragraph 78 he said,

> "They are asking the court to decide whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue."

73. However, Ms Ovey submits that the court must carry out a detailed inquiry when trustees are considering an award on the ground of dependency. She illustrated this approach by reference to Carnwath J in *Wild v Smith* [1996] Pens LR 275, particularly paragraph 26 where he sets out the inadequacies of the evidence. However it is important to place the case in its factual context. Mr Hindle-Smith had been living with Ms Slack. They had planned to refurbish an old cottage that she owned, and they agreed to exhaust Ms Slack's savings before Mr Hindle-Smith funded any costs. Mr Hindle-Smith had insisted that Ms Slack spend less time on her own affairs so that the financial burden of meeting their day-to-day expenses fell on him. Ms Slack commented that his

pride "would not allow him to be seen as a kept man". That snapshot alone shows why there was insufficient evidence of dependency before the trustees. Ms Slack owned her own cottage and elected to spend her savings on renovating it; if there was any dependency it came about by choice. All this case illustrates is that if the evidence does not support dependency then there may need to be further investigation. What the case does not do is set the bar that much higher for trustees when an issue of dependency arises.

74. The distinction that needs to be drawn is that the test for the court is one of evidence, not investigation. It is a matter for the trustee to determine the appropriate scope of the investigation. Mr Newman QC submits that if the court required a trustee to investigate to a particular standard that may well usurp the function of the trustee. I can certainly see dangers in that approach by the court, it could also increase costs and cause delay.

75. So the question for the court is whether the claimant has presented sufficient evidence to justify a reasonable trustee in forming a view that the second defendant was a dependant of Mr Benge for the purposes of the scheme rules.

76. The claimant specifically states in the announcement that it had gathered background correspondence, sought legal advice and contacted HMRC. In addition, it investigated the steps taken by Dentons to ascertain the benefits payable. The claimant sets out its conclusion that the second defendant was a dependant, and an authorised payment could be made to her. "We have clear and unambiguous evidence that Kay Barrett had a direct financial reliance on the deceased in their day to day living arrangements."

77. I go back to the evidence on which Dentons, and then the claimant, based the decision. The letter of instruction dated 20 March 2012 specifically refers to the definition of dependant in the 2009 trust deed and a copy is attached. Quite properly it also refers to the HMRC technical pages. The letter states that the second defendant considers herself to be a mutual dependant, which in the HMRC technical pages refers back to the scheme rules. Boodle Hatfield's letter dated 18 January 2012 setting out the second defendant's case on dependency is also attached. The advice from Mr Storar at Downs law dated 28 March 2012 expressly set out the test that he had considered, set out his reasoning and concluded that the second defendant was a dependant within the meaning of the 2009 trust deed.

78. Dentons were fully entitled to seek advice on the issue of dependency and to rely on the advice given, as was the claimant. In *Cotton v Brudell-Bruce* the trustees had decided to sell a high value property having taken advice from selling agents that a limited directed marketing strategy was appropriate rather than an open market campaign. Ultimately there was no dispute about the decision to sell but rather on the process by which the sale should be achieved. As Vos LJ said at paragraph 77,

> "I do not think that the trustees can be criticised for accepting GVA's clear view. They were the experts. They were accomplished and well-reputed in this market. One might ask how it would have helped if they had given the court more information about Mr A's history and antecedents and how he approached GVA in the first place. His bid is what it is and can be evaluated against the available expert evidence on its merits. It is true, of course, that GVA may have acted negligently in

> selecting the bidders. If, for example, they were later shown to have excluded a worthy bidder for an inappropriate reason, there might be a claim by the trustees against them. But there is no evidence of anything of the sort, and, in any event, as I said at the outset, there is a clear distinction to be drawn between the duties of the trustees to the beneficiaries and the duties of the experts to the trustees."

There was no reason to question or second guess that advice.

79. A trustee is not delegating its power by relying on an expert, any more than a judge is abdicating their role by being assisted by the opinion of an expert in determining a case. In both cases if the opinion is based on flawed instructions, perhaps errors with fundamental facts or an incorrect legal test, the opinion cannot be relied upon. That is not the case here. I am satisfied that the claimant was entitled to rely on the expert legal advice obtained by Dentons. Ms Ovey says that Dentons failed to consider six matters in reaching its decision, including whether the second defendant owned another property, whether she had bank accounts in her sole name, whether she had other assets, whether her income was derived from her employment or potentially from letting her former home, whether paying the outgoings from a joint account was simply a matter of convenience and whether the financial arrangements reflected Mr Benge's conscious choice given his medical diagnosis. She was strangely silent on whether it was improper for the claimant to rely on the advice of Mr Storar. Those points rather fall away.

80. In Mr Homer's first witness statement at paragraph 24 he sets outs the correct test on dependency and goes on to set out the evidence relied on by the claimant in reaching the decision. This position is reiterated in his third witness statement. At paragraph 18 he says,

> "I am accordingly advised by my legal advisers that, in deciding whether Mrs Barrett was, as a matter of fact, a dependant of Mr Benge within the meaning of above definitions[3], it is not necessary for the Trustees to be satisfied that Mrs Barrett was entirely financially reliant on Mr Benge: it is sufficient for them to be satisfied that she was to some extent mutually dependant on him, or dependent on him only for any (rather than all) of the necessaries of life."

81. He went on at paragraph 20 to identify the five facts that were of particular relevance and conclude at paragraph 21,

> "In light of the above, the claimant concluded and was satisfied that at the time of Mr Benge's death there was a significant and ongoing contribution by Mr Benge to Mrs Barrett's individual living expenses and standard of living (as well as their joint expenses). She was, as a matter of fact, living in Oakridge and Mr Benge paid the majority of outgoings in respect of that property. In contrast, Mrs Barrett's contribution to the joint finances and her own expenses was minimal. The Claimant

[3] Section A 2009 trust deed,

> considered that the fact that Mrs Barrett may have been paid a salary by the company and that she had her own pension arrangements was irrelevant because, at the time of Mr Benge's death, Mrs Barrett did not appear to have had the financial means to support the lifestyle they were living at that time and she relied on Mr Benge for her own day-to-day living expenses."

82. The second defendant's witness statement dated 7 October 2013 largely mirrors the evidence set out in Boodle Hatfield's letter dated 18 January 2012, its key evidence is contained in paragraphs 9 to 13. I accept Ms Ovey's proposition that mere cohabitation and the payment of expenses from a joint account are not sufficient to demonstrate dependency. Here the second defendant has adduced evidence going beyond that. Indeed, materially, the second defendant goes on to state at paragraph 11, "I could not have afforded to purchase either of these properties, or maintain them, without [Mr Benge's] support." This evidence is contained in a witness statement with a signed statement of truth.

83. It is also relevant to bear in mind that "necessaries of life" takes account of the relevant status of the person concerned. Mr Benge was a very wealthy man with assets of approximately £26 million. He had the property in Oakridge that he jointly owned with the second defendant purchased by him for £1.4 million and a ski chalet in Switzerland, also in joint names but again purchased by Mr Benge for CHF2,100,000. I am told he owned 5 cars in the United Kingdom and owned 5 cars in Switzerland. A lifestyle that the second defendant could only maintain because of Mr Benge. Mr Newman QC submits that the test of dependant in the 2009 trust deed does not require financial dependency on both sides, the definition simply uses "interdependency". I am not sure how that squares with his position that this test is materially similar to the tests of dependant in the FA 2004, which specifically refers to "the persons' financial relationship with the member was one of mutual dependence." The fact that both properties were owned by them as co-owners is material and a paradigm case of inter-dependency. Whatever the nature of the relationship between Mr Benge and the second defendant, the evidence is that she provided companionship, comfort and support. None of the definitions require the second defendant to prove that she was in a romantic relationship with Mr Benge, although that is her evidence.

84. The first defendant also asserts that the claimant failed to exercise its discretion by not taking into account other options for the distribution of Mr Benge's assets in the scheme. First, the claimant failed to consider making an unauthorised payment to Christina under provision 56 of the 2009 trust deed. That would of course have triggered a liability for tax and more significantly Christina did not adduce evidence of her dependency and in any case she does not maintain a dependency claim. Second, the assets should be paid to charity under provision 58(A) of the 2009 trust deed. This is not an option open to the claimant when it has determined that there is a dependant to whom an authorised payment can be made. Third, the claimant is considering winding up the scheme and if so there could be a return of funds to the Company. Mr Newman QC has pointed out that if the claimant were to pay back in circumstances where they could have benefited a member of the pension scheme or a beneficiary there will be a substantial tax charge of 35%. Fourth, the claimant could have made a payment to a non-dependant member of the scheme. This would incur a tax liability of 40%. When Mr Newman QC observes that the first defendant's opposition appears to be that the

claimant should make a payment to anyone other than the second defendant, there is some force in that. I certainly consider that had the claimant decided to take any of these four options that would have been a decision that no reasonable body of trustees could have reached.

85. Regardless of my analysis on the definitions, I am satisfied that the claimant applied the correct test to the evidence that they were presented with, that that evidence was sufficient to justify a reasonable trustee reaching the view that the second defendant was a dependant of Mr Benge for the purposes of the scheme rules and therefore making the decision.

(ii) The decision was not vitiated by any conflict of interest under which any of the trustees was labouring?

86. The first defendant accepts that the second defendant did not participate in the making of the decision.

87. Unlike the trustees in *Jones v Firkin-Flood*, Dentons identified the inherent conflict in the second defendant's position as trustee and her claim that she was a dependant. They took reasonable steps to manage that conflict by ensuring that the second defendant was not involved in the decision-making process and by seeking expert legal advice on whether the matters advanced in Boodle Hatfield's letter dated 18 January 2021 were sufficient to satisfy the test of dependency.

88. Ironically the first defendant criticises the second defendant for not performing her duty as a trustee. At sub-paragraph 56.3 of Ms Ovey's skeleton argument she says, "her position of conflict has led to her failure or inability to perform the duty of a trustee to ensure that all information required for the making of a properly informed decision is available and specifically has led to her failure to put information before the court." I find that position to be remarkable. As Mr Ashdown, counsel, adroitly observed the second defendant was 'Schrödinger's' trustee.

89. I am satisfied that Dentons and now the claimant have both identified the second defendant's conflict and taken reasonable steps to manage that conflict. In effect the claimant has treated the second defendant not as a trustee but as a member of the scheme, freezing her out of the decision. In isolating her in this way this has enabled the claimant to make the decision, free of conflict. The second defendant has provided evidence of her dependency and done all that she was required to do to satisfy the claimant that there was sufficient evidence of dependency.

90. The position here can be distinguished from that facing the court in *Jones v Firkin-Flood.* Accordingly this is not a case that is taken outside of the court's usual approach as set out in *Public Trustee v Cooper.*

(iii) Have the trustees of the scheme acted and are acting properly in refusing to reconsider the as yet unimplemented decision, alternatively pursuing the present application, in light of the information provided to them alternatively to the claimant since the decision was made?

91. On 7 September 2016 the first defendant set out various allegations against the second defendant, challenging that she was a dependant for the purposes of the scheme, as governed by the 2009 trust deed. The claimant made its decision, and the members of

the scheme were notified of this decision by an announcement dated 27 November 2017.What were the new facts following the decision that the claimant was under a duty to consider?

92. The letter from Walker Morris dated 5 December 2017 does not rely on new facts but suggests that the claimant failed to take all relevant matters into account. Neither the first defendant nor Christina took the opportunity to provide evidence to support the allegations that each made against the second defendant. Had they done so the claimant would have been obliged to take that evidence into account and evaluate their decision in light of it.

93. On 4 October 2018 the first defendant sent an email to the claimant repeating that the second defendant was not entitled to the death benefit and again setting out in florid terms his view of the second defendant and her conduct. By way of example he says, "By exploiting Dad's illness and manipulating the people around her Kay was able to obtain by deception cash and property totalling in excess of £3 million during the period of Dad's illness. A 263-page report detailing Kay's crimes and the supporting evidence was provided to the police." He required a "NDA to be signed" before releasing that report. I do not know why. On his case he possessed evidence that supported his position and yet he failed to produce it to the claimant. Evidence, that on the first defendant's case, would be relevant for the claimant to take into account.

94. The first defendant has carried out a forensic examination of the second defendant's financial position. Ms Ovey accepted during argument that some of the "new" evidence that she took me to had been known at the time of the decision by Dentons, but that some was new. The first defendant criticises Dentons and then the claimant in failing to take account of the second defendant's financial position prior to living with Mr Benge. She owned her own house, Boyatts Wood, and it could be inferred was self-supporting. She owned and ran two companies, KMB Management Services Ltd and KMB Property Investments Ltd. Although the latter's accounts for the period until 31 May 2009 has net current liabilities of £191,992 and the former's account for year end 31 May 2010 has total assets less current liabilities of £260,698 with a note that the balance owing to the KMB Property Investments Ltd is £196,035. She used Kelsi, 4 Windsor Gate, Eastleigh as her address for Companies House. The first defendant also produced an official copy of the leasehold title to a flat in Rufus Court, Eastleigh: an entry in the property register refers to a deed dated 10 December 2015 and the second defendant who is a party to it. At entry 2 it refers to a lease dated 25 May 2006 granted by Stephen Fletcher and Tracy Fletcher to KMB Property Investments Limited, although as at 11 January 2016 Mavis McArthur is the registered leasehold owner. I was also taken to the decision of the Pension Ombudsman dated 25 July 2014 which partially upheld complaints against Dentons and the second defendant in respect of expenses paid by the scheme (£42,387.90) and the imposition of a charge on the scheme when it should have been billed to the company (£4,117.07). I was also referred to a cheque dated 23 October 2007 made out by Mr Benge to the second defendant in the sum of £120,000. I was invited to infer that the second defendant had a substantial cash sum available to her. It was also submitted that authority had been given to the second defendant to deal with financial matters in respect of the company, which gave her substantial control. Although the authority I was taken to was not signed.

95. The first defendant has fallen into error in the way that he has approached the task for the court; the claimant is not asking it to find facts and the first defendant is not seeking

to prove that there has been a breach of trust. In a *Public Trustee v Cooper* application the court is asked whether the evidence presented to it is sufficient to satisfy it that the trustees have reached a decision which, in all the circumstances, a reasonable trustee could properly have formed.

96. The first defendant appears to be suggesting that the second defendant could simply have returned to her old lifestyle on the death of Mr Benge and therefore the claimant's decision on her dependency was flawed. This ignores that the test of being a dependant is at the date of Mr Benge's death, it fails to recognise that the second defendant "has moved up in the world" (Mr Newman's expression not mine) and that the "necessaries of life" is relative to the person's class and position in life. Mr Benge was, materially, a very wealthy man. In that context the second defendant's witness statement dated 7 October 2013 wherein she states that she could not afford to maintain her lifestyle without the support of Mr Benge was sufficient evidence to base the decision of dependency on and was conclusive.

97. Ms Ovey goes on to criticise Mr Homer for having a closed mind to the additional information eventually produced by the first defendant in his witness statement. I do not accept that criticism as being justified.

98. The first defendant alleges that the second defendant procured her state of dependency by taking advantage of Mr Benge's declining mental capacity. He also alleges that Mr Benge lacked capacity when he elected to take an ASP, a decision that he took as a member not a trustee, and that his election was invalid. There was no evidence to support these contentions until the first defendant filed his witness statement. As a matter-of-fact Mr Benge was in receipt of an ASP at the date of his death and his mental state at the time of election is not relevant to the determination of dependency at the date of his death. The first defendant has produced an expert report on Mr Benge's capacity, obtained for potential proceedings in respect of the 2008 will, its codicils and lifetime gifts in 2011; proceedings that have not been brought. Professor Jacoby was not asked to give an opinion on whether Mr Benge had capacity to elect to take an ASP or capacity to execute the 2009 trust deed. The first defendant could have taken various steps to support his current case that Mr Benge lacked capacity and moreover that the second defendant took advantage of this for her own financial gain. He could, during Mr Benge's lifetime, have applied to the Court of Protection for the appointment of a different deputy, he could have raised these issues in 2013/2014 when allegations of maladministration were raised with the Pension Ombudsman, he could have brought proceedings challenging the 2008 will and its codicils and he could have brought proceedings under Part 7 raising the issues that he has raised in the course of this application. There has been no proper attempt by the first defendant to substantiate these allegations.

99. Mr Homer has set out in his third witness statement an analysis of the evidence and assertions contained in the first defendant's witness statement and stated that the claimant has considered this evidence, but they continue to be of the view that the second defendant qualifies as a dependant within the meaning of the 2009 trust deed. I accept that evidence. The limited scope of the claimant's decision is, was the second defendant dependent or interdependent on Mr Benge for all or any of the necessaries of life? There is sufficient evidence for the claimant to answer that question, yes.

100. There are some cases where the court might dismiss the application (for example, in *Jones v Firkin-Flood*) or exceptionally require issues of fact to be determined under a Part 7 approach but that is not this case. The court does not forensically examine from the start of the process but rather looks at the end result, the decision, and asks itself whether there is a sufficiency of evidence to support this. I am satisfied that the claimant, and Dentons before, have taken account of only relevant matters and reached the decision which is squarely within the range of decisions which a reasonable trustee could make on the basis of this evidence.

(iv) Should the court, in all the circumstances, grant the relief sought in the claim form?

101. For the reasons set out above the court approves the decision.