The Public Trustee & Anor. v Paul Cooper & Ors.

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
20 December 1999

HC-99-04500

High Court of Justice Chancery Division

1999 WL 1425717

Before: Mr. Justice Hart

Monday, 20th December 1999

Representation

Mr. J. Sher, Q.C. and Mr. A. Taussig (instructed by Messrs. Charles Russell) appeared on behalf of the Claimants.
Mr. M. Herbert, Q.C. and Mr. S. Taube (instructed by Messrs. Herbert Smith) appeared on behalf of the First Defendant.
Mr. A. Steinfeld Q.C. (instructed by Messrs. Travers Smith Braithwaite) appeared on behalf of the Second and Third Defendants.

JUDGMENT

MR. JUSTICE HART:

This is an application by the claimants primarily for a declaration that they may properly accept the offer to purchase the claimants' shares in Mansfield Brewery plc ("the company"), which was made on 25th October this year, by Wolverhampton & Dudley Breweries plc ("W&D"). It has not and cannot be disputed that the terms of that offer represent in financial terms the best offer for their shares that the claimants can in current conditions expect to receive.

The claimants are the trustees of a settlement dated 2nd October 1970, made between F.B. Baily Thomas ("the settlor") and J.F.T. Nangle ("Mr. Nangle, senior"), Robert W. Chadburn (Mr. Chadburn, senior") and the Public Trustee and known as "the Provident Fund Settlement". The settlor was at all material times a mental patient whose property was under the supervision of the Court of Protection. He had been born with a mental handicap and never achieved a mental age of more than nine. He was a man of considerable wealth, that wealth being substantially derived from his shareholding in the company, which had been co-founded by his maternal great-grandfather, originally as a partnership, in the middle of the 19th century, had become incorporated in the 1920s and has been a public company since 1935.

By 1970, when the settlement was made, the settlor was aged about 53. His shareholding in the company represented about 48% of its issued share capital. A further 28% of the share capital was held by members of the family of one of the other 19th century partners in the business: W.J. Chadburn. The company was then run by a board consisting of Mr. Chadburn, senior as chairman of the company, a Mr. Deakin, a Mr. Scruby and Mr. Nangle, senior. Mr. Nangle, senior, who was a chartered accountant and partner in the firm of Barton Mayhew, had been the settlor's receiver since 1939.

In an affidavit sworn on 14th January 1970, Mr. Nangle, senior deposed that:

> "… the financial position of the Brewery Company is very sound and its business has prospered and increased. This is due partly to very efficient management and partly to the loyalty which has been shown by the employees, most of whom have been in the employment of the Brewery Company for many years, and by the friendly relationship between management and staff."

He went on to say:

> "My legal advisors and I have become increasingly concerned over the fact that, if the Patient were able to control his own affairs and had testamentary capacity, he would be receiving professional advice, from persons qualified and accustomed to give advice to owners of large fortunes, concerning steps that might be taken to prevent four-fifths of his fortune being absorbed by estate duty on his death and the remaining one-fifth passing to the Crown as bona vacantia, and to prevent the independence of the family business, from which his fortune has been derived, and the well-being of its employees from being placed in jeopardy on his death through the enforced sale of his de facto controlling interest."

After outlining proposed provision by way of settlement, which became known as "the Personal Fund", for the settlor's personal welfare, Mr. Nangle, senior went on to say, in relation to funds not required for the Personal Fund:

> "It is my considered view that if the Patient were sui juris he would wish to use this fund partly to preserve the independence of the family business from which his fortune is derived and to provide for the well-being of its employees to whom he owes so much and partly for charitable purposes, particularly those concerned with the relief of mental illness. In this connection I might add that the Patient has from time to time indicated to me his strong interest in charitable benefactions, especially those related to the relief of sickness."

Two funds were proposed: first, a Provident Fund designed to be, primarily, for the benefit of employees of the company and, secondly, a Charitable Fund for purposes connected with the relief of mental sickness. The proposal further was that the trusteeship of the three funds should be:

(1) as to the Personal Fund, Mr. Nangle, senior as receiver, Mr. Chadburn, senior as chairman of the company and a Mr. Surtees, a solicitor and partner in the firm of Norton Rose Botterall and Roche whom Mr. Nangle, senior described as "my solicitors";

(2) as to the Provident Fund, Mr. Nangle, senior as receiver, Mr. Chadburn, senior as chairman of the Brewery Company and the Public Trustee;

(3) for the Charitable Fund, Mr. Nangle, senior as receiver, Mr. Chadburn, senior as chairman of the company, Mr. Surtees as a nominee of the President of The Law Society and Sir Max Rosenheim (as he then was) as a nominee of the President of the Royal College of Physicians.

These proposals were approved with some variations by the Court of Protection, and the three settlements were in due course constituted and executed. Two variations from the original proposals, which may be noted, are these.

(1) Although both the Provident Fund and the Charitable Fund had originally been proposed as being equal in size, the Provident Fund as constituted had a smaller shareholding (172,000 shares) than the Charitable Fund (202,000 shares).

(2) For some reason, Mr. Chadburn, senior was not made a trustee of the Personal Fund. It should also be noted that, although the proposals may be said to have contemplated that Mr. Nangle, senior and Mr. Chadburn, senior would in some degree have a representative role (as appears from the description of them in the proposals) as receiver and as chairman of the company respectively, nothing in the wording of the settlements in terms reflects this, and the power of appointing new trustees was vested in each case in the surviving or continuing trustee for the time being, except in the case of the Personal Fund where the settlor had the power of appointment during his life.

In contrast, there were special provisions in relation to the Charitable Fund for ensuring an appropriate succession to the solicitor trusteeship and the physician trusteeship, the power of appointment being vested in the President of The Law Society and the President of the Royal College of Physicians respectively.

The provisions of the three settlements were, so far as material, as follows:

(1) The Personal Fund was to be held on trust for the benefit of the settlor during his life, with a general testamentary power of appointment, and subject thereto it was destined to accrue to the Provident Fund.

(2) The Charitable Fund was held, subject to a power to accumulate for 21 years, for the benefit of charitable purposes and institutions "connected with the prevention, treatment or relief of mental illness or other forms of sickness or ill-health".

(3) By the Provident Fund settlement, the trustees were given the power, again subject to a 21-year period of accumulation, during an 80-year period to:

> "… pay or apply the whole or any part or parts of the capital or income of the Trust Fund for any one or more of the following purposes:—
>
> (a) The provision equipment and maintenance of recreation grounds swimming pools sports pavilions club-houses or other sporting or recreational facilities or amenities for Employees or any class of Employees and the acquisition by purchase or taking on lease of land for any such purposes and the erection thereon of any necessary or convenient buildings or other erections
>
> (b) The provision of pensions allowances or donations for or to Employees or allowances or donations for or for the maintenance education or benefit of or to any Dependants on such terms and with such conditions as the Trustees shall think fit
>
> (c) The provision of housing accommodation rent free or at less than a rack rent for Employees and their families or dependants and the carrying out of housing projects for the benefit of any such Employees families or dependants
>
> (d) Any other purposes which the Trustees in their absolute discretion may consider to be for the benefit of Employees or Dependants

"Employees" were defined to include persons who were from time to time, or at any time had been, employees of all grades of the company and also personal employees of the settlor. This latter category was later excluded from the definition for fiscal reasons. Dependants were also defined. Subject to those powers, there was a trust in favour of the Charitable Fund.

It is, I think, permissible to infer that this structure of powers and trusts in the Provident Settlement was designed to overcome the difficulties (as the law was then perceived to be) in the way of creating a discretionary trust in favour of a large and potentially uncertain class of beneficiaries. No point has been taken before me that the class of employees entitled to benefit under the Provident Settlement are any less deserving of the trustee's attention because they are mere objects of a power than are the interests of charity. In fact the claimants as trustees of the Provident Fund have asserted that, in relation to the questions which they have had to decide, they have treated the objects of the clause 4 power as their primary beneficiaries.

The settlements each contained a provision which, in the case of the Provident Settlement, constitutes the reason why this application has been made and why its determination has been so controversial. It is contained in clause 3, which is in the following terms:

> "SUBJECT as hereinafter provided the Trustees may either allow the Trust Fund (so far as consisting of investments) or any part or parts thereof to remain as actually invested so long as the Trustees think fit or may at any time or times in their absolute discretion sell call in or convert into money the same or any part or parts thereof and shall at the like discretion invest the money produced thereby and any capital moneys forming part of the Trust Fund in the names or under the legal control of the Trustees in or upon any investments hereby authorised with power at such discretion as aforesaid to vary or transpose any investments for or into others of a nature hereby authorised Provided that the Trustees shall not sell charge or otherwise dispose of any shares stock debentures or other securities of or in the Principal Company which may for the time being be held by the Trustees as trustees hereof unless in the opinion of the Trustees there are special circumstances which make it desirable to do so …"

That clause was (by a subsequent variation) added to, in terms which I do not need to read.

The settlor died on 7th January 1997. As a result of various dispositions, including the making of a statutory will exercising the general power of appointment in the Personal Fund, the effect of his death was that the Personal Fund ceased to exist as such, and the relative positions of the Charitable Fund and the Provident Fund were that the former then held some 19.3m shares in the company and the latter some 12m shares, representing some 30% and 18% respectively of the share capital of the company. That continues to be the case. By this date the trusteeship of the two remaining funds was as follows:

(1) In the Provident Settlement, Mr. Nangle, senior had been replaced by his son, Mr. Nangle, Junior. Mr. Nangle, Junior was, like his father, a chartered accountant and had succeeded his father as the settlor's receiver in 1976. He was originally appointed a trustee in place of his father in 1975 but retired in his father's favour in 1983. Mr. Nangle, senior had finally retired in 1990, being replaced again by his son. Mr. Chadburn, senior had been replaced by his son, Mr. Chadburn, Junior in 1993; the Public Trustee remained in office.

(2) In the Charitable Settlement, Mr. Chadburn, senior had been replaced by Mr. Chadburn, Junior in 1994 and Mr. Nangle, senior had been replaced by his son, Mr. Nangle, Junior, in 1989, following an earlier swapping of trusteeships between them on a pattern similar to that obtaining in the case of the Provident Settlement. Mr. Chadburn, Junior had, since 1980, been a director of the company and was also a shareholder in the company. He is a Fellow of the Institute of Chartered Accountants. Until June 1997 he worked full time in the business but has since then been a non-executive director. Mr. Nangle, Junior was also a non-executive director of the company and also a shareholder, on a modest scale, in it.

The evidence is that both Mr. Nangle, junior and Mr. Chadburn, junior, to whom I can refer hereafter simply by their surnames, became concerned in late 1998 about the long-term future of the company and the consequences of that future for the value of the shareholding of the two settlements. The reasons for their concern have been described by Mr. Chadburn in his witness statement made in these proceedings on 8th December 1999.

In summary the nature of the national brewing industry had been radically affected by the "Beer Orders" which were made following the inquiry into the beer industry by the Monopolies & Mergers Commission in 1989. Prior to the making of those orders, the industry had been dominated by some six national brewers who together owned over half the total number of pubs. About a fifth of the total number of pubs were owned by regional brewers, such as the company, with the independent free trade accounting for the remainder. The Beer Orders required the national brewers to divest themselves of large numbers of pubs. This had led to the emergence of new, independent multiples whose increased buying power, as against the breweries, had led to pressure on wholesale prices. These fell by eight percent in real terms over the four years to June 1997. The reduction in wholesale prices had not, however, and has not yet, led to a reduction in the retail price of beer; in fact that has risen. As Mr. Chadburn puts it in his witness statement:

> "This reflects an aggregate shift of competitive strength from the business of producing and selling beer to the business of retailing beer. A number of the smaller managed pubcos have developed branded and themed outlets. These outlets require substantial levels of capital expenditure and compete directly with the managed pubs of the national and regional brewers … Another significant development in the past decade has been the increased demand by the public for quality — in terms of environment (i.e. modern and clean bars and toilets) of service and of food. To provide this quality pub owners must make ever-increasing capital investment in pubs …"

The company consists of two businesses: one is the production and distribution business associated with the brewery itself, the other is the retailing business conducted in its estate of some 500 pubs which comprise a mixture of tied and managed houses. So far as the former business is concerned, the principal activity is or has become the production of draught ales for the regional on-trade and of some branded canned and bottled products for the regional off-trade and own-label draught beers. The company also has a contract with Scottish & Newcastle to produce draught beers in exchange for a deal with the retail business to stock Scottish & Newcastle lager products, also wholesale into the free trade. This contract is not, in Mr. Chadburn's words, a "genuine brewing contract" but effectively a subsidy from Mansfield's retail business to its brewery unit. In Mr. Chadburn's view, it was not a sensible commercial arrangement in the long term.

Mr. Chadburn was also concerned that the company had failed to achieve any kind of penetration for its product with the new independent multiples; to achieve this, he perceived that it would be necessary to develop nationally acceptable brands and a national distribution capability. Mr. Chadburn's judgment was that if the company was to prosper in the long run, it could do so only by expanding its retail business substantially and by improving the quality of that business. Expansion would be necessary in order to achieve the economies of scale, without which the company would in the long run be unable to achieve the cost savings necessary to enable it to compete successfully with its main competitors, in particular the new multiples, and to generate sufficient profits to maintain and improve its retail outlets. The main impediment to the financing of such initiatives lay in the unwillingness of the trustees of the settlements to see any dilution of their control holding in the company. These concerns were shared by Mr. Nangle, Mr. Chadburn's co-director and fellow trustee on each of the settlements.

Furthermore, in December 1998 the Charity Commission had begun to express concern to the trustees of the charitable settlement at the fact that is eggs were all in the single basket of the company. The upshot was that these issues were discussed at a meeting of the trustees of the Provident Settlement held on 10th December 1998 and attended by Mr. Nangle and Mrs. Ziva Robertson, a solicitor employed as a trust officer within the Public Trust Office and the person who has had responsibility within that office for the Provident Settlement since January 1998. Mr. Nangle proposed that the two settlements should jointly commission a report on the long-term prospects of the company. In a contemporary note, Mrs. Robertson reports her response as follows:

> "I agreed that this would be a sensible move at this point in time. I noted that if we wished to consider selling or diluting the shares we would have to seek Counsel's opinion on whether or not we could do so without being in breach of trust, as it may be that the desirable action would fall short of the 'exceptional circumstances' prescribed by the trust deed. However, I considered that even if we say no, we should at least find out what it is that we are saying no to. Mr. Nangle remarked that he sits on the Board of Directors of the company and thus, although he felt his duties as a Trustee prevailed, he was not an independent trustee as such. I told him that I was ever mindful of the important role that the PT would have to play if we decided to diversify, as she would be the only truly independent trustee. However, I considered that by obtaining the report we were not committing ourselves to any particular course of action but simply taking a long-term view of the company and the trust, which is prudent in view of the changes to the market in recent years.
>
> Mr. Nangle said he would contact me with the views of the trustees of the Charitable Fund, as clearly any such step would have to be taken by both large shareholders acting in concert."

As a result, there was a further joint meeting between Mr. Macfadyen, Mrs. Robertson and Mr. Nangle on 22nd January — and I quote from a note prepared by Mr. Nangle dated 3rd February and circulated to all the trustees — where it is recorded that:

> "On 22nd January 1999 Michael Macfadyen (MM), Mrs. Ziva Robertson, for the Public Trustee (ZR) and Joss Nangle (JN) met to take the matter further. It was agreed at that meeting that:
>
> > ZR and JN would make contact with Schroders to assess their suitability/willingness to advise the trustees and to ascertain what they would charge for that advice;
> >
> > in the event of either group (or both groups) of trustees concluding, in the light of advice, that the best interests of the beneficiaries would be served by a disposal of the holdings in MB, counsel's opinion would be sought on the implications of such a step, bearing in mind in particular the 'special circumstances' requirements in the trust deeds;
> >
> > there should be no presumption that a sale of the holdings in MB would be the most likely outcome of the current review."

It was also noted that:

> > the interests of the Provident Fund may differ from those of the Charitable Fund in view of the fact that the primary beneficiaries are past and present employees of MB;
> >
> > the Provident Fund would be liable to capital gains tax on any chargeable gains realised on disposal, while the Charitable Fund would be exempt."

In the event, the trustees declined to retain Schroders on the terms on which the latter were prepared to act and instead decided to commission a report from Ernst & Young. That is the decision which is being criticised on the ground, inter alia, that Mr. Nangle was himself a partner in Ernst & Young. Ernst & Young reported on or about 1st June 1999. At this stage, it is sufficient to record what that report was interpreted as concluding by Mrs. Robertson. I quote from her witness statement at para.35:

> “(1) that there were substantial problems facing a regional company of the size of Mansfield in the longer term because of the competitive challenge posed by (a) the 4 large national brewers and (b) specialist pub retailers
>
> (2) that those problems could only be met by a substantial increase in the size of Mansfield’s business by acquisition or merger and/or a substantial investment in retailing or brand development
>
> (3) that none of these courses of action could be achieved without substantial dilution of the equity holdings in Mansfield of the Trustees and the Charitable Fund Trustees”

In further discussions with her co-trustees, Mrs. Robertson learned that it was unlikely that they would agree to the company taking steps which would result in a substantial dilution of the equity holdings of the two settlements, since to do so would reduce the influence of the settlements over the company and would involve the loss of the ability to generate a control premium on a sale. She was also informed that the trustees of the Charitable Fund had decided that they should explore the possibility of a sale of the whole of their holdings. The Provident Fund trustees then sought the separate advice, in consultation, of Mr. Christopher McCall, Q.C. and I have seen a note of the advice which he gave in consultation on 14th June 1999. It is unnecessary for me to summarise it save to call attention to the following points.

(1) It is clear that all those attending the consultation were approaching the matter on the footing that the primary class of beneficiaries whose interests fell to be considered were the company’s employees and former employees and their dependants. Mr. McCall had to remind all present that the Provident Settlement trustees also owed a duty to the Charitable Fund as, what he is recorded as describing as, the main beneficiary of the provident settlement.

(2) The potentially delicate question of the position of Mr. Chadburn and Mr. Nangle as directors of the company was addressed and fully discussed. As board members, Mr. Nangle and Mr. Chadburn were privy to the advice which the board had received from HSBC but were unable to share its contents with the Public Trustee. Mr. McCall urged Mr. Nangle and Mr. Chadburn not to resign from their role as Provident Settlement trustees on this account.

(3) Mr. McCall advised that the considerations which the Provident Settlement trustees should have in mind when deciding whether or not special circumstances existed were different from and wider than those applicable to the Charitable Fund trustees. For the latter, the main consideration was whether or not the company shares were a good investment. He also, however, drew attention to the danger potentially run by the Provident Settlement trustees, should they decide to retain their holding in circumstances where the Charitable Fund trustees decided to sell theirs. He advised that co-operation with the Charitable Fund trustees appeared to be the right course.

The decision was then made by the Provident Settlement trustees to explore the possibility of a sale. Mrs. Robertson describes the position thus at para.38 of her witness statement:

> “In the light of the contents of the Ernst & Young report, the views of Mr. Jocelyn Nangle and Mr. Chadburn, the decision by the Charitable Fund Trustees and the advice of Mr. McCall, Q.C. I considered that the only sensible course was for the Trustees to join with the Charitable Fund Trustees in instructing Ernst & Young to explore the market for the two trust holdings of Mansfield shares. On or about 23rd July 1999 we informed the board of Mansfield of this decision and Mansfield made this information public on 26thJuly 1999.”

She then exhibits a copy of the press announcement.

Mrs. Robertson goes on to describe the steps then taken by Ernst & Young on behalf of the trustees. It is unnecessary to describe them in detail. By the latter half of September, two indicative bids had emerged, an inhouse MBO offer of 340p per share in cash and an indicative bid of 360p a share, partly in shares and partly in cash, from W&D. The former appeared to the Provident Settlement trustees to be likely to lead to a substantial number of early redundancies. In the meantime, it became increasingly apparent to the Public Trustee that the positions of the Provident Settlement trustees and of the Charitable Fund trustees might need to be clearly differentiated.

During the period since 26th July, the company's employees had formed a campaign fund to protect their interests and had commissioned an independent firm of consultants (LEK) to review the prospects of the company. LEK produced their report in the middle of September. The trustees held a number of meetings with employees during this period and considered representations made by them. The employees also during this period obtained an opinion from Mr. Hubert Picarda, Q.C., the thrust of which was, first, that, in making distributions of surplus income to the Charitable Fund, the Provident Settlement trustees had acted in breach of trust in the past and, secondly, that the decision-making processes of both sets of trustees had been seriously flawed as a result of conflicts of interest. He identified these as being the fact that both Mr. Nangle and Mr. hadburn were trustees on both trustee bodies and that Mr. Macfadyen, a partner in Charles Russell, was acting as solicitor to both trustee bodies. In addition, Mr. Picarda said this:

> "Over and above this, there is a further palpable conflict of interest that arises by virtue of the fact that both Mr. Nangle and Mr. Chadburn, who are the pro-active trustees in this whole exercise, have substantial <u>private</u> holdings of shares in MBC, Mr. Nangle has 15,000 ordinary shares and Mr. Chadburn has no less than 217,000 ordinary shares. I do not think Mr. McCall was told of, or was aware of, this point. Sale of the shares may be very much to their private advantage should a predator making a cash offer under the City Code offer a premium for their beneficial interest."

He advised his clients to draw these matters to the attention of the Charity Commission. One result of this was that the Charitable Fund trustees did then update the Charity Commission with all that had taken place since earlier in the year and were able in due course to satisfy the Charity Commission that the course that they were taking was a proper one.

By this time, it had become clear that the Charitable Fund trustees had come to the conclusion that, so far as their trust was concerned, special circumstances did exist, rendering it desirable that the Charitable Fund trustees should realise their holdings in the company. On Mrs. Robertson's account, this was perceived as creating a potential direct conflict of interest between the Provident Settlement trustees and the Charitable Fund trustees which made it desirable that the common trustee arrangements between the two settlements should cease and that Mr. Macfadyen should cease to act as solicitor to the Provident Settlement trustees. The Provident Settlement trustees therefore decided that a separate solicitor in Charles Russell, its senior partner, should act for the Provident Settlement; and shortly afterwards the Charitable Fund trustees instructed Travers Smith Braithwaite to act for them.

On 30th September Mr. Nangle retired as trustee of both funds and Mr. Chadburn retired as trustee of the Charitable Fund.

In his witness statement, Mr. Chadburn explains his reasons for resigning from the Charitable Fund settlement but not the Provident Settlement in the following terms:

> "I should add that although I was in receipt of legal advice throughout my period as trustee of the two Trusts, including advice from leading counsel, until late September 1999 when it became clear that the Charity Fund Trustees were likely to accept the W&D offer no legal adviser suggested that I should even consider retirement as trustee of one or both of the Trusts. When the suggestion was made that I should consider the question of retirement I gave the matter very careful thought and decided to retire from the trusteeship of the Charitable Fund. My retirement from that trusteeship had nothing to do with the views expressed by the Charity Commission about the personal shareholdings of the trustees. Indeed it took place before I was aware that those views had been expressed. I did not however retire as trustee of the Provident Fund by reason of my shareholding in Mansfield partly because the Public Trustee indicated that she would prefer me not to retire and partly because I have a long and firm commitment to the welfare of the employees of Mansfield and their dependants which would always take precedence to my personal interest. Additionally, it seemed to me that it would be an abdication of responsibility for me to retire in the critical situation that faced the Trustees."

That evidence has not been challenged.

I can take up the account of the history of the matter again from Mrs. Robertson's witness statement at para.51:

> "The continuing discussions between The Baily Thomas Charitable Fund Trustees and their representatives and representatives of W&D led, on 30th September 1999, to the formulation of an offer by W&D for 380p per share for the shares held by The Baily Thomas Charitable Fund as part of a bid for the whole of the issued capital of Mansfield, including a limited guarantee of employment for those employees of Mansfield who actually work in the Brewery. W&D agreed to undertake to keep the brewery at 75% of its current employees for two years. Ernst & Young advised the Trustees that this offer was a good one and contained a substantial control premium."

And then para.53:

> "On the 7 October 1999 the Charitable Fund Trustees wrote to the Trustees informing them that they intended to accept the contemplated offer by W&D for their entire holding, stressing the undertakings as to the security of employment of the brewery employees which they had negotiated and urging the Trustees to accept the offer."

In the meantime, the Provident Settlement trustees had obtained further advice from Ernst & Young and (as a check on the latter) from Mr. Mainz of Price Waterhouse, who was asked to comment both on the Ernst & Young conclusions and on the contents of the LEK reports.

On 20th October the Provident Settlement trustees met — that is to say Mrs. Robertson and Mr. Chadburn — to consider their position. I will again take up the matter as it is described by Mrs. Robertson in her witness statement. She says:

> "Their options were to accept the bid, to reject the bid or to postpone a decision further.
>
> 55. Although in formal terms under the Settlement the employees (in which expression we include dependants of employees and former employees) are merely objects of a power which the Trustees can release at any time and there is only one trust, namely that in favour of the Charitable Fund Trustees, the Trustees thought it right to approach their decision on the footing that whatever the strict legal position might be the employees, rather than the Charitable Fund Trustees, were the primary beneficiaries of the Settlement and that therefore the welfare of the employees should be their primary concern.
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> 56. The main factors the Trustees took into account in coming to their decision were
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> (1) the commercial prospects for Mansfield
> (2) the prospects for Mansfield's employees
> (3) the wishes of the employees
> (4) the attitude of the Charitable Fund Trustees and
> (5) the terms of the offer from W&D
>
> The commercial prospects for Mansfield
>
> 57. The Trustees made a judgment on the commercial prospects of Mansfield and its brewing activity primarily by reference to the following:
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> (a) the Ernst & Young report (and their note on pub brewing employment)
> (b) the LEK report
> (c) the submissions of the employees
> (d) the Ernst & Young response
> (e) the reports of Mr. Mainz
> (f) Mr. Chadburn's knowledge and experience of the brewery industry and of Mansfield
> (g) a letter dated 21st October 1999 from Mr. Steel the chairman of Mansfield to the Trustees which was made available to the Trustees …
>
> 58. In the light of all this information the Trustees concluded:

(1) that the commercial environment within which Mansfield was operating had become much more difficult and that a regional brewer of the size of Mansfield could not survive in the long run because of the competitive pressures generated by:

(a) the 4 large national brewers

(b) the consolidation of regional brewers into large groups and

(c) the growth of specialist pub retailers

(2) that those pressures could only be met by a substantial increase in the size of Mansfield's bushiness by acquisition or merger and/or a substantial investment in retailing or brand development

(3) that none of these courses of action could be achieved without substantial dilution of the equity holdings in Mansfield of the Trustees and the Charitable Fund Trustees

(4) that none of these courses of action could be achieved without the support of the Charitable Fund Trustees whose 30% holding carries effective control of Mansfield

(5) that even if there was no takeover the future of the brewery itself was uncertain. Certain regional brewery companies, e.g. Vaux and Greenall Whitley, had already closed their breweries and the management of Mansfield might be forced to close the Mansfield brewery in any event. In this connection the Trustees noted that:

(a) Mansfield brews a beer (bright ale) which is showing little if any growth in their region of operation

(b) Mansfield has tried but failed to obtain contracts with pub retailers

(c) Mansfield's brewery is dependent to a significant degree on a contract with Scottish & Newcastle plc. If this contract is not renewed, this would have grave implications for the brewery.

(d) even if expansion were financially possible there are few suitable regional companies for Mansfield to take over

(e) Mansfield's management has already seriously considered closing the brewery on more than one occasion.

The prospects for the employees of Mansfield

59. On the basis of the information listed at paragraph 57 above the Trustees concluded

(1) that for the large number (about 3500) of employees who work in the public houses owned by Mansfield it is likely to make little difference who owns Mansfield. There is in any event a high turnover among these employees

(2) that for most of the long-term employees who do not work in the brewery i.e. administrative and sales staff (who number about 370) the medium— and long-term prospects of continued employment and indeed advancement are better within a larger group whether as a result of expansion by Mansfield or takeover by W&D than within Mansfield as it now is — although from their point of view an expansion by Mansfield would be preferable to takeover by a third party

(3) that, for the 130 brewery workers, the longer-term prospects are uncertain whoever owns the brewery but that except as part of a larger group the brewery is unlikely to survive in the medium term. The undertakings which are part of the W&D offer — see paragraph 53 above — provide these staff with some security over the short term

(4) that dependants of employees are in a similar position to the employees on whom they are dependent

(5) that former employees (who include 278 pensioners and 72 deferred pensioners) are unlikely to suffer as a result of a change in the control of Mansfield

(6) that W&D is a regional brewer with a tradition and philosophy very similar to that of Mansfield and while it like any purchaser would expect to make savings from the takeover it could be expected to treat employees relatively well

(7) that if the Trustees realise a very large sum of cash from the sale of the Mansfield shares in financial terms all employees who do not lose their jobs are likely to benefit and there will be greatly increased funds to assist those employees who do lose their jobs.

The wishes of the employees

60. The Trustees have had numerous contacts with employees of Mansfield and received many representations from

them — see paragraphs 43 and 44 above. The Trustees have no doubt that the employees are in general opposed to the sale of Mansfield — indeed no employees have told us that they support a sale. However we think that the attitude of many has probably been coloured by the hope that the Charitable Fund Trustees would change their minds and support the expansion of Mansfield.

The attitude of the Charitable Fund Trustees

61. The Trustees have always regarded the attitude of the Charitable Fund Trustees as very important because without their support the Trustees can have little influence on the direction of Mansfield — see paragraph 37 above. During the first 2 weeks of October the Trustees became aware that the position of the Charitable Fund Trustees had hardened in a number of respects. They informed the Trustees that they had definitely decided to accept the W&D offer … and that if the W&D offer failed they would not agree to the dilution of their holdings in order to facilitate the expansion of Mansfield's business but rather would seek another buyer.

62. The attitude taken by the Charitable Fund Trustees put the Trustees in a difficult position. Firstly, the W&D offer might be successful whatever position was taken up by the Trustees. Secondly, the unwillingness of the Charitable Fund Trustees to agree to any dilution meant that even if the W&D offer was unsuccessful the management of Mansfield would be unable to pursue the only course of action which held out the possibility of long-term success namely a substantial expansion of Mansfield's business. Thirdly, if the Charitable Fund Trustees were to seek another buyer for Mansfield, Mansfield would be exposed to a further (probably long) period of debilitating uncertainty."

She then describes the terms of the offer from W&D and rehearses the price movement of Mansfield shares over the three years prior to the Ernst & Young report and records Ernst & Young's advice that the W&D offer is a good one and she describes the terms of the undertaking which W&D made, as part of their bid, in relation to the retention in employment of some of the company's employees.

In para.66, she describes the decision taken by the trustees and I will quote it in full:

"In view of the importance of the decision and in particular its potential impact on the employees of Mansfield the Trustees have given the most careful consideration to the proper course for them to take. In the end they have come to the following conclusions.

(1) There is a substantial medium-term commercial risk to Mansfield arising from the factors listed in paragraph 58 and those factors are capable of constituting special circumstances for the purposes of clause 3 of the Settlement.

(2) Despite this if the Charitable Fund Trustees were willing to retain all or a substantial part of their holding in Mansfield and to agree to the dilution of that holding in order to permit Mansfield to expand the Trustees would not think it desirable to sell their holding in Mansfield. Rather they would wish to support the independence of the company.

(3) However the Charitable Fund Trustees have decided that they will sell their whole holding in Mansfield — and that (even if the W&D bid fails) they will not agree to its dilution. The Charitable Fund Trustees have indeed given W&D an irrevocable undertaking to accept their offer.

(4) The Trustees believe, on the basis of the advice they have received, that in purely financial terms the W&D offer is an attractive one.

(5) If there is to be a sale then because of the similarities of business tradition and philosophy Mansfield and its employees are likely to fit relatively easily into the W&D business. Another type of bidder e.g. a venture capitalist seeking a quick return on his investment would pose a much more serious threat to the employees.

(6) If the Charitable Fund Trustees sell out to W&D (as they have decided to) and the Trustees do not sell

(a) the Trustees will remain as minority shareholders in Mansfield without the ability to influence the Board of Mansfield so as to provide protection for employees against redundancy

(b) they will sacrifice the control premium (which represents a substantial additional fund available for beneficiaries under the Settlement)

(c) they will have no capital cash to apply for the benefit of beneficiaries

(d) they run the risk (if the W&D bid becomes unconditional) of being locked in as a minority shareholder and might find that the dividend was cut or eliminated and that their shares were unmarketable.

(7) By contrast if the Trustees accept the W&D offer they will have very substantial income and capital funds at

their disposal. These funds could be used by the Trustees to ease redundancy or other problems which may be suffered by employees as a result of the takeover.

(8) In the event of the Trustees' acceptance of the W&D offer the Trustees would be minded to:

(a) exercise their powers under clause 4 in a generous manner; and

(b) close for the future the class of employees who are objects of these powers so as to ensure that only current and past employees of Mansfield or their dependants can benefit.

(9) In the light of all these matters the Trustees consider that they should accept the W&D offer (unless a better offer is made but that in view of the opposition of the employees, the existence of the personal holdings of Mr. Chadburn and his wife and uncertainty as to the power of the Trustees to give the undertakings sought by W&D, they should seek the approval of the Court before accepting the W&D offer and giving the undertakings."

The Provident Settlement trustees were, over the next few days, pressed by W&D to give an undertaking to issue these proceedings and, if so authorised, thereafter to enter into the same irrevocable undertaking to W&D as has already been given by the Charitable Trustees.

It is necessary at the outset to identify the nature of the question which the court is being asked to answer and of the jurisdiction which it is being invited to exercise. Despite the reference in para.66(9) of Mrs. Robertson's witness statement to "the approval of the Court", the Provident Settlement trustees have made it completely clear, both in the form of relief which they have sought and in a fax written to the solicitors acting for the representative employee, dated 26th October 1999, and in the submissions which have been made to me on their behalf, that they were not, by seeking the court's assistance, in any way intending to surrender their discretion in the matter to the court.

In his submissions to me, on behalf of the representative beneficiary, Mr. Herbert, Q.C. questioned whether this as a possible stance for the trustees to take. He drew my attention to the opinion of Lord Oliver in *Marley and others v. Mutual Security Merchant Bank and Trust Co Ltd. [1991] 3 All E.R. 198* , where Lord Oliver said, at p.201, D:

> "… there has always to be borne in mind the position and duties of a trustee who applies to the court for directions. A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised."

Mr. Herbert submitted, on the basis of this passage, that the act of seeking directions necessarily involved the trustee in such a surrender of discretion. I do not agree. Applications for directions by trustees are a commonplace phenomenon. The ability of trustees to make such applications derives from the peculiar relationship of trusts to the court of Chancery and is no doubt founded in the jurisdiction of this court in an appropriate case itself to execute a trust. Such applications have generally been heard in Chambers and there are consequently few reported cases in which the nature of the jurisdiction has called for detailed analysis.

On the particular point made by Mr. Herbert, I had the advantage of having available to me a judgment of Robert Walker J. (as he then was) given in chambers in 1995. Since it was given in chambers, it is inappropriate for me to say more about it, save that it concerned the question whether the court in authorising trustees to pursue litigation was necessarily exercising its own discretion or was simply protecting the trustees in an exercise of their own. The relevant passage in the judgment is in the following terms:

> "At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when 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. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to … [He then

gave an example].
(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.
(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.
(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court. I mention that fourth category, obvious though it is, for a reason which will appear in a moment."

The learned judge then cited the passage which I have already quoted from the opinion of Lord Oliver in *Marley* and continued:

"It is not clear from the report in the *Marley* case whether the original decision of the judge sitting in chambers in Jamaica had been an approval of the exercise by fiduciaries of their discretion (that is a category (2) case) or an exercise of the judge's own discretion after accepting a surrender (that is a category (3) case).

"I would comment that it is not always as clear in practice as it is theory which jurisdiction is being exercised. That is particularly true, I believe, on *Beddoe* applications (see *Re Beddoe [1893] 1 Ch. 547*). It is to be noted that in *Marley* no authorities at all seem to have been cited to the Privy Council; at any rate, none was referred to by them. The whole thrust of Lord Oliver's speech, as appears in particular at p.202, was to distinguish the cases of the court approving a proposed exercise of the trustee's powers, whether in category (2) or in category (3), from a case in category (4). The error which the courts below had made was to assume that, once the fiduciaries had laid the matter before the court, the court should bless the fiduciaries' proposal unless it could be shown positively to be a breach of trust. That was the context in which the passage that I have read from the speech is to be found.

"I cannot think that the Privy Council in that case was intending to decide, apparently without argument or citation on the point, that what I have called category (2), which is familiar to all Chancery practitioners on the private client side does not really exist as a category at all."

I would add to that the following observations. First, the judgment was itself given in chambers. It is not possible to tell to what extent the point at issue had been the subject of argument or citation of authority beyond the decision in *Marley* itself.

Secondly, I would draw attention to the paradigm nature of the classification suggested by Walker J. There may be variations within each category; and a particular application may straddle more than one category. Moreover, some caution needs to be exercised before assuming that there is always a bright-line distinction between the case where trustees surrender their discretion and a case where they do not. In a case like the present, for example, it might theoretically be possible for the trustees to have been unanimous in reaching a conclusion that special circumstances existed such as would justify them in selling, but divided as to whether in fact it was desirable for them to do so. If the court's assistance was then invoked to resolve the deadlock, the court would not necessarily have to revisit with a clean slate the question of the existence of special circumstances. Even where the trustees are surrendering their discretion, the question will arise as to what discretion is being surrendered.

Subject to those observations, I respectfully and emphatically agree with Walker J.'s conclusion both that there is a well known distinction between the category (2) case and the category (3) case and that Lord Oliver's observation should not be read as having in some way abolished the distinction. The distinction is illustrated in the reported cases by the decision of Lindsay J. in *In re Drexel Burnham Lambert U.K. Pension Plan [1995] 1 W.L.R. 32* where trustees were assumed for the purposes of the judgment to have a potentially disabling conflict but were nevertheless authorised by the court to exercise a dispositive power. Mr. Justice Lindsay drew attention to the difference between the question "whether the trustees' proposals were ones which they could properly be given general liberty to carry into effect" and "the different question of how should the court, having the trustees' discretion surrendered to it, exercise that power [see at p.39, G to H]." That is precisely the distinction between Robert Walker J.'s second and third category.

What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case. In the present case, before the court can give general liberty to the Provident Settlement trustees to carry into effect the decision made by them on 20th October to accept the bid, i.e. to grant the declaration sought, it must be satisfied, after a scrupulous consideration of the evidence before it, of at least three matters.

First, that the Provident Settlement trustees have in fact formed the opinion that special circumstances exist which render it desirable that they accept the bid; first and foremost it is their opinion which counts. This is one of those cases where the governing instrument plainly constitutes the trustees as the forum to determine the precipitating event. As to this, while some attempt was made by Mr. Herbert to suggest that the Provident Settlement trustees had not ever formed an opinion on the question, it was clear that, insofar as the evidence did not already formally cover the point, the Provident Settlement trustees stood ready to attest that they had, and, in the event, I permitted them to adduce a further witness statement from Mrs. Robertson dealing with this point and which I accept.

Secondly, was the opinion which the Provident Settlement trustees formed one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived?

Thirdly, was the opinion at which that body had arrived vitiated by any conflict of interest under which any of the trustees had been labouring, either because such conflict actually had, or because it might have had, an effect on the decision which they took?

In relation to these questions, Mr. Herbert's submission was that the decision of the Provident Settlement trustees was so extraordinary and inexplicable that it could only be explained by resort to the hypothesis that they had been misled by their conflicting interests into taking the wrong path. Although the second and third questions were thus linked, I propose to deal with them separately.

The first question requires an examination both of the meaning, purpose and effect of the proviso to clause 3 and of the facts which were, in the event, perceived by the trustees as constituting these special circumstances. The proviso has to be construed in its context. The extent to which it is strictly permissible to include in that context the whole of the evidence originally before the Court of Protection, including evidence of the settlor's presumed intentions, might have been (but was not) the subject of some debate. Clearly, in all three of the original settlements, the function of the proviso was to prevent the trustees from coming under an immediate obligation to diversify their investments. Clearly also the purpose of the proviso, inserted on the same day into settlements made by the same settlor of holdings which together gave the three settlements a controlling interest in the company, was designed to enable control of the company to remain as it was.

In the case of the Provident Settlement, it can be seen from its own dispositive provisions that the motivation behind this was a paternalistic concern for the welfare of the company's employees, former employees and their respective dependants. The same cannot be said in the case of the Charitable Fund settlement. The Charitable Fund trustees owe duties to no one but their charitable objects and have no powers to benefit any but their charitable objects.

In the case of the Charitable Fund, it is relatively easy to identify what is the meaning and purpose of the proviso. So far as their investment powers are concerned, it is the duty of the trustees to take all reasonable steps to maintain and enhance the value of their funds. This would normally require them to consider diversification. However, by restricting the trustees' powers to sell their company shareholding, the framers of the settlement were seeking to achieve an object which, potentially at least, might conflict with the irreducible primary duty to act only in the interests of the charitable objects. However much it might have been desired, the trust could not be designed so as to include as an express object the furtherance of some non-charitable object; nor, even with the knowledge that such was the ulterior motive behind the provision, can it be construed by the court as having that effect. It is, in my judgment, clear that, in forming their opinion as to the existence of special circumstances, the Charitable Fund trustees are primarily and perhaps exclusively confined to investment criteria.

It is tempting to say that, because precisely the same formula is used in the sister Provident Settlement, it must be given precisely the same meaning and effect. That conclusion does not, however, in my judgment, follow, either as a matter of logic or of language. The precipitating event is the formation of an opinion by a different set of trustees charged with a different set of dispositive powers and duties. Even had the beneficial trusts been identical, the mere fact that there were separate settlements and separate sets of trustees would necessarily have involved the theoretical possibility that the two bodies might on the same facts reach different conclusions. The question raised by the formula is, by its nature, such that, in relation to particular facts, two equally reasonable and responsible bodies might quite properly reach different conclusions. No doubt the expectation and hope of the framers of the settlements, i.e. those who acted in the name and on behalf of the settlor, was that such a dissonance would never arise but its possibility could not be excluded, even had the beneficial trusts and powers been identical. Where, as here, the dispositive powers of the Provident Settlement trustees are radically different from those of the Charitable Fund trustees, the possibility is increased.

In my judgment, Mr. McCall, Q.C. was entirely correct to advise the Provident Settlement trustees that the considerations which they should have in mind were wider than those applicable in the case of the Charitable Fund. It is, however, one thing to recognise that the Provident Settlement trustees should in the exercise of this investment power treat as a highly material factor the interests of the class of employees and ex-employees of the company, and another to treat the proviso as in effect creating a free-standing and enforceable non-charitable purpose trust, that purpose being to preserve the independence of the company so long as its current employees could derive benefit from it.

In his submissions on behalf of the representative employee, Mr. Herbert laid emphasis on the strategy underlying all three of the original settlements as having been the preservation of the independence of the company and went so far as to describe this strategy as constituting the root purpose of the Provident Settlement. There are, in my judgment, difficulties with his analysis.

In the first place, it has to be recognised that whatever may be conceived to have been the original strategy, what is under consideration is a qualified restriction on a trustee power of sale with a view to investment. Moreover, it is included in a settlement which includes as beneficiaries charitable objects other than the class of employees. There is no warrant in the wording of the clause for supposing that the trustees were being authorised to hold an investment which on purely investment criteria was perceived as being problematic. The natural inference to draw is that the trustees were being relieved of their duty to diversify, so long as the investment was not, on such criteria, problematic and that the escape route of a power of sale was inserted precisely to deal with the situation where the trustees formed the judgment that it had, or might, become problematic.

Secondly, even supposing a pure purpose trust of the kind asserted were known to the law, it is not clear precisely what would be entailed in the concept of preserving the independence of the company. Reduced to a bare minimum, that concept means no more than preserving the control of a company in the same hands as enjoyed such control at the date of the settlements. All that would mean in practice, construed against the matrix of the circumstances which existed in 1970, would be the making of common cause, so far as possible, with the Chadburn interests, so long as they continued to control 28% of the company, and with the other settlements, so long as they controlled the balance of the settlor's 48% holding. Once the situation has arisen in which, inter alia, the Charitable Fund trustees (a) control 30% of the equity and (b) have unilaterally determined to market it, the co-operative mechanism for preserving control or independence envisaged by the original strategy can be seen to have ceased to be workable.

A wider meaning of the concept of independence of the company asks one to look at the company, not from the point of view of its ownership but as a socio-economic institution supporting, reflecting and informing the lives of those who depend upon it. This viewpoint was eloquently expressed by Mr. Cooper, the representative employee defendant, in para.47 of his witness statement, where he said this:

> “The Company is an important employer for the town of Mansfield, especially after the job losses caused by pit closures in the 1980s and now when further serious job losses are imminent in the local textile business. It is also indirectly responsible for providing additional work opportunities locally, because of its reliance on other local businesses for goods and services. I think it is fair to say that the Company is regarded with a certain amount of pride within the town and that the people of Mansfield regard the Company as their own. The loss to the community if the Company were to lose its identity or, worse still, be asset-stripped and closed down goes far beyond financial loss. I accept of course that the community of Mansfield itself is not a beneficiary of the Provident Fund; but the beneficiaries of the Provident Fund are members of that community and I consider it important to try to convey to the Court the fact that what is in the interests of those beneficiaries cannot be seen solely in financial terms.”

But how in the context of a potential minority (that is to say 18% shareholding) the Provident Settlement trustees can be expected to achieve the object of maintaining the state of affairs described in that paragraph, simply by invoking the prohibition on the sale of their shareholding contained in the settlement, is, in my judgment, difficult to see.

On Mr. Cooper’s behalf, it was submitted that the construction of the proviso should be influenced in favour of giving it such a “purpose trust”, as opposed to purely investment-related, character by a further consideration. This was that, as a matter of history, it could be demonstrated that the original scheme had been that the Provident Settlement should end up with some 30% of the equity and the Charitable Fund settlement be left with the 18%. There was some evidence that this had indeed at one time been envisaged as a possibly desirable end result. No criticism was, however, or could be, made of the process by which the present shareholdings had come about. Of course, had the position been (in early 1999 or now) that the Provident Settlement had the 30% equity holding, events would no doubt have unfolded and might now present themselves in a different manner. But the Provident Settlement trustees are bound to approach the questions raised on the footing of things as they are and not how they might have been.

With these observations on the meaning of the clause, I asked the question whether there was on 20th October 1999 or is now material before the Provident Settlement trustees on the basis of which they could properly form the opinion that special circumstances existed making it desirable that they should sell their shares pursuant to the W&D bid. I have set out at length Mrs. Robertson’s narrative of the factors which the trustees have taken into account. In essence the special circumstances, which are identified, are (a) the trustees’ perception, in the light of all the advice which they have received, of the impact of changes in the economic conditions in the brewing industry on the future prospects for the company and (b) the decision of the Charitable Fund trustees to accept the W&D offer and, in the event that that offer were to fail, to seek another purchaser for their shares and not to agree to any dilution of their equity. I have no doubt that this combination of factors justified, if indeed it did not compel, the Provident Settlement trustees in forming the opinion which they did.

It was argued with great force by Mr. Cooper in his witness statement, both on the basis of his intimate knowledge of the company (as its former group financial controller and now head of information processing) and by reference to the expert appraisals produced by LEK, that the Provident Settlement trustees and their advisors, Ernst & Young, were simply mistaken in the gloomy view which they have taken of the company’s medium-term future. His evidence was that the company had in fact prospered as a result of the Beer Orders; any storms which might occur in the future could be weathered by the loyal and committed management and workforce, with the same success as other such storms had been weathered over the last 150 years of the business. During that period, there had been countless occasions on which it had been possible to say that the brewing industry was at a crossroads in its development. Viewed in that context, there was, he urged, no basis for describing current conditions as a special circumstance. Mr. Cooper also subjected the Ernst & Young report to particular criticism for its failure to focus on the company’s own business plans and its particular regional market.

All these points were made with great force and cogency and on the basis of a detailed and well-reasoned analysis of all the relevant facts. I cannot imagine how the case for the employees in this respect could have been better put. Seldom can a representative defendant in proceedings of this kind have discharged his duties as skilfully and as conscientiously. The evidence relied on does not, however, in my judgment, succeed in establishing the case that there was no material on which the Provident Settlement trustees could reach their conclusion or that that conclusion was manifestly unreasonable. There is every evidence that the Provident Settlement trustees have taken into account the point of view expressed by Mr. Cooper. The fact remains that, while there is little dispute about past events, the view taken by Mr. Cooper is not the only possible view which can be taken when looking to the future.

In the final piece of advice to the Provident Settlement trustees, given in the course of these proceedings, Mr. Smith of Ernst & Young has summarised their advice in the following terms:

> "Conclusion
>
> Because, inter alia, of:—
>
> 1) the consolidation occurring within the sector, caused, in part, by the overcapacity in brewing production and the decrease in beer consumption; and
> 2) the threat from price competition and more attractive venue/product offering by competitors with more financial 'muscle' and buying power; and
> 3) the Company's inability to grow because of its shareholding structure
>
> It is, in our opinion, reasonable for the trustees to conclude that there are severe threats facing the Company.
>
> I conclude by quoting from a research note produced by Morgan Stanley Dean Witter on W&D dated October 13, 1999 …
>
> Under the heading:
>
> > 'Mansfield Brewery: between a rock and a hard place'
>
> Morgan Stanley conclude:
>
> > 'Regional brewers are on the whole overexposed to poor quality pub assets and a declining beer segment, and consolidation offers a short-term, though defensive, remedy. We believe Mansfield is too small to be a predator in the "eat or be eaten scenario.'"

I would comment that without knowing from what particular point in the food chain Morgan Stanley was itself making that comment, it is difficult to know how much weight to place upon it, but Ernst & Young's conclusions are clear.

Like any economic forecast, the correctness of those conclusions cannot be established beyond doubt. There was, however, as is clear from all the evidence, a rational basis for them. Only if the trustees' duties extended to deploying their trust fund through thick and thin in support of the current business unit in its current form, rather as if they were trustees of a maintenance fund for a historic building, could the trustees, in my judgment, have safely discounted such advice.

The Provident Settlement trustees were also, in my judgment, entitled and indeed bound to consider the effect of the Charitable Fund trustees' stance in coming to their own separate opinion. This is plainly highly material both to the question whether the company is likely to be able to raise fresh capital in the future and to the question of what the position of the Provident Settlement will be when it is no longer able to influence the direction of the company in co-operation with the Charitable Fund's 30% holding.

In his submissions on behalf of the employees, Mr. Herbert castigated this approach as an attempt by the Provident Settlement trustees to pull themselves up by the boot straps of their own past misjudgments. His submission was that, had the Provident Settlement trustees struck out on a properly independent tack, either in January 1999 or as late as June 1999, the present situation might well never have developed. The fact that the Provident Settlement trustees then signalled a willingness to test the market jointly with the Charitable Fund trustees had, he submitted, led to a situation where the

Charitable Fund trustees, having elicited a bid at a very good price, were now committed to a sale. Had the Provident Settlement trustees dug their heels in at the earlier stage, the Charitable Fund trustees might never have ventured so far down that road.

Once again, it seems to me that the submission suffers from the flaw of looking at what might have been, rather than what is, the case. Suppose he is right about what might have happened. The question would remain: what are the Provident Settlement trustees now to do? It is possible to imagine many possible scenarios in which past decisions by this controlling block of shareholders might have led to special circumstances arising, making it desirable to sell, but in which it would be then quite wrong for the trustees to blind themselves to those circumstances simply out of anxiety that their own past conduct had caused or contributed to their existence. I should add that I am far from satisfied that there were any such misjudgments in this case.

Accordingly, I have no doubt whatsoever that the circumstances in which the Provident Settlement trustees found their fund to be placed on 20th October this year were ones which, as a reasonable body of trustees, they were entitled to regard as special, making it desirable to sell their shares in the company, within the meaning of clause 3 of the Provident Settlement.

I turn, therefore, to the question of whether such conflicts of interest as existed at the material time were such as either to invalidate the decision reached on 20th October by the Public Trustee and Mr. Chadburn or were such as to cause the court sufficiently serious concern for it to decline to authorise them to implement their decision. In his attack on their decision, Mr. Herbert once again relied not only on the position as at 20th October but also on the position earlier in the year when what in retrospect might appear to have been critical preliminary steps were taken. In this respect the following matters were relied on as constituting conflicts of interest which had a vitiating or potentially vitiating effect on the trustees' subsequent decision.

(1) As to Mr. Chadburn: it is alleged that Mr. Chadburn was conflicted by virtue of his role until 30th September 1999 as a trustee of the Charitable Fund and by the fact that both he and his wife have personal shareholdings in the company.

(2) As to Mr. Nangle: the same conflicts are alleged, although it is acknowledged that his personal shareholding was very much smaller.

(3) As to Mr. Macfadyen: it is alleged that Mr. Macfadyen, by acting as solicitor to both the Provident Settlement and the Charitable Fund settlement as well as being a trustee of the latter, contributed to the effect of the other conflicts.

(4) As to Ernst & Young: it is alleged that the terms of their engagement were such as to encourage them to report in terms which favoured a sale and that the fact that Mr. Nangle was himself a partner in Ernst & Young affects the position.

These allegations have to be viewed in the context of the historic relationship between the two settlements. Given the underlying strategy of the settlements, namely of ensuring, so far as reasonably practicable, that the settlor's 48% holding continued to speak with one voice so far as concerned the future of the company, it is not surprising to find that the original composition of the trusteeship was designed in the overlapping way in which it was; nor is it surprising that each of the settlements contain provisions designed to ensure that in each case — and I speak only of the Provident Settlement and the Charitable Fund — there was provision for ensuring that there would always be a fixed number of trustees who were to be independent of the company and of each other.

Thus, in the Charitable Fund, there was the provision we have seen for the successors, whether mediate or immediate, of Mr. Surtees and Lord Rosenheim to be appointed from outside. In the Provident Settlement, there was the permanent appointment of the Public Trustee. The shared trusteeship lay in the role of Mr. Chadburn, senior, originally proposed as chairman of the company, and Mr. Nangle, senior, originally proposed as the settlor's receiver. No provision was made in these latter cases to ensure that the original office holders would necessarily be replaced by successors who enjoyed the same or similar characteristics but it was obviously entirely appropriate that, when the time did come for their respective replacements, the appointments of Mr. Chadburn, junior and Mr. Nangle, junior came to be made. The point is that the possibility of conflict between the interests of the Charitable Fund and of the Provident Settlement in relation in particular to a decision as to whether or not to sell the holdings was foreseen by the founders and provided for. No doubt it was expected that, in the normal course of events, pressure to sell would be more likely to emanate from one or other of the non-company trustees and be resisted by the "company" trustees. The important point, however, is that the possibility of conflict existed from the outset as did a mechanism in the form of wholly independent trustees for controlling and managing such conflict.

In considering the law applicable to this question, one starts with the classic statements of the equitable principle to be found in such judgments as that of Lord Cranworth L.C. in *Aberdeen Railway Company v. Blakey (1854) 1 Macq. 461* at 471 and of Lord Herschell in *Bray v. Ford (1896) A.C. 44* , 51 to 52 which, with other, more modern, citations to the same effect, are conveniently collected in the judgment of Lindsay J. in the *In re Drexel Burnham Lambert Pension Plan* case, to which I have already referred. As put by Lord Herschell, it is that:

> "It is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided … allowed to put himself in a position where his interest and duty conflict. … I regard it [that is this rule] rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

The principle has generated certain well known rules applicable to specific commonly encountered situations. I give as examples and not as an exhaustive list the following. A professional trustee may not charge for his services unless expressly authorised to do so by the trust instrument. Similarly a director trustee must account for remuneration earned as a director unless expressly or impliedly authorised to retain it. A beneficiary is entitled ex debito justitiae, that is to say, without having to prove actual unfairness or impropriety, to set aside any transaction entered into by the trustee in his personal capacity in respect of the trust assets. A trustee is not, generally speaking, able to exercise a power of appointment in his own favour unless expressly or implicitly authorised to do so.

One must, however, beware of supposing, simply because the principle has bred these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist. The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled ex debito justitiae to have it set aside. Equally, one would expect to find, in the absence of such an iron rule, that, where such action is challenged on such grounds, the onus would be thrown upon the trustee to demonstrate that the conflicting interest or duty has not in fact operated in a vitiating way.

In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to declare his interest to requiring him to abstain from participation in the relevant decision-making process. In the law of private (i.e. non-charitable) trusts, where unanimity of decision making is required, such devices are difficult to transplant. The beneficiary is entitled to the decision of all his trustees but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees. Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.

Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.

Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict.

These observations appear to me to be amply supported by recent authority. In *Hillsdown Holdings plc v. Pensions Ombudsman [1997] 1 All E.R. 862* at p.895, Knox J. rejected a submission that the self-dealing rule applied so as to render a transaction voidable no matter how fair and proper it was, if, in the negotiations which led up to the transaction, there was at least one person who was either a trustee or a director on both sides, with a conflict of duties. He accepted, however, that, in such a case, the onus of proving that the transaction was indeed fair and reasonable falls on those who seek to uphold it. I would add that I do not think that the Court of Appeal's refusal to apply the latter principle in *Edge and Others v. Pensions Ombudsman [1999] P.L.R. p.215* was because it disapproved of it in the context in which it was said to apply. In *Edge* the context was different: the relevant pension trust deed required the appointment of trustees fulfilling certain criteria and, effectively, authorised them to act notwithstanding the existence of the conflict (see the reasoning at para.62 of the report).

Furthermore, in the *Drexel Burnham Lambert Pension Plan* case, Lindsay J. had no hesitation in holding that the general equitable principle did not apply with such force, in the context in which he had to consider it, as to deny the court jurisdiction "to give directions where the scheme in respect of which directions are sought has been proposed by trustees who are in a position of conflict" [see the report at p.41]. That context was the exercise by trustees of a dispositive power in circumstances where they, with others, would directly benefit from its proposed exercise.

I turn, therefore, to ask how far such conflict as exists in this case can be said to have affected the trustees' decisions and how far it ought to affect my own decision whether or not to authorise them to implement their final decision.

Dealing first with the question of the alleged dual role of the professional advisors, Ernst & Young and Mr. Macfadyen, the first point to be made is that the equitable principle to which I have referred requires no relaxation or attenuation in order for their retainer in this case to be authorised. The settlements both expressly authorised the trustees to engage the services of firms of which the trustees were members.

Secondly, in the case of Mr. Macfadyen, there is not the slightest suggestion that the fact that he was advising both the Charitable Fund trustees and the Provident Settlement trustees improperly affected the legal advice which they obtained. On the contrary, at an appropriate juncture, he saw to it that the Provident Settlement trustees received the separate and wholly independent advice of highly experienced leading Chancery counsel.

Thirdly, so far as concerns Ernst & Young, there is no evidence that their report was anything other than a conscientious and professional attempt to answer the question asked of them by both sets of trustees or that the terms on which they were engaged were either unusual or calculated to produce something other than such a conscientious and professional answer. I see nothing in the evidence before me which persuades me for one moment that the Provident Settlement trustees' decision-making process has been flawed by their reliance on these particular advisors.

I turn to the question of the dual trusteeship during the period prior to 30th September 1999, of Mr. Nangle and Mr. Chadburn. While I think that the decision of Mr. Nangle and Mr. Chadburn to resign at that point from the Charitable Fund and (in Mr. Nangle's case) also from the Provident Settlement was both intelligible and wise, I do not think that the maintenance of the common trusteeship prior to that date can be criticised. There was in fact every reason why the Provident Settlement trustees and the Charitable Fund trustees should, in the context of their holdings in the company, seek to share information and advice and generally to make common cause for so long as they possibly could. There was of course always the possibility of a conflict of views emerging or of the inherent potential for conflict ripening into a real source of concern but, provided that the possibility of conflict was recognised and monitored from the outset, the balance of advantage must undoubtedly have appeared to lie in proceeding jointly as far as possible.

The question was addressed in a proper manner and the course adopted was not, in my judgment, unreasonable either viewed in the light of an unknown future or with the benefit of hindsight. Not only was the possibility of conflict recognised at the outset, as is testified by Mrs. Robertson's memorandum of 10th December 1998 and the subsequent note of Mr. Nangle dated 3rd February 1999, but, as already noted, the Provident Settlement had its own inbuilt mechanism for managing such conflict in that the Public Trustee was in place as a completely independent voice in the process.

Through Mr. Herbert, the employees have asserted that "on the evidence [the Public Trustee] took no independent stance: [she] admits that she relied on Mr. Chadburn, the 'main link' with the company … From the outset she has relied on both Mr. Nangle and Mr. Chadburn, without taking due notice of the conflicts mentioned …" I must of course read that allegation in the light of Mr. Herbert's basic thesis, which I have already rejected, that the conclusion at which the trustees arrived was not one at which any reasonable body of trustees could have arrived. But, apart from that thesis, the evidential point sought to be made by Mr. Herbert is wholly unfounded. Indeed it seems to me a travesty of the evidence before the court.

On that evidence, it appears to me that the Public Trustee, acting by her officers and in particular Mrs. Robertson, has conducted herself in a flawless, indeed exemplary, fashion. The criticism that she relied on Mr. Chadburn is simply a reflection of Mrs. Robertson's factual statement that Mr. Chadburn had been the main link between the settlement and the company; but the settlement obviously needed to have a link with the company, and any link it did have would be bound to come with his or her own views. No application, rightly, was made to cross-examine Mrs. Robertson. In my judgment, the allegation made against the Public Trustee is wholly unwarranted and I reject it.

That leaves the question of the personal shareholdings of Mr. Nangle and Mr. Chadburn. There is no rule that a trustee who owns shares in a company in which the trust also invests is absolutely debarred from taking part in decisions about the trust investment. This is, however, clearly an area in which great caution needs to be exercised. Often the existence of the personal shareholding will be recognised as immaterial. On other occasions, it may be actually or potentially significant or be capable of being viewed as such. The present case seems to me, on the evidence currently before me, to fall into this second category. In purely financial terms, Mr. Chadburn does have a material personal interest in the bid succeeding; the position of Mr. Nangle is different inasmuch as his holding is much smaller and he was in any case not a trustee at the critical moment. The potential gain for Mr. Chadburn can be simply measured by comparing the market price of the shares before the July board announcement with the price obtainable under the bid.

Unless Mr. Chadburn is a very wealthy man, for whom such a gain would be a mere bagatelle, which, for all I know, he may be, the amount of the gain is of an order which cannot be described as de minimis. Of course, his personal shareholding represents only a very small slice of the cake, but I have no evidence before me to suggest that it is not for him personally an appetizing slice. I do have evidence before me, which I have already quoted, that he has always sought to put the interests of the settlement before his own.

Had the whole body of trustees been exposed to individual conflicts of a similar nature, I think I might have been inclined to at least a provisional view that the proper course would be for them to have surrendered their discretion to the court, and the mere fact that the settlement contemplated or must have contemplated the possibility that its trustees might have such personal shareholdings would not by itself have dissuaded me from that provisional view. That is not, however, this case.

Here there is, and has throughout been, a wholly independent trustee and one who would have been in a position to take the decision on her own, had Mr. Chadburn taken the course of resignation. Moreover, he has put forward an entirely understandable and honourable reason for not having resigned, which has not been challenged and which I accept.

In the circumstances, I am satisfied that neither the joint decision made by the Provident Settlement trustees on 20th October 1999 was, nor any of their previous joint decisions were, vitiated by this suggested conflict of interest and that its mere existence should not lead me to withhold from the Provident Settlement trustees the authority of the court which is now sought.

In conclusion, I have been fully satisfied that all those involved in the decision-making process of the Provident Settlement trustees have been fully conscious of the momentous nature of the decision which they have had to take; that they have been correctly advised as to the nature of the fiduciary discretion vested in them; and that they have taken every relevant factor into account and have not been swayed by any improper or irrelevant considerations.

I propose, therefore, to make the declaration and the order which has been sought.

MR. SHER: My Lord, in the circumstances, would your Lordship then grant the declaration in para.1 of the application and authorise the irrevocable commitment which is referred to in para.2 and, of course, is contained behind tab 29?

MR. JUSTICE HART: Yes.

MR. SHER: My Lord, the only other matter I need refer to is the question of costs. Subject to your Lordship's approval, the beneficiaries, the employees, having been joined in a representative capacity, the trustees consider it appropriate that the trust fund, which is, after all, a trust fund for their benefit, ought in the circumstances to bear the costs of that representation on the usual indemnity basis —

MR. JUSTICE HART: Yes.

MR. SHER: — and likewise, my Lord, the charity who has been brought here as beneficiary ought to receive the same treatment. What I would ask your Lordship to do in those circumstances would be to order a detailed assessment of all their costs, unless they are agreed in the usual way. Subject to questions of disclosure of the judgment, I do not think that there is anything else that I need to put to your Lordship.

MR. JUSTICE HART: There was an issue raised earlier about whether the trust should pay for the LEK report, no doubt because of the perfectly proper attitude taken by the trustees at the time, the employees in fact had to dig their hands into their pockets to pay for it.

MR. SHER: Indeed, my Lord.

MR. JUSTICE HART: It would seem to me right, in the circumstances, that, on a detailed assessment, there should not be much argument about that being paid for.

My Lord, may I say that indications have already been given that that would be considered, but, in the light of your Lordship's observations, I am now instructed that, from the trustees' point of view, they recognise that it would be appropriate to treat those costs on the same footing as …

MR. JUSTICE HART: Yes.

MR. SHER: My Lord, while Mr. Herbert is taking instructions, may I just say that, on the question of disclosure, there is a lot in your Lordship's judgment that would be of value to the profession, especially with regard to the rules of conflict, and it would be very unhappy if this judgment could not be referred to in the future. Of course it is sensitive now and what I might suggest is this, my Lord: that when all the dust has settled and the bid is over, one way or another, perhaps your Lordship would permit this judgment to be released or perhaps invite us at that stage to make a unilateral application to your Lordship.

MR. JUSTICE HART: On the question generally of the privacy of the proceedings, as I indicated at the outset, I was not completely persuaded, notwithstanding the old practice, that under CPR.39 this would count as an uncontentious, administrative matter and, even on the old classification, it seemed to me that it probably straddles a category of Walker J.'s classification: straddles a category 1 and a category 2 case. So it might under the old practice have been an open question as to whether it should be in private or not and, from that point of view, if the parties have no objection, I have no objection to the judgment being …

MR. SHER: But for the moment, of course, while it is quite sensitive, I think it would be appropriate that your Lordship should indicate that it should not be disclosed.

MR. JUSTICE HART: Very well, yes, I have an application that I believe is going to be made to me.

MR. SHER: Yes, my Lord, we have heard about that, too. Perhaps, my Lord, after this judgment is over, we could find out whether those applications are in fact —

MR. JUSTICE HART: Are going to be made.

MR. SHER: Because in the event, my Lord, may I just say that the judgment having gone the way it has gone, it does not seem to us, at any rate, that there is any need at all for any other party …

MR. JUSTICE HART: All the bidder needs to know, it seems to me, is the terms of the order I have made.

MR. SHER: Yes.

MR. STEINFELD: My Lord, on the question of disclosure, could I ask for special permission to be able to disclose your Lordship's judgment to the Charity Commission, who are obviously interested in the outcome?

MR. JUSTICE HART: Yes.

MR. SHER: Yes, we have no objection to that.

MR. JUSTICE HART: Yes.

MR. HERBERT: And we have nothing further to say or any application to make.

MR. JUSTICE HART: Thank you very much. I will rise now and we will see if there is somebody waiting with baited breath outside the court to make an application. Perhaps you would stay here to make such observations as you can to assist me when that application is made.