Private Client eBriefing

‘Rep Sol’ instead of ‘Rep Ben’? When to appoint a solicitor as a representative party

Article by Jamie Holmes, 31st January 2025

1. The decision of Saira Salimi (sitting as a Deputy High Court Judge) in *Natwest & Ors v. Ludlow & Ors* [2024] WTLR 239 is an example of an application to Court by trustees in which the person appointed as a representative party on behalf of the interests of various persons was not a beneficiary (‘Rep Ben’) but a solicitor (‘Rep Sol’). This approach is not uncommon or controversial but may be somewhat overlooked.[1] This article considers in what situations it may be appropriate.

2. This article will not consider in any detail whether and when a representation order is needed in the first place, how many parties or classes are needed, who properly belongs in each class, or the duties that a representative owes. Rather, its focus is: *who* should be appointed to represent a given class. That said, as below, there may often in practice be an overlap between these issues.

3. The relevant procedural rules are at CPR 19.8-9. Neither is limited to trusts and estates proceedings (in which CPR 64.4 may also apply) and the wording of CPR 19.8 has notably not changed significantly for over 150 years.[2]

4. The guiding principle is pragmatism or convenience: “*Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. … “ … a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application." " It was better … to go as far as possible towards justice than to deny it*

[1] Examples include *Wythe v. Zavos* [2024] EWHC 2784 (Ch) at [5], [34], [41], [43]; and *Walker Morris Trustees v. Masterson & Ors* [2009] Pens LR 307 at [11]-[12]. See also, albeit only as a temporary “*stop-gap*”: *Chessels v. BT* [2002] Pens LR 141 at [21]-[23], in light of [11]-[20].

[2] *Lloyd v. Google* [2022] AC 1217 (UKSC) at [39], [33], per the unanimous judgment of Lord Leggatt JSC.

altogether." *… As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right. …* "[3]

5. This often leads to representation that is not "*perfect*", but which is the only practicable course and/or where chasing perfection would be inappropriate.[4]

6. By way of some further context, on the right facts, there may be little if any meaningful sense in which a Rep Ben is 'representative' of their class:

   a. The class that they represent may be defined by reference to the position of those within it on one or more of the issues in the case (e.g. "*to represent all those members in whose interests it may be to argue for a negative answer to each such question*") with the beneficiaries having little if anything else in common.[5]

   b. It has been recognised that in reality in modern times the representative does not normally conduct or control the proceedings, rather their lawyers do.[6]

   c. It may be appropriate for a single legal team to act on behalf of all beneficiaries generally, without separate classes, and presenting all of the arguments in opposition to the Trustee.[7] Indeed, the Trustee and Rep Ben(s) might each appoint separate counsel but act through one, common set of solicitors.[8]

7. There are also cases in which a suitable Rep Ben simply cannot be identified for one or more classes. That may be for practical reasons (they cannot be contacted) or an inherent feature of the class (persons unborn). In such cases, it may be that:

   a. the Trustee presents one or more sides of the argument;[9]

   b. the Trustee's counsel, as Advocate to the Court, presents all sides of the argument, with no representation order and no defendants joined at all;[10]

   c. where an issue that would require a further class to be represented may or may not arise, that being subject to the outcome of other issues, the Court might postpone the determination of that issue;[11] or

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[3] *Duke of Bedford v. Ellis* [1901] AC 1 (UKHL), at 8 and 10, per Lord Macnaghten, in part quoting two decisions of Lord Eldon 100 years earlier; *Lloyd v. Google* (cited above) esp. at [67]; see also [34], [38]-[41].
[4] *Bestrustees v. Stuart* [2001] Pens LR 283 at [26]; *NBPF v. Warnock-Smith* [2008] Pens LR 211 at [13]-[17].
[5] *Capita v. Zurkinskas* (Practice Note) [2011] 1 WLR 1274 at [9]-[13].
[6] *Lloyd v. Google* (cited above) at [72].
[7] *NBPF* (cited above) at [13]-[17].
[8] *South Downs v. GH* [2018] WTLR 673 at [2], [4.i], [27]-[31], esp. the guidance at [63]-[66].
[9] *MNOPF v. Everard* [2005] Pens LR 225 at [7]-[10]; *PD64B* at [4.1].
[10] *Womble Bond Dickinson (Trust Company)* [2022] WTLR 765 at [6]-[8]; *PD64B* at [4.2]-[4.3].
[11] *MNOPF* (cited above) at [11].

d. in a pensions case, the employer or company might present one or more sides of the argument.[12]

8. As can be seen from that final point, by and large the same considerations as apply to the potential appointment of a Rep Ben will apply to that of a Rep Sol:

   a. It may be that, as with paragraph 7 above, simply no (suitable) Rep Ben can (practically) be identified, e.g. because the class is of unborns.[13]

   b. In any event, the question will be a case and fact specific assessment, on which the Court will need to be satisfied. The cases cited above show that the principal considerations will often be the obvious ones: (i) how many trusts/beneficiaries/potential parties would in a perfect world be joined, taking account of how similar or divergent the interests are, (ii) how extensive is the trust fund and/or how will representation be funded, (iii) how urgent is the relief sought and what is the risk of delay in joining others, (iv) to what extent has notice been given, consultation undertaken or consent obtained?

   c. This may often in practice overlap with consideration of whether a representation order is needed at all, what separate classes are required, and who falls into each. In particular, it has been said that where interests are not merely divergent but actively in conflict (in the specific sense that if the representative took a particular stance on a given issue in the proceedings, that would be to the advantage of some within the class but to the prejudice of others) those persons cannot have common representation.[14]

   d. Finally, although always in the Court's discretion, if a person insists on participating and being separately represented, the Court may be instinctively inclined to permit that course, subject to their being at risk as to the costs of doing so.[15]

9. *Ludlow* did not consider these issues by reference to authority, but the case is a good example of the application of some of the relevant considerations:

   a. The background is at: [8]-[23]. Three banks had ended their business of acting as trustee of some 3,946 trusts and they applied respectively as trustee seeking their replacement. Ludlow had been selected in a tender process and had agreed to meet all of the costs (including in Court), and so no costs order was sought: [53]. Most of the transfers proceeded by consent. At the time of the application, there

[12] *Univar v. Smith* [2020] Pens LR 23 at [16]-[18]; *Burgess v. BIC* [2019] ICR 1386 at [4] (EWCA).
[13] See e.g. *Wythe v. Zavos* (cited above). See also *Walker Morris Trustees v. Masterson* (cited above).
[14] *Lloyd v. Google* (cited above) at [71]-[72]. *PNPF v. Taylor* [2009] Pens LR 263 at [40]-[42] suggests that the conflicts referred to in *NBPF*, (cited above) at [14]-[15], should be seen as having been cured by consent. Query whether that is capable of explaining cases such as those at paragraph 7 above.
[15] *PNPF* (cited above) at [62]-[64], [80]-[112]. See also *Lloyd v. Google* (cited above) at [77], [79].

were over 100 where no response had been received from the relevant power-holder, requiring an application on the issues at [40]-[50].

b. The trustees decided to appoint a Rep Sol in the circumstances, it being impractical to identify any one beneficiary who could represent the interests of all, including because of the lack of response concerning these trusts: [26]. The trustees adopted a tendering process for the Rep Sol, who acted on behalf of all of the 61 remaining trusts by the time of the hearing, including 6 charitable trusts (following approval from the Attorney General and the Charity Commission): [32]-[34]. The trusts are broken down at [35]-[39].

10. Finally, it should be noted that a number of safeguards are built into CPR 19.8-9. Although any judgment will as a general rule bind all persons represented, the Court can order otherwise, and in any event a judgment cannot be enforced against a non-party without Court approval: CPR 19.8.(4) and 19.9.(7). Further, under 19.9, the claim can only be settled with Court approval: CPR 19.9.(5)-(6).

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