Private Client eBriefing

Cator v Thynn – the latest in the Denaxe debate

Article by Samuel Cathro, 2nd March 2026

1. Must a trustee join all the trust's beneficiaries to a blessing application in order to gain immunity from subsequent suit? Until the Court of Appeal's decision in *Denaxe Ltd v Cooper* [2024] CH 65, the settled wisdom seemed to be: "no".

2. *Denaxe* upset that orthodoxy. *Cator v Thynn* [2026] EWHC 209 (Ch) is the latest development in the ongoing debate about whether *Denaxe* is right – it offers a strident criticism of the Court of Appeal's reasoning.

3. Because *Cator* is a High Court case, *Denaxe* remains binding authority in England and Wales and will stand until a higher court revisits the issue. But one clear practical implication from *Cator v Thynn* is that, in light of *Denaxe*, applicants for a representation order are likely to face a much easier argument that they did previously. The decision also provides a blueprint of the reasons not to follow *Denaxe*, which might be adopted in offshore jurisdictions considering whether that decision reflects the law there.

Some important context

4. *Denaxe* was the subject of a previous article in this e-briefing series (see *Immunity for Blackpool FC? It's not clear...*, August 2023).

5. The case concerned receivers who were selling the Blackpool Football Club. The Court of Appeal concluded that on an application by a fiduciary for blessing of a momentous decision, the immunity that follows is explained by *Henderson v Henderson* (1843) 3 Hare 100 abuse of process (or issue estoppel) principles (see the judgment of Snowden LJ at [117]). The consequence is that if a party is not joined to the blessing application, they will not be bound, and the fiduciary will not be immune to a subsequent challenge by that party (per Snowden LJ at [133]-[134]). Although the facts of the case concerned a receiver, the Court's reasoning was expressed as applying to trustees as well.

6. Since *Denaxe*, there has been considerable uncertainty for trustees about whether they need to join all interested parties in order to be protected from future proceedings.

The critique in *Cator v Thynn*

7. The first subsequent case to refer to the Court of Appeal's decision *Denaxe* was *Wythe v Zavos* [2024] EWHC 2784 (Ch).[1] *Wythe v Zavos* is a decision of Fancourt J, who was the first-instance judge in the *Denaxe* litigation. The Judge observed that as a general rule it was not necessary to join any or all beneficiaries to a blessing application. However, "*in light of the decision of the Court of Appeal in [*Denaxe*], which explains that the protection that trustees obtain from the court's approval depends on the principles of res judicata and abuse of process, not immunity arising from the approval, the protection may be more limited if beneficiaries are not joined*" (at [42]).

8. *Cator v Thynn* is the first substantial judicial consideration of *Denaxe* in the trusts context. HHJ Matthews embarked on a detailed analysis of the history of the blessing jurisdiction, beginning with *Leech v Leech* (1675) 1 Ch Cas 249, and referring, amongst other materials, to Charles Dickens' *Bleak House*. The Judge's conclusion from that historical survey was that, prior to *Denaxe*, the immunity conferred by a blessing application was <u>not</u> explained by reference to principles of issue estoppel.

9. Modern practice is also said by the Judge to be consistent with this. The Civil Procedure Rules proceed on the basis that there is no requirement to join all the beneficiaries. The Judge referred (at [27]ff) to CPR rule 64.4(1)(c) "*the claimant may make parties to the claim any persons with … an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought*"; and PD 64B para 4.1 "*Sometimes, if there are only two views of the appropriate course, and one is advocated by one beneficiary who will be joined, it may not be necessary for other beneficiaries to be joined since the trustees may be able to present the other arguments.*" Indeed there is no requirement to join any beneficiaries at all – PD 64B para 4.2 specifically acknowledges that "*[i]n some cases the court may be able to assess whether or not to give the directions sought, or what directions to give, without hearing from any party other than the trustees.*"

10. The Judge did not refer to CPR 19.10, which also supports that proposition, and provides that:

[1] All four counsel who appeared were from Wilberforce Chambers: Michael Furness KC and Jamie Holmes for the Claimants, and Jonathan Hilliard KC and Samuel Cathro for the Defendant.

(1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').

(2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings.

11. However, according to HHJ Matthews, the "price" for not joining particular defendants is that the trustee is obliged to put all the relevant information before the court (*Cator* at [36] citing CPR PD 64B para 7.1).

12. The Judge concluded his historical survey in an almost mournful tone:

In tracing the history of the directions procedure, I have looked in vain for any suggestion in the authorities before 2023 that the protection afforded to a trustee was based upon issue estoppel or abuse of process. The critical question was not whether someone had been joined as a party, but rather whether all sides of the argument were presented. This is of course consistent with the fact that it was possible to seek a direction from the court without joining a defendant. Before the decision in Denaxe Ltd v Cooper, *therefore, it was considered that the protection conferred upon the trustees following the approval by the court of their proposed course of action was the result of the court's approval, and not by virtue of there having been a trial of any issue between the relevant classes of beneficiaries affected by it: see eg* National Westminster Bank v Lucas *[2014] EWCA Civ 1632, [54]. But that view appears to have been overtaken by the decision of the Court of Appeal, even though it is not a case about trusts at all.*

Practical implications

13. The Judge considered that the following practical implications follow from the Court of Appeal's decision in *Denaxe* (at [43]-[47]):

    13.1 Following the Court of Appeal's reasoning, it is necessary for a trustee to join at least one defendant to the claim, otherwise there can be no issue estoppel and no protection.

    13.2 Trustees who have obtained blessing in the past, based on their understanding of the law prior to *Denaxe*, may not have the protection they thought they had.

    13.3 The justification for the requirement that the trustees give full and frank disclosure is difficult to understand in light of *Denaxe*, if it is not the "price" for deciding to bring an application without joining other parties who can advocate for their own interests.

13.4 There are likely to be increased delays and costs for trustees in allowing defendants to have the opportunity to file evidence and make oral submissions. It may be that trustees will not have time to apply for a blessing before the relevant decision needs to be made, and as a result perhaps they will not make decisions they otherwise would have.

14. *Wythe v Zavos* (mentioned above) is relevant to the last point. Fancourt J recorded that in the case before him the trustees had been willing to take the risk of not joining certain beneficiaries, principally because of the "*excessive and disproportionate cost*" of those beneficiaries obtaining advice on the very complex restructuring that was the subject of the application. The costs in that case would be borne by the trust (see [41]). Balancing the risk of not obtaining immunity against the cost and delay associated with joining all interested parties is an exercise trustees may now need to undertake more frequently.

15. A final practical consequence of these recent developments is that applications for representation orders may become more common, and perhaps more straightforward. That was, at least, the result on the facts of *Cator v Thynn*.

16. There, the claimant trustees wished to exercise a power of advancement so that they could make potential provision for a child born to a surrogate mother. The terms of the trust applied the pre-1970 common-law meanings of descriptions of family relationships, which required tracing relationships through "*persons who are … legitimate*" (at [5]). It was accordingly unclear whether the child in question fell within the beneficial class. In light of the uncertainty, the trustees wished to confer the power on one of the adult beneficiaries to add their surrogate child to the class. The Judge was satisfied that none of the adult beneficiaries could adequately represent the interests of the whole class – particularly, it was not realistic to expect the child's parents to argue that the trustees' proposal should not be implemented. The Judge therefore agreed that it was appropriate to appoint an independent solicitor to represent the beneficiaries who would be potentially prejudiced by the trustees' decision (at [56]).

17. The Judge made several references to the burdens of trusteeship, including the observation that "*Trusteeship is always an onerous, often a difficult and expensive, and sometimes a thankless task*" [52]. He explicitly referred to the "*apparent change in the law effected by* Denaxe" as a reason why the trustees were justified in applying for a representation order on the facts of that case.

Offshore consequences

18. Offshore jurisdictions appear to have largely weathered out the storm – the author is not aware of any offshore jurisdiction that has followed *Denaxe* so far.

19. Many of these jurisdictions have statutory provisions (similar to the provisions of the CPR quoted above), which provide that a trustee need not join all parties to blessing proceedings. See for example Article 51 of the Trusts Law (Jersey) 1984 and Rule 4/5 of the Royal Court Rules; Article 69 of the Trusts (Guernsey) Law 2007; s 61 of the Trustee Act 1961 in the Isle of Man; and s 48 of the Trusts Act (2021 Revision) in Cayman. The common origin of many of these provisions, incidentally, seems to be section 30 of the (long since repealed) Law of Property Amendment Act 1859 (UK).

20. The recent critique in *Cator* would provide helpful ammunition for offshore advocates seeking to argue that *Denaxe* does not and should not represent the law overseas. By the same token, those seeking to persuade offshore courts to follow *Denaxe* will need to consider how to overcome HHJ Matthews' forceful criticisms.

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