Representation of WW and XX (Trust)

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	02 November 2012
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Text

[2012] JRC 202

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **sitting alone**.

IN THE MATTER OF THE C FOUNDATION

WW
Representors
XX
and
A
First Respondent
B
Second Respondent

Advocate A. J. Clarke **for the Representors**.

Advocate M. C. Goulborn **for the Second Respondent**.

Authorities

Trusts (Jersey) Law 1984.

Trust — application by the representor for indemnity costs against the second respondent.

The Deputy Bailiff

1 This is my decision on the application by the representors for indemnity costs against the second respondent in relation to these proceedings, which concern a representation by the representors as trustees of the first part of the trust fund of the C Foundation.

2 The representors were appointed joint trustees by Act of the Court dated 25 th February, 2011. This appointment flowed from the fact that the previous trustee of this part of the trust fund had incorrectly purported to wind up this part of the trust fund in 1985 by transferring the shares which represented the totality of the funds of the first part of the trust fund to G Services Inc. At that time the shares had a value of approximately £1,060,000. The representors contended that the winding up of the first part of the trust fund was ineffective for reasons into which it is unnecessary to go for the purposes of this judgment.

3 In June 1985 the directors of G Services Inc made a declaration of trust known as the G Chaaritable Foundation and transferred all the shares in G Services Inc to that Trust. The following month the shareholding in the companies held in the first part of the trust fund of the C Foundation were ostensibly sold to G Services Inc thereby coming under the control of the trustees of the G Charitable Foundation, who are the first respondent. The representation thus sought orders from the Royal Court for service of the representation on those who might have an interest in it, and for substantive relief that the various documents involved in the transfer of assets from the first part of the trust fund of the C Foundation be declared invalid. Both the first and second respondents entered an appearance in the proceedings. The remaining respondents did not.

4 The second respondent filed an answer on 3 rd June, 2011. In it she asserted that the appointment of the representors as joint trustees of the first part of the C Foundation was invalid. She asked the Court to declare the appointment void and to appoint new trustees. She supported the assertions made by the first respondent that there were particular UK inheritance tax obligations which had to be taken into account.

5 The representors filed a reply to the second respondent's answer. They noted that the second respondent in her answer raised no substantive defence to the claims in the substance of the representation.

6 On 24 th May, 2011, the Court made the following order, having been addressed by the representors and both the first and second respondents:-

> ***"Subject to any future order the Court may make as to costs:-***
>
> ***a. The Representors and the Second Respondent shall be entitled to their costs of and incidental to this hearing, including any work carried out to comply with the directions contained in this order, capped at £25,000 each, out of the J Foundation; and***
>
> ***b. The First Respondent shall be entitled to its costs of and incidental to this hearing including any work carried out to comply with the directions contained in this order, capped at £30,000 out of the J Foundation."***

7 On 15 th March, 2012, the Court directed that the cashflow costs order in its Act of 24 th May should be extended to provide for a costs cap of £90,000 per party, payable out of the JE Charitable and Family Foundation Fund.

8 On 18 th June, 2012, the parties appeared before me as a single judge again. It appeared at that point that the tax difficulties had gone away, given the contents of a letter from HM Revenue and Customs confirming that they had no intention to raise any inheritance tax enquiry.

9 Advocate Goulborn accepted that there was nothing further to be raised in connection with the appointment of the representors as trustees, and accordingly there was nothing in his answer which had been filed which remained to be dealt with.

10 It was therefore ordered on 18 th June that the cashflow order in favour of the second respondent should cease immediately. Cashflow orders in favour of the representors and the first respondent in the further sum of £20,000 were approved, it being noted that there might be an issue over the terms of any indemnity which should be given to the first respondent and that there were issues of costs. The outstanding matters in relation to the first respondent are due to be heard shortly.

11 In his application for costs, Advocate Clarke asserted that the second respondent had by her actions caused a substantial diminution in the value of the Trust. The cashfloworders that had been made facilitated the participation of the second respondent, but they were always subject to a contrary order by the Court at a later stage, and Advocate Goulborn agreed that that was so. Advocate Clarke therefore asserted that the second respondent

should reimburse the fund with the costs which she had incurred and had been paid out of the fund, and that she should also pay 25% of the costs incurred by the representors. At the outset, it was contended that the second respondent had suggested she had something to contribute, and she could not do so without a cashflow order. In fact, Advocate Clarke submitted she had contributed nothing of substance, and had merely caused time and expense. Her attacks were designed to remove any obstacles to her getting some money out of the fund, and they had been unsuccessful.

12 In his submissions on the skeleton argument in relation to costs which had been lodged by Advocate Goulborn, Advocate Clarke submitted that her claim to be an innocent abroad was false. She was a protector of the fourth part of the trust fund in the 1980s when this took place. She had been a trustee of the H Will Trust and a director of LJ Industries Ltd between 1983 and 1984. To assert as she did that her recollections of events around the time of the creation of the Trust were very limited owing to her youth (she was then in her mid-30s) and that the decision making was beyond her knowledge and authority were he said not credible.

13 The second respondent also suggested in the skeleton argument that there might be some financial hardship if costs orders were made as requested. Advocate Clarke pointed to affidavit evidence which suggested that the second respondent's house had been sold for £925,000 and that in addition she had a property available to her in London and that she had received a sum of approximately £1.3 million from her mother's estate. It was noted that there was no affidavit of current means but to the extent that any evidence was available, it would appear that the second respondent was a lady of some substance.

14 All in all, the submission by the representors was that the second respondent had been convened because it was necessary to give her the opportunity of making submissions to the Court, but she need not have participated. The only effect of her participation has been to take £90,000 in respect of her own fees out of the Trust and cause some £25,000 of further fees to come out of the fund in payment of the representors' legal costs.

15 In his submissions, Advocate Goulborn indicated that his client participated by filing an answer, but she has not pursued any application for relief. Much of the time incurred has been expended on the inheritance tax issue. As it turns out, that is not in fact an issue. It had an impact however on his client in her capacity as a beneficiary rather than in her capacity as protector.

16 His instructions were that his client had no current liquidity, hence some loans which she had obtained from G. She could not have participated without the cashflow order.

17 In his submission the overriding objective was to do justice between the parties. Costs should not always follow the event and the Court should look at the litigation as a whole. This was one of those cases where it was difficult to label who has won or lost. As to the

level at which costs should be awarded, if his client were to be liable at all, he submitted that there had to be some seriously abusive behaviour before indemnity costs were awarded. The second respondent was not being unreasonable. She was fully entitled to participate as she did.

18 The application by the representors was made pursuant to Article 51 of the Trusts (Jersey) Law 1984. By Article 51(2)(b), the Court is entitled, if it thinks fit, to make a declaration as to the validity or the enforceability of a trust. The second respondent was convened to the application for such an order because, in her capacity as a protector of the G Trust, she had an interest in whether assets of that trust might be removed from it, if the declarations were made.

19 I note also that there is no suggestion that the second respondent was in any sense responsible for the steps taken in 1985 which it is now said were invalid.

20 Accordingly the starting point is that the second respondent was properly convened to the representation and had a legitimate interest in making submissions to the Court which were properly made to defend the interests of the trust of which she was a protector. If the second respondent had remained within the parameters of that position, then in my view she would have been entitled to have her costs paid out of the trust fund because this would be a *quasi*-administration action to which she was properly convened and in respect of which she was not in any sense a guilty party. The fact that she might have been unsuccessful in the contentions which she brought would not of itself expose her to an order for costs.

21 Accordingly the question here is whether the second respondent has strayed outside the reasons for her being convened to these proceedings. If she has, and if as a result costs have been unnecessarily incurred by the representors, and those charged to the Fund by the second respondent, then she may be exposed to costs.

22 In my judgment the second respondent went outside the parameters of an ordinary administration action when she contended that the representors did not have *locus standi* to the proceedings and have been incorrectly appointed. Subject to any other considerations, it would be right to reflect that incorrect stance in a costs order.

23 I do not consider that the first respondent was wrong to raise the question of potential inheritance tax liabilities. It was for just the reason that such liabilities might arise that the Court placed some pressure on the parties to seek a mediation of their difficulties. The mediation was unsuccessful at the first attempt, and on the second occasion was unsuccessful because the representors were only prepared to discuss whether disclosure should be made to HMRC in relation to possible taxation liabilities; and in fact at a later stage HMRC confirmed that it had no further interest in the J family arrangements. Had this information been made known at an earlier stage, a good deal of costs could have been avoided, whether in relation to the mediation or otherwise. Because I do not see the first

respondent as having raised a matter which ought not to have been raised, I do not consider that the second respondent was wrong to endorse the concerns which the first respondent advanced.

24 Similarly, I do not think that the fact that she was convened as protector of the G Trust made it inappropriate to raise these concerns. The possible inheritance tax liabilities could have had an impact on more than one branch of the family. Although she was convened as protector of the G Trust, I do not consider that it would be right to penalise her for making clear her concerns about potential inheritance tax liabilities.

25 However I did note that Advocate Goulborn submitted that much of the time which had been spent was expended on the inheritance tax issue. He said that approximately 50% of the costs had been incurred by his firm and 50% by the English solicitors who had been instructed by the second respondent and who were the source of his instructions. In his reply, Advocate Clarke suggested that most of the costs appeared to have been incurred in reading documents which had been generated by the first respondent and that in the circumstances the second respondent could have said at any time that she no longer had a positive contribution to make.

26 There seems little doubt that the representors were right about the inheritance tax issue. However, I also think that they have not been as sensitive as they might have been to the concerns which were expressed by the first and second respondents. Part of that lack of sensitivity might well have been the result of the attack made on them by the second respondent in the first place.

27 Costs applications of this kind almost invariably lead the Court to making a rough and ready assessment of where the justice of the case lies. I have not heard full argument on the underlying tax issue because the substance of the issue has only gone away as a result of the relatively recent letter from HMRC and the communications with HMRC which took place without the knowledge of the first and second respondents. Furthermore I have not been addressed on the issue by the first respondent because there has been a bifurcation of the applications for costs.

28 I am left with these conclusions:-

(i) The second respondent was rightly convened and was entitled to raise her concerns on the inheritance tax issue.

(ii) The second respondent was not entitled to challenge the *locus standi* of the representors.

(iii) The second respondent has in fact added very little to the progress of the case.

(iv) Nonetheless the second respondent was entitled to get advice from those

qualified to advice on inheritance tax matters (English solicitors) and, given the litigation was being run in Jersey, was entitled to be satisfied that her Jersey advocates understood the issues which were liable to be run.

29 Putting all this together, I exercise my discretion on costs by rejecting the application that the second respondent pay 25% of the representors costs and by ordering that the second respondent be entitled to 66% of her costs of an incidental to these proceedings out of the trust fund to be taxed on a standard basis, if not agreed. To the extent that the second respondent has received costs in excess of the amount agreed or taxed as aforesaid, she should repay such sums into the Trust Fund.