B v RBC Trustees (CI) Ltd (formerly known as Ernst & Young Trustees Ltd) and E

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Liston
Judgment Date:	22 September 2015
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Text

[2015] JRC 193

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Nicolle **and** Liston

IN THE MATTER OF THE HHH EMPLOYEE TRUST AND IN THE MATTER OF THE B SUB-TRUST

AND IN THE MATTER OF ARTICLE 26 AND ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Between
B

Representor
and
RBC Trustees (CI) Limited (formerly known as Ernst & Young Trustees Limited)
First Respondent

and

E
Second Respondent

Advocate A. D. Hoy **for the Representor.**

Advocate A. Kistler **for the First Respondent.**

Advocate E. C. P. Mackereth **for the Second Respondent.**

Authorities

Trusts (Jersey) Law 1984.

In the matter of the HHH Employee Trust [2012] (2) JLR 64.

In the matter of HHH Trust [2013] (1) JLR 135.

In the matter of HHH Trust [2013] (2) JLR 239.

Sheikh Fahad Alim Alhamrani v JP Morgan Trust Company (Jersey) Limited [2007] JLR 527.

J. Landau v Anburn Trustees Limited, A. Landau, C. Landau and R. Landau [2007] JLR 250.

S v L [2005] JRC 109.

Lewin on Trusts 17 th Edition.

Lewin on Trusts 19 th Edition.

Trust — application by B as beneficiary of B sub-trust for order for costs and expenses on grounds of being unreasonably incurred.

THE COMMISSIONER:

1 B, who is a beneficiary of the B Sub-Trust, applies by way of representation for an order under Article 51(2) of the Trusts (Jersey) Law 1984 (as amended) ("the Trust Law") for the costs and expenses claimed by E, the settlor of the HHH Employee Trust, to be assessed

by the Greffier on the grounds that they have been unreasonably incurred.

2 These costs arise out of proceedings brought by B, as a beneficiary of the B Sub-Trust, for disclosure by E, as settlor of the HHH Employee Trust, and which was the subject of the Court's judgment of 20 th June, 2012, (*In the matter of the HHH Employee Trust* [2012] (2) JLR 64). For the reasons set out in that judgment, the Court declined to order disclosure by E and discharged it from the proceedings.

3 On 30 th January, 2013, the Court, for the reasons set out in its judgment of that date (*In the matter of HHH Trust* [2013] (1) JLR 135) awarded E its costs out of the B Sub-Trust on the trustee basis, on the grounds that E, as a fiduciary, had an implied equitable right of indemnity to be equated with a trustee's right to be reimbursed in full ("the Costs Judgement"). That decision was upheld by the Court of Appeal on 26 th July, 2013, (*In the matter of HHH Trust* [2013] (2) JLR 239).

4 On 23 rd August, 2013, E submitted its costs to the first respondent ("the trustee") for payment out of the B Sub-Trust. Those costs were then subject to extensive correspondence between Ogier, representing E, and Carey Olsen, representing the trustee, over the ensuing year, and in due course, the trustee agreed the costs claim in the sum of £270,034.26 (comprising the fees of Ogier, English counsel and Allen & Overy), as being costs that had been reasonably incurred by E and to which it was entitled to an indemnity out of the B Sub-Trust. Notice of this was given to Advocate Hoy, acting for B, on 21 st August, 2014, albeit with an error as to the total sum involved.

5 The claim for costs, as agreed by the trustee, was not accepted by B and he gave notice of his intention to challenge it, which he did by way of his representation dated 20 th November, 2014, to which the trustee and E were convened. Pending that challenge the costs remain unpaid, B having declined to agree to any interim payment on account. They have been outstanding therefore for nearly two years.

6 By way of a consent order dated 12 th December, 2014, it was agreed between the parties that the trustee would not be required to be represented at the hearing, and would be bound by any orders made by the Court. It would seem that as between E and the trustee this was on the basis that because the threshold by which a beneficiary can challenge the costs of a trustee had been set very low by the Court of Appeal in *Sheikh Fahad Alim Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527 at paragraph 62 (effectively equivalent to a striking out), there was little point in it being involved in a dispute that was essentially between B, as a beneficiary, and E as fiduciary.

7 Advocate Kistler, for the trustee, who attended the hearing at our request, made it clear, however, that the trustee had reached a decision that the costs in the agreed reduced sum were reasonable and payable out of the B Sub-Trust and it had not surrendered its

discretion to the Court.

8 In his skeleton argument, Advocate Hoy had not addressed the principles upon which the Court was being invited to make an order in these circumstances, but in discussion he submitted that as E's right to an indemnity was to be equated to that of a trustee and because beneficiaries have an established right to seek an assessment of a trustee's costs as per *Alhamrani* (and see also the slightly earlier decision of *J. Landau v Anburn Trustees Limited, A. Landau, C. Landau and R. Landau* [2007] JLR 250), so B, as a beneficiary, had a right to challenge E's costs directly, irrespective of the decision of the trustee. He referred to the Costs Judgment where the Commissioner said at paragraph 21 *obiter*: –

> ***"21 The trustee, to whom application has to be made by the fiduciary for payment of those costs out of the trust fund, and the beneficiaries can of course challenge the costs and expenses incurred by the fiduciary on the grounds that they were unreasonably incurred or of an unreasonable amount."***

Neither that judgment, nor the subsequent Court of Appeal judgment which repeated that obiter statement, were concerned with the ability of beneficiaries to challenge such costs.

9 Advocate Mackereth, for E, submitted that for the Court to order an assessment of the costs submitted by E, which the trustee had agreed were reasonable, would be an unprincipled intervention by the Court over powers which by the trust deed had been given to the trustee, and not to the Court.

10 Under the provisions of the B Sub-Trust, the trust fund is held by the trustee who has all the powers over it of a natural person acting as absolute beneficial owner. Specifically, under Regulation 14 of the Trust deed, the trustee had power to effect compromises and to pay or allow any debt or claim on any evidence which it may think sufficient.

11 The principle of non-intervention is well established. In *S v L* [2005] JRC 109, the Court referred to pages 759 and onwards of the 17th edition of Lewin on Trusts under the heading ***"Control by the Court"***, and concluded at paragraphs 22 and 23: –

> ***"22 … Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as Advocate Sinel submits, the jurisdiction of the Court must be exercised on a sensible and principled basis.*** A settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If Advocate Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the court and the Court agrees to accept such

surrender (which it is not obliged to do).

23 We are not to be taken as approving every part of paragraph 29–100 of *Lewin* ***which we have set out above.*** We have not analysed or heard argument on every sub-paragraph in detail. But in our judgment the paragraph provides a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. We draw particular attention to paragraph (4). The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated by one or more of the sort of circumstances set out in *Lewin*."

12 The 19th edition of Lewin is in very similar terms to that referred to by the Court in *S v E*. The onus is on the persons challenging the conduct of the trustees to show that their discretion has been improperly exercised on a limited number of grounds, which so far as would be relevant here include:–

Finally, as *Lewin* states at paragraph 29–335, the Court does not sit to entertain appeals from the trustees' decisions.

(i) Where the trustees have based themselves on a faulty judgment as to a state of facts where such a judgment is a pre-condition to the exercise of the power.

(ii) The trustees have never brought their minds to bear on exercising their discretion.

(iii) The trustees have failed to take into account relevant and only relevant matters or in some other way the exercise is vitiated by mistake or misapprehension sufficient to warrant upsetting it under general principles or to attract the so-called principles in Hastings-Bass.

(iv) The trustees have acted in breach of a duty of care in the exercise of investment or other administrative powers.

13 In this case, Advocate Hoy did not criticise the decision made by the trustee as to the reasonableness of E's costs or as to the process by which it reached that decision and submitted that the trustee's decision could be circumvented by B seeking a direct assessment of E's costs in his capacity as a beneficiary.

14 As Advocate Mackereth pointed out, the decision of the Court of Appeal in *Alhamrani* is one which applies to the costs of trustees. The supervision of the costs of trustees is in a category of its own for a very good reason, he said, namely that the trustee in awarding itself costs sits on both sides of the transaction — it is both the keeper of the purse strings

and the recipient of the funds and is an inherent position of conflict. Where the beneficiary makes a case (that the trustee, in agreeing to make the payment to itself, is in breach of trust) which is not obviously bad (i.e. it would survive a strike out application), the Court will order an assessment. In contrast, here, the trustee is not sitting on both sides of the transaction. It is exercising its normal function and determining how much the B Sub-Trust owes to a third party, namely E.

15 In essence, Advocate Mackereth submitted that the trustee had reached a decision on this matter and the Court should not interfere with that unless there were grounds to do so, and none had been put forward. If B was unhappy with the amount of E's costs, then it was the trustee's decision to pay the same that he had to challenge (as being a breach of trust). He could not challenge E's costs directly.

Decision

16 In our judgment, Advocate Mackereth is correct in his approach. The implied right of indemnity that a fiduciary enjoys is a right exercisable against the trustee, who holds the trust fund, and not against the beneficiaries, even if the duties which the fiduciary owes are owed to the beneficiaries as the objects of those fiduciary powers. As *Lewin* states at paragraph 21–31 of the 18th edition to which the Court referred in paragraph 4 of the Costs Judgment:–

> ***"Trust instruments which confer fiduciary functions on protectors or other third parties often contain express provision for their indemnity in respect of costs incurred in connection with the discharge of their fiduciary functions.*** Even in the absence of an express provision authorising indemnity, and subject to any contrary intention expressed in the trust instrument, we consider that it is the better view that third parties with fiduciary functions in relation to the trust have an implied equitable right of indemnity in respect of costs reasonably incurred by them in the discharge of those fiduciary functions. For it is well settled that the costs reasonably incurred by the donee of a power of appointment of new trustees properly fall on the trust fund, and there seems no good reason why different considerations should apply to costs reasonably incurred by third parties in connection with the discharge of other fiduciary functions in relation to the trust which, like the trustee's own fiduciary functions, involve the performance of duties, if only in relation to the exercise of powers, for the benefit of the beneficiaries or some of them. Third parties are in a different position from trustees in that they do not hold the trust property, but that is no reason why an equitable right of indemnity should not take effect by way of a right of reimbursement from the trustees who are in turn entitled to reimbursement from the trust fund, or perhaps by way of a direct right of exoneration from the trust fund exercisable against the trustees." [our emphasis]

17 It is the trustee therefore, and the trustee alone, who has the obligation to discharge that implied right of indemnity and the duty to do so only to the extent that the costs claimed

have been reasonably incurred. Therefore, for the Court to permit beneficiaries to circumvent that process by challenging a fiduciary's costs directly would be to interfere with the conduct of the trust by the trustee in breach of the well-established principle of non-intervention.

18 We appreciate Advocate Kistler's comment that a trustee faced with a claim in an amount it has decided is reasonable but which it knows a beneficiary objects to in strong terms, has the predicament of either paying the claim and waiting to be actioned for breach of trust or applying to the Court for directions, which he said may well give rise to costs which are disproportionate to the amounts involved.

19 Assessing whether costs have been incurred reasonably is not an exact science and where a trustee has concerns as to the quantum being claimed and particularly where there are beneficiaries who might well be inclined to challenge what is a significant payment, then the issue can, we feel, be referred by the trustee to the Court without undue cost for an order that the Greffier assess the same (as per paragraph 65 of *Alhamrani*) and it is difficult to see how the fiduciary could properly resist such an order, unless it sought to argue (at its own risk) that any criticism of its costs was obviously bad. In the case before us the trustee has of course agreed E's costs.

20 Where the Court makes an order in favour of a fiduciary on the trustee basis, then the order would ordinarily provide that those costs be paid in an amount to be agreed by the trustee and failing agreement to be assessed by the Greffier, so that the process of assessment by the Greffier would follow automatically without the need of a further court order.

21 It follows from this that B's application for an assessment of E's costs must be rejected. The trustee has not referred the matter to the Court or surrendered its discretion. It has made its own assessment of the costs claimed and reached a decision on the amount to be paid. Its decision and the process by which it arrived at it has not been impugned by B and we can see no grounds upon which we could interfere with it even if invited to do so.

22 The trustee is now before the Court and in our supervisory capacity we think it wrong to send it away unprotected. We therefore direct it to discharge B's long outstanding costs claim in the agreed sum of £270,034.26 out of the trust fund of the B Sub-Trust.

23 In summary:–

(i) We refuse B's application for an assessment of E's costs; and

(ii) We direct the trustee to discharge those costs in the agreed sum out of the trust fund of the B Sub-Trust.