Jasmine Trustees Ltd v M

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Ramsden, Olsen
Judgment Date:	06 October 2021
Neutral Citation:	[2021] JRC 250
Court:	Royal Court

Text

[2021] JRC 250

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Ramsden **and** Olsen

In the Matter of the Piedmont Trust & Riviera Trust

Between
(1) Jasmine Trustees Limited
(2) Lutea Trustees Limited
Representors
and
(1) M
(2) N
(3) Q
(4) O, P, V, R, S, W
(5) U

(6) Advocate Damian James as Guardian ad Litem of X
(7) Advocate Simon Franckel as Representative of the unborn and remoter issue
(8) Rysaffe Fiduciaries S.à.r.l.
Respondents

Advocate N. M. Sanders **for the Representors**

Advocate F. B. Robertson **for the First Respondent**

Advocate J. P. Speck **for the Second and Third Respondents**

Advocate M. P. Renouf **for the Fourth Respondents**

The Fifth Respondent did not appear and was not represented.

Advocate D James **in person**.

Advocate S. A. Franckel **in person**.

Advocate R. S. Christie **for the Eighth Respondent**

Authorities

In the matter of The Piedmont Trust and the Riviera Trust [2021] JRC 248.

In Re Piedmont Trust [2016] (1) JLR 14.

Re Y Trust [2011] JRC 155A.

Re J P Morgan 1998 Employee Trust [2013] (2) JLR 239.

In Re Dunlop Settlement [2013] JRC 123.

Costs

JUDGMENT ON COSTS

THE COMMISSIONER:

1 This judgment follows on from the judgment dated 5th October 2021 *In the matter of The Piedmont Trust and the Riviera Trust* [2021] JRC 248 ("the Judgment") whereby the Court gave its blessing to the decision of the Trustees to terminate the P Trust and the R Trust by distributing all the assets of both Trusts in accordance with the Proposed Distributions. Terms defined in the Judgment have the same meaning in this judgment.

2 I now have to address the issue of costs. I have received written submissions from the parties and have made my decision on the papers.

3 On 25 th August 2021, I informed the parties of my costs decision. I now set out the reasons for that decision.

Costs of the fiduciaries

4 There are three fiduciaries in this case, namely the Trustees, the Protector and Advocate Franckel who was appointed to represent the interests of the unborn and remoter issue, of whom there are none living.

5 I endeavoured to summarise the principles to be drawn from earlier cases in respect of the costs of fiduciaries in a previous costs judgment in relation to these Trusts, namely *In Re Piedmont Trust* [2016] (1) JLR 14 ("the 2016 costs judgment"). In essence, a fiduciary is entitled to a full indemnity out of the trust fund in respect of costs and expenses properly incurred by him, but such indemnity may be lost if the fiduciary is guilty of misconduct or found to have acted unreasonably.

6 Although the Adult Grandchildren and the sons expressed reservations about certain aspects of the conduct of the Trustees and the Protector, none of them submitted that they should not both receive their costs out of the trust funds on the usual trustee indemnity basis. The daughter and Advocate James on behalf of the daughter's child expressly accepted that they should be so indemnified.

7 I have considered the course of these proceedings and the points raised by the sons and the Adult Grandchildren. Some criticism may certainly be laid at the Trustees' door for failing to take and consider UK tax advice before the first hearing. But, in my judgment, neither the Trustees nor the Protector has been guilty of misconduct or have behaved unreasonably such that they should be deprived of their indemnity as to costs. Accordingly, I direct that both the Trustees and the Protector should be indemnified out of the trust funds on the usual trustee indemnity basis.

8 No party suggested that Advocate Franckel had behaved unreasonably or been guilty of misconduct and I agree; his submissions were measured and appropriate. I therefore award him his costs out of the trust funds on the usual trustee basis.

9 I consider below how the costs payable to both the fiduciaries and the beneficiaries should be allocated between the P Trust and the R Trust.

Costs of the beneficiaries

10 A beneficiary who is convened by the Court to administrative proceedings in relation to a trust is normally entitled to have his costs out of the trust fund on the indemnity basis, but this may not be so if he has acted unreasonably; see the 2016 costs judgment at paras 31 and 43.

11 The daughter and Advocate James submit that all the beneficiaries should receive their costs out of the assets of the P Trust and the R Trust on the indemnity basis.

12 On the other hand, the sons, supported by the Adult Grandchildren, submit that all the beneficiaries should be ordered to bear their own costs subject to the proviso that, to the extent that any beneficiary wishes to seek a distribution to meet any costs which that beneficiary has incurred, the Trustees may agree to make such a distribution provided that it is accounted for as part of the Proposed Distribution which is to be made to or for the benefit of such beneficiary. In relation to the costs of Advocate James as guardian ad litem for the daughter's child, they submit that he should receive his costs on the indemnity basis out of the trust funds provided that such costs shall be deducted from the Proposed Distribution to be made to the daughter's child.

13 They made the following points in support of their submission:

(i) The order which they seek is fairer in that some beneficiaries may have incurred costs at a much higher level than others. The order which they seek means that such beneficiary would have to meet the extra costs which he or she had incurred rather than those costs being shared amongst all the beneficiaries by being paid out of the gross trust estate before distributions are calculated.

(ii) The daughter and Advocate James had taken a number of points on which they had lost, e.g. the conflict of interest point, the equalisation or grossing up of the distributions for UK tax purposes and her opposition to the Proposed Distributions.

(iii) The daughter had, according to the sons, been guilty of *'a cynical attempt…to derail and protract the proceedings…'* by raising the UK tax point at the hearing on 27/28 th May. Advocate Speck placed particular reliance on the case of *Re Y Trust* [2011] JRC 155A. The facts of that case were complex and very unusual. The trustee was found to have behaved in a very high-handed manner and the Court decided to deprive him of half of his costs. As to beneficiary A, it was ordered that his costs should come out of his share of the trust fund on the basis that the dispute was essentially between him and the trustee and that, as a result of previous distributions, there was insufficient in the trust fund to pay a distribution of £1 million which the trustee had agreed to pay to another beneficiary if the costs were taken out of the gross of the trust fund. Putting these matters together, the Court decided that A's costs should come out of his share rather than out of the gross of the trust fund. Advocate Speck submitted that the Court should make a similar order in this case.

14 I consider first Advocate Speck's reliance on *Y Trust*. Not only were the facts of that case highly unusual, but it was also decided before the clear guidance given by the Court of Appeal in *Re J P Morgan 1998 Employee Trust* [2013] (2) JLR 239. In the circumstances, I consider that the decision in *Y Trust* must be considered as turning on its own special facts and I do not derive any assistance from it in the present case. Since the *J P Morgan* case and those cases which have followed it, it has been clearly established that the normal position is as I have described it at para 10 above.

15 In my judgment, there is no good reason to depart from the normal order, namely that all the beneficiaries should have their costs out of the trust funds on the indemnity basis. In relation to the specific points raised by the sons and the Adult Grandchildren, I would comment as follows:

(i) The fact that one beneficiary may incur greater costs than another beneficiary will usually be the case and cannot of itself be a sufficient reason to depart from the normal order.

(ii) It is true that the daughter and Advocate James made a number of submissions which were rejected by the Court, as summarised by the sons. However, that will frequently be the position. As the Court said in *In Re Dunlop Settlement* [2013] JRC 123 at para 27 – in a passage specially approved by the Court of Appeal in *J P Morgan* at para 44 – it will often, and probably usually, be the case that a beneficiary puts forward a stance that he considers will be to his benefit, but this does not take the matter outside the normal order whereby a beneficiary is entitled to his costs on the indemnity basis. The whole point of convening beneficiaries to an administrative application by trustees is that those beneficiaries should have the opportunity of putting forward their submissions on the proposal of the trustees. It is regarded as part of the good administration of a trust and the costs incurred are regarded as being for the benefit of the trust estate. It would be completely contrary to this underlying principle if a beneficiary were to be deprived of his costs simply because he had made an argument to the Court which the Court had not accepted. If a beneficiary makes unreasonable submissions or otherwise behaves unreasonably in connection with the proceedings, then of course he may be deprived of his costs out of the trust fund or may even be ordered to pay or contribute towards the costs of other parties. But in my judgment, there is no question of any of the points put forward by the daughter or Advocate James on behalf of the daughter's child being categorised as unreasonable points.

(iii) Nor do I accept the description by the sons of the daughter's conduct in raising the UK tax issue. She was perfectly entitled to draw attention to the fact she would incur UK tax on the distributions and that the Trustees had apparently not taken this into account. Her conduct was not unreasonable. It was very much the Court's decision that the matter should be adjourned and if there is any blame, it attaches to the Trustees for not having obtained appropriate advice on the UK tax position prior to their decision to make the Proposed Distributions and leaving the question of UK tax to be considered only during phase 2.

(iv) The above matters are sufficient for me to make the normal order. However, it seems to me that the proposal of the sons and Adult Grandchildren would lead to considerable unfairness in the particular circumstances of this case. Taking first the costs of the father's children, the two sons have instructed Advocate Speck and the daughter has instructed Advocate Robertson. Assuming, for the purposes of argument, that the costs of each advocate are the same, the result would be that the distribution to each son would be reduced by half of Advocate Speck's costs, whereas the daughter's distribution would be reduced by all of Advocate Robertson's costs. Thus the net amount paid to each son would be greater than that paid to the daughter by half the amount of the sons' costs. The effect would be even greater in relation to the Adult Grandchildren and the daughter's child. Again, assuming for these purposes equal costs on the part of Advocate James and Advocate Renouf, each Adult Grandchild would only lose one sixth of Advocate Renouf's costs from his or her distribution, whereas the daughter's child would lose the whole of the amount of Advocate James's costs from her share. This seems to me to be an additional reason for adhering to the normal costs order in the present case, so that the costs of all parties are paid from the gross trust estate and percentage distributions are calculated by reference to the net trust estate after payment of costs.

16 For these reasons, I make the normal order envisaged in relation to administrative proceedings such as these and order the costs of all beneficiaries to come out of the trust funds on the indemnity basis.

Allocation of costs between the P Trust and the R Trust

17 In the 2016 costs judgment, I said this:

"52. During the course of the hearing on costs, a point emerged as to how the costs to be borne by the trusts should be allocated as between the P Trust and the R Trust. Hitherto, the trustees have allocated the litigation expenses equally between the two trusts on the basis that there has been no material distinction in the time spent in relation to each trust .

53. It was suggested by Advocate Speck that, given the fact that the value of the R Trust is approximately 1/5th of the value of the P Trust, it might be fairer to allocate the costs pro rata to the value of each trust. The father was neutral as to the method of allocation and the daughter preferred to continue with a 50:50 split .

54. In my judgment, given that there is no distinction in the time spent on each trust, the basis upon which the trustees have allocated costs so far and the fact that there is essentially a common class of beneficiaries (with minor exceptions), I think it would be simplest if costs continued to be allocated on a 50:50 basis."

18 A similar order was made following the 2018 judgment.

19 The Trustees have raised the question of how the costs of the present proceedings should be allocated as between the P Trust and the R Trust. They say that in terms of work done and time spent, they cannot distinguish between the two Trusts, which would point in favour of costs being allocated equally between the two Trusts. They say, however, that on the other hand, if the Court wishes to consider the impact of the costs orders as the guiding principle in circumstances where the Trusts are to be distributed in their entirety, a pro rata approach based on the respective value of the two Trusts would arguably be fairer. They remain neutral on the issue.

20 The daughter, supported by Advocate James on behalf of the daughter's child, submits that the Court should make the same order as previously on the basis that the work of the Trustees and the Protector, as well as the legal costs incurred by the beneficiaries, cannot be said to have been more for one Trust than the other. All of the beneficiaries are beneficiaries of both Trusts. She also submits that there could possibly be some efficiencies in relation to US state taxes if a greater portion of the costs comes out of the S Trust portion of the R Trust and this would be achieved by a 50:50 split rather than a pro rata allocation of costs.

21 Conversely, the sons and the Adult Grandchildren submit that the costs should be allocated pro rata to the value of the two Trusts which, on the figures available to the Court, would result in 77% of the costs being borne from the P Trust and 23% from the R Trust.

22 In my judgment, the sons and the Adult Grandchildren have the better of the argument in this respect. Whilst on previous occasions there has been no strong reason not to allocate the costs equally between the two Trusts because the class of beneficiaries was common to both Trusts and there was no proposal to distribute the trust funds amongst the beneficiaries, that is not the position now. The sons and the daughter are receiving a distribution only out of the P Trust and, whilst the daughter's child is receiving the same as the Adult Grandchildren out of the R Trust, she is receiving a greater share than them out of the P Trust.

23 Standing back, this is really one pot of assets, albeit contained in two trusts. If all the assets were in one trust, any costs payable out of the trust fund on termination would in consequence be allocated pro rata to the amounts being distributed to individual beneficiaries. That seems to me to be the fairest outcome and the way to achieve that is to allocate the costs pro rata to the value of each trust fund. The consequence will be that each beneficiary will bear a proportion of the overall costs which is similar to the proportion of the overall trust funds which will be distributed to him or her. The position is very different from the position in 2016 and 2018, when there were essentially common beneficiaries and no immediate distributions were envisaged. The position now is that different beneficiaries will be benefitting from the P Trust and the R Trust. If the costs were to be shared equally between the two Trusts, this would benefit the sons and the daughter (who are only

receiving distributions from the more valuable P Trust) at the expense of the Adult Grandchildren.

24 Accordingly, I direct that the costs payable both to the fiduciaries and to the beneficiaries should be payable as to 77% from the P Trust and 23% from the R Trust.