HHH Trust 30-Jan-2013 30-Jan-13

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	30 January 2013
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Date:	30 January 2013

Text

[2013] JRC 23

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**.

IN THE MATTER OF THE HHH EMPLOYEE TRUST

AND IN THE MATTER OF THE B SUB-TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, (REVISED EDITION)

Between
B
Representor

and
Royal Bank of Canada Trustees Limited
First Respondent

and

E
Second Respondent

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

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

Authorities

In the matter of HHH Trust [2012] JRC 127B .

Trusts (Jersey) Law 1984.

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

Lewin on Trusts, 18 th Edition.

In re Buckton [1907] 2 Ch. 406 .

Armitage -v- Nurse [1998] Ch 241 .

Alsop Wilkinson -v- Neary [1996] 1 WLR 1220 .

Harvey -v- Olliver [1887] 57 L.T. 239 .

Trust Protectors by Andrew Holden.

Royal Court Rules 2004.

In the matter of HHH [2011] JRC 235 .

Trust — costs judgment.

THE COMMISSIONER:

1 On 28 th June, 2012, the Court discharged the second respondent ("the settlor") from this representation for the reasons set out in the Court's judgment of that date (JRC 127B) whose definitions we adopt and the settlor now seeks its costs either to be paid out of the trust fund of the B Sub-Trust on the trustee basis or alternatively to be paid by the representor ("B") on the indemnity basis.

2 Mr Mackereth, for the settlor, submitted that as this was an administrative application under Article 51 of the Trusts (Jersey) Law 1984 ("the Trust Law") it would be usual for the costs of all of the convened parties to such an application to be paid out of the trust fund.

3 Furthermore, the settlor, whilst not a trustee, had fiduciary functions as settlor (as found by the Court) and was to be equated to a trustee, entitled to be indemnified for all of its costs under what is commonly referred to as the trustee basis (see *Alhamrani -v- JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527).

4 By way of support for that submission, Mr Mackereth referred me to the following passage in the 18 th edition of Lewin on Trusts at paragraph 21–31:–

> ***"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."

5 The Court ultimately found that the settlor's fiduciary functions did not require it to comply with B's wide ranging requests for trust documentation, but Mr Mackereth submitted that the fact that the application failed and that the Court agreed with the settlor that its fiduciary obligations did not extend to the disclosure being sought cannot be a reason to refuse or limit the settlor's costs absent any unreasonable behaviour on the settlor's part, of which there had been none.

6 Furthermore, he submitted that costs may be awarded on the trustee basis where the application before the Court concerns either the construction of the trust instrument or determination of questions of law as to the validity or scope of trusts or powers under the trust instrument or imposed or conferred by law. Conventionally, these types of proceedings

are treated as being divisible into three categories following the classification in the leading case of *In re Buckton* [1907] 2 Ch. 406 at 414 and conveniently summarised in *Lewin* at paragraph 21–79:–

> ***"(1) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held.*** In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be given credit if he does so on advice. In a case where any doubt is a slight one, consideration should be given to an application to the court under section 48 of the Administration of Justice Act 1985 as a convenient and inexpensive method of securing appropriate protection for the trustees.
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> ***(2) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee.*** Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs.
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> ***(3) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund.*** The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason. A case which falls clearly within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument, or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or rival view of the law. Here the general principles as to costs of hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation."

7 Mr Mackereth submitted that B's representation raised questions of law concerning the administration of the Trust and the B Sub-Trust. Resolving the central question of whether the settlor was required to disclose the documents requested by B required various legal issues to be canvassed including (a) the nature of the settlor's reserved power to vary administrative provisions of the Trust, (b) whether disclosure could be ordered against a settlor, (c) the scope of disclosure that could be ordered against a settlor, (d) whether the

reserved power to replace the trustee carried with it an obligation to keep the trustee under surveillance and (e) the effect of the general rule against pre-action disclosure on requests for trust documents.

8 There was clearly doubt as to whether B was entitled to the disclosure that he sought. The disclosure obligations of a settlor with reserved powers had not previously been determined in Jersey. Consequently (and subject to it making an application for leave under Article 51(3) of the Trusts Law), this proceeding could have prudently been brought by the settlor. While *Lewin* does not specifically address the situation where a fiduciary other than a trustee makes a pre-emptive application of this type, Mr Mackereth submitted there is no good reason why a trustee should be able to recover its costs out of the trust fund, but a non-trustee fiduciary should not. Both types of applicant would be seeking the Court's direction as to exercise of their fiduciary powers and both would be left equally out of pocket for doing so. It would be unjust, he said, to allow a trustee to be indemnified in such circumstances, while depriving a non-trustee fiduciary (such as a settlor) from recovering its costs.

9 Even though the settlor did not pre-emptively bring these proceedings, it would have been reasonable, he said, for it to have done so. Had it done so, it would have been entitled to have been indemnified. It would be inequitable if the settlor was denied indemnification simply because B brought the representation rather than the settlor. Such an approach would encourage a *"race to the courtroom steps"*.

10 If, contrary to its submission, the Court found that the representation was essentially adversarial rather than administrative, Mr Mackereth submitted that the settlor should still be indemnified on the trustee basis. The Court had found that there was no basis for ordering the disclosure and released the settlor from the representation, which is analogous to the claim against the settlor being dismissed. Where an action against a trustee has been dismissed, the trustee may recoup its costs out of the trust fund in reliance on its right of indemnity (*Armitage -v- Nurse* [1998] Ch 241 at 263). That same right should extend to a non-trustee fiduciary in a comparable situation and accordingly, the settlor's costs should be paid out of the B Sub-Trust on the trustee basis.

11 B's case is that his application falls within the third of the *Buckton* categories and therefore the general principles as to costs in hostile litigation apply. As the unsuccessful party, he accepts that he should be ordered to pay the settlor's costs on the standard basis.

12 The passage from *Lewin* quoted at paragraph 4 above makes it clear that a third party's right to an implied equitable right of indemnity in respect of costs reasonably incurred arises " ***in the discharge of those fiduciary functions".***

13 The Court found that the two fiduciary powers retained by the settlor had not been exercised or had been exercised *de minimis*. Mr Hoy submitted that to the extent such

powers had been exercised that had been outside the context of the proceedings. The Court had found, he said, that the nature of the representation was an application for pre-action disclosure. The only construction point that arose related to the power to amend, but the proceedings did not relate to the administrative functions undertaken by the settlor for the benefit of the beneficiaries.

14 Mr Hoy referred me to the three categories of trust litigation set out in *Alsop Wilkinson -v- Neary* [1996] 1 WLR 1220 summarised in *Lewin* at paragraph 21–48. In his view this was a *"beneficiaries dispute"* which fell to be determined in accordance with costs principles applicable to hostile litigation.

15 Nothing in this case, Mr Hoy said, had the characteristics of administration. If the settlor was correct, then B himself would be entitled to his costs out of the B Sub-Trust. It would be wrong, however, for any of these costs to be visited upon the B Sub-Trust as the action B had taken was clearly for his own personal benefit, namely to enable him to receive personal tax advice and to consider whether an action against the settlor for misrepresentation could be pursued, none of which would benefit the trust estate.

Decision

16 As made clear in *Alhamrani*, a trustee's right to indemnity arises as a matter of statute (Article 26 of the Trusts Law), contract and the inherent jurisdiction of the Court. As a matter of law, therefore, a trustee is entitled to be reimbursed in full for all expenses and liabilities reasonably incurred in connection with the trust. The Court, in its judgment of 28 th June, 2012, under paragraph 30, held that the settlor is not a trustee for the purposes of the Trusts Law and therefore Article 26 has no application to it. Furthermore, the settlor has no right to an indemnity under the terms of the trust deed of either the Trust or the B Sub Trust.

17 I accept, however, the view expressed in *Lewin* that third parties with fiduciary functions in relation to a trust have an implied equitable right of indemnity in respect of costs reasonably incurred by them in the discharge of those fiduciary functions. Authority for that proposition can be found in the case of *Harvey -v- Olliver* [1887] 57 L.T. 239 at 241 which held that the costs reasonably incurred by the donee of a power of appointment of new trustees properly fell on the trust fund. As *Lewin* says 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 a trust.

18 A similar view, in the context of protectors, is expressed in Trust Protectors by Andrew Holden where it says at paragraph 7.32:–

> ***"7.32 A protector in a fiduciary relationship with the beneficiaries is granted powers in order to serve the interests of those beneficiaries.*** It is an onerous role, involving time, expense, and the imposition of a range of

obligations. For that reason, and unless it is expressly excluded by the terms of the trust instrument, it is suggested that a protector in a fiduciary position has an implied right to be indemnified against the costs and expenses reasonably incurred in the course of the office."

The author goes on to say at paragraph 7.34:–

> ***"7.34 A non-contentious application by the protector for the court's directions or for a declaration on a point of law or construction affecting the administration of the trust would in general be viewed by the court as made for the benefit of the trust itself, and in such a case the ordinary course would be for the court to order the protector's costs to be paid out of the trust fund.*** Thus, for instance, if the trust instrument contained an ambiguity over the proper scope of the protector's powers that was inconveniencing the administration of the trust, the protector could perhaps make an unopposed application for a declaration as to the true construction of the instrument and be indemnified out of the trust fund against the costs of doing so."

19 Under Jersey law, neither a protector nor a settlor has the right to bring an application for directions under Article 51 of the Trusts Law but may do so with leave. No such application was made in this case, but I accept that faced with a demand for disclosure of the kind made here then it would have been open to the settlor to seek the guidance of the Court as to the extent of its obligations as a fiduciary to comply with that request; an issue upon which the Court has not previously given guidance. It seems to me that the granting of leave would have been axiomatic.

20 The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets. The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation under Rule 12/3 of the Royal Court Rules 2004.

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.

22 Has the settlor in this case incurred its legal costs and expenses in the exercise of its fiduciary functions? I have found this a difficult question to answer because as stated in *Buckton*, it is not easy in practice to draw a distinction between the first two categories and the third category.

23 In its earlier judgment on this matter of 15 th December, 2011, ([2011] JRC 235), the Court noted at paragraph 22 that B had now extracted the hostile claims from the representation so that it was clear that by the representation he was invoking the supervisory jurisdiction of the Court, pursuant to Article 51 of the Trusts Law in order to seek disclosure from the trustee and the settlor as a beneficiary.

24 At paragraph 23 of that earlier judgment, Mr Hoy is recorded as submitting that there was no difference between the nature and breadth of a trustee's obligation to make disclosure and those of a settlor owing fiduciary duties. The settlor did not accept that his obligations extended that far, and the issue was therefore set down for argument.

25 Although the Court in its judgment of 28 th June, 2012, found that in part the application for disclosure was an attempt to obtain pre-action disclosure (in major part the Court found the request should have been directed to the trustee), the re-amended representation makes it clear at paragraphs 7 and 8 that B sought disclosure from the settlor pursuant to its duties to the beneficiaries as a fiduciary.

26 As against that there is some force in Mr Hoy's submission that notwithstanding the efforts of the Court to retain the administrative nature of the proceedings, it was clear that B was seeking disclosure so that he could be advised on his personal tax position and so that he could consider bringing a claim against the settlor personally for damages. It is not immediately obvious why, when looking at the substance of the matter, this could be regarded as being for the benefit of the trust estate.

27 However the key point it seems to me is that the settlor was actioned in its capacity as a fiduciary and it was as a fiduciary that it raised before the Court the issue of the extent of its obligations. It therefore incurred these costs in the discharge of its fiduciary functions. It would be wrong in my view for the settlor to have to pay any part of the costs it has incurred as a fiduciary out of its personal assets, which any order for costs on the standard or indemnity basis would require it to do.

28 I conclude therefore that the issue of the extent of the settlor's obligation as a fiduciary to make disclosure to B as a beneficiary was a question which arose in the administration of the Trust and the B Sub-Trust and it was for the benefit of the trust estate that the issue be determined. Because it was brought before the Court by a beneficiary, it fell within the second category set out in the case of *Buckton*. The costs should, therefore, be payable out of the trust fund. I accept that this applies as much to B as it does to the settlor. The settlor is entitled to its costs on the trustee basis and the beneficiary on the indemnity basis and I will order accordingly. Pursuant to Article 53 of the Trusts Law, it is appropriate (and Mr Hoy did not suggest otherwise) that these costs should be paid out of the B Sub-Trust of which B and his family are beneficiaries.