Y Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	04 August 2011
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Text

[2011] JRC 155A

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE REPRESENTATION OF N

AND IN THE MATTER OF Y TRUST

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, AS AMENDED

Between
N
Representor

and

A

First Respondent

B

Second Respondent

C

Third Respondent

D

Fourth Respondent

and

Advocate P. D. James as Guardian ad litem for E and F as Representative of the issue of E, F and D

Fifth Respondent

Advocate R. J. MacRae **for the Representor**.

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

Advocate P. D. James **for the Fifth Respondent**.

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In the matter of Y Trust [2011] JRC 135 .

Lewin on Trusts 18th edition.

In the matter of ELO and R Trusts [2008] JRC 150 .

Watkins -v- Egglishaw [2002] JLR 1 .

THE COMMISSIONER:

1 This is my judgment on the various applications for costs arising out of the decision of the Court handed down on 7 th July, 2011, (JRC 135) and it has to be read in conjunction with that judgment, the definitions of which I adopt.

2 At the time of the December 2009 decision, which the Court has now sanctioned, the trust fund comprised of cash in the sum of £3.4M and the benefit of loans due to the trust by A in the sum of £300,000. There was therefore sufficient funds to meet the decision to apportion £1.9M for the benefit of A (part of which would comprise writing off the loans due by him), £ $^{1}/_{2}$M to C and £1M to the US Trust for the benefit of D, F and E, giving a cash surplus of approximately £300,000.

3 The position has now changed in that C has received her £ $^{1}/_{2}$M, some costs have been paid and a further loan made to A. At the time of the costs hearing before me, the trust had total assets of £2.95M, of which £510,000 comprised loans due by A, the cash assets being £2.44M.

4 The costs incurred by the parties are as follows:-

Deducting the N Trustee fees that have been paid, there are therefore fees in the sum of £492,550 which are unpaid. There will need to be added to this the unbilled fees of the parties and the legal costs of the costs hearing itself, which took a day. Mr MacRae informed that his firm advises clients that a routine application for directions to bless a decision would cost around £30,000 so the costs incurred in this case are greatly in excess of what might be expected for such an application.

Collas Crill (5 th Respondent)	billed	£79,550.00
	WIP	£ 6,000.00
Appleby (A)	billed	£215,000.00
Carey Olsen (N)	billed	£160,000.00 as at 30 th June, 2011
N as Trustee	billed and paid out of the trust fund	£45,000.00
	WIP	£32,000.00 approximately
	Total	**£537,550.00**

5 Taking these figures it can be seen that if the £492,550 due in fees is deducted from the cash held by the Trust in the sum of £2.44M, there is £1.95M available; insufficient to meet the apportionment of £1.39M for A (net of the loans due by him) and £1M for the US Trust.

6 For the purposes of this judgment, I will refer to the £1.9M which N decided to allocate to A as “A's share” and the £1M it decided to distribute to the US Trust as “the US Trust share”. It was agreed by the parties that in making orders for costs out of the trust fund I could direct that they should be paid out of the gross, thus reducing proportionately the funds available for A and the US Trust, or I could direct that they be paid in whole or in part out of the shares apportioned to A and the US Trust respectively.

7 Costs have been incurred in a proportionately small amount in the application to rectify the

Trust. The Court granted the application and it is clear to me that it was made for the benefit of the trust estate, was properly brought and should therefore be paid out of the trust fund in the ordinary way, N on the trustee basis and the First Respondent and Fifth Respondent on an indemnity basis. The other Respondents did not contribute to the issue.

8 The parties sought costs orders as follows:-

(i) N's primary position was that its costs and those of the convened parties should be paid out of the trust fund from A's share, thus preserving the full value of the proposed distribution of £1M to the US Trust. Its secondary position was that all of its costs and those of the Fifth Respondent should be paid from the trust fund in proportion to each party's remaining interest pursuant to the December 2009 decision; in broad terms, one third from the US Trust share and two thirds from A's share. A should bear his own costs. Its final and least favoured position was that its costs and those of the convened parties should be paid from the trust fund in proportion to each party's remaining interest.

(ii) A's position was that N had acted unreasonably and should therefore be deprived of its costs in whole or in part and should if necessary pay a portion of his costs if that was required to prevent the injustice of his being deprived of the full benefit of the apportioned share of £1.9M.

(iii) Mr James had the benefit of a pre-emptive costs order, namely that his costs be paid out of the trust fund but with liberty to the parties to address the Court as to the final allocation of those costs. Mr James' position was that the interests of those he represented and the proposed US Trust should not be affected in any way by this application in which they had been caught up in the crossfire and that accordingly, the costs of N and of the convened parties should all be borne out of A's share.

(iv) B made a written submission in which he sought what he described as a nominal fee of £20,000 for the extensive time he had spent on the matter and reimbursement for the costs of international calls made to Carey Olsen and Collas Crill. In relation to the costs of the other parties, he submitted that the US Trust share should not suffer any loss whatsoever and the costs should be split equally between N personally, A personally and Appleby personally, or failing that as to one third by A and two thirds by N personally.

Legal principles

9 There was no dispute between the parties as to the legal principles to be applied by me in the exercise of my discretion as to costs. This is an administrative application brought by N for the sanction of the decision made in December 2009. Normally costs of all the parties to such an application are paid out of the trust fund (see Lewin on Trusts 18th edition paragraph 21–85). It is not suggested by any of the parties that N had acted improperly in invoking the jurisdiction of the Court in this case.

10 As a matter of general principle a trustee is entitled to an indemnity out of the trust fund in respect of costs and expenses properly incurred by him in connection with the performance of his duties and exercise of his powers and discretions as a trustee but a trustee can be denied an indemnity for its costs if it is found to have acted unreasonably (see *In the matter of ELO and R Trusts* [2008] JRC 150). It was accepted by Mr Robertson that this was a high hurdle. As stated at paragraph 21–64 of *Lewin*:-

> ***"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others not the trustees or which ought not to be contested at all.*** If the Court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law."

11 A beneficiary convened to an administrative application can be at risk as to costs as made clear in *Lewin* at paragraph 21–85:-

> ***"In a case where a trustee makes an application for directions in consequence of the conduct of a disaffected beneficiary intent on disrupting the administration of the trust, the beneficiary is at risk at least of being deprived of his costs and at worst of being ordered to pay all the costs of the application which was made necessary by reason of his conduct.*** But a beneficiary who makes a bona fide claim against the trustees in third party proceedings should not, it is thought, be deprived of costs (nor be ordered to pay costs) of the Beddoe application, by reason only that he has commenced the claim and therefore necessitated the Beddoe application. Such a beneficiary might, however, become at risk as to costs if he adopts an excessive role in the Beddoe application and seeks to use it as a forum for promoting his claim in the third party proceedings. An application may be made for a prospective costs order in respect of the costs of trustees or beneficiaries of an application to the court for directions concerning the administration of the trust."

Submissions

12 A's criticisms of the conduct of N can be summarised as follows:-

(i) N did not follow up with A and his advisers the action points following the meeting

in February 2009 and gave no notice to them of the change in its thinking and that a meeting was proposed at which these distributions were under consideration. In contrast there was evidence of extensive communications between N and B and C. If N had communicated with A and his advisers before the meeting in December 2009, there was a reasonable prospect of his disappointment being eased, thus avoiding the need for these proceedings. Alternatively a slightly different decision might have been reached, similarly avoiding the necessity for these proceedings. The Court had been critical of N's conduct in this respect – see paragraph 65 of the judgment.

(ii) Following the December 2009 decision, the explanations given by N in its email of 22 nd January, 2010, and its subsequent communications with Mr Stanford-Tuck were wholly inadequate in providing any explanation as to N's shift in position from what they had said to A and his advisers in February 2009. It should not have proceeded with the distribution to C which depleted the funds available and on receipt of Mr Stamford-Tuck's letter of 17 th August, 2010, it should have engaged in further correspondence instead of instructing Carey Olsen to make the application.

13 Mr Robertson submitted that since January 2010 and through the proceedings A had been trying to understand why N had moved from the position it had communicated to him in February 2009 and this did not in fact become clear until O gave evidence at the hearing, the affidavits of M having been opaque in this respect in his view. By analogy to civil litigation it was not easy, he said, to characterise either A or N as the winner and applying the principles in *Watkins -v- Egglishaw* [2002] JLR 1, N, even with the decision being sanctioned, would have been deprived of its costs in whole or in part. It failed to engage at all with A prior to the December 2009 decision or after and painted itself into a corner where it had no alternative other than make the application.

14 In response, N relied primarily on the fact that the Court sanctioned the decision and in so doing rejected the contentions put forward by A. In its view, A was a disaffected beneficiary intent on disrupting the administration of the Trust. He had incurred very substantial costs in seeking extensive discovery of correspondence in an attempt to support his view that N had been improperly influenced by B and had extended the hearing with very hostile cross examination in particular of M and K, accusing them of acting capriciously and giving false reasons for N's decisions. N was repeatedly attacked for acting perversely and irrationally. It was true that there had been more extensive communication with B and C but that was because they chose to communicate with N which simply responded to them; A chose not to communicate with N in the same way.

15 With reference to the Court's concerns as to the lack of consultation, Mr MacRae pointed out that this was a matter raised by the Court and had not formed part of A's case, until adopted towards the end of the hearing. There was furthermore no causative link between any absence of consultation on the part of N and the costs incurred in the proceedings. Even if A had been consulted, it would have made no difference to the decision. If, following the decision, N had done more to explain its decision to A, he had received five affidavits and extensive disclosure and it must have been clear to him at that stage that his

arguments would fail; but still he carried on to a full hearing.

16 Mr MacRae submitted that to deprive N of its costs where the decision had been blessed would be unprecedented. It would be a departure from all authority and send shock-waves through the trust industry.

17 Mr James submitted that the interests of his clients in the proposed US Trust should not be adversely affected by what in effect was a dispute between A and N. They were innocent parties caught in the crossfire. The decision to allocate £1M to the US Trust had been sanctioned and they should be insulated from the costs that had been incurred. He submitted that it was entirely inappropriate for A to put this Trust to such a large expense. If one extended every sympathy to A, one could understand him being perplexed by the decision and wishing to resist the application for it to be sanctioned and the request for disclosure. Once disclosure had been given however, he could and should have dropped his complaint and asked for his costs. He didn't do so but mushroomed his case into a very adversarial three day hearing on what was essentially a new argument on changes in decisions and in respect of the letter of wishes. His failure lay in not offering an explanation that if he had been consulted the decision would have been different. He cannot complain about lack of consultation if he cannot say what that would have led to. He was now using the failure to consult in order to escape the costs of the process. Because he had used the material disclosed in essentially a different way from that originally envisaged he loses his right to any costs. In essence he should be treated as the losing party in hostile litigation and suffer the costs incurred out of his share.

Decision

18 I accept the proposition that the funds allocated to the US Trust should be insulated from the costs of this application as far as that can reasonably be achieved. Whilst it is not appropriate to talk in terms of the beneficiaries of the proposed US Trust being caught in the crossfire, this being an administrative application, in reality the issue was between A and N and they had no option but to take part in the proceedings in order to safeguard their interests.

19 The December 2009 decision was sanctioned by the Court and it would be unjust for those interested in the US Trust to have their fund diminished by way of a contribution to the costs of an application incurred as a result of A's disaffection with that decision. To do otherwise would also lead to an unfortunate inequality of benefit between C who has received her distribution and the other two grandchildren (who are the principal beneficiaries under the proposed US Trust). Ordinarily, that would lead to the costs of the parties coming out of the balance of the trust fund, i.e. A's share.

20 Should N pay any of these costs personally or be deprived of the whole or any part of its own costs? I accept that N was entitled to bring the application in light of Mr Stanford-Tuck's

letter of 17 th August, 2010, in which he gave notice that if the December 2009 decision was implemented he would "have no alternative but to immediately apply to the Royal Court in Jersey for directions or other relief", and of course the Court has now sanctioned the decision. A was indeed a disaffected beneficiary but what led to that disaffection? In the view of the Court N had contributed materially to that disaffection, saying this at paragraph 65 of the judgement:-

> ***"We therefore sanction the decision of N taken on 14th December 2009.*** In doing so we wish to say this. Whilst we have found that the decision was within the bounds of rationality and therefore to be sanctioned, we were very troubled by the high handed manner in which we feel N had treated A and his advisers. It was indeed regrettable that having met with A and his advisers in February 2009 and engaged in the kind of discussions reflected in the minutes of that meeting, N should then have proceeded to deal with the trust fund in this way without informing A and his advisers of its intention to do so. A would always have been disappointed with the decision that was made, but the manner of his treatment can only have added to his sense of grievance."

21 It might be thought that in light of the February 2009 meeting, N would have anticipated that disaffection and seen fit to give a very full explanation of its reasoning to both A and his advisers, but instead it resorted to a somewhat bland *"Dear All"* email of 22 nd January, 2010, addressed to both A and B, which could not have assisted A in understanding why what he would have regarded as part of his share of the trust fund had been allocated to the grandchildren against his express wishes. There were subsequent telephone conversations with N but nothing substantive in writing until the application had been made.

22 For costs of this magnitude to be visited upon the Trust is calamitous and I am led to the conclusion that N must bear some responsibility for it. To treat A in this manner would inevitably, in my view, have given rise to a sense of suspicion about and lack of confidence in N on his part. Through that conduct, I find that N acted unreasonably, as conceded very openly by M in evidence, and that unreasonable conduct had a direct effect on the level of costs incurred in the application which N found it had no alternative but to bring. Thus I find, contrary to Mr MacRae's submission, that there is a causative link between the lack of consultation and the level of costs incurred. It is right therefore for N to be deprived of a material part of its costs.

23 It is only possible to approach the issue of what proportion with a broad brush but in the exercise of my discretion I determine that it should be deprived of one half of its costs. I do not accept that this will send shock-waves through the trust industry as Mr MacRae warned because I believe that the industry will share the view expressed by the Court as to the manner in which N treated A. It follows from this that I reject the suggestion that N should be ordered to pay any part of A's costs.

24 I accept that once full disclosure had been made and affidavits filed A could be criticised for not accepting the decision but this is an administrative application, not hostile litigation. A is not to be equated to a plaintiff bringing a claim; he was convened so that he could express his views about whether the decision should be sanctioned, which he was perfectly entitled to do and to do so forcefully. I am not therefore prepared to treat him as a plaintiff for the purposes of costs. He has to accept, however, that with the decision being sanctioned, it would be unjust for those interested under the proposed US Trust to be prejudiced, which only leaves his share to meet the burden of the costs of this application. The risk of such an outcome must have been clear to A.

25 Turning to B, I do not think it appropriate for him to be compensated out of the trust fund for his time on this matter. These are administrative proceedings in which it is normal for beneficiaries to be convened in order to give them an opportunity to be heard and it would set an unfortunate precedent in my view for such beneficiaries in ordinary course to be paid for their personal time out of the trust fund in which they have an interest, adding as it would materially to the potential costs of such proceedings. However, I think it is reasonable for beneficiaries so convened to be reimbursed for expenses reasonably incurred and I will therefore allow B the cost of his international calls to Collas Crill and Carey Olsen.

26 Taking into account all of the applications before me and the submissions made, I propose to make the following orders only:-

In my view after the discharge of these costs, each share must henceforth bear the burden of the costs of its administration independently of the other.

(i) In relation to the application for rectification, the costs incurred by N shall be paid on the trustee basis and the costs incurred by the First and Fifth Respondents shall be paid on the indemnity basis out of the gross of the trust fund, so that to the extent that there is insufficient surplus above A's share and the US Trust share to meet these costs, they will suffer proportionately.

(ii) In relation to the balance of the costs in the application:-

(a) The costs of the Fifth Respondent of and incidental to the application shall be paid on an indemnity basis out of A's share but for the avoidance of doubt there shall be excluded from that any time spent by Collas Crill in advising on the US Trust; that is a separate matter to be funded out of the US Trust share.

(b) N shall be entitled to one half of its costs of and incidental to the application on the trustee basis payable out of A's share.

(c) A shall be entitled to his costs of and incidental to the application on the indemnity basis payable out of A's share.

(d) N shall pay B such sum as it shall in its absolute discretion determine shall be reasonable to reimburse him for the cost of international calls made to Collas

Crill and Carey Olsen in connection with the application, such costs to be paid out of A's share.

27 I will wish to hear from counsel as to any practical issues or difficulties that might arise out of what I propose to order or as to any clarification that may be needed.