Hawksford Jersey Ltd v A

Jurisdiction:	Jersey
Judge:	Sir Michael Birt
Judgment Date:	30 April 2019
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Text

[2019] JRC 72

Royal Court

(Samedi)

Before:

Sir Michael Birt, **Commissioner, sitting alone**

In the Matter of H Trust

Between
Hawksford Jersey Limited
Representor
and
A
First Respondent

and

B
Second Respondent

and

C
Third Respondent

and

D
Fourth Respondent

Advocate J. N. Heywood **for the Representor**.

Advocate J. M. Sheedy **for the First Respondent**.

Advocate C. B. Austin **for the Second and Third Respondents**

The Fourth Respondent did not appear and was not represented.

Authorities

Representation of Hawksford Jersey Limited [2018] JRC 171.

Re JP Morgan 1998 Employee Trust 2013 (2) JLR 239.

Re Y Trust [2011] JRC 155A.

Re Esteem Trust 2001/16A.

MacKinnon -v- MacKinnon [2010] JLR 508.

Trusts — costs

THE COMMISSIONER:

1 This judgment deals with the question of costs following the judgment of the Court dated 14th September 2018, *Representation of Hawksford Jersey Limited* [2018] JRC 171 ("the Judgment").

2 The factual background is set out fully in the Judgment, to which reference should be made. Definitions used in the Judgment are also used herein.

3 In short, the Representor ("the Trustee"), as trustee of the Trust, sought the Court's blessing

to a ‘momentous’ decision, which was to sell the sole asset of the Trust (a property in London) in circumstances where there were no liquid funds with which to meet the Trust's expenses and the beneficiaries were in dispute. The elder son was in favour of a sale whereas the younger son and the daughter (“the siblings”) wished to be given an opportunity of, in effect, buying out the elder son's share so that the Trust could retain the Property.

4 In the Judgment, the Court declined to bless the Trustee's decision to sell the Property. There were essentially three reasons for this:—

(i) The Trustee was the main creditor of the Trust but had not produced any evidence to show that, when reaching its decision to sell the Property, it had considered and taken into account its conflict of interest, in the sense that it could only be paid its outstanding fees if the Property was sold.

(ii) The Trustee ought to have taken tax advice in relation to its decision in order to ascertain whether, from a tax perspective, its decision to sell would be more disadvantageous than a decision to allow the siblings to buy out the interest of the elder son.

(iii) The Court considered that the siblings should be given more time to bring forward concrete proposals for buying out the elder son's interest.

5 In reaching its decision, the Court rejected the argument of the elder son that the decision to sell was not a momentous decision and also dismissed his submission that the decision to sell ought not to be blessed because it would afford the Trustee protection against any action for breach of trust concerning its actions, (in particular delay) leading up to the decision to sell.

6 In the light of the Court's decision, the elder son submits that the Trustee should be ordered to bear its own costs in relation to the application. The siblings support the elder son but go further and submit that the Trustee should be ordered to pay the costs of the beneficiaries, i.e. the elder son and the siblings. The Trustee, on the other hand, submits that it should receive its costs out of the trust fund on the usual trustee basis.

The legal principles

7 The principles in relation to costs of applications for the Court's blessing of a momentous decision are well established:—

(i) A trustee is entitled to an indemnity out of the trust fund for all his costs and expenses unless he has been guilty of misconduct (i.e. he has behaved unreasonably); see the decision of the Court of Appeal in *Re JP Morgan 1998*

Employee Trust, 2013 (2) JLR 239 at [20] and the following observation of Clyde-Smith, Commissioner in *Re Y Trust* [2011] JRC 155A at [10]:—

> ***"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 … it was accepted by Mr Robertson that this was a high hurdle. As stated at paragraph 21 – 64 on*** *Lewin*:—
>
> ***"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned to the proceedings, but also by reason of its 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."

(ii) As Advocate Sheedy very properly conceded, despite the similarity of language – i.e. a court will refuse to bless a decision where it is a decision which no reasonable trustee would take —the fact that the Court does not grant its blessing to a trustee's decision is not necessarily of itself sufficient reason to deprive a trustee of his costs; it will depend on the circumstances; see *Re Esteem Trust 2001/16A* at para 14(iv):—

> ***"It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs just because the court decides against the recommendation."***

(iii) In this respect I would refer also to the observation of Nugee JA in the JP Morgan case (supra) where he said at [20]:—

> ***"The trustee's right to a complete indemnity can of course be lost if the trustee is guilty of misconduct.*** Article 26(2) only entitles the trustee to reimburse himself for expenses "reasonably incurred in connection with the trust" and a trustee who has been found guilty of a breach of trust is likely to find that he has to bear personally the costs of unsuccessfully defending himself – although even then it does not automatically follow from a finding that a trustee has committed a breach of trust, however minor, that he will have to bear the costs; see the remarks of Jessel, M.R. in (*Turner -v- Hancock* 20 Ch. D at 305):-

"It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust.""

Discussion

8 Advocate Sheedy, supported by Advocate Austin, submitted that the Trustee behaved unreasonably in this case. He based that argument on two grounds. He submitted first that the Trustee had been guilty of unreasonable delay in resolving the dispute over whether the Property should be sold. The dispute had rumbled on for years without the Trustee taking a grip of the situation. The Trustee had first indicated an intention to seek directions to sell the Property as long ago as January 2015 and it had taken nearly 3 $^{1}/_{2}$ years before the Trustee had in fact issued the representation. During this time costs had been unreasonably incurred.

9 I have no hesitation in rejecting this submission. I am concerned only with the costs of and incidental to the representation seeking the Court's blessing. What is effectively being said by Advocate Sheedy is that the Trustee behaved unreasonably by delaying for so long before bringing the representation. That is a completely separate point. It was not the subject of determination by the Court and I am in no position to decide at a costs hearing whether the allegation of unreasonable delay in bringing the representation is well-founded or not. If the elder son believes that the Trustee has acted in breach of trust for the last 3 $^{1}/_{2}$ years, he must bring an action to that effect. It is not open to me to deal with it on a costs hearing and whether the Trustee was or was not guilty of unreasonable delay in bringing the application is not relevant in deciding whether, now that it has brought the application, it should be allowed to recover the costs of that application.

10 The second ground relied upon by Advocate Sheedy relates to the Trustee's conduct in relation to the application. He submits that the Trustee behaved unreasonably by dealing inappropriately with its conflict of interest (as held by the Court) and by not obtaining tax advice. These two matters had led the Court to refuse to bless the decision with the result that the costs of the hearing had been unnecessarily incurred. It was more than likely that, once the Trustee had decided how to proceed following the Judgment, a further application to the Court for its blessing would be necessary, with the consequence that there would be two sets of litigation costs rather than just one.

11 As mentioned already, the Court gave three reasons for withholding its blessing of the decision to sell, namely the failure to obtain relevant tax advice, the need to give the siblings further time to bring forward proposals for buying out the elder son and the failure to deal properly with the conflict of interest.

12 In relation to the first two reasons, I do not consider that, whether taken individually or

together, they reach the high threshold necessary to deprive a trustee of its costs. Whilst the Trustee should have obtained tax advice and, on the Court's finding, should have given the siblings more time to bring forward concrete proposals for buying out the elder son, I would not categorise those failures as amounting to misconduct or unreasonableness such as to deprive the Trustee of its right to an indemnity.

13 However, in relation to the conflict of interest point, whilst there is no suggestion that the Trustee sought to hide the conflict of interest (because it was blatantly obvious to all concerned that there was such a conflict because the Trustee was the major creditor of the Trust in respect of its fees), I nevertheless consider the failure to have been unreasonable. As the Court explained in the Judgment, it is of the first importance that a trustee be seen to acknowledge any conflict of interest and to take it into account before reaching a decision. It was that failure, rather than any suggestion that it had in fact been influenced by its conflict of interest, which, amongst other matters, led to the Court withholding its blessing.

14 Whilst this failure was significant, it was nevertheless only part of the picture. Thus, as mentioned at para 5 above, the Court rejected the submissions of the elder son that the decision to sell the Property was not a momentous decision and that it would prevent any beneficiary from suing for breach of trust in respect of the Trustee's conduct to leading up to the decision to sell.

15 In all the circumstances, I think the fair and just solution is to order that the Trustee is entitled to recover 50% of its costs incurred in respect of the representation. It follows that it will bear its own costs in respect of the remaining 50%.

16 Advocate Austin submitted that not only should the Trustee be deprived of its costs but it should also be ordered to pay the costs of the beneficiaries. That is a separate matter which does not follow automatically from the decision to withhold payment of the Trustee's costs. As Beloff JA said in the Court of Appeal in *MacKinnon -v- MacKinnon* [2010] JLR 508 at [33]:—

> ***"(iv) The refusal of payment of his costs out of the estate does not necessarily entail as its consequence the fixing of him with liability to pay the other party's costs, but the court may penalise him in both ways."***

17 This observation was made in the context of administrative proceedings concerning an estate, but the Court made it clear that it considered the principles for trusts and estates to be identical. Thus, at [42] the Court of Appeal specifically endorsed the remark of Sir Philip Bailhache, Commissioner, in the court below to the effect " ***In my judgment, no material distinction is to be drawn in the context of the costs of an administrative action between the position of an executor and the position of a trustee"***.

18 In my judgment, the conduct of the Trustee in this case is not such as to merit an order for costs against it and I therefore reject the application of the siblings.

19 That leaves only the costs of the beneficiaries, i.e. the elder son and the siblings. It was agreed by all parties that they should receive their costs out of the trust fund on the indemnity basis and I so order.

20 As to the costs of the costs hearing, this was discussed with counsel at the conclusion of the hearing in the light of the various decisions which I might reach. On the basis of those discussions and given my decision that the Trustee may recover 50% of its costs, I order that the Trustee's costs of the costs hearing be payable out of the trust fund on the usual trustee indemnity basis and that the beneficiaries' costs in respect of that hearing should be payable out of the trust fund on the indemnity basis.