

Jersey's Royal Court clarifies costs recovery principles for non-trustee fiduciaries

Insights - 29/09/2015

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In the latest instalment of the HHH Employee Trust case the Royal Court has rejected a beneficiary's challenge to costs recoverable by a non-trustee fiduciary which were incurred on the trustee indemnity basis and agreed by the trustee.

The court confirmed that the beneficiary's proper route to challenging the fiduciary's costs lay in challenging the trustee's agreement to pay the costs. Once a costs award has been made to a non-trustee fiduciary, the fiduciary is a creditor and it is the trustee's responsibility to settle the trust's debt at the appropriate level. The beneficiary's right to redress is limited to challenging the reasonableness of the trustee's action in agreeing the level of costs.

Although the Royal Court and the Court of Appeal had made obiter comments in previous judgments suggesting that a disaffected beneficiary could challenge the non-trustee fiduciary's costs directly, the Royal Court confirmed that this had been a mistake in approach and that the principle of non-intervention prevents the court from stepping in to make its own decision as to what the correct level of costs should be.

This contrasts with the ability of a beneficiary to challenge trustee costs (the procedure for which is set out in the Alhamrani [2007] JLR 527) and for good reason: The supervision of trustee costs is in a category of its own because in paying trustee costs out of the trust fund the trustee sits on both sides of the transaction - it is both creditor and the keeper of the purse strings and therefore is inherently conflicted. That is not the case where a non-trustee fiduciary requests its costs and the trustee determines the extent of the costs payable.

Help for trustees facing potential costs challenges by beneficiaries

The court went on to provide helpful guidance for trustees who are asked to settle costs claims but who either cannot agree the quantum or have good reason to suspect that the quantum will be challenged by disaffected beneficiaries.

The court suggested that a trustee facing either one of those quandaries could ask the court for an order that the costs be assessed by the court's taxation officer, so that the issue can be determined without a further full set of expensive court proceedings. If the matter is referred to the taxation officer, the taxation officer will seek the views of the fiduciary and of the trustee before reaching their decision. The court indicated that in future cases it would typically look to build in a referral to taxation in the event that the parties are unable to agree.

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