

Costs in trust proceedings - further Royal Court guidance

Insights - 29/02/2016

Costs in trust proceedings - further Royal Court guidance where fiduciary powers not validly exercised: In the Matter of the Piedmont Trust and the Riviera Trust [2016] JRC016

The Royal Court's judgment in 2015 *In the Matter of the Piedmont Trust and In the Matter of the Riviera Trust*¹ provided guidance with regard to the exercise of fiduciary powers of appointment and removal holding that appointments of trustees and protectors were invalid on the facts of the case (see the Ogier briefing on the substantive judgment which can be accessed by [clicking here](#)). The Royal Court has now delivered judgment on the costs of the proceedings, in which it reviewed and applied the key principles concerning the recoverability of costs by fiduciaries and beneficiaries in cases of this kind.

Issues

The focus for the Court on the issue of costs was to consider the position of the parties in their capacities as fiduciaries and beneficiaries. The key issues were:

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Costs bases

As part of its broader analysis, the Royal Court, confirmed that:

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A fiduciary's costs

The Royal Court noted the general position confirmed by the Court of Appeal in *Re The JP Morgan 1998 Employee Trust*², that different principles apply to whether a party is acting as a trustee/fiduciary or beneficiary and in which judgment the observation in *Re HHH Trust*³, that a person “*exercising fiduciary powers in the interest 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*” was approved. Therefore, the starting point is that a fiduciary will be entitled to a trustee basis indemnity when acting in that capacity. However in this case where, in particular, there had been findings that the exercises of fiduciary powers of appointment by the erstwhile protector and beneficiaries had been irrational or “*outside the band of reasonable decisions*”, the Court needed to consider whether those acting in that fiduciary capacity had lost that right of indemnity.

The Court considered that the Trustees in the case were wholly justified in bringing the proceedings and given that it was not suggested had acted unreasonably in doing so, they were awarded their costs on the trustee basis.

As regards the father (outgoing protector whose appointment of his sons as protectors was held invalid) , the Court's approach was mindful of the need to avoid excessively penalising persons that exercise fiduciary powers in good faith but ultimately in an invalid manner, and notably it was held that: “*the mere fact that an appointment by a fiduciary has been found to be invalid should not lead inexorably to the conclusion that he should be deprived of his indemnity*”; and that “*an unremunerated family trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has ex post facto been shown to be misguided or even careless*”. The Court specifically noted that whilst the test for finding a power to have been invalidly exercised (as noted above) and the grounds to deprive a fiduciary of its indemnity are similar, “*it is a mistake to consider the tests as being the same*”.

The Court confirmed, following the principles set out by the Court of Appeal in *Mackinnon v Mackinnon*⁴ that it will be a question of fact and degree and will require consideration of whether the nature or gravity of the fiduciary's conduct had reached a level where it was appropriate to deprive the fiduciary of its right to an indemnity. Examples of where that might be the case include: acting in bad faith; acting for any improper purpose; or acting with reckless disregard for one's fiduciary duties.

A beneficiary's costs

As a starting position in determining the recoverability of a beneficiary's costs of trust related proceedings, the Royal Court, following the guidance in *Re The JP Morgan 1998 Employee Trust* looked at the often cited categorisation of proceedings established in *Re Buckton*⁵ and which are referred to as the "*Buckton categories*", namely:

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Category 1 and Category 2 proceedings typically afford beneficiaries the right to seek costs on the indemnity basis, whilst Category 3 will follow usual cost principles applicable in hostile litigation (the starting point being that costs follow the event, ie the loser pays). The Royal Court confirmed that in a Category 1 or 2 case "*to the extent that any party is convened in his or her capacity as a beneficiary, that party is entitled to his or her costs out of the trusts on the indemnity basis save to the extent that such party has behaved unreasonably*".

It was of particular note that, in this case, it had been held that the substantive hearing was in effect hostile litigation for the purposes of whether or not the matter be heard in private or public. It was argued by the daughter, therefore, that the case fell squarely into Category 3 on the basis that it was essentially a beneficiary dispute between her on the one side (challenging the exercise of powers of appointment of the new trustees and protectors) and her father and brothers on the other (as the parties exercising the powers).

However, the Royal Court (again noting the Court of Appeal in *Re The JP Morgan 1998 Employee Trust*) confirmed that matters need to be looked at in the round and the categorisations of cases not considered as if they were statutes. The Court therefore looked more broadly at the substance of the matters before it and, whilst accepting that it had previously considered the issues raised by the daughter to constitute hostile litigation for the purposes of sitting in private, held that having heard the matter, the true nature of the proceedings related to the administration of the trusts, and the challenges raised by the daughter could just as easily have been raised by the Trustee on behalf of all of the beneficiaries. In those circumstances, the Court considered the matter to fall within Category 2, with the costs consequences following as set out above.

Decision

The Court held that the actions of the parties were not of a nature to cause them to lose any right to indemnity and accordingly awarded all of the parties their costs albeit on different bases. The substantive judgment had to determine the validity of both the trustee and protector

appointments, which were made in different circumstances and with the same parties acting in different capacities. Therefore the Court had to engage in a careful breakdown of the various actions taken by the parties and consider in what capacity they were involved in the proceedings in order to identify which costs were to be granted on which basis. The father, therefore, was awarded his costs on a trustee basis as were the sons with regard to their role as appointing beneficiaries with regard to the protector of the Piedmont Trust. The daughter only acted as a beneficiary and was awarded her costs on the indemnity basis, as were the sons with regard to the invalid trustee appointments and the Riviera Trust protector for the same reason. The Court did note that, ultimately, there would likely be little difference in practice between what a party would recover on the indemnity basis as compared to the trustee basis.

Comment

The general tenor of the costs judgment shows a willingness by the Court to look at the substance of matters when assessing the costs consequences that follow and to not slavishly seek to apply categorisations or hard rules. The decision in particular provides further comfort to trustees and other fiduciaries exercising powers under a trust, that just because an exercise is held to have been invalid, it will not automatically lead to the fiduciary being deprived of its indemnity. The Court will, rather, adopt an approach of closely looking at the motivations behind a fiduciary's actions and reaching a view on the gravity of his or her conduct.

Ogier represented the Trustees in this matter.

¹ [2015] JRC196

² [2013] (2) JLR 235

³ [2013] (1) JLR 135

⁴ [2010] JLR 508

⁵ [1907] 2 Ch.406

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