

MOURANT OZANNES

BRIEFING

Trustees may still be penalised in costs even where the Court blesses their decisions: In the Matter of the Y Trust [2011] JRC 135

NOVEMBER 2011

For more briefings visit mourantozannes.com

This briefing is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this briefing, please contact one of your normal Mourant Ozannes contacts.

Contacts:

Oliver Egerton-Vernon
Associate, Jersey

Bruce Lincoln
Partner, Jersey

For contact details, please see the end of this briefing.

The case involved an application by the trustee for a blessing in relation to its decision to distribute the assets of the Trust, which was inconsistent with its previous indication (described as a final decision) that the trust assets would be split 50 % for the benefit of the settlor's eldest son (A) and 50 % for the benefit of the settlor's younger son (B) as well as B's three children and his grandchild. The Court sanctioned the decision to allocate A less than half of the trust assets as the decision was within the realms of rationality but stated that it was troubled by the manner in which the trustee had treated B. For full details of this case please see our briefing sent out in October 2011 which considered the role of natural justice and legitimate expectations in trustees' decisions.

At the time of the Trustee's decision, which was subsequently sanctioned by the Court, the trust fund had sufficient funds to apportion £1.9 million to A, £0.5 million to B's eldest child (C) and £1 million to a US trust for B's remaining children and C's daughter. After taking account of all the parties costs (a total of £492,500) there were insufficient funds in the Trust from which to make the final distributions. The question arose as to what extent the costs should be met from the Trust's assets.

The Trustee's position

The Trustee's position was that its costs and those of the convened parties should be paid out of A's share of the Trust's assets, thus preserving the full value of the proposed distribution to the US trust. Its secondary position was that all of its costs and the costs of the guardian ad litem for the minors and unborns should be paid from the Trust assets in proportion to each beneficiary's remaining interest pursuant to the December 2009 decision, with A bearing his own costs. Its final and least favoured position was that its costs and those of the convened parties should be paid in proportion to each party's remaining interest.

A's Position

A on the other hand contended that the Trustee had acted unreasonably, that the Trustee should be deprived of its costs and that the Trustee should meet his own costs if that was required to ensure that he got the full benefit of the apportioned £1.9 million.

The Guardian ad Litem's position

The Guardian ad Litem argued that the interests of the minors and unborns should not be affected in any way and therefore that the Trustee's costs should be met out of A's share.

B's position

B argued that the costs should be split equally and personally between A, the Trustee and A's lawyers, failing which A should be personally responsible for 1/3 and the Trustee personally responsible for 2/3. B also submitted a request for a notional fee of £20,000 for the time he had spent dealing the matter and reimbursement for international telephone calls.

Legal principles

In the usual course, costs of all parties to an application for a trustee's decision to be blessed are paid out of the Trust fund. Furthermore a trustee is entitled to an indemnity out of the Trust assets in respect of costs and expenses that are properly incurred in connection with the performance of his duties. This can be denied however, if the Trustee is found to have acted unreasonably. A beneficiary who is convened to an administrative application can be at risk as to costs where a trustee makes an application as a result of the conduct of that disaffected beneficiary intent on disrupting the administration of the trust.

Decision

Despite the fact that the Trustee had purportedly made a "final decision" the Trustee failed to communicate the subsequent change in its thinking to the affected beneficiaries. A

BRIEFING

submitted that throughout the proceedings he had been trying to understand why the Trustee had changed its mind. The Trustee, on the other hand, argued that the Court had sanctioned the Trustee's decision and that A was a dissatisfied beneficiary who had incurred substantial costs by seeking extensive discovery. Furthermore, the Trustee submitted that to deprive a trustee of its costs where a decision had been blessed would be unprecedented and would "send shock-waves through the Trust industry".

The Court found that the funds allocated other than to A should be insulated from the costs of the application as they had had no option but to take part in the proceedings. When considering whether the Trustee should pay any costs personally, the Court accepted that the Trustee had been correct to bring the application and that A was a dissatisfied beneficiary but concluded that the Trustee had contributed materially to that dissatisfaction. The Court suggested that that Trustee should have anticipated that A would be dissatisfied and that it might be thought appropriate to give a full explanation of its reasoning to both A and his advisors.

The Court believed that the Trustee should bear some responsibility for the costs and that the treatment of A by the Trustee would inevitably have given rise to A's sense of suspicion and lack of confidence in the Trustee. The Court therefore concluded that through this conduct the Trustee had not acted reasonably in its dealings with A and that there was a "*causative link between the lack of consultation and the level of costs incurred*". The Court ordered that the Trustee be deprived of one half of its costs.

The Court then turned to examine the issue of whether B could be compensated out of the Trust fund for time that he had spent on the matter. The Court stated that it was normal for beneficiaries to be convened to give them an opportunity to be heard and that it would set an unfortunate precedent if they were in the ordinary course to be paid for their time out of a trust fund in which they have an interest, thereby adding to the cost of the proceedings. The Court therefore refused B his "nominal" £20,000 fee but did allow reimbursement of the cost of international calls.

The Court ordered that the Trustee's costs and the costs incurred by the minors and unborns should be paid out of A's share, that the Trustee would be entitled to half of its costs and that this was payable out of A's share, that A's costs would be payable out of A's share and that B could be reimbursed for the cost of international calls out of A's share.

Conclusion

The case provides a salutary lesson for trustees that even where a decision is blessed by the Court, if the Court considers that their conduct has been unreasonable (albeit not such as to prevent the Court sanctioning the decision) and such conduct has caused costs to be incurred, trustees may be deprived of their own costs.

Contacts:

Oliver Egerton-Vernon, Associate, Jersey
+44 1534 676 125
oliver.egerton-vernon@mourantozannes.com

Bruce Lincoln, Partner, Jersey
+44 1534 676 461
bruce.lincoln@mourantozannes.com