In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017: 317

IN THE MATTER OF THE A TRUSTS

RULING ON COSTS

(on the papers)

Trustees' application for approval of momentous decision-costs-whether beneficiaries should be reimbursed for costs of retaining financial experts-whether costs order should be in general or prescriptive terms

Date of Decision: May 10, 2018
Date of Reasons: May 17, 2018
Date of Ruling on costs: June 28, 2018

Mr Nicholas Le Poidevin QC of counsel and Mr Alex Potts QC, Kennedys Chudleigh Ltd., for the Plaintiffs/Trustees

Mr Frank Hinks QC of counsel and Mr Keith Robinson, Carey Olsen, for the 1st Defendant

Mr Robert Miles QC of counsel and Ms Nicole Tovey, Taylor's, for the 2nd Defendant and the 8th-10th Defendants

Mr Justin Williams, Williams, for the 3rd-5th Defendants

Mr Tom Leech QC of counsel and Mr Paul Harshaw, Canterbury Law Limited, for the 11th - 13th Defendants

The issues in dispute

1. On May 17, 2018 I invited written submissions on costs within 21 days having on May 12, 2018 approved the Trustees' decision to consummate a substantial share purchase transaction. The application was opposed by some beneficiaries and

supported by others. It is common ground that all beneficiaries should be reimbursed for their legal costs in connection with the Category 2 *Public Trustee-v-Cooper* application, and partially agreed that such costs as are not agreed with the Trustees should be subject to taxation on the indemnity basis.

2. The only issues in controversy are the following:

    (1) whether the costs of financial experts retained by D3-D5 and D11-D13 should be payable of out of the assets of the Trusts (in addition to the legal costs of local and overseas counsel);

    (2) whether the costs of the Defendants should simply be taxed on an indemnity basis unless agreed (as proposed by the Trustees) or subject to a more elaborate approval process not resulting in automatic taxation of costs which are not agreed (as proposed by D2 and D8-D11, and, in more diluted form, by D11-D13 as well).

3. I resolve the main issue in favour of the Defendants and the subsidiary issue in favour of the Trustees.

Costs of financial experts

4. The Trustees submitted that the Defendants ought to have been content to analyse the expert reports supplied to them during the consultation bearing in mind the character of the application, rather than instructing a "*battery of competing experts*":

> "*30. The Court is therefore invited to consider whether it was appropriate for the opposing beneficiaries to instruct experts at all and whether in the event they contributed anything to the resolution of the application. If not, the court is asked to disallow all the fees of the experts incurred by the opposing Defendants; the legal costs of instructing their experts and considering both draft and final reports of those experts; and other legal costs so far as they were increased by the use of those experts.*"

5. Mr Williams for D3-D5 noted that the Court in its Judgment had expressly noted the utility of the opposing reports as being material the Trustees were bound to have regard to. Mr Leech QC and Mr Harshaw for D11-D13 argued that because of the youth of their clients, expert evidence was the only vehicle through which informed views could be communicated to the Trustees.

6. Looking at the matter in terms of general principle, it is necessary to distinguish two questions:

   (1) was it reasonable for the opposing beneficiaries to retain experts to advise them in relation to the consultation process? and

   (2) was it reasonable for the opposing beneficiaries to retain experts for the purposes of opposing the trustees' Court application?

7. The crucial legal test which I held in my reasons for Decision the Court was required to apply was that approved by Asplin J in *Pollock-v-Reed* [2015] EWHC 3685 (at paragraph 129):

   "*It is whether in reaching its decision the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.*"

8. While the need for beneficiaries to seek expert financial advice in relation to momentous transactions trustees propose to enter into will depend on the facts of each case, it ought generally to be easier to justify obtaining limited advice to enable the beneficiaries to meaningfully consult with the trustees in relation to a genuinely controversial transaction. On the other hand, it ought in such cases generally to be more difficult to justify deploying such expert advice for the purposes of opposing the trustees' application unless the relevant advice potentially supports a judicial finding that "*the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.*"

9. This conclusion assumes, of course, that a bright dividing line can be drawn between the consultation process and the approval application. In my judgment in the present case, that line was blurred because of the speed with which the transaction was being progressed by the Trustees in circumstances where the majority of the beneficiaries had deep suspicions about the influence that D1 was believed to have over the Trustees. The Defendants' expert evidence and the Trustees' reply to that expert evidence were barely distinguishable from the consultation process that continued until shortly before the hearing. Indeed, Mr Le Poidevin QC in his oral submissions at the main hearing positively invited the Court, in assessing the adequacy of the Trustees' deliberative process, to take into account the scrutiny to which the transaction had been subjected in the course of the final hearing. In these particular

circumstances, and bearing in mind that the Trustees concede that the Defendants are entitled to recover their costs of opposition, I find that it was reasonable for the opposing Defendants to both :

(a) seek expert financial advice for the purposes of the consultation process; and

(b) to deploy that advice at the approval hearing.

10. I find that the Defendants are entitled to recover their costs in this regard.

Whether costs should be "taxed if not agreed"

11. The Trustees proposed simply that the Defendants' costs "*be taxed on the indemnity basis unless agreed by the Plaintiffs*". D2, 8-9 proposed:

(a) if on a review of any item felt to be unreasonable by the Trustees the parties were unable to agree, the Trustees would be able to query it;

(b) if on a review the Trustees remained of the same view, they should have liberty to apply for taxation on the indemnity basis;

(c) reimbursement of reasonable costs should be made within two months of submission of a claim;

(d) reimbursement should not be delayed to one or more Defendant because of a dispute with one or more other Defendants.

12. D11-13 submitted a draft Order containing a partially similar proposal:

"*3. If on review of the claim for Costs submitted by any of the Defendants, the `Trustees determine that any item of Costs was unreasonably incurred, and if the Trustees and the Defendant or Defendants claiming such costs, acting reasonably, are not able to agree a resolution of the issue, the Trustees shall be at liberty to apply to the Court for Directions.*"

13. It is understandable that the opposing Defendants should be concerned to ensure that the Trustees deal with settling their costs claims in a reasonable and prompt manner. In my judgment that obligation already binds the Trustees due the fiduciary nature of their office and by virtue of their obligation as civil litigants to assist the Court to achieve the overriding objective (Order 1A/3). Unless otherwise agreed by the parties, I see no justification for the prescriptive form of costs order contended for by these Defendants. The usual form of wording proposed by the Trustees should in my judgment be used.

Dated this 28th day of June, 2018 _____

IAN RC KAWALEY
CHIEF JUSTICE