Neutral Citation Number:
[2019] EWHC 2324 (CH)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Property Trusts and Probate List
IN PRIVATE

Case No: HC-2017-002797

Rolls Building, 7 Fetter Lane,
London, EC4A 1NL

Date: 17/07/2019

Before :

MASTER PRICE

Between :

AB	**Claimant**
- and -	
(1) CD	**Defendant**
(2) EF	
(3) GD	
(4) HD	
(5) ID	
(6) JD	
(7) KD	
(8) LM	
(9) NM	

Richard Wilson QC (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**
Emily Campbell (instructed by **Kuit Steinart Levy**) for LLP for the 1st, 2nd and 3rd **Defendants**
Judith Bryant (instructed by BDB Pitmans LLP) for the **8th and 9th Defendants**
The **4th, 5th, 6th and 7th Defendants** did not appear and were not represented.

Hearing dates: 8th and 9th May 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Master Price:

1. This judgment follows on from an earlier judgment in this case which was circulated in draft in July 2018 following a hearing in May of that year. A hearing was scheduled for January of this year, 2019, but had to be postponed as I fell ill. It was intended that the earlier judgment should be handed down at that hearing and that was also the purpose of the hearing before me on 8 May 2019, but that remains outstanding pending the handing down of this judgment which deals with matters which have arisen consequent upon the draft judgment from 2018. In the earlier judgment I directed further consideration by the claimant together with the defending trustees (that is to say the first to third defendants) of how they should exercise a power of appointment. Unfortunately, that reconsideration has failed to resolve the impasse between trustees.

2. I do not propose to go back to square one, as it were, in this judgment and this judgment is to be read together with the earlier one once finalised. Inevitably, however, I will have to pick up on various matters which I dealt with in the earlier judgment.

3. As I have said the case concerns the exercise of a power of appointment in relation to a trust established by the grandparents of the fourth to ninth defendants. They were the parents of the first defendant who is the father of the fourth to seventh defendants. The claimant is trustee with the first and third defendants and by this action seeks directions in relation to the exercise of the power of appointment. The fourth to seventh defendants have played no active role, and that was also the case in relation to the eighth and ninth defendants until recently. The eighth and ninth defendants are the children of the first defendant's sister. For reasons which are referred to in the earlier judgment the families are estranged. Although the eighth and ninth defendants did not actively participate in the earlier hearing they are now represented by counsel and solicitors.

4. The case was brought because of the claimant's concerns at the disparity in treatment which they had received and were receiving compared to the fourth to seventh defendants. At the earlier hearing I was primarily concerned with submissions as to whether the court should intervene in the circumstances which had arisen and the extent to which certain funds then known as the M Fund (after the property in respect of which the funds represent the proceeds of sale), was to be taken into account and used for the purposes of distribution. I directed further consideration and indicated that in the absence of some agreed position between the trustees I thought it appropriate that the court should itself exercise the power of appointment. I found that the first defendant had not at least in the past acted in a manner which was consistent with his duties as a fiduciary and had failed to take into account all relevant matters, to act impartially and had sought to fulfil purposes which were impermissible. Looking forward I took the view that, so far as it was appropriate at that stage for the court to express a view, the claimant had the better of the argument in relation to the proposed exercise of the power of appointment in seeking to reach an adjustment to move closer to the original letter of wishes in relation to the trust fund, and to that extent the particular letter of wishes in relation to the M Fund should be discounted and it was necessary to take into account the availability of the M Fund which had for administrative reasons been distributed to the discretionary trust in favour of the grandchildren, although earmarked by a separate letter of wishes for

distribution to the first defendant. I did not think it right there and then to impose the claimant's solution given that a range of possibilities arose by which this might be done. In this I accepted the submissions of the defending trustees in preference to the argument of the claimant that the court should there and then grasp the nettle and intervene. However, no resolution has emerged despite the passage of 10 months since my draft judgment was circulated. On that basis it seems to me as indicated in the 2018 draft judgment, that the court should intervene for the following reasons.

5. Firstly, there is in my view ample authority that the court should intervene in special circumstances based on the decisions referred to in the 2018 draft judgment at paragraphs 14 and 18, namely *Garnham v PC* [2012] JRC 050 and *Klug and Klug* [1918] 2 Ch. 67. Those cases were different in so far as they required approval of discrete and simple proposals, but the categories of special circumstances cannot in my view be so circumscribed and are not closed.

6. Secondly it is, I think, common ground between the trustees and all concerned that these trusts should be wound up so far as possible with a view to minimising administrative and professional costs in future.

7. Thirdly, the significant costs of this litigation may, depending on what orders I ultimately decide to make, substantially erode the trust funds. The latest estimate of costs to date presented to me by the eighth and ninth defendants is approximately £555,000.00. Of course, these costs continue to be incurred minute by minute and this is in itself a reason for the court to cut the Gordian Knot, as it were, and endeavour to bring this litigation and the accruing costs to an end.

8. Fifthly, the history of the matter as related in my earlier judgment and the first defendant's stance, even though he appears to have resiled from that, necessarily colour one's view of the matter given that the trustees remain unable to agree a common approach.

9. Sixthly, the refusal or failure of all the trustees to agree to surrender their discretion so that the impasse might be broken. The claimant did so agree but the first to third defendants indicated they would do so only in certain circumstances: but anyway matters have been overtaken by the indication I gave in the earlier judgment as to how the court should proceed if the impasse continued, as is the case.

10. Seventhly, the cost and delays involved in finding another alternative professional trustee to replace the claimant, and the not insignificant risk of further deadlock.

11. Although the court is understandably reluctant to accept a surrender of trustees' discretion in so far as the court may not be best placed to exercise a broad discretion as a result of adversarial argument, the difficulty of reaching an appropriate solution cannot in the final analysis dictate how the court should proceed, where a decision by the court is the most pragmatic course, as seems to me to be the case here.

12. It follows therefore that in the absence of agreement and since the claimant reiterates his earlier proposal with which the first to third defendants will not concur, notwithstanding the directions which were given in the earlier judgment and the terms in which they were couched, I think it right that the court should decide how the

power should be exercised with a view to winding up the particular discretionary trust involved.

13. As matters stood entirely as they were in July 2018 when the draft judgment was promulgated, I would therefore have proceeded to endorse the proposal put forward by the claimant in preference to the defendants' positions.

14. Whilst it is true that the first to third defendants have made a further alternative proposal after extensive correspondence the considered position of the claimant as set out in a further witness statement is that his original proposal represents the minimum amount in all the circumstances which could properly be distributed to the eighth and ninth defendants. He also indicates in his evidence that there were and are other options by which matters could be arranged so as to redress the imbalance which has arisen in respect of the treatment between the grandchildren including the possibility of revocation of earlier appointments in favour of the first defendant, and he has also rejected the suggestion that the court should only decide between those proposals put forward by himself and the defending trustees.

15. The defending trustees' proposal which has emerged. from what appears to be somewhat adversarial correspondence between solicitors, does not in my view adequately meet the problem of disparity as identified by the claimant and in my view this conclusion is reinforced by submissions which have now been made to me on behalf of the eighth and ninth defendants who now appear by counsel. They argue for a different solution and their argument sheds a different light and offers a different perspective. It is perhaps regrettable that these matters were not raised earlier but it has to be said that in my view the belated submissions on behalf of the eighth and ninth defendants have enabled the court to review a wider range of options than would otherwise have been the case.

16. They point out that in accordance with the letter of wishes the trust assets are held as to one third for the first defendant and two thirds for all the grandchildren equally per capita. The first defendant is treated entirely separately so that from the outset the first defendant's side of the family, if one may so describe it, was given preferential treatment. However, it is nonetheless the case that the two thirds divided between the six grandchildren should leave each grandchild with 11 per cent. It is not clear what the current value of the trust assets is, including the distributed properties but a range of figures has been put before me from which it appears that the released fund, that is the distributed properties appointed to the first defendant are worth in excess of £4 million and quite possibly more than that. No up to date valuations have been obtained and although there was some suggestion that that might be necessary by the eighth and ninth defendants I have been reluctant to proceed on that basis as this could only involve further delay and costs, particularly given the submission on behalf of the eighth and ninth defendants that whatever the precise figures the range involved inevitably shows a considerable disparity in the treatment between the grandchildren which requires redress. Upon the basis that the valuation of the funds overall exceeds £4 million (which appears to be common ground) then the eighth and ninth defendants might have had a legitimate expectation of receiving upwards of £850,000.00 whereas to date they have not yet received any distribution at all, although they are set to receive an equal share with the first defendant's children in relation to the non-discretionary element of their grandfather's will trust, as was accepted prior to the last hearing. We are of course only concerned with the exercise of discretion in relation to

the power of appointment over the discretionary funds, apart from the appointed properties but including the M funds. The M Fund also owns a share of one of the appointed properties, where a lease extension was obtained for a payment of £140,000 paid out of the M Fund in return for a 16.4 percent share in that property. It is not clear how this share might be realisable, and in practice has to be distributed to the first defendant or his children.

17. On one of the proposals put forward by the claimant it appears that, depending upon precise values, the eighth and ninth defendants would receive between 6.2 and 7.1 percent of the total value and on the first defendant's proposal between 5 and 5.7 percent against the expectation in accordance with the original letter of wishes of 22 percent. Although the released funds, that is the appropriated properties, have been appointed to the first defendant, the terms of the appointment operate to create successive interests and the income from the properties is appointed to the first defendant in his lifetime. The trustees have power to advance the property to or for his benefit but the first defendant also has power to appoint a life interest in favour of his wife upon his death which he has in fact done. Subject to those provisions the properties are held on trust for the first defendant's children on their attaining the age of 25 during the trust period. The eighth and ninth defendants are entirely excluded from these arrangements which in effect appoint the lion's share of the trust fund (as must inevitably have been anticipated at the time) in favour of the first defendant and his children. This was a matter of concern at the time of the appointments in 2002 as was raised in an email from the second defendant trustee. It was contemplated then that there would be arrangements so that "[eighth and ninth defendants would not be] prejudiced". In view of the precise dispositions I do not think it can be said that the interests of the fourth to seventh defendants are as "spectral", as suggested by counsel for the first to third defendants and are more than a mere spes. Since defeasible interests in possession are created, (essentially for tax planning purposes), the likelihood is that the assets so distributed will ultimately find their way, subject to whatever tax may prove to be payable, to the fourth to seventh defendants and it is necessary to take that into account in deciding on further distribution.

18. It is also appropriate take into account the position of the grandchildren themselves. The first defendant has described his children as being "independently wealthy", but that does not appear to be the case in relation to the eighth and ninth defendants based on the evidence filed by them some time ago. It cannot be said that either of them appears to be in dire circumstances or need, however, and both would appear to have good prospects. Standing alone, it seems to me this evidence would not displace a presumption, if such there be, in favour of equality between the grandchildren.

19. I have earlier referred to the defending trustees' latest proposal, and I should also deal with the submissions which were made to me at the hearing by counsel for the defending trustees as to how the court should exercise its discretion having decided to take control. Whilst standing by the earlier proposal as being within the permitted range I was urged not to align the interests of the first defendant for whom a one third share was earmarked by the letter of wishes anyway, with those of his children. The appointments of the properties were made within the lifetime of his mother, one of the settlors, and in all the circumstances it was submitted that fairness to the first defendant's children should mean equality of treatment between the grandchildren, but I am unable to accept this approach is appropriate given the effect of the

appointments already made and the trustees' evident concerns at that time as to the disparity in the treatment; I have already mentioned the precise terms of the appointments, and the interests of the first defendant's children under those.

20. Before drawing all these various threads together, I have to deal with the question of costs since this has an impact on the funds available. The claimant and defending trustees are entitled to an indemnity in respect of their costs and I was referred in this connection to the decision of Kekewich J. In *Buckton v Buckton* [1907] 2 Ch. 406 at 414 where he said:

> "In a large proportion of the summonses adjourned into court for argument the applicants are trustees of a will or settlement who ask the court to constitute the instrument of trust for their guidance and in order to ascertain the interests of the beneficiaries or else to have some question to determine which has arisen in the administration trust. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate and I direct them to be taxed as between solicitor and client and to be paid out of the estate. It is, of course, possible that trustees may come to court without due cause. A question of construction or administration may be too clear for argument, or it may be a duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which a court can give them and I must give them credit for not applying to the court except under advice which though it may appear to me unsound, must not be readily treated as unwise."

21. I was also referred to Lewin on Trusts 19th edition (2015) at paragraph 27-141, as to circumstances in which a trustee might be deprived of his costs where he ceases to be neutral and takes the side of one faction or beneficiary against the others. It is of course the case (as I referred to in paragraph 9 of the earlier judgment) that I considered the first defendant to have acted unreasonably and there is a forceful argument that these proceedings were precipitated by the first defendant's stance, if not intransigence, but at the end of the day it has to be said that there were legitimate issues as to competing letters of wishes and on the law relating to intervention by the court such that it was appropriate these be brought before the court. It is also the case that the first defendant's unreasonableness lapsed on service of his evidence in this case, at which point he was prepared to accept that the eighth and ninth defendants were entitled to their fair share. I do not therefore think it would be appropriate to categorise this case as one involving exceptional unreasonable behaviour on the part of the defending trustees. The particular difficulties which have arisen in my view really arise from the disparity in treatment which arose by reason of the released funds and those difficulties predate the appointment of the claimant as a substitute trustee, and it appears to be common ground these cannot now in practice be undone. However, they must, in my view, be taken into account looking forward. I do not

accept either the submission on behalf of the eighth and ninth defendants that following the circulation of the draft 2018 judgment the failure of the trustees to reach agreement is a matter which can lead to disallowance of costs in all the circumstances. Equally it seems to me that the involvement on the eighth and ninth defendants has been valuable in so far as it has enabled the court to consider matters more broadly than on the basis of the options for the exercise of power put forward by the claimant and the defending trustees. There is, perhaps, a sense in which their involvement has made matters worse in so far as it has perhaps made it more difficult for the claimant and defending trustees to avoid the further costs of bringing the matter back to court, but it seems to me that it was right that they should take advice and having done so it must be assumed they have acted on that advice in order to intervene and make the submissions as to how the power should be exercised based on their own particular perspective and their own interests. In the circumstances it seems to me right therefore that their costs also should be paid from the trust. Apart from the question of the incidence of costs as between the parties, there also arises in this case the question as to the incidence of costs as between the liquid funds and the distributed funds. This arises because there are now only liquid funds in the order of £750-790,000, and if all the costs incurred to date in these proceedings (now estimated as some £555,000) were to be paid from the amount available for distribution it would in fact mean that neither the proposal of the claimant or the defendant could be met. In effect therefore the eighth and ninth defendants would be called upon to pay for the costs of these proceedings by way of diminution of any distribution in their favour. This does not appear to me to be a fair outcome and it was suggested that the appropriate course in those circumstances would be to order that the costs of the claimant to be paid from the liquid funds and those of the defending trustees should be paid from the distributed fund. This would seem to be desirable from the perspective of the claimant and to meet the justice of the case.

22. I now have to draw all these threads together in order to reach a conclusion as to the exercise of the power. It is regrettable that such a large figure for costs has been incurred and with the benefit of hindsight it might have been appropriate at the outset to embark upon a costs budgeting exercise so as to cap recoverable costs. It does not seem to me appropriate, as was submitted by counsel for the defending trustees, that the costs should be directed to be paid from the liquid assets and this would just be "tough luck" in regard to the eighth and ninth defendants. It was always the case on the basis of the letters of wishes in play that the lion's share of the estate would be distributed to the first defendant's family and the eighth and ninth defendants had an expectation at best of 22 percent in accordance with the original letter of wishes. I have already mentioned the disparity of treatment in percentage terms that arises either by acceptance of the claimant's proposal or the defending trustee's proposal. It would not be right in my view to distribute the remaining funds on the basis of equality between the grandchildren given the interests of the first defendant's children under the prior appointments and the likelihood that they will inherit further monies from their father. In my view particular weight must be given to the views of the independent professional trustee who has brought the matter before the court and has been anxious to achieve an accommodation which operates pragmatically and does not unravel the historic appointments. It does not seem to me, even if it were practicable, that it would be right to revoke the appointments in respect of these funds. In the events that have happened and in view of the accrual of significant costs there is no answer which will do perfect justice as between the parties. The submissions

made to me on behalf of the eighth and ninth defendants are that the overall disparity in treatment is such that whilst not upsetting the existing arrangements, the available liquid funds, including the M Fund, ought in all fairness to be appointed to the eighth and ninth defendants and I will make an order which achieves that. I accept therefore the arguments of counsel for the eighth and ninth defendants in this respect. In my view this is what the justice of the case requires in exercise of the discretion of the trustees.

23. In the circumstances I would ask that counsel agree an appropriate draft minute for my approval. If there are any consequential matters then arrangements will have to be made before a further hearing to deal with those, but the question of costs should not arise in so far as is dealt with in this judgment. Arrangements for an appointment for the formal handing down of this judgment should be made with the court manager at Chancery Chambers, Mr Uddin, and provided that no hearing for consequential matters is needed, it ought to be possible for that to be done by another Master, given my retirement from office.