



Neutral Citation Number: [2021] EWHC 1521 (Ch)

Case No: PT-2021-BRS-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 07/06/21

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) LYNN SMITH	<u>Claimants</u>
(2) PATRICK MICHAEL GASKINS	
- and -	
(1) MICHELMORES TRUST CORPORATION	<u>Defendants</u>
LTD	
(2) MICHAEL PATRICK	
(3) SIMON DENNAR CRAWSHAY	
(4) ARTHUR JOHN MORRIS CRAWSHAY	

Oliver Wooding (instructed by **Kitsons**) for the **Claimants**
Evan Price (instructed by **Athena Law**) for the **Fourth Defendant**
The First and Second defendants made no submissions
The Third defendant made a written submission on his own behalf

Decision on written submissions

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.

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HHJ Paul Matthews :

Introduction

1. On 27 May 2021 I handed down written reasons, under neutral citation [2021] EWHC 1425 (Ch), for my oral decision on 14 May in a Part 8 claim seeking directions from the court. This claim was in effect to approve a proposed appointment by the claimants, as trustees of a discretionary trust created by the will of the late Hope Crawshay, of all the liquid funds in the trust fund, £55,000 (advanced by the claimant as executrix of the will out of the one quarter share of residue left to the trustees). The proposal was to appoint these funds to the fourth defendant absolutely, as an object of the power of appointment.
2. My decision at the conclusion of the hearing was to refuse to approve the proposed appointment, for the reasons subsequently given in writing. I now have to decide what costs orders to make. For this purpose I have received written submissions from the claimant and two of the four defendants. The third defendant made his own submission. The fourth defendant made a submission by counsel. The other two defendants indicated that they did not wish to make submissions.
3. The fourth defendant submitted a draft order providing for the claimants to pay his costs summarily assessed in the sum of £2,700 plus VAT, totalling £3,240, and for no part of those costs or the claimants' costs of the claim to be paid from the quarter share of residue given to the trustees of the discretionary trust. The claimants agreed both those orders.
4. But the claimants themselves
“seek their costs from the remaining $\frac{3}{4}$ of the estate under the principle that they should be entitled to an indemnity under the general rule in CPR r. 46.3 and/or from the provisions of the Will itself”.

It is not clear from this whether the claimants seek not only their own legal costs but also the costs they will be ordered to pay to the fourth defendant. For present purposes I will assume that they do: *cf Singh v Bhasin* [2000] WTLR 275, 280G.

5. As I have said, the first and second defendants have made no submissions. But the third defendant has, and he opposes the claimants' application. He says the claimants should not be entitled to the usual indemnity available to trustees and personal representatives. He says the first claimant had a conflict of interest from the beginning and acted hastily in pursuit of this claim.

The will

6. The claimants claim an indemnity not only under the general law, but also or in the alternative by virtue of the will itself. It is convenient therefore to begin with the will. That does not contain any express provisions concerning trustees' or personal representatives' indemnity. However, by clause 7 it incorporates the Standard Provisions of the Society of Trust and Estate Practitioners (1st edition), except clause 5. Those Standard Provisions make provision for trustee remuneration (clause 11) and for limiting trustees' liability (clause 12), but there is nothing concerning the trustees'

right to indemnity out of the trust fund. Accordingly, the matter is governed by the general law, to which I now turn.

The law

7. In principle, trustees and personal representatives are entitled to an indemnity out of the trust funds or estates which they control. Under the general law this appears in the Trustee Act 2000, section 31(1), which provides:

“A trustee –

(a) is entitled to be reimbursed from the trust funds, or

(b) may pay out of the trust funds,

expenses properly incurred by him when acting on behalf of the trust.”

This is applied to the personal representatives of estates by section 35 of the same Act.

8. In passing, it may be noted that, in referring to the trustee “acting *on behalf of the trust*”, this section contains an interesting modern example of the *personification* of the trust concept. But every student of the law of trusts knows (or should know) that a trust is *not* a corporation or other legal person. It is instead a legal relationship *between* persons in relation to assets. I am not aware of any UK primary legislation before this Act which treats the trust as a *person*. (Other examples in this Act are to be found in sections 28, 29, 32, and 33.) No-one, for example, would refer to someone as providing services “to or on behalf of a contract”. The predecessor provision, the Trustee Act 1925, section 30(2), referred instead to “expenses incurred in or about the execution of the trusts or powers”, which, if I may say so, is entirely orthodox. In *Price v Saundry* [2019] EWCA Civ 2261, Asplin LJ, with whose judgment Underhill and Arnold LJJ agreed, said (at [22]) that section 31 of the 2000 Act did not change the law. So a trust is still not a person, but continues to be a legal relationship.
9. Nevertheless, inapt as they may be, the meaning of the words used in section 30(1) is clear enough. The indemnity is available for expenses *properly* incurred on *trust* business. In the context of costs incurred in trust and estate litigation, however, there are special rules to be found in the CPR, both at rule 46.3 and also at paragraph 12 of the Practice Direction to Part 46. In *Price v Saundry*, Asplin LJ (again at [22]) described these as “a commentary upon and complementary to” section 31. I understand this to mean that these provisions implement the statutory indemnity in the litigation costs context.
10. The first of these two provisions is as follows:
- “46.3 (1) This rule applies where –
- (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
- (b) rule 44.5 does not apply.

(2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.

(3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.”

11. The second provision reads as follows:

“**1.1** A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative (‘the trustee’) –

(a) obtained directions from the court before bringing or defending the proceedings;

(b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and

(c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.

1.2 The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally.”

12. In *Price v Saundry*, Asplin LJ summarised the effect of all these provisions by saying:

“24. The test for whether the indemnity is available or has been lost or curtailed is also the same under section 31(1) of the 2000 Act and section 30(2) of the 1925 Act. It is best expressed in the form of two questions: were the expenses properly incurred?; and were the expenses incurred by the trustee when acting on behalf of the trust? The answer to those questions is often far from straightforward. They are dependent upon all the circumstances of the case.”

13. Asplin LJ then discussed certain authorities, and concluded:

“29. All of this discussion brings one back to the question of whether the costs incurred by trustees in defending an action or arguing a point in the particular circumstances were expenses ‘properly incurred’ when acting on behalf of the trust. It seems to me that ‘properly incurred’ should be interpreted to mean ‘not improperly incurred’. This was the way in which Lindley LJ approached trustee indemnity in *Easton v Landor* (1892) 62 L.J. Ch 164 and in *In re Beddoe, Downes v Cottam* (1893) 1 Ch 547. See also *In re Grimthorpe Dec'd* [1958] Ch 615 per Danckwerts J at 623.

[...]

31. It seems to me, therefore, that if a breach of trust causing loss to the trust fund or other misconduct is established against the trustee, the trustee may be deprived of his indemnity depending upon all the circumstances. Misconduct in this

context should be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances. It does not extend, however, to a mere mistake on the part of the trustee: see *Lewin on Trusts*, 19th ed. para 27-112.”

This case

14. The present case is unusual. The claimants claimed as trustees of the discretionary trust under the will. But they have agreed with the fourth defendant to pay his costs of the claim and not to seek indemnity out of the discretionary trust fund of their own costs. Instead, the first claimant seeks her costs (which as I have said I will assume include the costs ordered to be paid to the fourth defendant) out of the residue of the estate, other than that part which constitutes the discretionary trust fund. So, I have to consider whether the first claimant as sole surviving personal representative of the estate is entitled to an indemnity out of the estate for costs expended in a *different* capacity, namely as trustee of the discretionary will trust.
15. If the personal representative and the trustees had been quite different people, the question could not have arisen. The trustees would have brought the claim, but the personal representative would not have been, and would not have needed to be, a party, and there would be therefore no question, either under section 30(1), CPR rule 46.3, or PD46 para 1, of claiming indemnity for costs incurred as a party. It is only because the same person is both the personal representative and also one of the trustees that the question is even raised. But the first claimant cannot claim to have brought these proceedings in her capacity as personal representative of the estate. In *that* capacity she did not have the power which was sought to be exercised. Instead, she asked the court in her capacity *as trustee of the discretionary trust* to approve her and her co-trustee’s decision to appoint funds to the fourth defendant. That is why her co-trustee (who is not a personal representative) was joined as second claimant. But in *that* capacity (*ie* trustee) she and her co-trustee have agreed not only to pay the fourth defendant’s costs but also not to seek indemnity from the *trust fund*.
16. Accordingly, the first claimant cannot claim indemnity out of the estate for the costs of this claim under section 30(1), because she was not acting “on behalf of” the estate in bringing it, or, as I would say, on estate business. Nor can she claim under CPR rule 46.3, because she was a party in her capacity as trustee of the discretionary trust, but does not claim indemnity out of the trust fund. Finally, she cannot claim indemnity under para 1 of PD 46, because this qualifies rule 46.3, and the relevant trust fund is the discretionary trust fund, out of which she does not claim that indemnity.
17. In case I am wrong, however, and the position should be analysed as one where the claimant *was* acting on behalf of the estate, I go on to consider the consequences of that. It would be the duty of the claimant to do the best she can for the estate, including taking steps to collect as much of the debts due to the estate as possible. The problem is then not that she is not acting on estate business in exercising the power under the discretionary trust, but rather that in so acting she is acting in a situation of acute conflict of interest, purporting to exercise a power beyond its scope and/or committing a fraud on that power. The expenses of the claim will have been *improperly* incurred, because it is improper to achieve a proper object (collecting debts due) by improper means (acting in conflict of interest, committing a fraud on a

power). And both section 30(1) and para 1 of PD46 confine the indemnity to expenses or costs “properly incurred”.

Conclusion

18. Accordingly, I conclude that the claimants are not entitled to any indemnity for the costs of this claim (including costs payable to the fourth defendant) out of the assets of the estate.