

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF THE DEED OF SETTLEMENT MADE THE 26TH DAY OF JANUARY, 1983 BETWEEN ATEF DANIAL AND ROYWEST TRUST CORPORATION (CAYMAN) LIMITED, NOW COURTTS (CAYMAN) LIMITED, AND KNOWN AS THE OMAR FAMILY TRUST

AND IN THE MATTER OF THE TRUSTS LAW (1996 REVISION)

C 575/97

For the Trustees - Mr. Seamus Andrew
For the Trust Protector - Mr. Andrew Bolton
For Omar Danial - Mr. William Helfecht

Before Harre CJ.



JUDGMENT

This was an inter partes hearing of paragraph 3 of an originating summons by the Trustee dated 14th July 1997. It sought -

“an order that the applicants costs incurred in and incidental to Cause No. 565/97 be paid out of the assets of the Trust in any event on an indemnity basis.”

Cause No. 565 of 1997 is an action by the Trust Protector who has sought to replace the present Trustee. The issue in that action is whether he has properly exercised a power expressed in the Trust Deed in that regard.

In Cause No. 575 I made an order on 14th July about which I can simply say for present purposes that it preserved the status quo in relation to the present Trustee pending the determination of the issue in Cause No. 565.

The Order now sought by the Trustee raises a novel issue with regard to the relationship between a Trust Protector, a Trustee and a Beneficiary. The Principal Beneficiary is alleging that the Protector has purported to exercise his power to remove the original Trustee in breach of a fiduciary duty and that there are serious issues to be investigated.

I can conveniently indicate the extent of the issue between the parties in relation to costs by reference to an exchange of correspondence between the respective attorneys.

The Protector's position was put as follows in a letter from his attorney dated 30th July 1997 -

“Our clients agree that, providing your client takes only a formal role in the proceedings, simply putting before the Court such material as is relevant arising in the proceedings, and does not actively oppose the relief sought by our clients, their costs may be paid out of the Trust Fund on an indemnity basis. If however, they incur costs in seeking to persuade the Court that they should not have been removed as trustee and fail to do so, we see no reason why they should not bear those costs.”

The trustee's attorney responded on 4th August in the following terms -

“As will be apparent to you from the circumstances as set out in Mr. Galloway's Affidavit sworn in Cause No. 575 of 1997, our clients do have serious concerns as to the propriety or validity of their purported removal as trustees by the Protector. We consider it both appropriate and desirable in assisting the Court that our clients should, as well as putting forward all relevant evidence in their possession or control, explain to the Court their concerns and the reasons for them. This would involve our clients in going somewhat further than you have suggested and in effect to seek directions from the Court but it is not our clients' intention to put forward a positive case that the Protector's purported removal of them as trustees is invalid or improper. We do consider that in such circumstances it is both appropriate and desirable that our clients' costs in cause 565 of 1997 should be paid out of the trust fund on an indemnity basis irrespective of the eventual outcome of the proceedings. We are therefore instructed to now re-list our

clients' application at paragraph 3 of their Ex Parte Originating Summons in cause no. 575 for hearing on an inter partes basis as soon as possible."

The matter thus relisted is that which I now seek to address. In the case of a fund held on trust the Trustee is entitled to his costs out of the fund on an indemnity basis provided that he has not acted unreasonably or in substance for his own benefit rather than that of the fund. See per Hoffman LJ in McDonald et al v. Horn et al (1995) 1 All ER 961 at 970. In Alsop Wilkinson v. Neary et al (1995) 1 All ER 431 at 434 Lightman J described as follows three kinds of dispute in which Trustees can be involved -

"(1) The first (which I shall call 'a trust dispute') is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be 'friendly' litigation involving, for example, the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or 'hostile' litigation, for example, a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw (see Re Buckton, Buckton v. Buckton [1907] 2 Ch 406).

(2) The second (which I shall call 'a beneficiaries dispute') is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may not take in the future. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust.

(3) The third (which I shall call 'a third party dispute') is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities, for example in contract or tort, assumed by the trustees as such in the course of administration of the trust."

It did not fall to Lightman J, as it now falls to me, to consider the position of a Trust Protector, who is a creature of the trust itself though neither a Trustee nor a

Beneficiary in his capacity as a Protector. In the present case it happens that the Protector is a Beneficiary also but I do not think that affects anything which I now say.

In Buckton v. Buckton, referred to by Lightman J in the passage to which I have referred, Kekewich J observed that on questions of construction or administration (whether made by the trustees themselves or by beneficiaries) he acted on the principle that trustees are entitled to the fullest possible protection which the court can give them. He also referred to the type of case where there is an adverse claim by a beneficiary against another. On that, he said this at page 415 -

“...when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.”

He there draws what I regard as an important distinction between the true adversaries and a trustee who may find himself embroiled with them.

By reason of the issues concerning the protector, the present case does not fall neatly within any of the categories analysed by Lightman J. It does, however, seem to me to be a case where the real question in relation to any ruling on the trustees' costs is as to the true construction of the trust and in particular the powers and duties of the trustee vis a vis the protector, who is also a creature of the trust, and the administration of the trust in the light of that question. I do not think that it is realistic to say that the

ultimate question - which is indeed whether the removal of the original trustee was valid or not - can be properly addressed without a full presentation by the trustee (subject to any directions which may be given as the action proceeds) of its concern relating to the purported exercise of the power of removal. No impropriety has been alleged against the trustee. It is not defending its position and is neutral in that sense. By raising its concerns and fully developing them I do not think that it is compromising its neutrality in a dispute which in its adversarial aspect is one between the protector and a beneficiary to the extent that in the event of one of the possible outcomes it will be shown to have been "wrong" to the extent of being penalised in costs.

As would be the case of a Beddoe application, I do not find it wrong in principle to determine the issue of costs in cause 565/97 in this closely related cause No. 575. I will make the order sought in paragraph 3 of the Originating Summons of the trustee dated 14th July.



G.E. Harre
Chief Justice

27th August 1997

