Green v Torode
Royal Court
24th March 2017

JUDGMENT
16/2017

Entitlement of Executor to rely on an indemnity clause contained in a Will

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

GRAHAM ERNEST GREEN
RUSSELL IAN GREEN
ELLIOT LUKE GREEN
(Known collectively as "Messrs Green") **Plaintiffs**

-And-

MARK ANDREW TORODE **First Defendant**

-and-

SUSAN WRIGHT **Second Defendant**

Decision made on the papers

Judgment handed down: 24th March 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiffs: Advocate Mark P Priaulx
Advocate for the First Defendant: Advocate S Duerden

Cases, texts & legislation referred to:

Lewin on Trusts, 19th ed
In re the Tchenguiz Discretionary Trust (unreported, 27 November 2015)
Blades v Isaac [2016] EWHC 601 (Ch)
Alsop Wilkinson v Neary [1996] 1 WLR 1220
McDonald v Horn [1995] 1 All ER 961
The Royal Court Civil Rules, 2007

Introduction

1. This judgment is supplemental to the Court's judgment of 15 October 2015, which dealt with the

substance of the Plaintiffs' application. It took a long time for the parties to provide a draft Act of Court, as requested at para. 174 of that judgment. An Act of Court dated 7 February 2017 has now been issued and the only remaining question is about the First Defendant's entitlement to rely on the indemnity contained in Clause 10.1 of the late Ernest Green's Will. That sub-clause provides:

> "*Any Executor or Trustee for the time being hereof being an advocate, accountant or other person engaged in any profession or business shall be entitled to charge and to be paid for all their professional or other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or not and though not of a nature requiring the employment of an advocate, accountant or other professional person.*"

This question arises because the Act of Court of 7 February 2017 records the agreement of the parties that, in respect of the costs of the Plaintiffs' application, there be no order as to costs, but para. 5 expressly states that the terms of that costs order is "*without prejudice to the First Defendant's entitlement to rely upon his indemnity as may be decided under paragraph 6*", which in turn directs the parties to agree a timetable for the resolution of that question.

2. The parties' Advocates have now lodged written submissions in accordance with the timetable agreed. I am satisfied, as I have been invited to do, that I can properly determine the question about whether (and if so, the extent to which) the First Defendant can rely upon that indemnity on these written submissions rather than re-convening the Court for oral submissions as well. Both sides have lodged their original submissions and their submissions in response to each other's original submissions.

Effect of order already made

3. The Plaintiffs' primary position is that the Court has already decided that the First Defendant is not entitled to rely upon the indemnity in the Will because it is clear from making no order as to costs that that is the consequence. The First Defendant contends that this cannot be the case because of the express wording of the agreed paragraph in the Act of Court.

4. In my view, the Plaintiffs' contention cannot be sustained. There would be no point in the Court ordering that submissions be made on the question of the entitlement of the First Defendant to rely on the indemnity if the Court had already tied its hands by making no order as to the costs between the parties on the Plaintiffs' application. That would be tantamount to the parties being directed to incur further expense for no reason at all. Accordingly, I accept that it must be open to the First Defendant to seek a further order that he retains the benefit, in whole or in part, of the indemnity conferred on him under the Will. Equally, however, the First Defendant cannot, in my view, suggest that the outcome of the Plaintiffs' application now falls to be ignored. The decisions taken by the Court must be capable of being taken into account in determining the question I now have to resolve.

Legal principles

5. Reference again needs to be made to the way the position is set out in *Lewin on Trusts*, 19th ed., in respect of the situation in which a trustee can be deprived of his costs (para. 27-113):

> "*A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law.*"

This paragraph was discussed in the earlier judgment and I do not propose to repeat all of that analysis here.

6. I consider that it makes sense to place that passage into context by also quoting the preceding para. 27-112:

> "*The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in the execution of the trust. By this is meant costs which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is, the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee. Thus if breach of trust causing loss to the trust fund or misconduct is established against the trustee, the trustee may be deprived of his right of indemnity and further ordered to pay the costs of other parties. The word "misconduct" is a strong one, yet it is clear that conduct that might be characterised by milder terms such as caprice and obstinacy, or neglect, negligence or carelessness, suffice to deprive a trustee of the right of indemnity or justify an order for costs against him. While the mere fact that the trustee has made a mistake is not enough, it is equally clear that dishonesty is not requisite. Consequently, either "misconduct" should be widely construed so as to cover unreasonable conduct, or in the alternative the "inequitable conduct" on the part of the trustee which causes his right of indemnity to be lost or curtailed includes both misconduct in the sense of dishonesty and unreasonable conduct. We will here use "misconduct" in the wider sense.*"

Paragraph 27-114 also refers to the situation where a trustee acts for his own benefit:

> "*A trustee who makes an application to the court for the purpose of obtaining some advantage for himself, for example, approval of a self-dealing transaction or authority to retain a profit, may be ordered to pay costs whatever the outcome. A trustee who seeks to set up or defend his own private interest against the trust will be ordered to pay costs or at least not recover them under his right of indemnity. But a trustee who successfully defends a breach of trust action will not be deprived his right of indemnity on the ground that he defended himself rather than the trust.*"

7. I agree with the Court's approach as stated in *In re the Tchenguiz Discretionary Trust* (unreported, 27 November 2015), that para. 27-113 of *Lewin* can be applied in Guernsey law as it operates in English law. The Plaintiffs have relied on what the Court said in para. 28 of the judgment in that case:

> "*If an order, which provides that there should be no order as to costs, is made either by consent or by the presiding judge, there is, as I see it, no reason to depart from that provision and to allow parties to exercise a right of indemnity out of the trust assets for their costs of the specific application or applications where no order for costs has been made. The Court of Appeal in England decided in In re Hodgkinson [1895] 2 Ch. 190, that a declaration that there should be no order as to costs is a judicial decision that the parties to whom the decision applied, including trustees, are not entitled to their costs of the application or applications in question. It followed, the Court of Appeal decided, that, where a provision has been made that there should be no order as to costs, the trustee had no right to retain his costs of such application or applications out of the trust estate. I respectfully agree with the way it is put at p. 194 of the judgment of Lord Justice Lindley.*
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> *"The effect is that each party must pay his own costs. If so, how is that consistent with the retainer by the trustee of his costs out of the estate? I cannot think that it is … [I]f the judge says, "I make no order as to costs," that negatives the prima facie right of the trustee to take his costs out of the estate.""*

8. As I have already noted, but for the inclusion in para. 5 of the Act of Court that the outcome that

there be no order as to costs was expressly "*without prejudice to the First Defendant's entitlement to rely upon his indemnity*", I would have regarded this statement of principle as a complete answer to the submissions now advanced on behalf of the First Defendant. (In doing so, I am satisfied that the position of the First Defendant in these proceedings can be regarded as broadly analogous to that of a trustee.) Instead, I regard the approach to the passages in *Lewin* as being indicative of one possible outcome, but the extent to which the First Defendant may still retain some ability to rely on the indemnity remains open.

9. The First Defendant relies upon the same principles from *Lewin* about when he loses his right to indemnity and so concentrates on misconduct and the way in which the test of whether his conduct "*crossed the threshold of reasonably justifiable behaviour*", as described in para. 22 of the earlier judgment, has been established. In doing so, his primary position is that I should focus on the quality of the First Defendant's decision to contest each element of the Plaintiffs' application. The bulk of the written submissions on behalf of the First Defendant then analyses why he argues that his decisions have largely been vindicated by the Court's decision on the Plaintiffs' application.

10. The First Defendant has cited the decision of Master Matthews in *Blades v Isaac* [2016] EWHC 601 (Ch) as supporting his contention that the right to indemnity should be treated as not having been lost or curtailed. In that case, a beneficiary brought proceedings which essentially amounted to an application for disclosure of information from the professional trustees of a discretionary trust created by will. In the event, the reasons for the claim being instituted fell away. The claimant argued that, because she received what she was seeking, she should be regarded as the successful party and so entitled to her costs. The defendants argued that they had behaved reasonably throughout, which meant they were in the usual default position of enjoying an indemnity for their costs. The Master concluded that he should not order the defendants to pay the claimant's costs, but that both sides were to have their costs paid out of the trust fund on the indemnity basis (para. 82). The First Defendant refers, in particular, to para. 116, which in full states:

> "*So I return to the position which seemed to me to be correct in principle. A trustee who has not committed a breach of trust causing loss is not automatically deprived of the indemnity for costs (of either kind). Of course, it can still be lost, in accordance with the rules stated in paragraph 1 of PD 46, if the liability was not "properly incurred". For this purpose, it is necessary to consider all the circumstances of the case, and the three specific matters referred to: (1) whether directions were obtained; (2) whose interests were served; and (3) whether the action or conduct was unreasonable.*"

11. I am uncertain as to why this particular paragraph is relied upon as opposed to the broader analysis undertaken throughout this comprehensive judgment. The two kinds of costs referred to are the indemnity for the trustees' own costs and an indemnity for costs a trustee may be ordered to pay to a claimant (para. 84). It is, of course, only the first head that is now in issue in the present case because there is no order that the First Defendant pays any of the Plaintiffs' costs of these proceedings. The relevant principles applicable to that first type of costs were described by the Master in the following terms:

> "*86. As to the first kind of indemnity, I have already pointed out the difference between (i) cases of claims of breach of trust by trustees causing loss to the trust fund, and (ii) cases of claims that the trustees are in breach of some other duty, not itself causing loss to the trust fund.*
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> *87. As to the first class of case, a trustee successfully defending against a breach of trust claim may recoup his costs of doing so (so far as need be) out of the trust fund, even though he is acting in his own interest: Walters v Woodbridge (1878) 7 Ch D 504; Re Spurling [1966] 1 WLR 920; Des Pallières v JP Morgan Chase & Co [2013] JCA 146, [21].*
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> *88. On the other hand, a trustee who defends such a claim unsuccessfully may not: Armitage*

v Nurse [1998] Ch 241. It may be that this is just an example of the rule as now expressed in PD 46, paragraph 1, that the trustee may lose his indemnity where he acts in substance for a benefit of other than the trust or otherwise acts unreasonably. (In the cases this is often referred to generically as "misconduct"). The applicable rule in 1998 was RSC Ord 62 r 6(2), which was cast in narrower and more rigid terms than the current paragraph 1 of PD 46. But I do not need to resolve this now.

89. As to the second class, however, a trustee who is accused of breach of duty not causing loss to the trust fund is prima facie entitled to the indemnity, whether he is found to be in breach of duty or not, but will lose it if guilty of "misconduct": Turner v Hancock (1882) 20 ChD 303, Re Jones [1897]2 Ch 190, Re Londonderry's Settlement [1964] Ch 594, 614, Armitage v Nurse [1998] Ch 241."

It is apparent from this passage that the task of the Court is to categorise the type of proceedings involved and not solely to assess whether the First Defendant in the present case has been involved in something that can be characterised as misconduct.

12. This consideration brings me to the well-established principles derived from *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, in which Lightman J discussed the different kinds of dispute in which a trustee may be involved. (For present purposes, I am satisfied that these descriptions can be applied to disputes between executors and beneficiaries of the estate being administered.) His Lordship labelled these disputes as a "trust dispute", a "beneficiaries dispute" and a "third party dispute". There is no third party involved in the present proceedings. The dispute arising from the Plaintiffs' application was not properly capable of being categorised wholly as a trust dispute, although some of the aspects of the First Defendant's engagement with the Court had some of that element. The reality, however, is that this was a beneficiaries dispute. As was explained on page 1224:

> "*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 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. ...*
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> *A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see per Hoffmann L.J. In McDonald v. Horn [1995] I.C.R. 685, 696.*"

Discussion

13. Looking at the way the Plaintiffs' application was couched, it amounted to a direct challenge to the way the First Defendant had conducted his executorship. In saying that, I have not overlooked the way in which the interests of the Second Defendant, as the fourth beneficiary of the Estate, have been swept into this dispute. She aligned herself much more to the First Defendant's position than to that of the Plaintiffs. To an extent, what the First Defendant had done during the executorship was to seek to protect the interests of the Second Defendant to the extent that he perceived they were being threatened by the positions adopted by the Plaintiffs. However, had the Plaintiffs secured some or all the relief they sought, the Estate would have benefited (and did so benefit through the partial relief granted), with the consequence that the Second Defendant has also benefited. Although the Second Defendant is not a party to the issue now before me, I have had in mind what the effect on her will be whatever I decide. To have ignored her position entirely would not, in my view, be just to the overall position.

14. The reason why I refer to "just" is that, although the parties have agreed no order as to costs on the Plaintiffs' application and left the question of the First Defendant's indemnity open, it would be artificial for me to treat it as an entirely distinct issue. With the benefit of hindsight, the question of the appropriate costs order to make, including the extent of any reliance on the indemnity under the

Will should have been addressed in the round. As matters stand, I feel obliged to give effect to the outcome that there be no order as to costs between the two sides, because that is what they have agreed, even if I might not have made the order in those precise terms had I been making the order after submissions.

15. I start from the premise that the usual order in a case such as this would be that costs follow the event. This was, at least in large part, hostile litigation. The Plaintiffs sought substantial repayment to the Estate of costs alleged to have been taken by the First Defendant from it without justification. The substantive judgment and the ensuing Act of Court show that assessing who was the successful party was going to be difficult. The proceedings fell into four parts. I had to consider what the costs orders should be in respect of three applications that had ended up being withdrawn before they resulted in any determination and then there was the more general question about repayment to the Estate of a proportion of the costs taken from it in respect of the general administration of the Estate.

16. In respect of the Removal Application dated 2 May 2012, there was no order as to costs (para. 2, Act of Court). There was then an order in favour of the Plaintiffs that the First Defendant reimburse the Estate in respect of lost interest for having taken his costs earlier than he was permitted to, which was a discrete part of the consideration of the overall administration of the Estate (para. 4(a), Act of Court). In my judgment, it is possible to apply the reasoning that I have set out above to this aspect of the case. Having concluded that there shall be no order as to costs in respect of that Removal Application, the costs of arguing about that outcome should similarly be treated as being that there is no order as to costs. In those circumstances, the First Defendant has lost his indemnity in respect of the portion of the overall costs associated with those arguments. The order that each party bears its own costs of that application negatives the prima facie entitlement of the First Defendant to rely on the indemnity in the Will.

17. In respect of the Harrier Application dated 10 July 2012, this was potentially the type of application that would have invoked the directions jurisdiction of the Court but, as the earlier judgment explains, that application should not have been presented in the way it was, which is why the Plaintiffs won and the First Defendant could not rely on the indemnity in the Will. Having already been deprived of his indemnity under the Will in respect of costs taken and been required to pay the Plaintiffs' litigation costs because of the misconduct found, it would be a form of recovering from the backdoor the costs associated with the application if the First Defendant were now able to argue that his resistance of that outcome should be covered under his indemnity. In my judgment, the misconduct found can properly be read into the costs the First Defendant has incurred in relation to this portion of the case, in the sense that it "infects" all elements of the Harrier Application, and so he has to forego his indemnity in respect of his own costs as well.

18. In respect of the Winding Up Application dated 17 December 2012, there was similarly no order as to costs. This application was categorised as being an administrative one, which is why I explained that it could not be seen as hostile litigation. Unlike the Removal Application, the ruling that there should be no order as to costs does not have the same effect in relation to the costs of arguing about the costs consequences of resisting that part of the Plaintiffs' application. Accordingly, it is not as easy just to conclude that the no order as to costs made by me results in the First Defendant losing his right to rely on the indemnity in the Will. Equally, just because this Winding Up Application can be regarded as within the range of applications where an executor seeks the directions of the Court, it does not mean that the indemnity automatically survives. As the cases to which I have referred show, it requires a more nuanced consideration than that.

19. In the earlier judgment, I was critical about the approach that the First Defendant took to the bringing and making of that Winding Up Application. On the basis that the entirety of the costs of making that Application could not be said to be reasonably incurred (see para. 172), the Court took a broadbrush approach and required repayment of approximately half of the costs. It would seem rather an odd outcome if the First Defendant is now justified in taking the entirety of his costs from the Estate of arguing that there had been no misconduct. The finding of misconduct, whilst not

absolute, in the sense of resulting in full repayment to the Estate, must, in my judgment, be reflected in the overall costs position. In other words, the First Defendant's argument that his indemnity survives in its entirety is, in my view, flawed. How this should be reflected is something to which I will return.

20. These matters relating to the strands of the proceedings that were costs applications in respect of previous applications that had been withdrawn also need to be viewed in the context of the Plaintiffs' overall application to have the First Defendant repay the Estate sums that had been taken from it. That aspect of the application can, I think, be regarded as hostile. It is a form of beneficiaries dispute. Consequently, the starting point, had this been considered by me rather than by the parties reaching an overall agreement on the costs, is who, if anyone, was to be treated as having been the successful party.

21. Although the Plaintiffs did not get as much returned to the Estate by the First Defendant as they sought, the fact that they succeeded in getting something paid back can be regarded as them having won. Had they failed on every aspect, clearly the First Defendant would have won and would most probably have been awarded his costs. Had that been the position, he would have potentially been entitled to rely on his indemnity from the Estate in respect of any shortfall in terms of recovery. That did not happen. I do not think that the First Defendant can be said to have been the successful party just because he avoided a more serious outcome for himself than that sought by the Plaintiffs. At least, as a starting point, I would have approached the costs question as the Plaintiffs being successful, but would then have gone on to consider how the way in which the First Defendant had not been required to repay more than he has as something to factor into the question of whether the Plaintiffs' prima facie entitlement to recover their costs should be modified by some form of discount.

22. There would have been no empirical way to make such an assessment. I therefore reject the submissions made on behalf of the First Defendant that the percentage of the overall costs the First Defendant had to repay is *de minimis*, being a little over 5%, and so should not affect his entitlement to rely on his indemnity. I regard that as being a mistaken way to look at the way the case has progressed and the overall outcome. Costs should reflect the work that has been involved and not the financial consequences of the outcome on a range between total failure and total success. As I have just said, I would have started from the premise that the Plaintiffs won, but that the reduced basis on which they won should be reflected in a discount on the costs to which they would otherwise be entitled. This approach is not a red herring, as submitted on behalf of the First Defendant, because, in my view, the correct approach is not to isolate the question of the entitlement to the indemnity from the costs decision itself, but to combine both elements to produce a decision that properly reflects the findings of the Court on the whole of the Plaintiffs' application, as set out in the earlier judgment.

23. It strikes me that what the Advocates have done in their negotiations leading to the conclusion that there be no order as to costs is to reach a pragmatic outcome. On the part of the Plaintiffs, this award recognises that, although they succeeded in a number of respects, the First Defendant could properly expect some discount from the in principle decision to award them their costs. The First Defendant no doubt felt that he had had the better of the argument on the question of what needed to be repaid by him to the Estate. The agreed order appears to me to reflect that he may have regarded the overall honours as being broadly even. In the minds of the Plaintiffs, as their submissions show, they were content to agree that both sides bear their own costs on the basis that there would be no recourse to the Estate by the First Defendant in respect of any of his costs. I could perhaps regard the agreement reached as being based on a mistake, but to do so would simply entail yet more costs being thrown at the parties' respective arguments where I think everyone requires finality.

24. The parties' pragmatic outcome is as generous to the First Defendant as I could possibly have been had I been deciding the costs order. I have been shown an exchange of correspondence between the parties' Advocates in December 2013 and February 2014 marked "*without prejudice save as to costs*", which would have seen the First Defendant resigning the executorship on terms offered by him or on the terms of the Plaintiffs' counter-proposals. The eventual outcome cannot, in my view,

be regarded as clearly showing that one party failed to better the offers made and so I do not regard this correspondence as affecting the approach I should now take in considering the appropriate costs order. Indeed, I may well have ended my analysis in favour of awarding the Plaintiffs a small percentage of their costs. In doing so, I would also have indicated that these were costs to be paid by the Defendant personally rather than out of the Estate because they arose in the context of hostile litigation where, as explained in *McDonald v Horn* [1995] 1 All ER 961, the costs usually follow the event. Through the act of defending his own position rather than acting in the best interests of the beneficiaries, the usual indemnity was no longer available to the First Defendant, because it only attaches where the First Defendant is serving the interests of the beneficiaries of the Estate.

25. The only aspect of the case where I have found that the First Defendant might have been able to rely on the indemnity, therefore, is the partial reliance in respect of the Winding Up Application costs he has incurred. However, I take the view that this possible reliance has already been factored in to the general order agreed between the parties that there be no order as to costs. Although this was expressed to be without prejudice to the First Defendant's entitlement to rely upon his indemnity, thereby leaving open the submissions he has now advanced, I am satisfied that the overall outcome should be that he has foregone his entitlement now to invoke that indemnity to draw the costs he has incurred in these proceedings from what remains of the Estate. I reach that conclusion because of the way those aspects of the case dealing with the withdrawn applications would have resulted in two instances of the indemnity being completely lost and in one instance in it being partially lost, and the remainder of the application needing to be viewed not as administrative proceedings where the indemnity might still have been available unless there were misconduct but as a form of hostile litigation where the self-serving acts of the First Defendant already fall outside the indemnity and where reliance on the indemnity after the case has concluded depends on whether the executor has been successful. In saying that, I have not overlooked that the tenor of the Court's judgment was that the First Defendant's conduct had not taken him across "*the threshold of reasonably justifiable behaviour*". However, in my judgment, this relates to whether or not there needed to be any repayment, rather than whether the costs of conducting his defence to the Plaintiffs' application falls under the terms of the indemnity in the Will.

Conclusion

26. For these reasons, I am satisfied that the overall order that there be no order as to costs is a fair and just one. It means that both sides will bear their own costs in respect of the Plaintiffs' application. Because the overall nature of these proceedings has been hostile litigation where the First Defendant has, save in a small way, acted to serve his personal interests rather than those of the Estate, the order means that he is unable to rely on his indemnity to draw the costs of any of these proceedings from the Estate. In reaching that conclusion, I have separated out the four strands of the Plaintiffs' application in order to consider what the order would have been for each strand discretely, and I have then brought them back to consider them collectively because the overall test (eg, set out in rule 82 of the Royal Court Civil Rules, 2007) is to reach an award of costs that I consider just.

27. Finally, in relation to the costs of these submissions, because I have found that the First Defendant is not entitled to rely on his indemnity under the Will, I regard the Plaintiffs as having succeeded on this point. Accordingly, I will order that the First Defendant pays to the Plaintiffs on the recoverable basis, to be taxed if not agreed, the costs that have been incurred in this last stage of the proceedings.