TRUSTEE'S RECOVERY OF COSTS

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It's not my money so who cares? - Wrong.

In a recent Judgment delivered by the Bailiff, clear guidelines were given to trustees regarding the use of trust funds to pay lawyers' fees and other expenses. The Bailiff delivered his Judgment on 25 May 2006 in the case of Alhamrani v Russa Management and others. The Judgment was delivered as a result of an appeal against the decision of the Greffier Substitute in taxing five bills of costs arising from a number of orders made in the proceedings. The orders were made in favour of the trustee and the Greffier Substitute had significantly reduced the fees claimed as a result of the taxation exercise causing J P Morgan to appeal against his decision.

The facts of these proceedings are somewhat complex but for current purposes it is sufficient to say that the background to the appeal is a bitter family dispute involving nine brothers and sisters of the Alhamrani family. All nine brothers and sisters are beneficiaries of two Jersey Trusts namely the Internine Trust and the Intertraders Trust. The trustees are J P Morgan Trust Company Jersey Limited ("J P Morgan") and Russa Management Limited respectively.

There have been numerous interlocutory applications throughout these proceedings and numerous orders made by the Royal Court and the Court of Appeal. This particular appeal concerned costs orders relating to five applications that had been made in favour of J P Morgan and which had been significantly cut down as a result of the taxation exercise. It had previously been ordered:

1. in two instances, that J P Morgan could only recover a certain percentage of its legal fees from the trust fund; and
2. in three instances, that J P Morgan was not able to claim 100% of its bill from the other party to the litigation against whom it had won the application.

In both cases it meant that the trustee was looking at having personally to pay a proportion of the legal fees incurred. The question for the Bailiff was whether this was right in principle.

A careful reading of the Judgment, however, reveals that the Bailiff is also giving trustees a very firm word of warning. The underlying theme to the Judgment is one of balance. As the Bailiff says at paragraph 20 of his Judgment, "There is naturally a balance to be struck. Suggestions of this kind are not a licence for a trustee to engage an army of advisers at the expense of the trust fund. Much will depend upon the circumstances of a particular dispute."

So trustees beware. In instructing legal advisers or incurring any other kind of trustee expenses, a degree of proportionality must be observed. Consideration must be given to

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the complexity of the issues to be determined, the value of the trust fund itself, the extent to which the trustees need to be involved in the proceedings, the extent to which the trustees need advice at all and the nature of the expertise that is required.

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These considerations are not exhaustive but the clear message is that whilst trustees will be supported by the Courts when they take appropriate steps in lengthy and complicated litigation, even if that means incurring significant costs, the Court will not sanction the exhausting of a trust fund on teams of lawyers where the circumstances of the case cannot possibly justify it. Ultimately, the trustee is responsible for the trust assets and that responsibility cannot be discharged by utilising trust assets in order to obtain advice if that is provided in a manner which is disproportionate to the nature of the problem or the size of the trust fund. Trustees therefore must give extensive consideration to the law firm that they utilise, the extent of the legal team that they use, the hourly rate being charged and the time that is being spent.

The Bailiff also made it clear that as a matter of good practice, trustees should always be transparent in relation to incurring expenses by notifying the beneficiaries, where appropriate, that expenses are either about to be incurred or have been incurred. Such notification will entitle beneficiaries to object in circumstances where objection is appropriate and will allow the trustees to give further consideration to the incurring of such expense or to the continued incurring of such expense with the benefit of the beneficiaries' thoughts and comment.

Trustees should also note that if costs are incurred excessively or inappropriately, they will be open to criticism from the beneficiaries and to possible actions for breach of trust, as well as to the taxation exercise itself. However, where a trustee acts and incurs costs reasonably, taxation of costs does not arise at all.

In the Alhamrani case itself, the taxation orders of the Greffier Substitute were successfully appealed and remitted for reassessment. It is likely that the orders made will now be significantly increased but it is to be remembered that the Alhamrani dispute is not only complex but it concerns many millions of pounds in trust assets. The litigation is multi-jurisdictional and interlocutory applications have already been made to the Privy Council. The legal costs in such a matter are likely to be extensive and it is likely that teams of lawyers will be employed on all sides to fight the case.

Not all trusts are this large and not all disputes relating to trusts are this complex. It is sometimes the case that lawyers attempt to persuade their trustee clients that they should obtain a Rolls Royce service which will inevitably lead to the trustee being charged Rolls Royce prices.

The trustee should not settle for anything less than the best advice he or she can obtain, but it is important to remember that the best is not necessarily the most expensive and that a team of ten lawyers or more is not necessarily any better than a team of two or three. Not least of which because you will never get ten lawyers to agree about anything!

Proportionality and balance, then, is the key to this Judgment. Trustees should remember this when instructing legal and other professional advisers. The point is the same where costs are incurred in a non-litigation context.

Trustees should proceed with great care, not confusing the protection of the trust assets and the best interests of the beneficiaries with

the protection of their own reputation and position. If a trustee is being criticised by a beneficiary then the trustee should not necessarily feel that he or she is able to utilise trust assets in order to protect his or her own reputation or to defend proceedings being brought against him or her for breach of trust, though sometimes this will be permissible.

CONCLUSION

Trustees should take some considerable comfort from the Alhamrani Judgment. Provided a trustee is acting properly and in the best interests of the beneficiaries, then the incurring of legal fees and other expenses is unlikely to be questioned by the Court

or as a result of the taxation process in any significant way. Trustees are entitled to be indemnified for their expenses (if properly incurred) and the Court has clearly indicated in this Judgment that it will uphold that principle.

Prior to incurring such expenses and costs however, a trustee must perform a balancing exercise. Just as you would not take your car to an expensive garage simply because it has run out of washer fluid then a trustee must not employ the services of vast teams of expensive lawyers where the matters in dispute are relatively simple and easy to resolve.

Provided that trustees are measured in relation to the legal advice taken and costs incurred, then they will undoubtedly obtain the full support of the Court. But if a trustee were to consider the Alhamrani Judgment as giving him or her carte blanche to spend a trust fund as they please, then that trustee must beware, for such action will undoubtedly lead to personal exposure.

The decision of the Bailiff is significant: whilst it does not create new law, it is helpful in clarifying how trustees should conduct themselves with regard to instructing advisers to assist them in carrying out their trustee duties.

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It will come as no surprise to trustees to hear that they are expected to conduct themselves properly and reasonably in the interests of the beneficiaries of their trust. Indeed the decision in Alhamrani was based on the premise that the trustees had so conducted themselves: the question that arose was whether, in such circumstances, the trustees could be exposed to the taxation process and if so, given that they had acted properly and reasonably, to what extent they could be called upon personally to pay fees incurred.

The starting point is that article 26(2) of the Trusts (Jersey) Law 1984 allows a trustee to reimburse himself or herself out of the trust for all expenses and liabilities reasonably incurred in connection with the trust.

The Royal Court recognised that being a trustee was onerous and sometimes dangerous and therefore trustees were not expected to carry out work at their own expense. Trustees are entitled to be paid back all that they have paid out provided those expenses are properly incurred: Re Grimthorpe [1958] Ch 615 at page 623.The Court saw fit to draw no distinction between the words “reasonably” and “properly” in this context.

The Royal Court also referred to the case of Re Esteem Settlement (2000) JLR N-67 (20 July 2000) Jersey Unreported; which

confirmed that people should not be discouraged from becoming trustees by having costs orders visited upon them in circumstances where they have fulfilled their duties, even if they have committed an innocent breach of trust. The Royal Court cited from the Esteem Judgment as follows:

"There is ……. no evidence of misconduct and I can see no reason why the trustees' costs should not be paid from the trust fund. Although the trustees' application has been adjourned sine die, it seems to me unlikely, unless the Court's decision is overruled by the Court of Appeal, that the application will be resumed for many months. To require the trustee, which in my judgment has acted entirely reasonably in making the application, to pay its costs in the meantime out of its own pocket would be quite unfair".

In this manner the Court reaffirmed the trustees' general right of indemnity for expenses reasonably incurred. The Court would clearly not wish to deter persons from becoming trustees and taking on the onerous task of doing so. The Court went on to observe that it had power to override this general right of indemnity where circumstances required under article 29 of the Civil Proceedings (Jersey) Law 1956 and also in article 53 of the Trusts (Jersey) Law 1984 which entitles the Court to make orders for costs and expenses of and incidental to a Court application to be paid "in such manner and by such persons as it thinks fit".

In particular, the Court recognised that in complex and weighty matters it was not unusual for English firms of solicitors and English counsel to be utilised in order to assist Jersey lawyers. There are only a limited number of lawyers in Jersey who can be said to specialise in contentious trust work. In those circumstances, the Court accepted that it is not only necessary but sometimes desirable to employ the services of more specialised English practitioners and of large English firms of solicitors who are able to devote the necessary resources and manpower to assist Jersey lawyers in complex, important and document-heavy cases. In such cases, the Court accepted that there was no need to "punish" the trustee by making him liable for the use of these resources. At first blush, therefore, the Bailiff's Judgment seems to be designed to give trustees a certain degree of comfort in relation to incurring expenses where it is reasonable to do so.

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