EXECUTOR NOT ARBITER - THE ROLE OF THE TRUSTEE IN A DISPUTE BETWEEN BENEFICIARIES

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This article examines the very recent decision handed down by the Bermuda Court of Appeal in the matter of *Ingham & Anor v Wardmanet al* [2022] CA (Bda) 7 Civ.

The judgment by Justice Williams is unusual in its forcefulness and contains a number of specific criticisms of the actions and behaviour of the trustee executors. Those criticisms – and the overarching tenor of the judgment – should be at the forefront of a trustee's thinking in circumstances where a dispute arises between beneficiaries.

Background and procedural history

The proceedings relate to the estate of the late Elfrida Chappell. Butterfield Trust (Bermuda) Limited and Stephen Kempe were appointed as her executors in her last will (the **Executors**). Jonathan and Nicholas Ingham (**the Inghams**) represent one group of the family and the Wardmans – including the First Defendant – represent the other.

The Inghams took issue with the actions of the First Defendant and her late husband (George Wardman, Mrs Chappell's son) in relation to Mrs Chappell's financial affairs. They initiated proceedings in Bermuda seeking to pursue a derivative claim against the First and Second Defendants, on the basis that the Executors are unable to bring a claim themselves due to conflicts of interest.

Separate but related proceedings were also issued in Guernsey. In those proceedings certain documents were discovered which the Inghams believe have relevance for the purposes of the Bermuda proceedings (the **Documents**).

Guernsey proceedings carry the usual implied undertakings not to use disclosed documents for a collateral purpose, and the rules of civil procedure (The Royal Court Civil Rules, 2007) also confirm that documents disclosed in legal proceedings may only be used for the purpose of the proceedings in which they are disclosed, with certain exceptions.

Therefore the Inghams sought an order from the Royal Court of Guernsey for permission to use the Documents in the Bermuda proceedings.

That order was granted on the condition of privacy – the Documents were made subject to privacy orders such that prior to any use in

Bermuda, the Bermuda Court would itself need to grant privacy orders prohibiting any further disclosure of the Documents other than for the purposes of the proceedings in that jurisdiction.

It was, in effect, a request for reciprocal privacy assurances, aimed at putting before the Bermuda Court documents that appeared to be relevant and of assistance to the Court in coming to its determination but respecting the usual protections afforded to documents disclosed in court proceedings. All of the main beneficiaries of the trust consented to that happening.

The Inghams sought and obtained the necessary privacy order (the **Privacy Order**) in the Supreme Court of Bermuda *ex parte*. However, that was challenged by the Executors and was set aside by the Supreme Court at a contested hearing. The Executors argued – and the Court at first instance agreed – that:

1. the Privacy Order offended the principle of open justice in Bermuda; and
2. in granting it, the Court was enforcing a foreign judgment that was unenforceable on Bermudan reciprocal enforcement principles.

The appeal and the Court's findings

The Inghams appealed to the Court of Appeal. Having determined that all grounds of appeal had been made out, it restored the Privacy Order.

The Court of Appeal had little truck with the Executors' argument that the Privacy Order should be considered as a method of enforcement of a foreign judgment, describing that notion as "*quite absurd*". The Court found instead that the Privacy Order was no more and no less than a mechanism to put relevant documents from separate proceedings before the Bermuda court. The Guernsey order did not need to be – and was not being - enforced in Bermuda at all.

The argument that the Privacy Order would run contrary to the principles of open justice was also rejected. The Court held that it was clearly in the interest of justice that all relevant documents be put before the judge hearing the relevant application.

Of most interest to trustees and practitioners, however, will be the Court of Appeal's strident views as to the conduct and decision making of the Executors (and by analogy, trustees and other representative parties) when faced with a situation where there is – as was the case in these proceedings – an underlying dispute between beneficiaries. The Court considered that in choosing to challenge the Privacy Order the Executors' actions fell short of their duties. Importantly, the criticism of the Executors was not based on a legal technicality or one-off error, and instead was rooted in their very approach to the matter and their conscious decision to 'descend into the arena', forgoing the neutrality that would have been expected of them.

The Court referred to the well-known case of *Alsop Wilkinson (a firm) v Neary and others* [1995] 1 All ER 431 and specifically Lightman J's categorisation of the types of dispute in which trustees might find themselves, those being a trust dispute, a beneficiaries dispute and a third-party dispute. *Alsop Wilkinson* confirms that in a beneficiaries dispute – which the Court was concerned with here – "*the duty of the trustee is to remain neutral and…offer to submit to the court's directions*".

The Court of Appeal found that the Executors did not do so and instead sought to prefer one class of beneficiaries to another by

deciding for themselves that the claims brought by the Inghams against the Wardmans lacked merit. As stated by Justice Williams, "*That is not their function; they are not the arbiter of that dispute. Rather, they should remain neutral, and follow the directions of the court*". The Court noted that if the Executors' approach was successful it would have the effect of shutting down a claim made by one group of beneficiaries against another. Seen in that light, the Executor's actions appeared to have strayed some way from true neutrality.

The Court of Appeal went further in its criticism of the Executors, however, saying:

"*I have already indicated that in my view the Executors should have followed the course set out in* Alsop Wilkinson v Neary*…*

I regard their conduct in relation to these proceedings exactly as Ms McDonnell [Counsel for the Inghams] *described them; improper and unjustifiable, as well as hostile and potentially governed by self-interest*."

Concluding thoughts

This case serves as an indication of the importance placed by the Court on a trustee acting appropriately when faced with a dispute and is in many ways a "what not to do" guide. In order to be able to act in accordance with their duties a trustee should first identify which category the dispute falls into, and what duties apply, considering the principles laid out in *Alsop Wilkinson v Neary*.

To the extent the dispute can be satisfactorily categorised as a beneficiary dispute, the trustee can and should leave them to it, and take a neutral position. A failure to do so may lead to delay, costs and criticism similar to those detailed in this judgment.

Trustees should also on a continuing basis reflect whether their proposed actions in a dispute can be considered to be truly neutral when looked at objectively. In this case the Court considered that it ought to have been obvious that the Executors' should have been neutral, and that their actions were not. Taking professional advice as to which of the beneficiary parties they should support (as the Executors effectively did here) is contrary to that principle of neutrality, and no defence to its contravention.

Costs were not determined in the judgment due to the existence of a prior *Beddoe* order, which complicated the costs issue. Nevertheless the Court of Appeal's view that absent that *Beddoe* it would have had no hesitation in ordering that the Executors pay the Inghams' costs remains stark.

Practitioners may also welcome the Court of Appeal's pragmatic approach to the making of privacy orders to facilitate justice being done where proceedings have been initiated in different jurisdictions. The alternative view – that documents that are known to be relevant should be precluded from the Court's consideration – is a position that a party (and particularly a trustee) should be cautious in adopting.

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