

Recoverability of trustee expenses

NOVEMBER 2017

In re the Tchenguiz Discretionary Trust, Judgment 49/2017

The Royal Court of Guernsey has handed down its second judgment on costs in relation to the Tchenguiz Discretionary Trust. Although the judgment was handed down in private on 29 June 2017, it has only now been released.

The judgment serves to highlight the significant hurdle to be overcome before a court will deprive a trustee, or another fiduciary, of its right to reimburse itself from the trust for its legal expenses.

The judgment addresses a number of challenges made by various parties (including the current and previous trustees, the protector and the liquidators of four creditor companies of the trust) against each other, all citing unreasonable levels of legal expenses.

It is the sequel to an earlier costs judgment, handed down in November 2015, by which the Court confirmed that the trustees (both former and current), the protector and Advocate Christian Hay (for and on behalf of the minor and unborn beneficiaries) were entitled to an indemnity for their expenses from the trust fund in relation to a large number of applications concerning the trust. The trust was insolvent at the time of those applications.

However, the Court noted that in order to avail themselves of that right, the parties must provide full details of the expenses they are claiming from the trust, which would allow all parties to challenge the nature or amount, if any of them considered such expenses to have been incurred unreasonably.

As directed by the Court, various invoices, billing guides and explanatory notes were exchanged by the parties, and challenges were indeed made by (1) the liquidators, the current trustee and the protector against the former trustee and (2) the liquidators again, against the current trustee and the protector. In essence, the challenges were made on the basis that the amounts claimed were unreasonable (rather than the nature of the work being so).

It therefore fell to the Court to determine whether the challenges should be upheld or dismissed, which is the focus of the latest judgment.

The Court usefully reiterated the guiding principles for determining such challenges, confirming the approach in *Alhamrani v J.P. Morgan Trust Company (Jersey) Limited* [2007] JLR 527 that:

- The onus is on the challenging party to establish that the expenses were either unreasonably incurred or had been incurred in an unreasonable manner; and
- A challenged party will be given the benefit of doubt in any event.

In short: it is a high hurdle to surmount.

In this instance, the hurdle was – save for some limited exceptions – simply too high for the challengers. LB Bailiff Patrick Talbot noted that the challenges were largely arbitrary in nature and were not sufficiently analytical or probative. Because of this, they did not "*show, or even approach showing, clearly that those challenged costs had been unreasonably incurred*". A greater degree of precision was required. The test is not whether the costs are incurred at the right level – it is whether they were reasonably incurred.

That is not to say that all challenges failed. Some costs were ruled as unreasonable. These were costs that were said to be so general as to not be directly referable to any particular application – the parties could not themselves point to what the work related to – and so were disallowed.

Despite this, the vast majority of the parties' challenged costs were preserved, even those where the Court considered the fees to be "*unexpectedly high*". Notwithstanding the Court's view on the level of those particular costs, they were still considered to fall within the "*band of reasonable actions*" identified by Vos J.A. in *Alhamrani* (at paragraph 66 of that judgment)

Take away points:

1. The bar for displacing a trustee's right of indemnity is high, although the court can, and will, rule out expenses that clearly fall outside the parameters of reasonableness (as happened here).
2. The fact that the trust was insolvent at the time – and the parties knew that – should not affect the level of recovery under the indemnity. As noted in the judgment, this fact "*did not require any of the challenged parties either to reduce the degree of attention which they could properly give to the various applications...or to reduce the number of lawyers used by them*".
3. The appointment of English solicitors in relation to Guernsey proceedings, and the resultant fees, are not in and of themselves unreasonable expenses. If the appointment of English legal experts is understandable and appropriate, the Court will generally allow a trustee to be indemnified in respect of such expenses.

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