Jsy/PCT/14162299

Case Summary

Should costs be borne by the income or capital of the Trusts Fund?

Close Trustees (Switzerland) SA v Castro [2008] EWCH 1267 (CH)

Facts

This English law case was an application by Close Trustees (Switzerland) SA and Close Brothers Trust Company (the “**Trustees**”) in respect of a trust where the life tenant was entitled to the income. After the life tenant’s death the capital would be held for the benefit of her children. The life tenant was seeking damages and compensation from both the investment management companies and the Trustees and Protector for losses in respect of the performance of investments held in the trust through the Californian Courts. The Trustees sought the approval of the Court for the retention of a proportion of the income which would otherwise be paid out to the life tenant to ensure that funds were available to reimburse the Trustees’ legal costs. The case did not consider whether the Trustees were entitled to be reimbursed for their legal costs as this would depend upon the outcome of the Californian case, but just whether the retention was permissible given the effect that this would have on the life tenant’s income.

The life tenant had what were described as “considerable” income requirements during that time period and the retention would reduce her income from the trust considerably. The Trustees argued that as the only claimant in the proceedings was the life tenant then any costs should be borne by the income and not the capital. The life tenant argued that the costs of legal proceedings should be borne by the capital.

Decision

In this case, the Court held there was no conflict of interest as the Trustees were not seeking to make the retention in order to prevent the claimant bringing the claim. The case in California was being funded on a contingency basis and therefore the claimant was not relying on her income from the Trust to bring the claim. The question was whether the retention should be from income or capital and this was a matter between the life tenant and the capital beneficiaries and the Trustees did not have a conflict of interest in this matter.

The Court confirmed that where trustees had actual or contingent liabilities which might be payable out of the Trust Fund then such trustees have power to retain the income or capital by way of retention to ensure that such funds to reimburse the Trustees would be available.

The starting point was that the costs of Court proceedings incurred for the benefit of the trust as a whole should normally be taken from the capital. However, the Trustees must also ensure equity between the beneficiaries which could in some circumstances justify the costs being borne by the income. There is no general rule that if a life tenant makes an unsuccessful claim that the trustees’ costs should be borne from the income and therefore by that life tenant. In such cases trustees needed also to consider where the benefit of the action fell. In this case the Court held that if the claim was successful then any damages payable by the investment management companies would be received by the Trustees for the benefit of the Trust Fund as a whole and therefore would be to the advantage of both the life tenant and the capital beneficiaries. Although the Trustees could take into account that there should be a greater burden on those beneficiaries who supported the litigation, this should not be the sole criterion.

Therefore, the Trustees were held not to have made their case for a retention solely from the income.

Comment

- This is an interesting case that confirms the starting point for the costs of litigation is that they should be taken from the capital. However, trustees do have discretion to pay such costs from income if this would be equitable. Trustees should not, however, just assume that a beneficiary who brings an unsuccessful claim should bear the costs from his or her share. This case did not consider the circumstances where trustees may recover the costs of litigation.

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