Neutral Citation Number: [2022] EWHC 755 (Ch)

Case No: PT-2021-000683

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 8/4/2022

Before:

MASTER CLARK

- -

Between:

(1) NICHOLAS JOHN WALTER PARSONS
(2) MARK ROWLEY HILL **Claimants**
(as trustees of the will trusts of WILLIAM FRASER REID)

- and -

(1) STEPHEN PAUL REID
(2) JUDITH CAROLINE SHAW **Defendants**

- -
- -

Sarah Haren QC (instructed by **Sewell Mullins Logie**) for the **Claimants**
Oliver Hilton (instructed by **Edwin Coe LLP**) for the **First Defendant**
Jordan Holland (instructed by **Billy Hughes & Co. Solicitors**) for the **Second Defendant**

Hearing date: 17 February 2022

- -

Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 8 April 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This judgment deals with two points of principle which arose in the directions hearing in this claim:
   (1) whether the court has jurisdiction under CPR Pt 64 to make a so-called "put up or shut up order" in respect of an intimated breach of trust claim;
   (2) if so, the nature of that jurisdiction, and, in particular, what disclosure and further information should be ordered.

Parties and the claim

2. William ("Bill") Reid died on 20 March 2018, leaving a will dated 20 December 2004 and codicil dated 8 February 2012 (together "the Will"). The claimants, Nicholas Parsons and Mark Hill (respectively the deceased's solicitor and land agent) are the executors and trustees appointed under the Will, but take no interest under it.

3. The defendants, Stephen Reid and Judith Shaw, are the deceased's children. For convenience and without intending any disrespect, I refer to them by their first names.

4. The principal asset of the estate was a farm, Swillbrook Farm, Minety, Malmesbury, Wiltshire SN16 9GA ("the Farm"). Under the Will, the deceased's residuary estate was left on full discretionary trusts for classes including his children and grandchildren. The net value of the estate is about £3.4 million.

5. On 28 July 2016 the deceased made a Memorandum of Wishes ("the letter of wishes"). This expressed the wish that payments be made to Stephen reflecting various moral and financial obligations owed by the deceased to him, and then that his residuary estate was divided as to 60% for Stephen and 40 % for Judith.

6. Probate was granted to the claimants on 11 March 2019. A sale of the Farm for £4.3 million was agreed in October 2019. The claimants then began considering how the estate should be distributed when the time came, by reference to the letter of wishes. On 19 November 2019, Stephen provided the claimants with 4 schedules (marked A to D), setting out the sums he said should be paid to him, totalling £951,684. These were a mixture of legal liabilities and loans, and payments reflecting the deceased's moral obligations to Stephen as set out in the letter of wishes.

7. The claimants did not accept all the sums claimed by Stephen. On 27 November 2019 they wrote to him setting out the payments they proposed to make to him before any distributions between him and Judith. These totalled £472,008.

8. At some point Stephen sent his schedules to Judith. On 9 December 2019, Judith emailed Stephen expressing concern about them, and continuing:

> "I am therefore going to except (*sic*) it is in the hands of the Trustees and executors. If they feel these costs are reasonable then I will take their advice.
>
> However, I do feel that when you put your case to Dad to convince him that it was fair that you receive 20% more of his Estate than I then surely many of those issues were taken into account by him and you are therefore potentially doubling up.
> …

If the sale of the Farm is held up as a consequence of me not signing something I don't want to, then so be it."

9. On 11 December 2019, Judith also wrote to the claimants about the schedules. They replied the following day stating that they had not made any decisions as to the payments to be made to Stephen, but that they would not need to seek her agreement to such decisions. Judith's response was "Thank you for your email which has cleared up my queries".

10. By a deed of appointment dated 3 January 2020 ("the Deed of Appointment"), the claimants appointed £600,965 to Stephen and the remainder of the residuary estate as to 60% to Stephen and 40% to Judith.

11. The sale of the Farm completed for the sum of £4.22 million on 20 March 2020. On the same day, in response to an email query from Judith, the claimants sent her a breakdown of the £600,965 appointed to Stephen, including those amounts which they had decided not to include. Interim distributions were then made in April/May 2020: £1.35m to Stephen, £700,000 to Judith.

12. There were further smaller interim distributions in September: £252,000 to Stephen and £140,000 to Judith. The balance now held by the claimants pending distribution is about £455,000.

13. Judith's solicitors wrote formally on 22 September 2020 complaining about "the nature and level of the costs and expenses" claimed by Stephen and the claimants, and seeking an undertaking by the claimants not to distribute the estate.

14. This was followed on 1 October 2020 by an extensive request, said to be under CPR 31.16 alternatively CPR 31.17, for disclosure by Stephen in relation to the schedules. No application seeking this disclosure has been made.

15. On 6 November 2020, the claimants' solicitors set out their position to both sides, including that:
    (1) the claimants were under no obligation to consult either party regarding the exercise of their discretion;
    (2) Judith had indicated in her email of 11 December 2019 that she was content with the items claimed by Stephen in schedules A, B and C, but was only content with schedule D if the claimants considered them to be legitimate costs;
    (3) the claimants had exercised their discretion to reach a decision which was reflected in the Deed of Appointment;
    (4) the matter was therefore concluded;
    (5) if the parties could not reach agreement, the claimants would need to apply to court for permission to distribute the remainder of the trust fund.

16. On 10 December 2020, Judith's solicitors wrote a 13 page letter of claim setting out that Judith did not accept the propriety of what trustees had done. There matters have effectively stalled. Judith has not withdrawn her challenge, but has not issued a claim. The trustees are therefore left holding a substantial fund, with the threat that if they pay it out, and Judith brought a claim, it could be held that they had paid it out under a defective or invalid deed of appointment.

17. The claim was commenced by Part 8 claim form on 4 August 2021. The details of claim state that the claimants seek the court's directions that they may:

> "distribute the funds retained by them pursuant to the terms of the Deed of Appointment without being at risk of any later challenge to its validity or propriety"

18. The formal relief sought is

> "An order that they may distribute the funds retained by them pursuant to the Deed of Appointment dated 3 January 2020."

19. The parties are at issue as to the nature of the claim and consequentially as to the directions to be made in it, particularly as to disclosure, further information and the length of the trial.

Judith's position

20. Judith's position is that the application is of the type made by trustees in relation to the exercise of powers vested in them, the four categories (often overlapping) of application having been identified by Walker J in the judgment quoted by Hart J at p922 of *Public Trustee v Cooper* [2001] WTLR 901:

    (1) An application to determine whether an action is within the trustees' powers (which is ultimately a question of construction of the trust instrument, statute or both).

    (2) An application to determine whether a proposed course of action is a proper exercise of the trustees' discretion where there is no real doubt as to the scope of the trustees' powers (known as a "*blessing application*"). In this category, the trustees are not surrendering their discretion to the court.

    (3) An application where the trustees surrender their discretion to as to whether and how to exercise a power to the court. If the surrender is accepted then the court will exercise the power instead of the trustees.

    (4) Hostile litigation brought by a beneficiary seeking to attack the exercise of the trustees' discretion.

21. Judith's counsel submitted that the claimant's application was clearly an application under category (2) of *Public Trustee v Cooper*. As such, it would, he said, have the effect of extinguishing Judith's right to challenge the decision in question.

22. The consequence of this is, he submitted, that the claimants are under a duty of full and frank disclosure to provide to the court all relevant facts and documents (see *Tamlin v Edgar* at 25, set out below) and should disclose all documents which they have or ought to have which are materially relevant to their decision: referring to *A and B Trusts* [2007 JLR 444] at 22 and *Thomessen v Butterfield Trust (Guernsey) Limited* [2009-10 GLR 102] at 16.

23. The draft directions proposed by Judith reflect the proposed examination of the basis and reasons for the claimants' decision in the Deed of Appointment. They include:
    (1) disclosure of documents "which are materially relevant to the Claimants' decision to execute the Deed of Appointment and/or to distribute the funds held by them on the trusts of the Will Trusts in accordance with the Deed of Appointment";
    (2) witness statements by the claimants "setting out and confirming all of the considerations which the Claimants took into account in reaching the decision to execute the Deed of Appointment and/or to distribute the funds held by them on the Will Trusts in accordance with the Deed of Appointment and the reasons for the Claimants' said decision(s)";
    (3) a 3 day trial (including ½ day judicial pre-reading).

Claimants' position

24. The claimants' position is that their application is not an application for a blessing. They do not seek the court's approval of their decision effected by the Deed of Appointment. The disclosure and further witness evidence proposed by Judith are not therefore, they say, to be ordered on the basis that the claimants are seeking a blessing of their decision.

25. As to the relief sought by the claimants, their position seems to me to be unanswerable. It is for a claimant to decide what relief they are seeking from the court and the basis on which it is sought.

26. What then is the basis of the claimants' application? It is explained in the following terms in the second witness statement of the first claimant, Mr Parsons at para 9:

> "The dilemma for the trustees is that they have beneficiaries who maintain that they should act in completely different ways. Furthermore, what the trustees are not prepared to countenance is that they distribute the whole estate but are then faced with a claim for breach of duty by Judith. What we need to know is whether we may distribute now on the basis of the deed of appointment, without the risk of a later challenge by Judith that the exercise of the powers in that deed (of which she has known for over 18 months) was a breach of duty. I do not think it is unreasonable that Judith should decide now whether she proposes to bring a claim in respect of the appointment, and if she does not that the trustees have the comfort of knowing that she will not bring a claim when they no longer have any part of the fund to which she lays claim. Contrary to what Judith's witness statement suggests, **I am advised that it is perfectly orthodox for a court to direct a fiduciary to act on the basis that a claim which has been alleged, but not brought, will not in fact be made and for the fiduciary to be protected from distributing on that footing.** … Alternatively, if the court directs that funds should be retained pending some possible future challenge by Judith then it will be clear to Stephen that it is not appropriate for the trustees to distribute and that the trustees should retain the fund and to exercise their lien over the trust property notwithstanding the appointment."
> (emphasis added)

27. This would appear to be a reference to the court's power to make an order analogous to the form of order in *Re Benjamin* [1902] 1 Ch 723, in which executors were authorised to distribute the estate on the footing that a given person, who had not been heard of for some years, was unmarried and had not survived the testator.

28. Helpful guidance is found in *Lewin on Trusts* (20th edn) as to the nature of this jurisdiction, at paras 39-032 to 39-033:

> "A Benjamin order is useful where there is doubt as to the existence, or the continued existence, of a person who, if alive, would be prejudiced by a distribution on the proposed footing.
> …
> It has been said that the power to make a Benjamin order is not apt where the trustees are faced with a claim to a beneficial interest which the claimant fails to pursue. The reason is that a Benjamin order caters for a case in which it is impossible or impracticable to establish a fact one way or the other; but if there is a claimant who has made a claim, the claim undoubtedly exists and it is in principle possible to decide it in such a way as to bind the claimant. Nonetheless, the court has jurisdiction to authorise trustees to distribute without regard to such a claim, by analogy to its jurisdiction to authorise a distribution despite an adverse claim to the trust assets from a third party, and will exercise it **where there is reason to think that the claim is insubstantial.**"
> (emphasis added)

29. The jurisdiction referred to as respects third party claimants was exercised in *Re MF Global UK Ltd (In Special Administration)* [2013] EWHC 1655 (Ch) [2013] 1 W.L.R. 3874, and *Finers v Miro* [1991] 1 W.L.R. 35, [1991] 1 All E.R. 182.

30. The claimants' counsel did not refer me to any decision in which this principle was applied to a beneficiary complaining about a decision by trustees. She relied however upon the exercise of the court's inherent jurisdiction discussed in *Sherman v Fitzhugh Gates (a firm)* [2003] EWCA Civ 886; [2003] P.N.L.R. 39, at [57]:

> "There is no statutory time-limit for proceedings to challenge the validity of a will. It seems that an action may be struck out if there has been unreasonable delay, but the cases offer little guidance as to what this means in practice (see *Williams* op cit para.35–03; *Re Flynn* [1982] 1 W.L.R. 310), or as to what directions the court can give. This subject was not explored in detail in the submissions before us. The powers of the court to control abuse and delay have been strengthened by the new Civil Procedure Rules. However, even before those changes, the court's powers of direction under the old RSC Ord.85 (administration actions) were very wide. I see no reason why they could not have been used to impose a time-limit on a potential challenge to the probate—in effect a direction to "put up or shut up"—following which the executor would be free to distribute under the will."

31. Sherman was applied in *Cobden-Ramsay v Sutton* [2009] WTLR 1303, in which the validity of a codicil was questioned on the grounds of capacity by the defendant. The claimant had no personal interest in the estate, and wished to distribute two pecuniary legacies provided for by the codicil. The claimant had made available to the defendant all material that was believed to be relevant to the issue of capacity. However, the defendant refused to bring a claim to revoke the grant of probate, and insisted that the claimant bring a claim to prove the codicil's validity. The court (Deputy Master Behrens)

made an order that the claimant might distribute the estate in accordance with (the will and) codicil unless the defendant issued a claim within 28 days.

32. The claimants' position is that, 2 years having elapsed since the Deed of Appointment, Judith has had every opportunity to challenge it; and in the absence of a challenge the court should grant the trustees permission to distribute without allowing Judith any further time to bring her challenge. If the court is willing to allow Judith to bring a challenge, this should, she contends, be brought by Part 7 claim form with pleaded particulars and a time limit for bringing the claim should be imposed.

33. Stephen supported the claimants in their submissions that the order sought (and which it would be appropriate to make at the final hearing) was a put up or shut up order, in which a defined time limit should be imposed on Judith to bring a claim. His position, however, is that, given the costs already incurred, it would be more efficient for any claim to be brought within this claim, as a counterclaim.

34. The practical effect of the order sought would be that Judith was prevented from bringing a claim against the claimants (though not against Stephen) even though the limitation period for such a claim will not expire for some time.

Background legal principles

35. By way of context to the issues arising, the following principles are well established and were common ground between the parties:

36. First, trustees exercising a discretion are not in general required to disclose their reasons for taking a particular decision, or to disclose or allow inspection of documents disclosing the reasons for exercising a power or a discretion in a particular way: *Re Londonderry's Settlement* [1965] Ch.918; *Schmidt v Rosewood Trust Limited* [2003] UKPC 26, [2003] AC 709; *Lewin* para 21-051.

37. Secondly, if trustees apply for a blessing, then they must give full disclosure of all relevant matters, as explained by Sir Andrew Morritt C in *Tamlin v Edgar* [2011] EWHC 3949 (Ch) at [25]:

> "The very fact that the decision of the trustees is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees. It is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose such as might engage the doctrine misleadingly called a fraud on the power. They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires the full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such."

Before giving its approval, the court must therefore be satisfied that the trustees have not taken into account irrelevant considerations or failed to take into account any relevant considerations: e.g. *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch).

38. Thirdly, if the trustees' exercise of a discretionary power is challenged, either in a breach of trust claim (or, less usually, in an application under Part 64), then the trustees will be required to give disclosure as to the validity of their reasons, and under CPR Part 18 information about those reasons; and can be cross-examined at trial about them: see *Lewin*, para 21-110.

Discussion and conclusions

39. In this context, I turn to consider the principles which the court would apply in determining the claimants' application. First, it seems to me, the court would have to consider whether the claim was insubstantial, remote or speculative. This would involve considering its merits and therefore all the available material relevant to those merits, including documents and information held by the trustees. In *Cobden-Ramsay*, as noted above, the executor had provided the defendant with all material relevant to the testator's capacity. I do not therefore accept the claimants' counsel's submissions that it would be sufficient for the court to consider whether Judith had been able to articulate her claim in a letter before claim, thereby obviating the need for disclosure. Indeed, if the letter of claim puts forward a substantial case, that would, in my judgment, be a factor in favour of ordering disclosure by the claimants.

40. Secondly, in my judgment, the court would require to be satisfied that it was fully informed before making the order sought, because it would extinguish the trustees' liability. Judith's counsel submitted (in the alternative) that because the order would have this draconian effect, Judith should be in no worse position as regards disclosure than if the claimants were seeking a blessing (with similar effect). I accept that submission. Full disclosure is the price to be paid by the claimants for the exoneration they seek. This conclusion is supported by the discussion in *Lewin* at 24-033(3) dealing with applications for leave to distribute notwithstanding a claim or possible claim by a third party: in such an application the trustee will be protected by the court's directions, if (and only if) s/he has made full disclosure to the court.

Conclusion

41. I conclude therefore that it is necessary for the fair determination of this claim for the disclosure and witness evidence proposed by the second defendant to be ordered. The duration of the trial will also need to reflect the consideration by the court of the merits of Judith's intimated claim.