Neutral Citation Number: [2023] EWHC 838 (Ch)

Case No: PT-2018-000391

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

Rolls Building
7 Fetter Lane
London EC4A 1NL

Date: 17 April 2023

Before:

MR JUSTICE ZACAROLI

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Between:

H.M. ATTORNEY GENERAL **Claimant**

- and –

ZEDRA FIDUCIARY SERVICES (UK) LIMITED **Defendant**

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William Henderson (instructed by **Government Legal Department**) for the **Claimant**
Robert Pearce KC and Daniel Burton (instructed by **Macfarlanes LLP**) for the **Defendant**

Hearing date: 4 April 2023

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JUDGMENT

Mr Justice Zacaroli:

Introduction

1. In a judgment handed down on 21 January 2022 ([2022] EWHC 65 (Ch)), I directed that the charitable trust fund referred to as the "National Fund" be applied cy-près by being transferred to the National Debt Commissioners, as opposed to the scheme proposed by the defendant trustee (the "Trustee"). The background to this case is fully described in that judgment.

2. The Trustee sought permission to appeal, which I refused for reasons contained in a judgment dated 19 December 2022 ([2022] EWCH 3357 (Ch)).

3. The Trustee now makes an application for directions as to whether it should apply for permission to appeal to the Court of Appeal, and as to whether it is entitled to be indemnified out of the trust assets in respect of that application and any subsequent appeal. The Trustee has made it clear that it will pursue an application for permission to appeal only if it is entitled to be so indemnified.

The Law

4. In proceedings concerning the administration of a trust, a trustee should ordinarily accept the decision of the court at first instance, so that if it chooses to appeal it does so at its own risk as to costs. There is, however, no inflexible rule to that effect, and if the court is satisfied that the trustee is acting in the interests of the trust as a whole, then the trustee is entitled to be indemnified in respect of its costs of the appeal and any adverse costs: Lewin on Trusts, 20th ed., at §48-048. The paradigm example of such an appeal would be where the decision under appeal created significant uncertainty as to the operation of the trust.

5. The authorities on this point were reviewed by Arnold J in *Airways Pension Scheme Trustee Ltd v Fielder* [2018] EWHC 29 (Ch), at §42-76. At §76, he said that he did not wish to cast doubt on the proposition that, in most cases, the trustee should accept the decision at first instance, but noted that where the appeal would be in the interests of the trust as a whole, the trustee ought not to be deterred from appealing by the risk of an adverse costs order.

6. The skeleton arguments in relation to this application contained detailed arguments as to whether the Trustee was surrendering its discretion to the Court, or asking the Court to review the decision it had already reached that it was in the interests of the trust. Since Mr Pearce KC, who appears for the Trustee, accepted that this was merely another potential route to arrive at the question Arnold J identified as the pertinent question in *Fielder*, it is unnecessary to address these arguments.

7. Mr Pearce nevertheless submitted that a relevant factor to take into account is that the Trustee has itself decided that it is in the interest of the trust to pursue an appeal. I reject that submission. The question whether it is in the interests of the trust to pursue an appeal is one for the Court. In reaching its decision

the Court is assisted by submissions from the Trustee, but the fact that the Trustee has formed its own view that an appeal would be in the interests of the trust is in my judgment neither here nor there.

8. It is therefore unnecessary to consider the various arguments advanced on behalf of the Trustee and the Attorney-General as to whether – if I was being asked to review the Trustee's decision, or if it was relevant to take into account the fact that the Trustee had reached the view that an appeal was in the interests of the trust – I should discount the Trustee's decision because of its conflict of interest (arising from the fact that it currently earns a not insubstantial amount by way of fees from administering the National Fund, and from the fact that it would stand to benefit in a similar way, if only indirectly, from its proposed scheme).

Application to the facts of this case

9. In the case of a private trust, with identifiable beneficiaries, it is likely to be relatively straightforward to determine whether a proposed course of action is in the interests of the trust. While each case turns on its own facts, the reasons given by Arnold J why it was in the interest of the trustee in that case to pursue an appeal to the Supreme Court provide some guidance as to what might be meant by the interests of the trust. He identified a number of factors. First, the appeal had real prospects of success (where the Court of Appeal differed from the first instance judge, and was itself split 2:1). Second, success on appeal would benefit the vast majority by value of the scheme members, in excess of 90% of whom stood to benefit from a successful appeal; moreover, that success would not come at the expense of other beneficiaries of the scheme. Third, the amount in issue was significant. Fourth, Arnold J considered that the decision of the majority in the Court of Appeal did not make clear the limits on the trustee's power of amendment, and it was reasonable to believe that the Supreme Court would provide greater clarity. Fifth, the trustee was realistically the only party capable of appealing, having conducted the litigation for five years. Sixth, the proceedings were initiated and pursued to the Court of Appeal by BA for its own commercial interests. Seventh, a recent settlement proposal from BA favoured pursuit of an appeal.

10. Where the trust is a charitable trust, however, it is rather more difficult, particularly where the question is whether to appeal a decision which starts from the (unappealable) premise that the original purposes have failed so that the trust assets have to be applied cy-près.

11. I agree with Mr Pearce that the interests of the trust cannot be equated with the interests of the particular charity established by the original trust, because that trust has failed. I also accept that they cannot be equated with the interests of the charity as defined by the cy-près scheme ordered by the Court, because it would by definition never be in the interests of the charity, in that sense, to appeal the decision which determined that the funds should be applied in accordance with that scheme.

12. In my judgment, in these circumstances the interests of the trust are to be equated with the interests of charity in a more general sense, encompassing the range of possible charitable purposes for which the National Fund might have been applied cy-près.

13. Mr Pearce submitted that it is in the interests of the charity here "that its new purposes should be correctly determined". He also submitted that the public interest comes into play in considering what directions should be given on a *Beddoe* application involving a charity, and that there is a public interest in the correct determination of the new purposes of the National Fund.

14. In his oral submissions he presented eight reasons why an appeal would be in the interests of the trust: (1) the Trustee is the proper party to appeal and the only person able to do so; (2) the issue is important because it involves the application of approximately £500 million of trust assets; (3) the Trustee has decided that it is in the interests of the trust to appeal; (4) there is at least a real prospect of persuading a single Lord Justice in the Court of Appeal to grant permission to appeal; (5) whenever a party seeks to appeal a first instance decision, as a matter of process the wrong place to stop would be after having been refused permission by the first instance judge; (6) the costs of an appeal would involve an extremely small portion of the trust's funds (worth the equivalent of two or three days' interest on the fund); (7) an appeal would not take up a disproportionate amount of court resources; and (8) public interest comes into play on a *Beddoe* application involving a charity and there is a public interest in the correct determination of the National Fund.

15. I do not see any relevance in the first, third, fifth and seventh reasons to the question I have to decide.

16. I accept that the second reason (the large amount of money at stake) and the sixth reason (the relatively small cost of an appeal) might point in favour of permitting the trust funds to be used for an appeal if that appeal is otherwise in the interests of the trust, but I do not think that they point, in themselves, to an appeal being in the interests of the trust.

17. As to the fourth reason (the merits), I also do not consider this carries any weight, at least in the circumstances of this case. Mr Pearce rested his argument on the proposition that it was enough to say that the relatively low hurdle for permission to appeal – i.e. that there was a real prospect of success of an appeal – was overcome. In my view, however, that is just a necessary starting point, but no more. To put it another way, it would plainly not be in the interests of the trust to pursue an appeal which had no real prospects of success. The relevance of the merits of an appeal might be different if it was being said that they were particularly strong.

18. I have of course already concluded, in refusing permission to appeal, that in my view an appeal would have no real prospect of success. The question I now have to consider, however, is whether there is a real prospect of the Trustee persuading a single Lord Justice of Appeal that there is a real prospect of success on the appeal. That is a relatively low hurdle, to which I return below.

19. As to the eighth reason (public interest), I do not think this adds anything material to the other points.

20. Taking those eight points together, I am not persuaded that they suggest that it would be in the interests of the National Fund to pursue an appeal. That would certainly be the case if an appeal was being pursued in order to persuade the Court of Appeal simply that it would be preferable that the National Fund was applied pursuant to a different scheme to the one I have ordered. In my judgment, once it is ordered that the funds of a charitable trust whose purposes have failed are applied pursuant to some other charitable purpose, it is not in the interests of charity – in the sense I have described it at paragraph 12 above – to use the charity's funds to try and persuade the Court of Appeal that they should be applied in favour of some other charitable purpose.

21. Mr Pearce developed, however, a different point in the course of the hearing. This was to the effect that my decision is one which is wrong (and one which no judge could reasonably have come to) because it requires the National Fund to be applied for a purpose which – while still charitable – produces no practical benefit. The scheme therefore fails the test in s.67(3)(c) of the Charities Act 2011 ("the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances"). If that is right, he submitted that it is then in the interests of the trust (in the broader interest I have identified above) to correct the position so as to ensure that the funds are applied in a way which does produce a practical benefit.

22. I accept that the interests of charity would be engaged if it is sufficiently arguable that the current scheme fails to satisfy the test in s.67(3)(c). The fact that this was not satisfied would itself be a reason to trigger the need for a further application of the funds cy-près under s.62(e)(iii) of the Charities Act 2011.

23. I have, in reaching this view, noted Mr Henderson's submission to the effect that it is primarily for the Attorney-General, who represents the totality of the beneficial interest or objects of the trust, to decide whether an appeal is in the interests of the trust, and that she has concluded that expenditure of the trust's funds on an appeal would not be in the interests of charity or the public. While the Attorney-General's views are undoubtedly a factor to weigh in the balance, however, the decision is ultimately one for the Court.

24. For reasons I have already set out in previous judgments, I do not accept that the application of the National Fund in reduction of the National Debt produces no practical benefit. Moreover, as noted above, I have concluded that there is no real prospect of an appeal in that respect. I nevertheless accept that there is at least a prospect of the Trustee persuading a single Lord Justice of Appeal to take a different view. I bear in mind in this regard that the Trustee has the benefit of advice from eminent and experienced Leading Counsel that an appeal would have a real prospect of success.

25. Accordingly, I accept that it would be in the interests of the trust to seek permission to appeal from the Court of Appeal. As to the position thereafter, it would follow – if permission to appeal is granted on that ground by the Court of Appeal – that for the same reason it would be in the interests of the trust for the matter to be pursued to a full appeal.

26. At the hearing, I canvassed the possibility of limiting the permission to use the trust funds to the application only for permission to appeal, with a requirement that further consideration be given to using the trust funds to pursue a full appeal in light of the Court of Appeal's decision on permission. The reason for doing so was that the Trustee has drafted numerous grounds of appeal, whereas my conclusion that an appeal might be in the interests of the trust is based on the narrower, more focused arguments presented during the hearing by Mr Pearce. Mr Henderson, who appeared for the Attorney-general, however, submitted that I should deal now with both stages, as to do otherwise would be likely to lead to yet further costs being incurred. In view of the very large sums already spent by the Trustee on this application to date I accept that submission. Accordingly, I grant permission to use the trust funds to pursue both the application for permission to appeal and, if permission is granted, the appeal itself.

27. In these circumstances, I need not address the Attorney-General's other contention, which was that I should direct the Trustee *not* to pursue an appeal.

28. I am not, however, prepared to permit the use of trust funds in this way without limitation. I accept that the Trustee and its advisors are acting properly, and will continue to do so, and that the Attorney-General could object to sums being spent which she considers unreasonable, and bring the matter back before the Court if necessary. I also accept that the amount proposed to be spent on the appeal is small in the context of the size of the National Fund. I am concerned, however, that the amount proposed to be spent – in absolute terms – is high, particularly in view of the amount that has already been spent in relation to a proposed appeal.

29. The total amount which the Trustee proposes to spend on the application for permission to appeal is just short of £80,000. Of that, just over £27,000 has already been incurred. A further sum in excess of £86,000 is sought in relation to the appeal itself. That is in circumstances where the Trustee has already spent over £180,000 in connection with this application, and the other work that has already been undertaken in relation to the potential appeal.

30. Counsel for the Trustee have already drafted initial and detailed grounds of appeal, a skeleton argument in support of the application to me for permission to appeal, a further revised, detailed grounds of appeal taking account of my reasons for refusing permission to appeal, and two written opinions on the merits of an appeal. Mr Pearce acknowledged that in view of the work that has already been done, all that remains to be done in support of the application for permission to appeal to the Court of Appeal is a further skeleton argument (it being the practice of the Court of Appeal to deal with applications on paper). Given all of the work that has already been done in formulating

grounds of appeal and advising on merits, I consider that the remaining work is relatively limited in scope.

31. Accordingly, I will give permission to use the trust funds for the purpose of pursuing an application for permission to appeal, but limited to a <u>further</u> sum of £25,000 which is more than adequate for the purpose of drafting a skeleton argument (and would still mean that more than £52,000 had been incurred on the application for permission to appeal in total). I do not propose, however, to place a cap on the amount which may be incurred on the appeal itself. Much may depend on the extent to which, and grounds upon which, permission is granted by the Court of Appeal.