



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 116 OF 2024 (IKJ)

**IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION)
AND IN THE MATTER OF GCR ORDER 85, RULE 8
AND IN THE MATTER OF A TRUST IN FAVOUR OF KAZUKO LORENZ AND ALEXANDER
LORENZ**

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Guy Dilliway-Parry for Priestleys Attorneys at Law (the “Applicant”)

Heard: On the papers

Date of Decision: 24 April 2024

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Trusts law-funds held in trust by attorneys pending determination of matrimonial property adjustment dispute-protracted delay in resolution of dispute-application for directions as to whether attorneys able to pay monies into court-whether service of application required-right to indemnity- Trusts Act (2021 Revision), sections 48, 69-Grand Court Rules, Order 85 rule 8

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REASONS FOR DECISION

1. The present case illustrates how the supervisory jurisdiction of this Court over trusts can be conveniently applied to relieve a lawyer who merely acted for a party to matrimonial proceedings in relation to the sale of matrimonial property from the burden of continuing to hold and manage the proceeds of sale. On 24 April 2024, I granted the Applicant an Order in the following terms:

“1. Service of the Application is not required;

2. The Trustee shall pay the net Trust funds into Court pursuant to Section 69 of the Trusts Act;

3. The Trustee be and hereby is released from its undertakings given pursuant to a letter from the Trustee to Solomon Harris dated 2 April 2019 (“Undertakings”);

4. The Trustee be indemnified out of the assets of the Trust in respect of its costs of the Originating Summons pursuant to Section 47 of the Trusts Act.”

2. These are the reasons for that decision.

The Applicant’s dilemma

3. The application was commenced by an Originating Application dated 11 April 2024 supported by an Affidavit sworn by Sally Crane on the same date and Written Submissions. The dilemma faced by the Applicant can be sufficiently described quite briefly.
4. In January 2019 they were instructed to act for Ms Lorenz in connection with sale of a property she owned jointly with Mr Lorenz. Divorce proceedings were pending, and a dispute arose as to the distribution of the net proceeds of sale. On 2 April 2019, just over 5 years before the present application was made, the Applicant wrote a letter to Mr Lorenz’s Cayman Islands attorneys, Solomon Harris, undertaking to hold US\$500,000 (the “Fund”) *“strictly on trust for the benefit of Our Client and Your Client”* until carefully defined *“Instructions”* were received from each party for the disbursements of the monies.
5. The Applicant initiated attempts in December 2023 to bring matters to a conclusion, by which time it appeared that all that was required was a joint instruction signed by both parties as to the disbursement of the funds. It was indicated that the matter would have to be placed before this Court if appropriate instructions were not received within a reasonable time.

6. With no clear end in sight, the Applicant filed the Originating Application and ultimately sought permission to pay the Fund into Court following an administrative hearing which dispensed with the need to serve Mr and Mrs Lorenz (the “Beneficiaries”).

The jurisdiction invoked

7. The primary substantive jurisdiction the Applicant intended to ultimately engage was the power conferred by section 69 of the Trusts Act (2021 Revision) (the “Act”), which pivotally provides:

“(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into Court; and the same shall, subject to rules of court, be dealt with according to the order of the Court.

“(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court...”

8. However, the Applicant sought guidance from the Court as to whether, and if so on what terms, it could or should pay the Fund into Court under section 48 of the Act:

“Application to the Court for advice and directions

48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person’s own responsibility, to have discharged that person’s duty as such trustee or personal representative in the subject matter of the said application:

Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court.”

9. At first blush it seemed somewhat odd for a provision typically invoked by professional trustees to be relied upon by a law firm holding trust money pursuant to a mere undertaking. However, the undertaking letter by its terms created an express trust and if that was not effective in law, section 2 of the Act provides that *“the expressions ‘trust’ and ‘trustee’ extend to implied and constructive trusts, to cases where the trustee has a beneficial interest in the trust property and to the duties incident to the office of a personal representative”*. The existence of the requisite jurisdiction to

approve the payment into Court decision the Applicant had made did not appear to me to be subject to any doubt.

Did the application need to be served?

10. Mr Dilliway-Parry commended the following matters to the Court:

- (a) the Originating Application had already been provided by email and hand delivery to Mr Lorenz' Cayman attorneys (Bedell Cristin) and by email to Mrs Lorenz' last known email address;
- (b) section 48 of the Act only required service of applications on interested parties to the extent "*the Court shall think expedient*";
- (c) GCR Order 85 rule 8 provides for section 48 applications to be *ex parte* in the first instance;
- (d) The fee for filing under rule 8 was \$200 compared with \$5000 for a summons under rule 2; and
- (e) Each of the Beneficiaries was at unknown overseas addresses, which would give rise to personal service difficulties and potentially engage Order 11.

11. Order 85 provides so far as is material:

"8. (1) An application by an executor, administrator, trustee or enforcer under Section 48 of the Trusts Act (as revised and amended) for the opinion, advice or direction of the Court upon any question respecting the management or administration of the estate or trust fund may be made by written submission without any oral hearing.

(2) An application under this rule shall be made by ex parte originating application in Form No. 57 of the Grand Court Rules – Volume II.

(3) An application under this rule shall be supported by a written submission signed by the applicant's attorney which shall —

(a) explain why the application is not made under rule 2 and served in accordance with rule 3;

(b) define the question in respect of which the Court's opinion, advice or direction is sought;

(c) identify and discuss all matters of law which are material to the application; and

(d) give a full and frank disclosure of all facts material to the application...."

12. Order 85 rule 8 appeared to me to be elegantly designed for cases such as the present application to avoid the wasteful depletion of trust funds through disproportionate proceedings. Here, the
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Applicant was seeking a cost-effective route to bringing its trusteeship, which ought to have been terminated years ago, to an expeditious end. The interests of the Beneficiaries would not be affected by payment into Court. Their failure to forward instructions to enable the Fund to be paid out to them made it obvious that, in circumstances where they were already on notice of the application, no practical benefit would be achieved by requiring formal service. Their financial interests would only be prejudiced by compelling the Applicant to increase the size of its claim to an indemnity out of the Fund by increasing the costs of the present proceedings.

13. Further and in any event, section 48 itself confers a discretionary power on the Court to determine when service is required and upon whom. The present case was a paradigm example of circumstances in which service ought not to be required because, it being clear that the beneficiaries could not agree on the distribution of the Fund, that they were in no position to validly oppose the ultimate action the Applicant proposed to take.
14. One of the overarching imperatives of trust law is advancing the best interests of the beneficiaries. The Applicant was most commendably proceeding in a way designed to protect those interests rather than proceeding in a clunky and formalistic manner which would only serve to needlessly deplete the Fund. It was clearly appropriate to make no directions for further notice to be given to the Beneficiaries, or for formal service to be required.

The merits of the application

15. An express trustee is typically appointed on the terms of a trust deed, which confers express management powers, allows the trustee to charge its usual fees and provides extensive indemnities in relation to its good faith execution of the trusteeship. A law firm acting in relation to a conveyancing transaction and agreeing to hold the proceeds of sale for an interim period assumes none of those benefits in return for accepting ill-defined burdens. It is, in effect, “*between the Devil and the deep blue sea*”. It is forced to rely on a general right of indemnity in relation to fees and expenses, but will be anxious about the extent to which all professional time spent on seeking to bring the *ad hoc* trusteeship to an end will be recoverable.
16. Against this background Mr Dilliway-Parry’s central submissions were compelling:

“31. It is submitted that the Trustee should not be required to retain the Funds and remain bound by the Undertakings in circumstances where it was entered into on the basis that an agreement or Court order would be obtained imminently to allow the Funds to be disbursed and the Trustee released from the Undertakings...”

32. In *T Trust* (Grand Ct: Smellie, C.J), [2000 CILR N-5], the Court held that a trustee should have returned to the Court for directions if it thought an undertaking previously given

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to a third party was no longer appropriate in the interests of the trust. This is directly applicable in the instant case. It is no longer appropriate or in the interests of the trust for the Trustee to retain the Funds in the absence of any connection to the Parties. Payment into Court in accordance with s.69 Trusts Act provides a route by which the Trustee can obtain sufficient discharge for the Funds so paid into Court (s.69(2)).” [Emphasis added]

17. Although *In re T Trust* concerned an undertaking to the Court, the principle articulated by Anthony Smellie CJ (as he then was) in my judgment applies to undertakings generally. A party bound by undertakings of any kind cannot, at their own whim, decline to comply with them on the grounds of inconvenient circumstances. Here the undertakings had been given to a divorcing couple who were refusing to cooperate in bringing the ad hoc trusteeship to an end. It was appropriate for the Applicant to come to Court to seek to legally terminate the trusteeship which it was unambiguously clear justice required it should be released from. This practical result would be achieved if the Court approved the Applicant’s proposed payment into Court under section 69 of the Act.

Costs: the Applicant’s right of indemnity

18. The Applicant sought an Order that the costs of the Originating Application be paid out of the Fund pursuant to section 47 of the Act. This section provides, so far is material for present purposes:

“(2) A trustee may reimburse themselves or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.”

19. Although the heading to section 47 reads “*Implied indemnity of trustees*”, section 47 (2) by its terms creates an express statutory right of indemnity. This does not in my judgment justify attaching to the statutory right of indemnity the legal label which would be apposite if express statutory rights had been conferred. After referring to section 47 (2), Mr Dilliway-Parry then submitted:

“34. In Equity Trust (Jersey) Ltd v Halabi and ITG Ltd and others v Fort Trustees Ltd and another [2022] UKPC 36 from the Jersey and Guernsey Courts of Appeal, which considered the Jersey law equivalent of s.47(2), it was unanimously concluded by the Board of the Privy Council that a trustee’s right of indemnity in respect of expenses incurred reasonably in its capacity as trustee confers a proprietary interest in the trust assets by operation of equity, which proprietary interest takes priority over the interests of the beneficiaries.

35. It is submitted that the Trustee is entitled to indemnification of its costs incurred in bringing this Application, having been reasonably incurred in respect of execution of the Trust, to be deducted from the Funds, prior to payment of the remainder of the Funds into Court and orders are sought accordingly.”

20. In *Equity Trust (Jersey) Ltd v Halabi and ITG Ltd and others v Fort Trustees Ltd and another* [2022] UKPC 36, the Judicial Committee of the Privy Council considered the nature of a trustee's right of indemnity which is expressed in the same terms in section 26 (2) of the Trusts (Jersey) Law 1984 as section 47 (2) of the Act. It is possible that section 47 (2) was based on that Jersey provision. The submission made in relation to the legal character of the right of indemnity accurately summarises the Privy Council decision which appeared to me to assume (seemingly without the benefit of argument or analysis) that the statutory right carried with it all the ancillary characteristics of the English equitable equivalent. That assumption may well have been justified. Giving statutory force to the right of indemnity can hardly have been designed to dilute trustees' pre-existing protections.
21. It was not necessary for me to delve too deeply into such esoteric matters, because the trustee in the present case was in possession of the Fund and could enforce its indemnity before paying the net amount of the Fund into Court. The Applicant was permitted to recover its reasonable costs out of the Fund pursuant to section 47 (2) on this entirely straightforward basis.

Conclusion

22. For these reasons on 24 April 2024, I directed pursuant to section 48 of the Act that the Applicant could pay into Court under section 69 of the Act the Fund it has been holding on trust for a former conveyancing client and her former spouse for over 5 years, after indemnifying itself for its costs.



THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT