LESSONS FOR BLESSINGS: ANALYSIS OF FOLDS FARM TRUSTEES LTD & OTHERS (2024)

Authored by:
Andrew Morgan (Senior Associate) - Russell Cooke & Andrew Bird (Associate) - Penningtons Manches Cooper

This is a joint article between Penningtons Manches Copper and Russell-Cooke on the recent case of Folds Farm Trustees Ltd. v Cutts and others. Both firms represented the beneficiary ("D1") who sought to purchase Folds Farm (in the New Forest) out of discretionary trusts ("Trust") set up by the late Susan Cutts. Penningtons Manches Cooper acted in the trial of the application to bless the trustees' decision to appoint Folds Farm to the beneficiary for £4.2 million.Russell-Cooke acted in the consequential costs hearing. Daniel Burton of Radcliffe Chambers was instructed at both hearings and offers some concluding remarks below.

The Blessing: Background

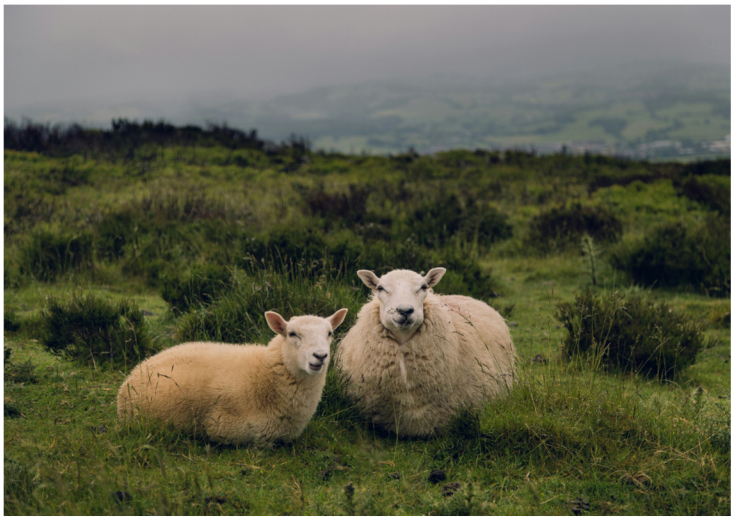
The late Susan Cutts left a letter of wishes, recording her wish that Folds Farm (the main asset of the Trust) remain in the family for future generations.

Following consultation, the Trustees decided to appoint Folds Farm to D1 for £4.2 million and, to encourage D1 to retain Folds Farm in the family, to include an overage provision in the event of a sale ("Decision"). The appointment was below market value and included an element of gift. D1 agreed to buy Folds Farm. His siblings (D2 - D4) opposed the Decision for various reasons.The trustees brought a blessing application in the vein of a "type 2" Public Trustee v Cooper (2001) WTLR 901 claim.

The Blessing: Legal Principles

The judgment at (65-70) provides a helpful reference point on the Court's treatment of applications for approval brought by trustees. As set out at Lewin on Trusts (20th ed.), at §39-095:

- Whether the decision of the trustees is one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause(s) could properly have arrived at, and, in particular:
  - Whether there are any relevant matters which the trustees have failed to take into account;



  - Whether there are any irrelevant matters which the trustees have wrongly taken into account;
  - Whether the decision is one which a rational trustee could have come to.
- Whether the decision was vitiated by any conflict of interest on the part of any of the trustees.

It is important to bear in mind what a blessing does (and does not do). A blessed decision authorises the trustee to implement the decision as a proper and legitimate use of their powers. It does not bind trustees to implement the decision.

The Blessing: Judgment (2024) EWHC 12 (Ch)

Master Clark approved the Decision, with judgment handed down on 15 January 2024.

Paragraph 91 addresses the relevant factors considered in support of the Decision. More notably, whilst Folds Farm was more valuable than £4.2million, it was an illiquid asset that generated only a small amount of income.Master Clark noted at (79) that the sale of a trust asset to a discretionary beneficiary is "fundamentally different" to the sale to a third party or someone with an absolute vested interest in capital, which requires the trustees to obtain the best price reasonably obtainable. The element of gift in the proposed exercise of discretion "are not grounds of themselves for challenging the Decision".

The Blessing: Lessons

1. Trustees are not obligated to treat discretionary beneficiaries equally. The very reason for establishing a discretionary trust may be that the settlor anticipates that some discretionary beneficiaries may be treated more favourably than others.

2. The Court will not micromanage. The decision to be blessed should be detailed enough to allow the Court meaningfully to understand and assess it, but detail on each and every aspect is unnecessary. Here, some of the defendants criticised the lack of detail as to the overage provisions, but the Court was clear that its role was not to micromanage all aspects of the sale.

3. Representation orders remain essential. Although a representation order was not made in respect of the minor and unborn beneficiaries at a directions hearing, Master Clark made a representation on the first day of the trial. The Court's flexibility in this regard underscores the importance of ensuring the effective constitution of the claim and that all relevant parties are bound.

4. Opposing parties need to develop conflict of interest arguments. The opposing party should explain the nature of the conflict and how it impacts the trustees' decision. The conflict of interest itself must have substance – personal or friendly relations are not enough to show bias.

5. Opposition must be focused. A prudent opposition should scrutinise the decision for any relevant factor that was not taken into account. The Defendants found little joy in challenging the trustees' assessment of factors that they did take into account. They did identify one relevant factor for which there was no evidence that it was considered by the trustees, namely who should face the burden of costs of the claim.

Although the trustees' failure to explicitly consider the burden of costs of the claim was not enough to refuse the Decision, it did have a bearing in relation to costs. Master Clark noted at (100) that it "may be appropriate" for D1 to bear a share of the costs of the claim, taking into account that the trustees would have needed to bring the claim even if the Decision had been unopposed (on the basis of there being minor and unborn beneficiaries within the class). In the event, the costs hearing took place in June 2024, with judgment handed down on 24 September 2024.

Costs: Legal Principles

The costs judgment contains a useful summary of the legal principles at (2-16).

Under section 31(1) of the Trustee Act 2000, a trustee enjoys an indemnity for "expenses properly incurred". The judgment clarifies that CPR 46.3 and paragraph 1 of PD46 "are only a commentary on and complementary to" section 31(1). Lewin at §48.006 considers "properly incurred" to mean "honestly and reasonably incurred", which was cited with approval in Abdullah v Abdullah (2013) EWHC 4281 (Ch) at (23-24).

A beneficiary's costs are addressed with reference to the three categories from Re Buckton (1907) 2 Ch 406. Here, the first category applied such that "the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it."

As Category 1 beneficiaries are awarded costs by analogy to the trustees' rights of indemnity, the beneficiaries are subject to the same requirement as reasonableness (Lewin at §48.041).

A beneficiary's opposition is itself not enough to deprive them of costs: National Westminster Bank plc v Lucas (2014) EWCA Civ 1632 at (112). However, Mr Justice Roth noted in Green v Astor (2013) EWHC 1857 at (54) that:

"where unreasonable conduct by a beneficiary is responsible for generating substantial costs on the part of a trustee or personal representative as regards an application to the court, it is appropriate that the burden of those costs should be borne by that beneficiary and not fall on the trust or estate and thus the beneficiaries as a whole."

Costs: Judgment (2024) EWHC 2143 (Ch)

It was common ground that the trustees' costs should be borne by the trust fund (to be assessed on the indemnity basis, if not agreed). The Second and Fifth Defendants were unrepresented. That left the First, Third and Fourth Defendants' costs to be determined.

<u>The First Defendant</u>

D1 supported the Decision. He made an open offer on 1 March 2024 to: (a) pay £15,000 towards the trustees' costs (i.e. 25% towards their estimated costs of £60,000 for an uncontested blessing application); and (b) bear his own costs personally. The offer expired on 22 March 2024 without acceptance from the other defendants.

At the costs hearing, D1 sought all his costs from the trust fund (with payment to be made from the cash fund following the appointment of Folds Farm

to D1). Master Clark considered it "wrong in principle" that such payment of costs would not affect the part of the trust fund received by D1, particularly where the "gift element" was around £2.4million.

Ultimately, Master Clark broadly gave effect to D1's offer. He was to ordered to pay £15,000 towards the trustees' costs and to bear his own costs up to and including 22 March 2024. As the offer was not accepted, however, D1's costs from 23 March 2024 were to be borne by the trust fund.

The Third and Fourth Defendants

D3 opposed the Decision. She sought her costs (of approximately £223,000 including the costs hearing) from the trust fund.

D4's position evolved. From a position of purported neutrality, she adopted D3's submissions at trial. She sought her costs (of approximately £100,000) from the trust fund.

Master Clark treated D3 and D4 in similar terms.As each party went beyond reasonable opposition, they were each deprived of costs "to the extent that they increased those costs above that which should reasonably have been incurred". Each would receive 80% of their costs from the trust fund.However, fearful of hardship arising from bearing 20% personally, their costs are to be borne by the trust fund in the first instance, but deducted from any appointment to D3 and D4.

Costs: Lessons

1. Unreasonable conduct will be penalised. Master Clark noted multiple examples of D3's and D4's conduct. More notably, points deployed by D3 were described as "falling far short" and "unarguable" in the trial judgment; and D4 engaged in extensive cross-examination that was unnecessary as the same points could have been made with reference to written material that was or could have been put before the Court. The 20% reduction (itself arrived at following "inevitably a broad brush exercise") may seem modest in the circumstances, but future cases will likely build on the precedent.

2. Reasonable conduct will be rewarded. D1 made a reasonable open offer of settlement in relation to the costs; that much is clear since its terms were reflected in the costs judgment. The non-acceptance of that offer meant D1 incurred costs unnecessarily, resulting in his recovery of costs (from expiration of the offer) from the trust fund, on the indemnity basis. A reasonable offer of settlement (even to narrow the issues in dispute; notably, D1's offer would not have resolved the other parties' costs position) ought to provide costs protection.

3. Costs Budgets for Costs Capping purposes remain important. The trustees argued that the beneficiaries' failure to file a costs budget (pursuant to paragraph 5 of PD3E; not CPR r.3.13) should be taken into account. In providing the first judicial guidance on the point, Master Clark disagreed, noting that the PD3E requirement does not have a wider purpose beyond the costs capping order regime and that neither the trustees nor the Court pursued such an order at two previous hearings. Since the relevant time for making the order passed, any failure was irrelevant now. It follows that PD3E costs budgets remain important and that greater vigilance is likely to follow in early case management.

Counsel's Concluding Remarks

Cutts is a paradigm example of how not to oppose a blessing application. At the heart of the other beneficiaries' opposition was a misconception that they were entitled to an equal share of their mother's estate and that the Decision was not "fair". As objects of a discretionary trust, that was simply not the case.

The trustees were in a difficult position as they faced trenchant criticism and opposition over a momentous decision, thereby justifying their stance in seeking a blessing from the Court. By the time of the trial, the Court of Appeal's guidance on blessing applications in Denaxe v Cooper (2023) EWCA 752 (at (169)) was available and so representation orders were made to ensure that the Court's decision was fully binding on minors and future generations.

The two judgments of Master Clark illustrate the light touch the Court takes in approval applications and the consequences of unreasonable opposition. The first judgment shows that parties making bad points will get short shrift

from the Court, whilst the costs judgment illustrates that there are limits to the nature of the opposition a beneficiary is permitted to put forward at the expense of the trust fund. In Cutts, the parties' costs were inflated by the stance taken by the opposing beneficiaries and it will be the trust fund, after the appointment of Folds Farm to D1, which will bear the vast majority of those costs. The effect is to reduce the pot out of which any payments might be made to those opposing beneficiaries. Put simply, if you take unreasonable and unmeritorious positions which increase costs for everyone, then you will ultimately pay for it.

Andrew Morgan
Senior Associate
Russell Cooke

Andrew Bird
Associate
Penningtons Manches Cooper