THE COST OF PROTECTING TRUST ASSETS IN A DIVORCE

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John Steinbeck once said that "anything that just costs money is cheap".

Trustees joined to financial remedy proceedings are unlikely to agree with him on this: they rarely have to endure the emotional turbulence that divorce wreaks on its protagonists, but they would still be unlikely to accept that it's cheap.

Of course, no litigation is cheap, and the reality is that trustees joined to financial remedy proceedings – an essentially inquisitorial process – have relatively limited opportunity to recover their costs from the applicant. The result is that usually most, if not all, of the trustees' legal costs will be borne by the trust fund in question.

Usually, discretionary [1] beneficiaries who are not party to the marriage in question will accept (begrudgingly) that this is the justified cost of giving their interests a voice in the proceedings. But that is not always the case: some beneficiaries will be understandably aggrieved by the erosion of the trust fund by divorce proceedings that do not concern them.

Against that context, we consider in this article the applicable cost rules and what trustees can do to limit cost exposure once they are joined, and submit, to financial remedy proceedings in England & Wales.[2]

What procedural rules apply?

The general rule under the Family Procedure Rules 2010 (FPR) regarding financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another (the "no order as to costs" rule) (FPR 28.3(5)).

When it comes to third parties, however, their costs are not subject to the same regime: the "no order as to costs" rule does not apply (see Baker v Rowe [2009] EWCA Civ 1162 which dealt with the equivalent provision in the old FPR 1991).

Does this mean that one should turn to the Civil Procedure Rules and the default rule that costs follow the event under CPR 44.2(2)(a)?

No – that's not applicable either: FPR 28.2(1) disapplies CPR 44.2(2) expressly. So where does this leave trustees in this procedural no-man's land?

The applicable rule is simply that "the court may at any time make such order as to costs as it thinks just." (FPR 28.1). This is likely to be frustrating for trustees who seek certainty as to the consequences for the trust fund.

1 Where the divorcing spouse has a vested interest or an appropriated fund, the cost can of course be allocated to his or her share.

2 This article does not consider trustees' personal exposure: ordinarily, trustees should expect to obtain Beddoe relief as a preliminary step to ensure that they may rely on their right of indemnity in respect of the legal costs incurred.

Beyond this 'clean sheet' procedural rule, case law provides a little more guidance:

> ***"the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion" (Baker v Rowe 25).***

The case of Gojkovic v Gojkovic (No 2) [1991] 2 FLR 233 also gives authority for the idea that there should be a rebuttable presumption that costs will follow the event. This approach also received approval more recently in Solomon v Solomon & Ors (Rev 1) [2013] EWCA Civ 1095.

The question then is, when it comes to trustees, what is the "event" in question that costs should follow? Or to put it another way…

How can trustees "win" in financial remedy proceedings?

Where a third party, such as a parent, has been joined to financial remedy proceedings for the determination of a particular issue such as the ownership of a particular asset, it may be very apparent where success lies and where the costs should fall.

When it comes to the joinder of trustees, however, the position may not be so clear-cut. This is particularly the case where trustees adopt a 'neutral role' as between the husband and wife – precisely so that they avoid an adversarial stance that could incur an adverse costs order.

The difficulty is that by adopting a wholly neutral role, the trustees may also be losing the opportunity to benefit from a costs order in their favour against the applicant.

Specifically, where trustees adopt a neutral stance on the issues in the proceedings and merely assist the court by furnishing it with information, it might be said that vis-à-vis the trustees, there is in fact no issue in dispute that could determine where costs fall.

In those circumstances, it is likely that a court will make no provision as to the trustees' costs.

Where an order is silent on costs (and the no order as to costs rule does not apply) the general rule is that no party is entitled to their costs.[3]

So, if trustees want to 'win' a substantive issue (so that they are able to claim their costs from the applicant), they will need to venture a positive case against the applicant – most likely on the issue of whether the trust is nuptial in character and, by extension, whether it should be varied by the matrimonial court.

Naturally, the approach taken will need to be informed by the merits of the case. If the trustees are not sufficiently confident in their case, they will not want to risk running a positive case which could fail and result in adverse costs.

So, other than 'winning' substantive issues in dispute, what else can trustees do to recoup, or otherwise minimise, their legal costs?

What should trustees do to limit cost exposure?

01 Deal with trust issues only

First and foremost, trustees would be well-advised to avoid incurring additional costs by becoming embroiled in issues as between husband and wife. This might sound obvious, but it is often a delicate balance to strike: ensuring that the trustees and their legal team are kept apprised of any procedural developments or correspondence that has a bearing on trust matters while avoiding involvement in issues that do not. A clear protocol should be set down from the outset.

02 Raise the issue of another party's conduct

When deciding what (if any) costs order to make, the court must consider all the circumstances of the case, including the conduct of the parties (CPR 44.2(4) and (5)). Specifically, this includes:

- conduct before, as well as during, the proceedings;
- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- the manner in which a party has pursued or defended its case or a particular allegation or issue;

and

- whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

The acrimonious nature of many divorce proceedings means that they can be fertile ground for unreasonable conduct. If the trustees' costs have been disproportionate because of another party's actions, the trustees should consider making representations to the Court that the unreasonable party should bear the burden of those excessive costs.

03 "Winning" interim applications

The summary assessment of costs on interim applications can provide a valuable means of recouping costs for trustees. Unlike the substantive issues in dispute where (as discussed above) it may be more difficult for the trustees to adopt an adversarial stance, interim applications will usually involve procedural issues of dispute on which the trustees can more easily be said to have 'won'. As such, it can often be worth trustees seeking the summary assessment of their costs – especially where the interim application process goes hand-in-hand with the issue of unreasonable conduct, whereby a party will make multiple interim applications in order to delay the proceedings.

3 This is provided for by CPR 44.10(1), which also applies to family proceedings (FPR 28.2(1). However, this is a general - not an absolute - rule and the court may make a retrospective order, where no order has previously been made (Timokhina v Timokhin [2019] EWCA Civ 1284).