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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION



No. PT-2019-000414

[2021] EWHC 3755 (Ch)

Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 10 December 2021

Before:

MASTER TEVERSON

B E T W E E N :

NIALL DAVID BAKER

Claimant

- and -

BDS

Defendant

ANONYMISATION APPLIED

THE CLAIMANT (Irwin Mitchell LLP) appeared in person.

THE DEFENDANT appeared in person.

JUDGMENT

MASTER TEVERSON:

- 1 By a Part 8 claim issued on 22 May 2019, the claimant, Mr Niall David Baker, seeks an order authorising an amendment to paragraph 7 of a trust deed, dated 9 August 2001.
- 2 The trust is what is sometimes referred to as a “personal injury trust”. The trust was established for the benefit of the defendant, BDS, then aged nine. I shall refer to the defendant as “BDS”, without intending any disrespect.
- 3 The trust was set up to hold a sum of around £2,225,000 received as damages for negligence from the Central Manchester Healthcare Trust. BDS suffered a brain injury at birth on 23 March 1992 as a result of the negligence of the healthcare trust. The terms of the proposed trust deed were approved by the order of Mitting J on 26 July 2001, prior to the execution of the deed, which is dated 9 August 2001.
- 4 The trust is a bare trust for BDS’s benefit. The initial trustees were BM (BDS’s father), FBM (BDS’ mother), and Lesley Herbertson, a solicitor with Alexander Harris Solicitors.
- 5 The deed recited the court proceedings, the judgment in favour of BDS, the approval of the draft trust by the judge on 24 July 2001 and the final order sealed on 26 July 2001. It recites that the judge, in approving the draft, had ordered that the beneficiary should not be entitled to give a valid receipt to the trustees for the trust fund, or any part of it, until he obtained the age of 21.
- 6 Clause 2 provides that the trustees are to hold the capital and income of the trust fund upon trust for the beneficiary, namely BDS, absolutely. Clause 3 gave the trustees the additional administrative power set out in the schedule of the deed. Clause 4 disapplied section 31 of

the Trustee Act 1925 and gave power to the trustees, so long as BDS was under 21, to pay or apply income for his maintenance as they thought fit. Clause 5 contained an extended power of advancement. Clause 6(2) provided that, pursuant to the judge's order of 26 July 2001, the beneficiary should not be entitled to give a valid receipt to the trustees in respect of the trust fund, or any part of it, until he obtained the age of 21.

7 Clause 7 is the clause which is the subject of the present application. It reads as follows, under the heading "Trustees":

'At all times at least one of the trustees shall be a solicitor, barrister, accountant, registered medical practitioner or any company which has power by its Memorandum of Association or other its constitution to undertake and carry on trusts (that one trustee being referred to as the "Professional Trustee") and in the event of the death, retirement or other incapacity to act of the Professional Trustee the Trustees shall appoint a replacement trustee who or which is a Professional Trustee and until such replacement is appointed the Trustees shall have no power to deal with the capital of the Trust Fund provided that the Court must approve the appointment of the replacement Professional Trustee unless the replacement Professional Trustee is a member or employee of the same firm or company as the prior Professional Trustee'.

8 On 30 January 2007, Ms Herbertson was replaced as the Professional Trustee by Mr Baker. BM retired on 8 December 2008. On 23 March 2010, BDS was appointed as a trustee on attaining the age of 18 on his 18th birthday. On 21 December 2011, FBM retired and since that date the trustees have been the claimant, Mr Baker, and BDS.

9 The professional evidence before the court demonstrates quite clearly that BDS has the capacity to manage his property and financial affairs. He is described by one professional as being a very intelligent man who is disabled exclusively by his movement difficulties. The views of the professionals concerning BDS's intelligence are confirmed by Mr Baker, who has worked with BDS for many years now.

10 The purpose of the application is to remove the requirement that at least one of the trustees must be a professional trustee. The requirement means that the professional trustee's costs are being incurred on an annual basis. The trust fund is now in excess of £3million, including properties, but nevertheless I have no doubt that the professional trustee's fees on an annual basis do impact upon the income return from the trust.

11 The application is made under section 57 of the Trustee Act. Subsection (1) provides:

“Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”

- 12 It is now established that the words “either generally or in any particular instance” enable the jurisdiction under section 57 to be exercised in a way which is not limited to a particular instance, but extends generally to the authorisation of a new administrative power.
- 13 The purpose of the amendment sought is to confer on the trustees the power to administer the fund and deal with capital without the requirement that one of the trustees be a professional trustee. The section 57 jurisdiction cannot be used to alter the beneficial interest, but it may be used to extend administrative powers. In the present case, what is sought is the prospective removal of the requirement that there be at least one professional trustee.
- 14 When the court approves a trust for the purposes of holding damages, the court will almost invariably require that one of the trustees is a professional trustee to ensure that the trust fund is properly supervised. That requirement is made so that during the minority of the beneficiary the court can be satisfied that the trust fund will be properly supervised.
- 15 In *OH v Craven* [2016] EWHC 3146 (QB), Norris J stressed the importance of the terms of a proposed trustee being carefully considered and stated that in an age of low returns it was important to consider the charges of the professional trustee and of those involved in the management of the funds. The judge expressed the view that the trust should include an express power of revocation upon the beneficiary reaching full age. In the present case, the trust deed does not contain such a power of revocation.

- 16 The present position is that BDS, having attained 21 some time ago, could call for the trust fund to be paid over to him. He prefers instead that the trust should continue, because he sees that there are advantages to him in the trust continuing to subsist.
- 17 As it seems to me also, BDS, together with his co-trustee, Mr Baker, are in a position to agree to depart from the terms of the trust. However, quite understandably, they do not wish to take that course without the court's approval.
- 18 In my judgment, in those circumstances, the court does have power under section 57 to sanction a departure from the terms of clause 7. I am satisfied that it is expedient for the court to exercise that power. I do not need to set out at length why I have reached that conclusion. In summary, it is clear from the evidence that BDS has the ability and expertise to manage the trust fund, which has increased in value over the years, and that there is no continuing need for the fees of a professional trustee to be incurred. The application is made by Mr Baker and, quite plainly, he, having known BDS for many years and acted as co-trustee together with him for many years, supports the application and is making it to the court.
- 19 I would add, although not directly relevant to the issue of expediency, that there is evidence before me that BDS's parents, who were two of the three original trustees, did not understand or intend that the requirement for a professional trustee should continue after BDS reached 18. They are aware of this application and they support it.
- 20 In those circumstances, I am satisfied that it is expedient and appropriate to order that from the date of this order there will no longer continue to be a requirement that at least one of the trustees be a professional trustee and to order that, notwithstanding the terms of clause 7, the

trustees, so long as they are two in number or a trust corporation, may deal with the capital of the trust fund without there being a requirement that at least one of the trustees is a professional trustee.

- 21 Finally, I should mention that there was a procedural issue relating to the delay in a certificate of service being filed. I am content for the court order to recite that the parties agree that, notwithstanding any delay in service or the acknowledgement of service, that the claim be treated as validly before the court.
- 22 I give permission for this judgment to be reported.

CERTIFICATE

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