

BERMUDA SUPREME COURT

IN THE MATTER OF THE ESD 1994 TRUST AND IN THE MATTER OF THE MARLBOROUGH TRUST AND IN THE MATTER OF THE TRUSTEE ACT 1975 AND RSC ORDER 85

MERITUS TRUST COMPANY LIMITED -v- BUTTERFIELD TRUST (BERMUDA) LIMITED

[2017] SC (Bda) 82 Civ (13 October 2017)

The Plaintiff (the successor trustee) sought an order requiring the Defendant (the former trustee) to transfer and vest title to the assets of two trusts in the Plaintiff.

The Defendant had been removed as trustee and the Plaintiff appointed in its place in December 2016. The change took place in the context of a threatened claim against the Defendant in respect of its management of the trust assets. Hence the transfer process was, in the words of Kawaley CJ, “somewhat prickly”.

Firstly, the Defendant asserted that it was entitled to retain sufficient trust assets against which to enforce its indemnity in relation to the contingent costs liability in relation to the defence of the threatened claim. The Plaintiff contended that, as a matter of law, the right of indemnity did not confer such retention rights.

Secondly, the Defendant asserted that it was entitled to a contractual indemnity, while the Plaintiff countered that no such entitlement existed.

Submissions of counsel

Kawaley CJ, distilled counsel for the plaintiff’s submissions on the retention point as follows:

1. A former trustee’s right of indemnity in equity, putting aside any more generous rights conferred by statute, contract or a particular trust deed, took effect as a non-possessory lien and did not include a right of retention

REMOVAL OF TRUSTEE – WHETHER TRUSTEE’S EQUITABLE RIGHT TO AN INDEMNITY INCLUDES THE RIGHT TO RETAIN SUFFICIENT ASSETS TO MEET ACTUAL AND CONTINGENT LIABILITIES AND THE RIGHT TO A CONTRACTUAL INDEMNITY

as against a successor trustee, in contradistinction to the position of a beneficiary or creditor of a trust.

2. This position was consistent with the statutory framework for changing trustees which required all trust assets to be vested in the new trustee upon appointment or as soon as possible thereafter (Trustee Act 1975, section 27(d)).
3. The position was also consistent with a proper analysis of relevant case law (*principally Lemery Holdings Pty Ltd. -v- Reliance Financial Service Pty Ltd* [2008] NSWSC 1344 and textbook authority).

Counsel for the Defendant relied upon a contrary view of the relevant law on the central issue. Cases he relied heavily on in terms of direct authority included *Apostolou -v- VA Corporation Aust Pty Ltd*. [2010] FCA 64, while text authorities he referred to included *Underhill and Hayton: Law of trusts and Trustees*, 18th edition. He questioned whether there was a clear conceptual demarcation between transferring assets to a successor trustee and making payments to a beneficiary.

Having heard the arguments, Kawaley CJ noted:

“It being common ground that neither the Act nor the Trust Deeds conferred retention rights on [the Defendant] as a former trustee, in my judgment [the Plaintiff’s] counsel was right to contend the statutory vesting scheme is, in a general sense, inconsistent with the notion of the old trustee enjoying retention

of asset rights capable of being asserted by a former trustee as against a new trustee.”

He also found that: ‘there is a clear practical and theoretical distinction to be drawn between making a routine distribution to a beneficiary (which once made ordinarily strips the distribution proceeds of their character as ‘trust assets’) and the transmission of trust assets from one trustee to another.”

Judgment summary

The Court found that the Defendant had no right to retain any trust assets (whether vested or unvested in the successor trustee) as security for its indemnity rights under the trusts, nor was it entitled to an equitable contractual indemnity.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.