



Neutral Citation Number: [2020] EWHC 597 (Ch)

Case No: PT-2019-000445

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**PROPERTY TRUSTS AND PROBATE LIST**

Rolls Building  
Fetter Lane,  
London EC4A 1NL

Date: 13/2/2020

**Before:**

**CHIEF MASTER MARSH**

**Between:**

**LONDON CAPITAL & FINANCE Plc**  
**(in Administration)**

**Claimant**

**- and -**

**GLOBAL SECURITY TRUSTEES LIMITED**

**Defendant**

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**Matthew Collings QC and James Couser** (instructed by **Mishcon de Reya LLP**) for the  
**Claimant**

**James Pickering** (instructed by **Judge Sykes Frixou**) for the Defendant

Hearing dates: 19 February 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

## **Chief Master Marsh:**

1. This judgment deals with consequential issues that arise from the judgment handed down on 10 December 2019. I determined that the defendant (“GST”) should be removed as Security Trustee under the Security Trust Deed dated 5 November 2015 and an order to that effect was made on 10 December 2019. The remaining issues arising from the judgment were adjourned to a date to be fixed.
2. I declined to order that the Administrators of the claimant (“LCF”) should be appointed as trustees in place of GST and directed that further evidence should be filed providing details of suitable candidates to be appointed. Having considered that evidence, an order was made on 14 January 2020 appointing Madison Pacific Trust Limited (“Madison Pacific”) as the trustee to replace GST.
3. The hearing on 19 February 2020 was convened to deal with the outstanding issues arising from the judgment. These issues comprise:
  - (1) What order should be made in relation to the costs of the claim?
  - (2) If an order is made requiring GST to pay LCF’s costs (a) should costs be ordered on the indemnity basis and (b) what order for a payment on account should be made?
  - (3) Is GST entitled to an indemnity in respect of the costs of this claim under the provisions of the Security Trust Deed? The indemnity may relate to the costs it has incurred in the claim and its liability (if any) to pay LCF’s costs.
  - (4) Is there a need for the benefit of the Security Trust Deed to be assigned to Madison Pacific? And what is the effect of the orders made on 10 December 2019 and 14 January 2020 so far as GST is concerned?
  - (5) Should the court deal with GST’s claim to remuneration and costs that do not relate to the claim?
  - (6) If GST has been supported by a funder in relation to the costs of the claim, should GST be ordered to identify the funder?

### **Issue 1**

4. LCF considers that GST should pay its costs of the claim and the order should direct that such costs be subject to a detailed assessment. GST says that no order for costs is the appropriate order.
5. I do not accept Mr Pickering’s submission that because the test for removal of a trustee is not fault based (in the sense that it is not essential for fault to be established), notions of success or failure are irrelevant. This confuses two quite different matters. A trustee should always give anxious consideration to concerns about conflicts of interest and whether resignation is the right approach. It will be very unusual for a trustee to be able actively to oppose the claim seeking an order for replacement and avoid liability for costs if the court orders replacement. The position may be different if the trustee plays no active part in the claim and merely awaits a

determination by the court, but that will only normally assist the trustee where there are other parties with competing views.

6. LCF's Administrators took issue with GST acting as the Security Trustee long before the claim was issued. An opinion from Mr Collings QC dated 9 April 2019 was provided to GST and, as a consequence, Mr Lee ceased to be a director on 18 April 2019. Mr Gill and Mr Pollard were appointed as directors on the same date. The Administrators expressed the view in a letter from their solicitors dated 26 April 2019 that the issue of a conflict of interest had not been fully addressed and also referred to the wishes of the bondholders (who are the beneficiaries of the Security Trust). After further correspondence the Administrators reasonably formed the view that GST was unwilling to make further changes and this claim was issued. It was resisted by GST up to and including the hearing on 19 November 2019. GST was fully on notice of LCF's case, including the wishes of the bondholders, before the claim was issued and the claim has been successful.
7. The judgment handed down on 10 December 2019 is critical of GST's directors in a number of respects. There was a singular failure to address the very real conflicts that existed. When added to a lack of experience on the part of the directors in acting as trustees with the wishes of the bondholders, the case for replacement was compelling. As has been said before, the sight of a trustee clinging to office is unattractive.
8. Mr Pickering submits that the Administrators' primary case was that they should replace GST. He says that they only raised the alternative of GST being replaced by an independent trustee as an alternative and did not condescend to provide the name of a trustee until part way through the hearing. This had the consequence that the Administrators were ordered to make further enquiries and to file further evidence. It is notable, however, that the work entailed would have had to have been undertaken any way and a further hearing was avoided by the appointment being dealt with 'on paper'.
9. Although the Administrators put forward as a primary case that they should replace GST, it is right that their alternative case was flagged from the outset in Mr Stephens' first statement. It was put on the basis that the court might prefer to appoint an independent trustee and that proved to be the case. It was not unreasonable for the Administrators to await the hearing in order to find out what the court's preference was. Furthermore, the primary issue in the claim was not who should replace GST but whether GST should be replaced at all. This is not a case in which it can be said LCF's case was only partly successful.
10. In my judgment, LCF has made out a compelling case that GST should be ordered to pay LCF's costs. The general rules that are applicable include CPR rule 44.2(2) that the unsuccessful party will be ordered to pay the costs of the successful party.

## **Issue 2**

11. The court is entitled to make an order for costs on the indemnity basis applying the guidance given by the Court of Appeal in *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879. The principles are discussed in the notes at paragraph 44.3.8 of Civil Procedure 2019 on page 1393 and 1394. For present purposes I need only consider whether the particular circumstances of this case are

such as to take the case outside the norm. It is not the Administrators' case that there are issues of conduct to which the court should have regard.

12. The claim was some distance from what might be regarded as a routine claim seeking replacement of a trustee. The claim arose in the context of:
  - (1) The role of the trustee being limited to the steps set out in the Security Trust Deed. The trustee was not given the conventional task of holding an asset or money, or both, on a specified basis.
  - (2) The bondholders have suffered very substantial losses at the hands of those connected with LCF. This gave rise to the need for particular sensitivity to, and the need to pay close heed to, the wishes of the bondholders. Not unreasonably, they saw GST as part of a discredited ancien regime. GST clung to its office without regard to the reasonable concerns of the bondholders and placed their own commercial interests first.
  - (3) The appointment of Mr Gill and Mr Pollard as directors of GST was the occasion when a careful review of conflicts should have been carried out. Instead the obvious conflicts were ignored.
13. In my judgment, these factors are sufficient to take the circumstances of the case outside the norm and I consider it is appropriate for the court to exercise its discretion to order costs on the indemnity basis.
14. Under CPR 44.2(8) the court is required to order the paying party to make a payment on account unless there is a good reason not to do so. No such reason exists here. LCF's costs of the claim as they are shown in its costs schedules are substantial. In aggregate they exceed £350,000. LCF proposes a payment on account of £150,000. GST was willing to submit to an order to pay £75,000.
15. I have regard to the fact that costs will be assessed on the indemnity basis. This will affect the amount LCF is able to recover. In my judgment £150,000 is a reasonable sum to order as a payment on account.

### **Issue 3**

16. The question of whether GST is entitled to an indemnity requires the court to consider the relationship between the terms of the Security Trust Deed, section 31(1) of the Trustee Act 2000 and CPR rule 46.3(2). An indemnity in the context of this claim may enable GST to recover (a) the costs it has been ordered to pay to LCF; (b) its own costs and expenses of this claim; and/or (c) its expenses and fees relating to acting as Security Trustee, other than costs relating to this claim. This judgment relates to the first two categories. The third category will be the subject of permission to apply in the order arising from the hearing – see paragraph 38 of this judgment.
17. Under clause 5.5 of the Security Trust Deed:

“The Security Trustee may indemnify himself out of the Trust Property against all claims, demands, liabilities, proceedings, costs, fees, charges, losses and expenses reasonably and properly incurred by him in relation to or arising out

of the taking or holding of any of the Security, the exercise or purported exercise of any of the rights, trusts, powers and discretions vested in any of them or any other matter or thing done or omitted to be done in connection with any of the Security or pursuant to any law or regulation (otherwise than as a result of the Security Trustee's gross negligence or wilful misconduct)."

18. Security is defined to mean "the security interests ... constituted by or pursuant to, or evidenced by the Debenture".
19. There is a further indemnity that is contained in clause 4.2(a). However, it relates to the deduction of charges expenses and liabilities from the proceeds of enforcement action taken by the Security Trustee and is of no direct relevance because GST will not, as a result of being removed, be in the position of holding such proceeds.
20. Mr Collings QC initially submitted that there was a contractual limitation on the scope of clause 5.5 which would prevent GST from indemnifying itself against costs and expenses incurred in relation to consideration of issues relating to a conflict of interest and associated issues arising in these proceedings. However, in his submissions in reply he did not pursue this point on the basis that the scope of clause 5.5 is sufficiently wide to cover steps taken in relation to this claim because it includes costs and expenses incurred in relation to the holding of any Security. I accept that clause 5.5 is in some respects widely drafted. It is, however, unnecessary for present purposes to express a view on where the limits of the indemnity may lie, other than to record that requirement for costs and expenses to be "reasonably and properly incurred" provides a material restriction.
21. The indemnity under clause 5.5 is to be contrasted with the statutory right of indemnity under section 31(1) of the Trustee Act 2000 which provides:  

“(1) A trustee –

  - (a) is entitled to be reimbursed from the trust funds, or
  - (b) may pay out of the trust funds,  

expenses properly incurred by him when acting on behalf of the trust.”
22. It is unlikely there is any difference between expenses "reasonably and properly incurred" and expenses "properly incurred". It is difficult to imagine that expenses that are not reasonably incurred could have been properly incurred and vice versa. However, the terms of the indemnity under clause 5.5 are wider than section 31(1) of the Trustee Act 2000 because the indemnity covers not just expenses incurred but also "claims, demands, liabilities" etc. I observe that clause 5.5 includes an excess of language and does not entirely make sense because, unlike a loss or expense, it is difficult to see how "claims" or "proceedings" could be said to have been reasonably and properly incurred. It seems likely the draftsman had in mind liabilities or expense incurred as a result of claims or proceedings.
23. The third element that has to be considered is the provisions of CPR 46.3 and paragraph 1 of Practice Direction 46. CPR 46.3 is somewhat puzzlingly headed

“Limitations on court’s power to award costs in favour of trustee or personal representative” although the rule does not provide any such restrictions. CPR rule 46 applies where a person has been a party to any proceedings in the capacity of trustee (or personal representative) and rule 44.5 does not apply.<sup>1</sup> Rule 46.3(2) provides:

“The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.”

24. Rule 46.3(3) provides that where the trustee or personal representative is entitled to be paid costs out of the fund or an estate they will be assessed on the indemnity basis.
25. As it appears to me, rule 46.3(3) only applies in the event that the court makes an order directing that the trustee’s costs are to be paid out of the fund. There is no requirement for such an order if there is an entitlement to an indemnity under the trust deed. The rule does not specify that there must be a detailed assessment where the general rule under rule 46.3(2) applies.
26. Practice Direction 46 paragraph 1 deals with, as the heading puts it: “Awards of costs in favour of a trustee or personal representative: rule 46.3”. As is made clear in the judgment of Asplin LJ in *Price v Saundry and another* [2019] EWCA Civ 2261 at [22] the provisions of the CPR can only be a commentary upon and complementary to section 31(1) of the Trustee Act 2000. That claim concerned an application to remove trustees and to replace them with a professional trustee. There was no entitlement to an indemnity under the Declaration of Trust and, therefore, the court was only concerned with whether, in the circumstances of that case, the trustees were entitled to an indemnity under section 31(1).
27. In this case, GST seeks an indemnity for its costs and its liability to pay LCF’s costs only under clause 5.5 of the Security Trust Deed. Prima facie, therefore, section 31 and the CPR are not engaged. It is suggested in *Lewin on Trusts* 19<sup>th</sup> ed. at 21-008 that the terms of the trust may only enhance the statutory right of indemnity, but not exclude or restrict it. With respect to the editors of *Lewin*, I have real doubt about whether that statement of the law is right. As it appears to me, if there is a contractual right to an indemnity, it governs the scope of the indemnity for all purposes. To conclude otherwise would necessitate (in the absence of express words) construing the terms of the contractual indemnity in every case as if it is subject to section 31(1) and the provisions of the CPR. However, the point does not arise for determination in this case because GST only seeks an indemnity under clause 5.5 of the Security Trust Deed.
28. GST’s entitlement to an indemnity in this case is not subject to paragraph 1.1 of Practice Direction 46. It involves construing the provision in clause 5.5 and considering questions that are similar to, but not precisely the same as, those posed by Asplin LJ in *Price v Saundry* at [24] namely, were the expenses properly incurred and were the expenses incurred by the trustee when acting on behalf of the trust? The class of expense under clause 5.5 is wider than “expenses” under section 31(1) but the steps taken by the trustee that may lead to the indemnity applying are on one view narrower than “when acting on behalf of the trust” which appears in section 31(1).

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<sup>1</sup> It is common ground that it does not apply.

29. If the steps that may lead to an indemnity under clause 5.5, subject to the “reasonably and properly incurred” limitation, are taken in turn, they must be steps:
- (1) “... arising out of the taking or holding of any of the Security ...”:
  - (2) “... the exercise or purported exercise of any of the rights, trusts, powers and discretions vested in them...”;
  - (3) “... or any other matter or thing done or omitted to be done in connection with any of the Security ...”:
  - (4) “... or pursuant to any law or regulation ...”.
30. The clause ends with a proviso in parentheses “(otherwise than as a result of the Security Trustee’s gross negligence or wilful misconduct)”. The placing of the proviso in parentheses would appear to indicate that it is intended to apply to all the steps that are set out in the clause, and not only to the trustee acting pursuant to any law or regulation.
31. I would add one further point. Although the terms of clause 5.5 fall to be construed on a conventional basis, it is informative to consider what similar language has been held to mean outside of the context of a contractual indemnity. In *Price v Saundry v Asplin* LJ at [29] considered that “properly incurred” should be interpreted to mean “not improperly incurred” following the approach in the authorities she cites. And at paragraph [31] she considered that “misconduct” that might deprive a trustee of an indemnity “... should be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances.”
32. Lewin at 27-191 provides a commentary on the position under section 31(1) and the provisions of the CPR and suggests that as a general principle:
- “If the trustee is removed on grounds of conflict of interest, it would be normal for the court to find that his resistance to removal was unreasonable, deprive him of his indemnity and order him to pay the successful party’s costs.”
33. Drawing the strands together and having regard to the terms of clause 5.5:
- (1) I have very real doubt about whether the conduct of this claim by GST and its liability for costs can be said to arise within any of the steps that I have set out in paragraph 29. It is not obvious to me that GST was acting in connection with the Security or pursuant to any law or regulation. However, I can see it is arguable that defending this claim might be the exercise of power or discretion and LCF conceded the contractual point.
  - (2) The conduct of the claim has been held to be misguided. The court has concluded that GST should have recognised the constitution of its board made it inappropriate for it to act as trustee and it should have left it to the court to determine whether the Administrators or an independent trustee should replace it. GST acted at all times in accordance with its own commercial interests and not as a fiduciary acting in the best interests of the beneficiaries. In my judgment it is clear that the costs it incurred and the liability to pay

LCF's costs were not reasonably and properly incurred whether the test is looked at with a double negative (not improperly incurred) or in the way the language is used in the Security Trust Deed.

- (3) If it were necessary to do so I would also hold that defending this claim and incurring a liability for costs, both its own and LCF's costs, amounted to wilful misconduct.

#### **Issue 4**

34. GST proposed that the Security Trust Deed should be assigned to Madison Pacific. It transpired that the reason for this proposal was concern on the part of GST that as an original contracting party it could be liable for events after the date upon which it was removed. At the hearing the need for an assignment was not pressed.
35. Although it is right that GST is an original party to the Security Trust Deed, the effect of the order dated 10 December 2019 is that GST has been removed as the trustee and the order dated 14 January 2020 replaces GST with Madison Pacific. The two orders have terminated GST's role under the Security Trust Deed and it has no further duties under the Deed. It is of course left with all rights and liabilities that accrued up to the date of its removal.
36. GST also sought an indemnity from LCF in respect of future liabilities but it is now common ground that one is not required.

#### **Issue 5**

37. GST sought to persuade the court that it should approve its claim for fees and expenses in respect of work undertaken as the trustee including costs in respect of the application made in the Companies Court. Schedules of fees and expenses have been provided to LCF by letter.
38. I accept that it is appropriate for any issue about GST's remuneration as trustee to be dealt with in these proceedings. However, I was unwilling to deal with remuneration without (i) GST issuing an application specifying the relief it is seeking and (ii) providing clear evidence explaining the basis upon which the claim is made and how the sums claimed are calculated. I have ordered that GST has permission to apply in relation to this matter.
39. I do not have jurisdiction to make an inter partes order in respect of the application in the Companies Court and I do not understand GST to be asking me to make one. I am asked to approve the costs incurred by GST in those proceedings as part of the overall costs and expenses it has incurred.

#### **Issue 6**

40. At the hearing, GST was requested to write to LCF to say whether it had obtained third party funding and, if so, to name the funder. The point arose because Mr Pollard's witness statement dated 11 July 2019 said in terms that GST had "sought and obtained external funding". GST's solicitors Judge Sykes Frixou explained in their letter dated 28 February 2020 that GST has no third party funding in place and



that Mr Pollard's statement to the opposite effect was intended to apply to funding that had been agreed in principle concerning the claim under Rule 14.8 of the Insolvency (England and Wales) Rules 2016 in the Companies Court.

41. Written submissions have been filed on behalf of LCF requesting that GST is ordered to provide a witness statement addressing three points:
  - (1) Confirmation that no one was funding GST's defence to this claim.
  - (2) Providing an explanation about how Mr Pollard said the opposite in his witness statement; and
  - (3) Confirming that both GST's solicitors and counsel were acting under conditional fee agreements.
42. Given the decisions that are recorded in this judgment I do not consider there is a need to order GST to make a further witness statement.