[2020] IEHC 355

THE HIGH COURT

[2016 No. 2326 S]

BETWEEN

MARGARET BEST AND CARMEL BEST (AS JOINT COMMITTEE OF THE PERSON AND THE ESTATE OF KENNETH BEST, A WARD)

PLAINTIFFS

AND

PRAMIT GHOSE, NIALL JOSEPH TINNEY, PATRICK THOMAS FINNEGAN, PETER ALPHONSUS COSTIGAN, PATRICK DEMPSEY, RAYMOND DEASY, TADHG FRANCIS GUNNELL, ANGUS MCDONNELL, DAVID HARLOWE, MARTIN HARTE, AIDAN SHEERIN, ARTHUR QUINLAN, JOHN MARTIN MAGUIRE, ANNE BARRETT AND LEGACY INVESTMENT HOLDINGS LIMITED, TOGETHER FORMERLY TRADING AS BLOXHAM STOCKBROKERS PARTNERSHIP,

BLOXHAM STOCKBROKERS PARTNERSHIP (IN LIQUIDATION)

AND NORTHERN TRUST (IRELAND) LIMITED

DEFENDANTS

No. 2

Judgment of Ms. Justice Baker delivered on the 9th day of June, 2020

1. This judgment is supplemental to a judgment delivered on 27 June 2018, *Best v. Ghose* [2018] IEHC 376, and order of 16 October 2018. The question now for determination is whether the defendants have adequately met the obligation identified in the judgment that an account be given of the management of the funds of Kenneth Best, a ward of the High Court, and on whose behalf the defendants were entrusted with the management of funds lodged in the High Court.

2. The principal judgment was given after a hearing in proceedings commenced by summary summons by which the plaintiffs, the Committee of Mr Best, sought an order that the defendants were obliged to give account of the funds lodged to the credit of Mr Best in the High Court, and an order directing an inquiry as to the dealings by the defendants with the monies lodged in court on his behalf and to his benefit.

3. The second relief sought in the summary summons was an order for the making of an inquiry, but that relief was not pursued, and the Committee prudently took that approach, as it is likely that the making of a formal inquiry by the court would be time consuming and prohibitively expensive.

4. The first 15 defendants were, at the relevant times, partners in the firm of Bloxham Stockbrokers Partnership which was wound up by order of Cross J. on 31 May 2012. The sixteenth defendant is the firm now in liquidation acting through Mr Kieran Wallace who was appointed liquidator by order of Laffoy J. made on 25 June 2012. No order was sought against the sixteenth defendant.

5. For the reasons set out in the principal judgment the proceedings against the second to fifteenth defendants were struck out. The first defendant, at the relevant time managing partner of Bloxham Stockbrokers Partnership ("Bloxham"), acts as representative defendant and in his personal capacity.

6. The conclusion made in the principal judgment was that Bloxham had, by reason of its role in the management and administration of the fund lodged in court to the benefit of Mr Best, an obligation akin to that of a trustee or fiduciary to furnish a record of transactions in the form of an account and narrative. As is apparent from a reading of the principal judgment, at the time it was delivered the documents then available at the hearing were considered to be incomplete, and further documentation was to be sought and furnished in accordance with the directions then given and supplemented at later hearing.

7. As is apparent too from the principal judgment, the documentation was voluminous as the monies pledged for the benefit of Mr Best had been managed by Bloxham since 2001. It was estimated at the time of the delivery of the principal judgment that the liquidator had in his possession some 504 boxes of documents likely to be relevant to an understanding of the manner by which the fund was managed. There existed or exists also a voluminous amount of documentation in soft form. As is also apparent from the reading of the principal judgment, while some statements of account were given to the Committee of the Ward from time to time in the currency of the management by Bloxham of his funds, these were incomplete, and the view taken in the principal judgment was that the obligation to account existed and had not been met.

8. Throughout this ruling I propose to use the word "documentation", save where the context otherwise requires, to connote all forms of information, whether in soft or hard copy, whether it contains a narrative, figures and columns listed by reference to date or otherwise, or a combination of these.

The issues now remaining

9. After the principal judgment was delivered, the Committee of the Ward received documentation from the Office of the Wards of Court and from the Accountant's Office of the High Court, some of which had been previously sought by the Committee in order to ascertain whether tax had been withheld from the Ward, which, pursuant to s. 198 of the Taxes Consolidation Act 1997, the Ward would be entitled to reclaim. I was unable to make a final order as it was premature given the circumstances. The matter came back before me on a number of occasions for the purpose of enabling the parties to locate and inspect the documents.

10. Mr David Croft on the instructions of the Committee was given the opportunity of looking into the boxes of documents held by the liquidator. A report from him of 27 November 2018 made it clear that there were documents that would have enabled an account to be created, but that there did not exist what might be properly called "an account" at that stage. Mr Myles Kirby, chartered accountant for Mr Ghose, also produced a report of 11 December 2018. Both Mr Croft and Mr Kirby seemed to agree that the exercise of preparing an account was not particularly complex, although it might have taken time, but also agreed that there were gaps in the information and referred to those gaps: Mr Croft, at para. 17, and Mr Kirby at para 7.11 respectively. Mr Croft pointed out there was no updated record of Irish equities being transacted, and no records of distributions received.

11. Mr Kirby set out certain basic information of what an account should contain, and at the hearing of 13 December 2018 counsel for the plaintiffs expressed the view that there seemed to be "no huge difference" between the experts in that respect.

12. Bloxham had, in fact, provided an account in respect of the Ward's funds to the Wards Office for two years (2002 and 2003) in a form of account or statement that counsel for the plaintiffs accepted was adequate: it dealt with the transactions in terms of stock and bonds sold and purchased; with the cash account, monies received for sale of stocks, dividends received, fees paid, stamp duty paid, *etc*. Counsel for the plaintiffs said that it may well be that, after 2003, Bloxham changed the format of the account but what matters for the Committee was the availability of the information, and expressed the view that the Committee was happy to get an account in Bloxham's standard format at that time.

13. The issue in contention at that hearing who is to discharge the costs of the preparation of the account. Counsel for the plaintiffs argued that I should take into account that Mr Best is a Ward of the High Court, and has no funds left. His mother, who is in her seventies, is attempting to look after her disabled adult child in these difficult circumstances but wants an account to see where the money lodged in court has gone.

14. Counsel for Mr Ghose submitted that the principal judgment did not draw a distinction between the cost of the making of the account and the subsequent copying and furnishing of copies to the plaintiffs. Reliance was placed in the principal judgment on the decision of Kenny J. in *Chaine-Nickson v. Bank of Ireland* [1976] IR 393. Counsel for the plaintiffs argued that that was an unusual case which involved the issue as to whether a potential beneficiary, not an actual beneficiary, under a discretionary trust, was entitled to certain information and a copy of an account. He argued that the issue in that case was not so much who had to pay, but whether there was an entitlement at all for a potential beneficiary. He argued that the case means that a beneficiary is to pay the copying charges, but that it is not authority for the proposition that the beneficiary would have to pay the costs of actually creating or keeping the account.

15. Neither counsel could provide authority on the point.

16. The second issue is whether an adequate account now exists, as Mr Ghose furnished a report to the plaintiffs on 25 January 2019 setting out an analysis of the transactions in the fund for the years 2001 to 2012. He says that the combination of that report and the documentation now available means than the firm has met its accounting obligation. A two-page document containing comments on this report was prepared by Mr Croft and a further report from Mr Kirby were furnished thereafter. The parties further engaged in an attempt to reach an amicable solution in respect of the fulfilment of the obligation to account, and regarding the redaction of parts of the report of Mr Ghose. That took some months.

17. This ruling will consider therefore whether adequate documents and narrative now exist to bring the proceedings to finality or whether further steps are required.

18. Mr Ghose, himself a stockbroker of considerable experience, and with some knowledge of the Ward's portfolio, took it upon himself, and without express directions that this be done, to prepare a report dated 2 January 2019 setting out details of movements on the fund. From this report, a redacted copy only of which was made available to me at the final hearing of this matter, it is clear that regular, clear, and complete transaction statements including regular valuations, details of transactions, dividends, coupons fees and taxes were not provided to the Committee or to the Office of Wards of Court during that period. Mr Ghose has attempted to reassemble some of the information and has now provided a summary valuation of the fund, a summary of the cumulative value of purchases and sales, the amounts paid out, the overall return, a list of individual bonds and equities and cash held, and some cash reconciliation reports showing cash movements.

19. The legal advisors for the parties engaged in correspondence regarding some of the content of the report of Mr Ghose and agreed on the redaction of parts of the report for production to me, albeit the two experts have seen the full report and have each, in their final reports, made comments on the adequacy of its contents and conclusions. Much of the argument now centres on whether there now exists a sufficient account of transactions in the fund of Mr Best such that a final order is not required.

20. In summary, three reports were prepared by Mr David Croft on the instructions of the Committee the last of which is dated 20 March 2019. In turn, three reports were prepared by Mr Kirby on behalf of Bloxham, the last one dated 2 April 2019. It is fair to say, subject to what is narrated below, that the experts have reached some consensus on the documents produced by way of an account, and with regard to the adequacy of the information that may be gleaned therefrom.

21. In order to consider the question of whether the account furnished by Mr Ghose fulfils the obligation at issue I must deal with the form of such account and the considerations made by the parties in the hearing of 13 December 2018 are still relevant.

What form of account?

22. The first question to consider is the nature of the account Bloxham was obliged to furnish to the Committee of the Ward. The account contemplated is described in that part of the judgment which commences at para. 93, and what was envisaged was an account supported by documentation "sufficiently intelligible and clear to provide an explanation as to the movement on the account". The purpose of the giving of an account was explained by reference to a formula described by McGhee in *Snell's Equity* (33rd ed., Sweet & Maxwell, 2015) at para. 20.013 as would serve "the informative purpose of allowing the beneficiaries to know the status of the fund and what transformations it has undergone".

23. The context in which the application was made was regarded as relevant and, at para. 94, the conclusion was drawn that the complexity of modern commerce might not always require a trustee or a person holding monies in a fiduciary capacity to fully narrate the movements on an account. In the present case the approach adopted, founded on the

fact that the Committee of the Ward had employed a forensic accountant and legal advisors, was that information would be sufficiently complete, coherent and detailed if it could be understood by a person with that legal and financial competence.

24. Finally, it was noted at para. 95 of the principal judgment that the furnishing of an account had to take some regard of practical commercial sense and that a proportionate response to the request for an account properly reflected the discretionary and flexible nature of the remedy, which is equitable in origin.

25. The question of the adequacy of the documentation and the form of the account had appeared to crystallise at the hearing on 13 December 2018, and the parties had reached a form of consensus as to the form of an account.

26. As noted in the principal judgment, the equitable jurisdiction engaged requires to be informed by common sense and proportionality regarding the amount of detail to be furnished, the manner in which an account is to be presented, and the circumstances of the case. For that purpose, I have had the assistance of the experts.

Commentary on the report of Mr Ghose

27. In his first report dated 27 November 2018, Mr Croft, after setting out the documents that he had reviewed, and noting, as I had in the course of the principal judgment, that there was an absence of regular reports of the investment portfolios, expressed the view that it should be possible for Bloxham to reconstruct the transaction data, either on a monthly or quarterly basis, in a manner sufficient to enable him to prepare a "narrative description of the investment strategy and the evolution of the portfolio" and then to take a view on whether the portfolio was competently and responsibly managed in the light of the needs of the Ward. Mr Croft identified the type of documents and the information that should be contained, including lists of transactions, of assets held from time to time with valuations, details of expenses, taxes and a comparison of performance benchmarked against an appropriate index. He fairly said that when more documentation was furnished to him in line with the directions contained in the principal judgment, his initial view that no intelligible account existed was modified, but that there still remained a deficit and the documentation taken as a whole still failed to provide a complete or consistent report or account of the evolution of the funds. He said that for each quarter from August 2008 to February 2012, while the overall value of the fund is now ascertainable from the valuations contained in a composite Book of Valuations, the details of transactions are not. He extrapolated, however, that if an overall value was furnished to the Office of the Wards of Court and the Accountant's Office of the High Court, the firm must have available records of sales, purchases, dividends and coupon receipts, and that these would be sufficient to enable the preparation of quarterly valuations. With regard to the later period, 2012 to 2016, he was satisfied that the composite file called "Transaction Detailed by Security" appeared to have been generated from a "relatively well-developed investment management system". His conclusion was that it was possible from the information to hand to prepare an intelligible account based on the documentation furnished and a reconstruction of a transaction history.

28. Mr Ghose, whilst he does not expressly say so, in essence, has prepared what his counsel argues contains a reasonably complete analysis in the form and containing the details identified by Mr Croft.

29. In his last report Mr Croft expresses himself not satisfied and complains that the summary and narrative in the report of Mr Ghose would not inform a "layman" of how the fund is performing, what return was generated from time to time, and how the value of the fund was changing or why. He notes the absence of a full list of all transactions during the period and that what is given, in essence, is a single cumulative figure for cash withdrawals, but no individual details of fees expenses and taxes.

30. He also complains of the absence of an "informative commentary" or of "insight into the risks being taken such as currency risks, volatility of return or concentration risks or current strategy". He accepts that it is possible to calculate the annual returns year by year from the cumulative returns although he notes that a nonprofessional could not do so.

31. The experts disagree as to whether management fees were paid, Mr Ghose suggesting that none were paid and Mr Croft saying that his instructions are that fees of the management of the account were paid.

32. Mr Ghose's report shows the performance by year of the fund and Mr Croft complains that what is identified are the net and not the gross figures. Again he accepts that these can be calculated. He accepts the accuracy of the reports and has done a random spot check of some payments in the cash account statements which can be reconciled with the table of figures. Finally he agrees that the lack of recovery in value after the financial crisis was due to a high level of withdrawals at a time when market value was low.

33. Mr Kirby disagrees and takes the view plainly that the report of Mr Ghose is "accurate and sufficient", sufficient for any professional investment manager or forensic accountant to take a view as to the evolution of management of the fund in the relevant years. His opinion is that the report is "accurate comprehensive and sufficiently detailed with appropriate supporting documentation such as to enable a professional adviser to assess the evolution and management of the fund".

Conclusion on the state of the documents and the report of Mr Ghose

34. The commentary of the two experts informs my decision in this ruling, but I wish to observe that the commentaries of the experts strayed to an extent outside the narrow purpose for which their expert view was sought, and commentary regarding the reason for the fall in the value of the fund, the possibility that the firm acted negligently in the management of the fund, *etc*. are not matters which properly belong in these proceedings, and I do not propose to draw any conclusions based on these observations. The present ruling is not concerned with questions of negligence, nor with any assessment of why the fund is now insufficient to deal with the ongoing needs of Mr Best, nor is it concerned with an analysis of the movement of the funds. The sole question is

whether the obligation identified in the principal judgment has been met, and if not, what further needs to be done.

35. I am also not concerned with whether management fees or commission were paid to the firm, and those matters may well fall for consideration in other litigation, but are not part of the process engaged in these proceedings which had, as is explained in the principal judgment, the narrow focus of ascertaining the nature of the relationship for the purpose of coming to a conclusion as to whether the firm had an obligation to now furnish an account.

36. What has emerged following an inspection of the documentation held in the Office of the Wards of Court and the Accountant's Office of the High Court, and from an inspection of the boxes held by Mr Wallace as liquidator of the firm, and from the reports of the experts and that prepared by Mr Ghose, is that no account or statements of account were furnished on a regular basis by the firm to either the Office of Wards of Court or to the Committee directly.

37. The accountants differ to some extent in the view they take as to the adequacy of the two accounts now furnished by Mr Ghose. Mr Croft is of the view that the contents of the report are "sparse" and fall short of a reasonable minimum standard, and would not inform a layman about the movement of monies in the fund. With great respect to Mr Croft, I am of the view that he has misunderstood one element of the principal judgment, and his insistence that the account be intelligible by a layperson does not reflect the observations made in the principal judgment that the account to be furnished must have as its starting point that both parties have financial and legal advice and also that a degree of common sense and proportionality is to be brought to bear on the form in which the account is to be rendered, the amount of detail to be furnished, and the manner in which it is presented.

38. Both experts agree that, in the normal way, regular periodic reports will be provided by an investment manager and that there are significant gaps since 2004 in the documentation made available through the various sources including the Office of the Wards of Court, the Accountant's Office of the High Court, and Bloxham itself.

39. The evidence points me to the conclusion that no regular or periodic reports were provided by the firm, whether to the Committee or to the Office of the Wards of Court since 2007 and that such reports would have been provided in the normal way in any standard investment relationship.

40. The documentation is not complete but the gaps in the documentation are not such as to prevent an understanding by an expert of the movements in the funds, the investment choices, and some of the reasons why the investments failed.

41. Undoubtedly, the exercise has been more difficult and time consuming than would have been the case had periodic reports and statements been delivered in accordance with what the two experts agree is best practice. Nonetheless, in the light of the practical

common sense approach advocated in the principal judgment, I am of the view that there is little now to be gained from the making of an order for the preparation of further reports or the attempt at reconstructing each movement on the investments for the period. That exercise would be expensive and, as the purpose of this ruling is to adjudicate on the adequacy of the documentation now available and whether it is sufficient to meet the obligations identified in the principal judgment, and not to lay blame, I am satisfied that no further order should be made and that the albeit incomplete documentation now to hand as supplemented by the narrative and reconciliation carried out by Mr Ghose and the supporting documentation taken together amount to a sufficient compliance with the obligation that an account be provided.

Obligation to pay the costs and expenses of experts

42. What remains then is a consideration of who should discharge the cost of the inspection and analysis by the experts and the preparation by Mr Ghose of his report. This is not the question of the costs of the proceedings but rather of the engagement by the experts with the voluminous documentation obtained since the principal judgment and summarised above.

43. It was argued by counsel for the plaintiffs that the firm was obliged as a matter of contract to furnish on a regular, probably quarterly, basis complete accounts, that this obligation is found in the express contract of retainer, or would be implied in the contractual relationship normally found between stockbroker or investment manager and client. It is argued in that context that the firm should discharge the cost incurred as a result of the failure to do this as that would be no more than obliging the firm to perform a contractual obligation to which it had committed when it took over the management of the portfolio.

44. The summary summons was not concerned with the contractual relationship between the Committee and Bloxham, and the argument that there existed a direct contractual relationship is to be understood in the context of the placing with Bloxham by the Office of the Ward of Court of responsibility for the management of the fund in 2001. I do not therefore propose to consider this argument from the point of view of the contractual relationship between the firm and the Committee, if indeed there was such.

45. Counsel for Mr Ghose argues that the decision of Kenny J. in *Chaine-Nickson v. Bank of Ireland* referred to in the principal judgment, means that the cost of making an account is to be met by a beneficiary and not by a person giving the account. At para. 125 of the principal judgment, in reliance on that proposition, I formed the view that pending any further order, the Committee and/or its advisors should inspect the boxes of documents held by Mr Wallace at the cost of the Committee itself.

46. That ruling was made as an interim ruling pending further order. It does not mean that the Committee must bear the costs of the preparation by Mr Ghose of the account, and of his expert, Mr Kirby, in reviewing the documentation and the reports of Mr Croft.

47. Counsel for the Committee makes the argument that while the judgment of Kenny J. in *Chaine-Nickson v. Bank of Ireland* is a useful and binding authority regarding the duty of the trustee to account and the right of the beneficiary to be given full and accurate information, it is less useful as an authority in regard to the question of the liability for the costs of the production of documents as the plaintiff in that case was no more than a potential beneficiary under a settlement of property vested in the defendants as trustees on a discretionary trust.

48. I am unable to read the judgment of Kenny J. so narrowly as not to form a useful authority as to where the costs of furnishing documentation should fall. The distinction between a beneficiary and a person who had no more than an entitlement to be considered as a potential beneficiary under a discretionary trust did not form the basis of the decision and the question for consideration was not whether a distinction was to be drawn between the entitlement to information of a potential beneficiary and that of a present beneficiary. The decision concerns more the entitlement to receive information, rather than the obligation to pay the expense of providing the documentation.

49. However, I agree with the argument made by counsel for the plaintiffs that Kenny J. was concerned with the cost of making copies, so-called scrivenery costs or fees, and did not order any account to be taken by the court. His decision was solely that documentation be produced, not that an account be taken, a distinction material in the present case. The judgment, therefore, does not offer any useful guidance on who should bear the costs of the preparation by an expert of an account where the circumstances do demand that an account be furnished.

50. The matter, therefore, is to be decided on the evidence and from first principles. The experts agree that they would have expected regular updates to be furnished whether to the Office of Wards of Court or to the Committee, or both, and in my view, it is the absence of these regular and complete statements that has led to the litigation and the subsequent attempts to assemble the records and to reconstruct the information regarding transactions over 15 years. That was best done by experts and Mr Ghose has offered considerable assistance by preparing a report and narrative which while not equivalent to monthly or quarterly statements offers a reasonable profile of the movements of the investments.

51. The costs of engaging the experts to carry out this task are to be met by Bloxham, as it is its failure that has led to the inability of the Committee to understand the transactions or to have otherwise available copies of periodic statements.

52. I will hear counsel as to the appropriate order in these circumstances. I am conscious that Bloxham is insolvent and in liquidation, but I am unclear as to the financial arrangements that exist between Mr Ghose and the other defendants, whether the expenses are capable of being met in the form of insurance or other funding.

53. I will also hear counsel as to the costs of the proceedings, and of the various hearings after the principal judgment was delivered.