



How many law firms is it reasonable for co-parties to instruct?

The High Court decision in the case of Ong & Ors v Ping is a useful warning that the costs of separate representation in trust litigation may not be recoverable in full for successful parties.

In trust litigation, parties are often advised to seek separate representation because of the possibility of conflicts of interest arising between them. However, even if this is justifiable (reasonable or necessary) at the outset, the position needs to be kept under regular review. If the situation changes and the parties' interests align, there is a real risk that the full legal costs of their ongoing separate representation will not be recoverable.

The Case

Ping concerns the proceeds of sale of a substantial house in London and relates to litigation that has been running on and off since 1988.

At a hearing on 17 June 2015, the Claimants, Jane Ong and her three children, were each held to be the beneficiaries of a discretionary family trust over the property and therefore the £3.2million proceeds of sale. The Defendant, Mr Ong Ping, was held to be a trustee of the discretionary trust and liable to account for the whereabouts of the proceeds of sale, which are currently unknown.

The beneficiary Claimants were separately represented: Jane Ong by one firm, and her three children by another. The Defendant, having been found to be liable for the Claimants' legal costs, argued that the Claimants should only be entitled to the costs of one of the two firms, alleging that, in the circumstances of this case, separate representation was unnecessary.

The factors considered by the Judge in reaching his decision on costs:

Arguments in favour of the two law firms' costs being recoverable	Arguments against the two law firms' costs being recoverable
No difficulty had been created by the involvement of two law firms.	In practice, the Claimants acted as if they had the same interests and, therefore, separate representation was irregular.
The Defendant had never previously raised an issue with the Claimants being represented by two law firms.	The Claimants instructed the same counsel and there was no conflict in the manner in which their case was presented.
In theory there had been the possibility of a conflict of interest. On the facts, only the children may have been found to be discretionary beneficiaries and, therefore, earlier judgments against their mother would have been in their favour.	The relevant provisions of the Civil Procedure Rules require costs to be "proportionate" and "reasonably or necessarily incurred".
	If the Claimants had applied to Court for permission to be separately represented, the Judge believed that they would have been refused.

Judgment

On the facts, the Claimants' instruction of a single law firm would have been sufficient for the main claim. Separate representation exceeded what was reasonably necessary to present the Claimants' case. Accordingly, the additional costs, being those in excess of what would have been incurred on the instruction of a single law firm, would be disallowed.

This did not equate to the entirety of one of the firm's costs being disallowed. The cost judge would need to review both firms' costs and determine which should be included in calculating the final costs bill. It would be for the Claimants then to determine how the remaining legal costs would be paid.

In respect of some of the earlier applications in the litigation between the parties, over which the Judge was not making a decision, the Judge recognised that the Claimants' separate representation may have been justifiable, their interests being sufficiently divergent on the relevant issues.

Conclusion

Where as a beneficiary or trustee you are advised to seek separate legal representation from your co-parties in litigation, it is advisable to:

- consider whether separate representation is in fact necessary – in practice is there a conflict of interest risk?
- if in doubt, the parties can make an application to Court for an order permitting separate representation;
- if you decide that separate representation is necessary, keep the position under regular review;
- note that the ability to instruct the same counsel is an indication that your interests are aligned;
- be aware that the same considerations regarding the recoverability of legal costs apply to trustees or beneficiaries who instruct separate law firms to represent them.

This is a private trust case but the principles would be equally applicable to pensions litigation. For example, the sponsoring employer's and the Scheme Trustees' interests may be said to be aligned, or there may not be sufficient divergence of interest between different class of members to justify separate representation. This case demonstrates that the structure of ongoing litigation should be reviewed and it does not apply only to new proceedings.

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