



Neutral Citation Number: [2016] EWHC 2594 (Ch)

Case No: HC-2016-001020

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Fetter Lane,
London EC4Y 1NL
Date: 18/10/2016

Before:

CHIEF MASTER MARSH

**THE T & N ASBESTOS TRUSTEE COMPANY
LIMITED**

Claimant

Peter Arden QC & Anna Scharnetzky
(Instructed by **Weil Gotshal and Manges**) for the **Claimant**

Hearing date: 28th September 2016

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.

.....

CHIEF MASTER MARSH

Chief Master Marsh :

1. On the 28th September 2016 I heard an application made by the claimant (“the Trustee”), the sole trustee of the UK Asbestos Trust (“the Trust”) constituted by a trust deed dated 10th October 2006 (“the Trust Deed”). The Part 8 claim seeks the court’s permission to enter into an agreement with the Federal-Mogul Asbestos Personal Injury Trust (“the US Asbestos Trust”) and for permission to amend the Trust Deed and the related document entitled the Trust Distribution Procedures (“the TDPs”). The court granted permission to issue the Part 8 claim form without naming defendants pursuant to CPR rule 8.2A and gave directions concerning notification of the proceedings to a wide class of interested parties by an order dated 17th June 2016. Any party so notified, or to whose attention the claim was brought, was entitled to give notice of intention to participate in the claim and to serve evidence. In the event, following notification substantially in the form directed by the court, no persons have given notice of intention to participate and the application proceeded entirely unopposed.
2. The background to the claim is set out in the first witness statement of Mr James Gleave, who is a director of the Trustee, dated 24th March 2016. I gratefully adopt the clear and helpful summary provided by Mr Gleave and, in light of the application being unopposed, it is unnecessary to set out the background facts in detail here. So far as it may be necessary, I will adopt the same abbreviations used in the witness statement.
3. The claim falls in the second category of applications by trustees described in the unreported judgment of Robert Walker J in 1995 which was referred to by Hart J in Public Trustee v Cooper [2001] 1 WTLR 901 at 923 :

“The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees’ powers where there is no real doubt as to the nature of the trustees’ powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers... In such circumstances there is no doubt at all as to the extent of the trustees’ powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the courts blessing on a momentous decision ...”.

4. The approach to be adopted by the court has more recently been explained by David Richards J (as he then was) in Re MF Global Limited (No 5)[2014] Bus LR 1156

“The court’s function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees’ powers is lawful and within the power and that it does not infringe the trustees’ duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only

to be satisfied that the trustee's can properly form the view that the proposed transaction is for the benefit of the beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). The court may also withhold approval where the trustees have demonstrated a general unfitness to act, by conduct before the taking of the decision in question."

5. The Trust came into being following the entry into administration of T&N Limited ("T&N") and its affiliates followed by CVAs which were approved on 7 September 2006. The US Asbestos Trust was created by an analogous path via Chapter 11 proceedings of Federal-Mogul Corp and its subsidiaries (including T&N) in the United States culminating in the confirmation by the US Bankruptcy Court on 27th December 2007 of a reorganisation plan.
6. The essence of the arrangements which are reflected in the CVAs is that the holders of "Asbestos Claims" assigned those claims to the Trustee in exchange for a "Trust Claim" which is, essentially, an interest in the right to receive payments from the Trust in accordance with the Trust Deed and the TDPs.
7. Mr Gleave's first witness statement explains that a significant insurance recovery was expected to be made under what is termed "the Hercules Policy", an insurance policy taken out by T&N in 1996. The Trust's entitlement under the Hercules Policy has been commuted for a final cash payment with a total net sum to be received by the Trust of approximately £3 million. The court is not asked to approve that agreement, but it is a key factor which lies behind the application.
8. The remaining background matters which are of significance arise from there being two classes of fund, each comprising two funds, which were created by the CVAs and given life in the Trust. The need for separate funds is explained in Mr Gleave's first statement. The funds are:
 - T&N Fund
 - T&N Hercules Fund

- Chester Street Fund
- Chester Street Hercules Fund

9. Each of these funds is defined in the Trust Deed. The two ‘Hercules’ funds were created to receive the proceeds of recoveries under the Hercules Policy. This contrasts with the T&N Fund and the Chester Street Fund which were each created with a capital sum. For example, the “T&N Fund” and “T&N Fund Assets” are defined as follows:

“T&N Fund

The fund to be established in accordance with the terms of the UK Asbestos Trust Documents for the benefit of holders of T&N Trust Claims”

T&N Fund Assets

T&N Fund Assets means:

- a) The sum of £33 million which is to be paid to the UK Asbestos Trustee pursuant to paragraph 14.2(a) of the CVAs;*

....”.

10. The Trustee’s experience since the Funds were set up is that fewer claims have been made successfully against the Chester Street Fund than had been originally anticipated. Claims and costs have largely been paid out of income such that the original capital of £22 million is still almost intact. The Trustee, having taken actuarial advice, believes there will be a surplus with a net present value of about £12 million in the Chester Street Fund. However, the Trustee is not in a position to distribute the surplus to the holders of Chester Street claims because the payment percentage of the Chester Street Fund is linked to that of the T&N Fund.
11. If the proposal is not implemented, as a result of the commutation, the T&N Hercules Fund will receive about £1.8 million and the Chester Street Hercules Fund about £1.2 million. However, there will be a surplus in the Chester Street Fund. T&N assigned the reversionary interest it held in the Chester Street Fund to the US Asbestos Trust and, as matters stand at present, any surplus will have to be retained and paid over only at some point after 2046. It cannot be used for the benefit of the CVA Asbestos claimants or any class of them.

The Proposal

12. The proposal follows from the agreement to commute claims under the Hercules policy. It has the following elements;
- (i) The US Asbestos Trust and the Trust agree to vary the split of net Hercules recoveries as between the T&N Hercules Fund and the Chester Street Hercules Fund to reflect the Trustee’s view of the likely respective asbestos liabilities of the two funds.

- (ii) The T&N Hercules Fund and the Chester Street Hercules Fund will assign to the US Asbestos Trust their right to receive Hercules recoveries.
- (iii) The US Asbestos Trust will assign to the Trust its reversionary interest in the Chester Street Fund and the Chester Street Hercules Fund in the same proportions as the split of Hercules recoveries, save that the whole of the reversionary interest in the Chester Street Hercules Fund is to be assigned to the T&N Hercules Fund in order to avoid circularity.
- (iv) In order to derive value from the reversionary interests in the Chester Street Fund and the Chester Street Hercules Fund, the Trustee wishes to make amendments to the Trust Deed and the TDPs. The amendments are described in paragraph 70(a) to (d) of Mr Gleave's first statement. (The amendment described at paragraph 70(e) is no longer sought).

Trustee's Powers

- 13. Under clause 19.10 of the CVA, the Trustee and the US Asbestos Trust are entitled to alter the Hercules percentages to promote a fair division of Hercules recoveries from time to time between the US Asbestos Trust and the Hercules Funds. This power, however, has not been exercised because the US Asbestos Trust was unwilling to agree terms on a 'stand-alone' basis. In any event, had such powers been exercised, the problem of surplus funds within the Chester Street Fund would not have been resolved.
- 14. The relevant powers of the Trustee are contained in clauses 6 and 7 of the Trust Deed. The former clause deals with general powers of the Trustee and the latter with powers of investment. During the course of the hearing, Mr Arden QC undertook a full review of those powers and careful consideration was given to their scope. Initial concerns were expressed by the court that the powers might not be wide enough to permit the transaction to take place. In the event, however, I am satisfied that the powers are, in fact, wide enough for the following reasons;
 - (i) Clause 6.1.1 contains a wide ranging general power on the part of the Trustee in the following terms;

“The Trustee shall have all the power necessary for the implementation of this Trust and, unless otherwise directed by this Deed, they may exercise such powers as they think fit.”

There are no relevant restrictions on the exercise of such powers in the Trust Deed and on the face of it the power provided by clause 6.1.1 is more than adequate because the arrangement can properly be seen as part of the implementation of the Trust for the benefit of its beneficiaries.
 - (ii) Clause 6.2 contains a number of specific powers of the Trustee which are expressed to be without prejudice to the generality of clause 6.1. They include a power under clause 6.2.13;

“...to change or vary any property or investments for the time being forming part of the Fund Assets”.

Fund Assets is defined narrowly by reference to the four Funds and two other

Funds which are not relevant. So far as the two non-Hercules funds are concerned, they are described by reference to cash sums and accretions. The two Hercules funds are defined more widely.

- (iii) Under clause 6.2.20 there is an express power to commute a settlement in relation to the Hercules policy.
 - (iv) Under clause 7 there is a general power to apply the Fund Assets and there are other specific powers of investment which include, for example, under clause 7.2.1 the power to acquire any interest in personal property and under clause 7.2.4 the power to enter into obligations or contracts or dealings.
15. The powers to deal with (to use a general expression) Fund Assets are wide enough to give the Trustee powers to undertake the transaction which has been agreed, in principle, between the Trustee and the US Asbestos Trust despite those powers being limited to dealing with the Trust Fund. It is unnecessary to go further than to consider the power in clause 6.1.1 but, if it were, it is inconceivable that the draftsman of the CVAs and the Trust Fund intended to impose a fetter on the power under clause 6.2.13, in particular, by reference to the definition of each of the four Fund Assets as initially constituted. It made sense, at the time the Trust Deed was created to define the Fund Assets by reference to the cash to be received by them, or by reference to the funds expected to be received under the Hercules policy. However, looking at the arrangement as a whole, it was clearly contemplated that the nature of those assets might change over time and the Trustee was intended to have a broad ability to deal with them as required by events as they occurred over the anticipated 40 plus year lifespan of the Trust.
16. Clause 19.1 of the TDP gives the Trustee the power to
- “... make such amendment as may from time to time appear to be in the best interests of the Beneficiaries of the Trust...”.
- The exercise of this power is subject to ensuring that the “**Core Objective**” stated in clause 1.3 of the TDP is maintained.
17. The Core Objective is to enable Trust Claimants with established claims to receive a payment (or payments) from the appropriate fund or funds which;
- (i) Reflect the value of the CVA Asbestos Claim, the proceeds of which are assigned to the Trust by the Trust Claimant.
 - (ii) Is fair and proportionate, having regard to the interests of other Trust Claimants with similar Trust Claims claiming out of the same Fund or Funds; and
 - (iii) Is calculated and paid in an efficient and cost effective manner, following an efficient and cost effective assessment of the Trust Claim.
18. The three elements of the core objective have to be taken together. They recognise that the distribution cannot take place on a perfect pari-passu basis and objective (c) emphasises the importance of claims being paid in an efficient and cost effective

manner. Thus, the Core Objective is maintained where, as under the proposed scheme, the surplus can be put to use immediately. Current payments can be paid out of the Hercules Fund albeit there are restrictions built into the changes made to the Trust Deed and the TDP's.

Benefits and risks

19. The Trustee has considered the risks involved in the scheme and obtained actuarial advice. Absent a statistically remote possibility, all holders, present and future, of (1) T&N and T&N Hercules claims and (2) Chester Street and Chester Street Hercules claims benefit from the arrangements. There is a less than 1% chance that Chester Street or T&N claimants would be better off if the Trustee did not enter into the agreement with the US Trust.
20. The Trustee has formed the view that the proposed arrangements taken with the associated amendments to the Trust Deed and the TDPs are in the best interests of Trust Claimants and the anticipated benefits outweigh the possible risks. The thought process leading to this conclusion, and the matters taken into account, have been carefully and fully explained in Mr Gleave's first statement.

Conclusion

21. I am satisfied that;
 - (i) This was a proper application for the Trustee to make given the nature of the proposed transaction with the US Asbestos Trustee.
 - (ii) The Trustee has the requisite powers to enter into the transaction with the US Asbestos Trustee.
 - (iii) The Trustee has properly formed the view that the proposed transaction is for the benefit of Trust Claimants and has taken into account proper and relevant considerations.
 - (iv) The Trustee has power under the Trust Deed and the TDSs to make the proposed amendments to the Trust Deed and to the TDP's.
 - (v) There has been adequate notification of the proposals to interested parties.