Womble Bond Dickinson (Trust Corporation) Ltd (as trustee of the Stephris Trust) v No Named Defendant [2022] EWHC 43 (Ch): Taking action against potentially collusive actions?

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Introduction

One way this case differs from most is obvious from its name. There was a claimant, but no defendant. Nevertheless, the court court was *'given full argument on the points … to be determined'* (§8 of the judgment). In this respect Deputy Master Brightwell was arguably better off than his counterparts in various recent trust cases in which there were named defendants, but in which both sides agreed on a preferred outcome. In *Womble Bond Dickinson* an Advocate to the Court (what used to be called an *amicus curiae*) was appointed to put the counter-arguments to the trustee's position. This procedural feature of the case may be the most interesting one: does it mark a departure from recent practice, and what might the implications be if so?

The case in summary

Before exploring these questions, it is worth explaining what there was to be argued about.

The trustee of a discretionary trust for the benefit of employees of a defunct group of companies sought directions from the court on two related matters. The first was the scope of the class of beneficiaries on a true construction of the trust instrument. The second was what steps the trustee should take to identify the beneficiaries within that class and distribute the fund to them.

The main issue of construction was this. Did the class of beneficiaries track the membership of the corporate group, with employees or former employees of a company ceasing to be beneficiaries when their company left? Or was anyone who had worked for a company while it was a member of the group a beneficiary for life? The trustee argued for the narrower reading, the Advocate to the Court for the broader one. The court sided with the Advocate.

On the court's construction of the deed the trust did still have beneficiaries. Yet no substantial distributions had been made for 15 years, and the trustee only had a list of 600 potential beneficiaries (with an unknown number still to be identified). Could the trustee distribute the fund without further, expensive steps to identify beneficiaries? If not, what further steps should it take?

The trustee surrendered its discretion to the court, but proposed a suite of options and made clear that an equal distribution of the fund among the beneficiaries it already knew about was its preferred one. The Advocate to the Court made objections to each of the trustee's ideas.

The court directed the trustee to distribute the trust fund in equal shares to those former employees who were beneficiaries and whose identities and contact details were ascertained by a fixed date. It did not direct the trustees to make further proactive efforts to identify more beneficiaries.

The customary approach in trusts cases

So how does the provision for an Advocate to the Court in *Womble Bond Dickinson* compare with the usual approach in trusts cases?

More common than claims in which there is no defendant at all are claims on which the trustee and the beneficiaries agree: many claims, for example, for rectification or under the rule in *Hastings-Bass*.

Historically, the court in such cases expected someone to make the case against the claim. In *Green v Cobham* [2002] STC 820, Parker J noted that *'for the assistance of the court'*, the defendant's counsel *'has very properly and helpfully undertaken to play the role of devil's advocate'* (825).

This practice had a particularly clear rationale in cases (like *Green*) where relief was sought because the trust fund had suffered a tax hit. Even if such relief would suit both parties, it would not be in the interests of HMRC.

In more recent times, however, exactly this problem has been dealt with in a different way. In *Wright v National Westminster Bank plc* [2014] EWHC 3158 (Ch), §9, the court explained that: *'As is customary in such cases, HMRC has been notified of the claim to rescind the settlement. By a letter dated 2 October 2013 a trust officer at HMRC confirmed that HMRC did not wish to be joined as a party to the proceedings seeking to set aside the trust on the grounds of mistake but required the claimants to draw the court's attention to the decision in Pitt v Holt [2013] UKSC 26.'* The defendant did not act as *'devil's advocate'* like the defendant in *Green*.

In the very recent case of *JTC Employer Ser Trustees Ltd v Khadem* [2021] EWHC 2929 (Ch), HMRC again declined to be joined but asked the court's attention to be drawn to a letter drafted by one of its senior lawyers. Again, neither of the actual parties made arguments against the claim they both supported.

In each of these cases, and in *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) and *Bhaur v Equity First Trustees (Nevis) Limited and others* [2021] EWHC 2581, the court expressly justified making a decision without hearing the contrary arguments. Norris J in *Wright* said: *'In the circumstances this application proceeds on what is effectively an unopposed basis. But even if the evidence is not challenged the court must still be satisfied that it proves the facts necessary to establish that the jurisdiction is available and that it is appropriate for the court to exercise the jurisdiction and make an order for rescission … The jurisdiction to set aside transactions, even of a voluntary nature, is not a collusive remedy.'* (§10)

In cases involving pension funds, the practice that has developed is different again. Where there is a claim for rectification, it is usual for a representative beneficiary to be appointed on behalf of members who would be harmed if the claim succeeded. The 'rep ben' may decide that there is no defence to the claim, but the custom in those circumstances is for his or her counsel to submit a confidential opinion to the court. The claim is not contested, but any available arguments against it should at least

reach the court via the opinion. (This practice is discussed at §29.98 of the *Chancery Guide*, and the cases that best exemplify it are cited.)

The approach adopted in *Womble Bond Dickinson*

In *Womble Bond Dickinson*, as in the tax and pensions cases, there were third parties who might lose out if the trustee's position prevailed (all potential beneficiaries on the construction issue, and hitherto unidentified beneficiaries on the administration issue). The same general problem accordingly arose, with the added nuance that no plausible defendant could be joined—even for the purposes of agreeing with the claimant trustee.

As mentioned, the court dealt with the problem by ordering the claimant to instruct an Advocate to the Court. That order was made by Master Pester, at a preliminary hearing prior to the trial before Deputy Master Brightwell.

In one sense Master Pester's decision marks a departure from that in *Wright, JTC*, and so on, and a return to the approach in *Green*. As Deputy Master Brightwell said, it was taken *'to ensure that all arguments were fully presented'* (§6).

Yet there are two points of difference. The role of an Advocate to the Court is set out in Practice Direction 3G: *'It is important to bear in mind that an Advocate to the Court represents no-one. Their function is to give to the court such assistance as they are able on the relevant law and its application to the facts of the case. An Advocate to the Court will not normally be instructed to lead evidence, cross-examine witnesses or investigate the facts.'* (§4)

The first difference, then, is that appointing an Advocate to the Court is a step beyond inviting the defendant's counsel to act *'for the assistance of the court'* (*Green*, 825). In a case without a represented defendant (or any defendant at all) it is a workable substitute for such *Green*-style devil's advocacy. Where the defendant is represented, however, it would be an even more rigorous method than the traditional one of ensuring the court hears all the best counter-arguments.

The second difference concerns the Advocate's '*function*'. It is to help the court on the law and its application to the facts. This is what was required in *Womble Bond Dickinson*, in order for both sides of each of the issues in play to be ventilated properly.

Yet appointing an Advocate might not achieve quite as much in all trusts cases—especially those about a mistake. In the 2021 case of *Bhaur*, Marcus Smith J stressed that *'even where the claimant's application to set aside a transaction is essentially unopposed, the court must still be satisfied that the claimant has proved the facts necessary to establish that the court has the jurisdiction to set aside the impugned transactions and that it is appropriate for the court to grant relief'* (§107).

While an Advocate to the Court can make submissions on the appropriateness of granting relief, he or she cannot *'normally'* help to the same extent with proving facts. For the claimant's witnesses to be cross-examined, or its account of the facts to be otherwise challenged, a different procedure might be required.

The procedure behind the procedure

There is one other point worth noticing. Practice Direction 3G says that *'in most cases, an Advocate to the Court is appointed by the Attorney General, following a request by the court. In some cases, an Advocate will be appointed by the Official Solicitor or the Children Family Court Advisory Service'* (§2). Master Pester provided for an Advocate without involving the Attorney General.

Deputy Master Brightwell recognised as much, but dealt with the point in a slightly enigmatic way. On the one hand he said Master Pester's direction had not been made pursuant to the Practice Direction, since no request was made. On the other, he relied on the point that the Practice Direction itself only envisages a request *'in most cases'*.

His conclusion in any event was this: *'A claim involving the supervisory jurisdiction of the court in relation to trusts, where the advocate is appointed in place of a representative beneficiary, and where the cost is to be borne by the trust fund in question, would seem to be an appropriate case for the appointment by the court and for the choice of counsel to be made by the trustee's solicitors.'*

While the decision in *Womble Bond Dickinson* was arguably a return to an older and more taxing approach, in another sense it showed striking procedural flexibility.

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