Client Memorandum

TRAVERS THORP ALBERGA
ATTORNEYS-AT-LAW

In re the Poulton Family Trust FSD 121 of 2016 (IKJ) – judgment delivered 18 February 2022

Further to the Court's main judgment in February 2022 (see, TTA Feb 20022 Client briefing https://www.traversthorpalberga.com/wp-content/uploads/2022/02/PFT-19.2.22-PFT-ARTICLE.pdf), the Hon. Mr. Justice Kawaley has delivered another significant decision in the long-running trust proceedings relating to the *Poulton Family Trust*. This most recent judgment considers the Plaintiffs' application for an interim payment on account of their costs and the basis upon which the Court will make an order for an interim payment on account of costs.

The *Poulton Family Trust* was settled in Cayman in 2003 for the benefit of the Settlor and his descendants and held a substantial property portfolio. At the end of 2014, the Settlor (who at this time also acted as the Trust's Protector) received notice from the Trustee (Cayman National Trust Co. Ltd) of FATCA reporting obligations. This caused the Settlor to take legal advice from Florida attorneys (Holland & Knight) in the spring of 2015 to the effect that the Cayman Islands trust should be terminated and that he should regain control of the assets of the Trust and onshore them to the US. In the middle of 2015, then aged 76, the Settlor became unwell, he was later diagnosed, in October, with Stage IV colon cancer. At the same time his third wife (D) became involved in his affairs and dealt extensively with lawyers in Florida, Cayman and London (including two QCs) in relation to the Trust and its affairs. This involved adopting and following a strategy: (i) excluding the Settlor's children from the Trust, (ii) having the Trustee terminate the Trust and appoint its assets to the Settlor and D jointly, and (iii) enabling D and her son and daughter-in-law to take control of the underlying trust companies in Cayman and England. When documents were sent to the Settlor's children seeking them to agree to a transfer of the trust assets directly to their father, suspicious of what may have been going on behind the scenes, the children refused to sign the documents and warned the Trustee and the Trustee's Cayman Islands attorneys (Appleby) of their concerns over their father's health, capacity and that their father was being subjected to his third wife's, their step-mother's, undue influence.

In due course, the Trustee received a Declaration of Exclusion signed by the Settlor-Protector of the Trust recording the decision to exclude irrevocably all of the Trust's beneficiaries, with the exception of the Settlor and D. The Trustee, on advice from its attorneys, accepted the Declaration and gave effect to it and then, some weeks later, the Trustee executed Deeds of Termination and Appointment, terminating the Trust and appointing the assets of the Trust to the Settlor and D jointly.

After the Settlor's death, his children instructed Travers Thorp Alberga to advise and represent them. Travers Thorp Alberga applied on the children's behalf for and obtained an *ex parte* injunction restraining D and her son and daughter-in-law from dealing with the Trust assets, which by that stage had been transferred to D, pending a trial of the Plaintiffs' claims to set aside their exclusion from the Trust, the termination of the Trust and the appointment out of the Trust assets.

After a 7-week trial of the proceedings, the Hon. Mr. Justice Kawaley accepted and followed the decision, cited and relied on by the Plaintiffs, of Morritt J (as he then was) in *Simpson v Simpson* [1992] 1 FLR 601 that a relationship of husband and wife can give rise to a presumption of undue influence when one spouse becomes ill and dependent on the other, paragraph 341 *ff.* of the main judgment.

The Court also accepted the Plaintiffs' legal analysis on the law of undue influence. The Plaintiffs' relied on passages from the English and Canadian authorities *Bullock v Lloyds Bank Ltd [1954] 1 Ch 517, Powell v Powell [1900] 1 Ch 243* and *Mundinger v Mundinger (1968) 3 DLR (3d) 338* to illustrate the operation of undue influence in wholly familial circumstances. At paragraph 340, the Hon. Mr. Justice Kawaley found,

"These passages suggest that the doctrine of undue influence is more fluid than it might initially appear to be, especially if one has only encountered it in limited factual and legal contexts, such as the well-known scenario of the Etridge case. They also remind one of the need to avoid confusing the legal principle itself with the way it is applied in particular factual contexts, a 'tail wagging dog' tendency which often flows from a mechanistic interpretation of judicial authorities."

Following on from the main judgment in February 2022, in August, the Hon. Mr. Justice Kawaley made a costs order in the Plaintiffs' favour against D. As a result of that costs judgment, the Plaintiffs applied to the Court for an interim payment on account of costs.

D opposed the Plaintiffs' application and contended that the Court should not order any interim payment on account of costs, partly on the basis of her averred impecuniosity.

In March 2023, the Hon. Mr. Justice Kawaley delivered his ruling on the application and made an order that D pay US$1,000,000 as an interim payment on account of the Plaintiffs' costs pending the outcome of taxation of the Plaintiffs' bill of costs.

There are four important points to take away from the Hon. Mr. Justice Kawaley's recent ruling on the issue of interim payments on account of costs:

(1) Applications for interim payment on account of costs can be dealt with on the papers on a summary basis without any extensive articulation of the governing legal principles.[1]

(2) Financial hardship and impecuniosity is not a valid basis for refusing to make an order for interim payment on account of costs.[2]

[1] Judgment, paragraph 4

(3) The amount of the Interim payment should be assessed taking into account what sums the winning party would likely be awarded on a taxation.[3]

(4) In Cayman, the Court is likely to award as an interim payment around 30%-40% of the rough and ready figure it estimates that the winning party is likely to be awarded following taxation of its costs.[4]

Neil McLarnon was Partner with conduct of the proceedings on behalf of the Plaintiffs and represented the Plaintiffs on their application for the interim payment on account of costs.

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[2] Judgment, paragraph 11
[3] Judgment, paragraph 13
[4] Judgment, paragraphs 16 & 17