



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESSE FREDERICK-CONAWAY,)
Appellant)
)
v.) No. 359, 2016
)
KEVIN M. BAIRD, COURT-) ON APPEAL FROM THE COURT
APPOINTED EXECUTOR OF THE) OF CHANCERY C.A. NO. 8379-
ESTATE OF EVERETT T.) VCG
CONAWAY AND COURT-)
APPOINTED TRUSTEE OF THE)
EVERETT T. CONAWAY)
REVOCABLE TRUST,)
Appellee)
)
And)
JANICE M. RUSSELL-CONAWAY,)
Appellee.)

**ANSWERING BRIEF TO APPELLEE JANICE M. RUSSELL-
CONAWAY'S OPENING BRIEF
OF
APPELLEE, KEVIN M. BAIRD, COURT-APPOINTED EXECUTOR OF
THE ESTATE OF EVERETT T. CONAWAY AND COURT-APPOINTED
TRUSTEE OF THE EVERETT T. CONAWAY REVOCABLE TRUST**

BAIRD MANDALAS BROCKSTEDT, LLC
Stephen A. Spence, Esquire (#5392)
1413 Savannah Road, Suite 1
Lewes, DE 19958
302-645-2262
sas@bmbde.com
*Attorney for Kevin M. Baird, Court-Appointed
Executor of the Estate of Everett T. Conaway and
Court-Appointed Trustee of the Everett T.
Conaway Revocable Trust*

November 11, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

NATURE OF PROCEEDINGS..... 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

 A. Introduction 3

 B. Janice is not just a beneficiary; she was also a fiduciary 3

 C. The Petition for Instructions sought the legal interest rate; Janice only contested the rate of interest, not whether it was due 4

 D. The Court of Chancery specifically noted Janice’s fiduciary position when deciding on the rate of interest to impose..... 5

ARGUMENT 6

 I. THE COURT OF CHANCERY PROPERLY ORDERED JANICE, A FIDUCIARY, TO PAY THE LEGAL INTEREST RATE ON THE FUNDS SHE RECEIVED..... 6

 A. Question Presented 6

 B. Scope of Review 6

 C. Merits of Argument 6

 i. Janice failed to preserve her argument that no interest should be imposed 7

 ii. Janice, as a fiduciary, was prohibited from self-dealing and personally benefiting before other beneficiaries..... 7

 iii. Janice’s reliance on authority regarding a beneficiary’s liability to a trust ignores her status as a fiduciary 8

iv. The Court of Chancery’s imposition of the legal interest rate was within its broad discretion to craft a remedy.....	10
CONCLUSION.....	12

TABLE OF AUTHORITIES

Cases

<i>Hogg v. Walker</i> , 622 A.2d 648 (Del. 1993).....	6
<i>In re Estate of Howell</i> , 2002 WL 31926604 (Del. Ch. Dec. 20, 2002)	8
<i>Matter of Estate of Hedge</i> , 1984 WL 136921 (Del. Ch. Feb. 8, 1984)	7
<i>McNeil v. McNeil</i> , 798 A.2d 503 (Del. 2002).....	6, 11
<i>Paradee v. Paradee</i> , 2010 WL 3959604 (Del. Ch. Oct. 5, 2010)	8
<i>Schock v. Nash</i> , 732 A.2d 217 (Del. 1999).....	6, 11
<i>Vincent v. Baize</i> , 2011 WL 4695622 (Del. Ch. Sept. 30, 2011).....	7
<i>Walls v. Peck</i> , 1979 WL 26236 (Del. Ch. Oct. 24, 1979)	8

Other Authorities

George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES § 543 (2d ed.1993).....	8
Restatement (Third) of Trusts, §104.....	8
Restatement (Second) of Trusts §255	8
Restatement (Second) of Trusts §257.....	9
12 <i>Del.C.</i> § 3581	9, 11

NATURE OF PROCEEDINGS

Appellee, Kevin M. Baird, Court-Appointed Executor of the Estate of Everett T. Conaway and Court-Appointed Trustee of the Everett T. Conaway Revocable Trust (“Mr. Baird”), incorporates by reference his Nature of Proceedings stated in his Answering Brief to the appeal of Appellant Jesse Frederick-Conaway, filed on October 14, 2016 (D.I. 25; Trans. ID 59701297).

On October 12, 2016, Appellee, Cross-Appellant Janice Russell-Conaway (“Janice”) filed her “Answering Brief on Appeal and Opening Brief on Cross-Appeal” (“Janice’s Opening Brief”).

This is Mr. Baird’s Answering Brief responding to Janice’s Opening Brief.

SUMMARY OF ARGUMENT

I. DENIED. Mr. Baird contends that the Court of Chancery erred by ruling that Janice properly received the two CDI Payments. Those payments were property of Mr. Conaway's Estate and should not have been paid to Janice.¹ If this Court rules that the CDI Payments are Estate assets, this specific argument by Janice is moot.

If this Court rules that the Court of Chancery correctly found that those Payments were properly paid to Janice, then this Court should hold that the Court of Chancery did not abuse its discretion by ordering Janice to pay the legal interest rate on the two payments. Janice was a co-trustee owing fiduciary duties to the Trust when she received those payments. Therefore, Janice impermissibly personally benefited by receiving Trust distributions before other beneficiaries received theirs. Accordingly, the Court of Chancery's imposition of the legal interest rate was a proper exercise of its broad discretion to craft a remedy.

II. DENIED. The Court of Chancery did not abuse its discretion by ordering Janice to repay the \$77,987 in "advances" with legal interest. Those advances were in reality improper self-dealing by Janice when she was a fiduciary of the Trust and Estate. Accordingly, the Court of Chancery's imposition of legal interest was a proper exercise of its broad discretion to craft a remedy.

¹ See Mr. Baird's Ans. Brief, D.I. 25, at pgs. 16-25.

STATEMENT OF FACTS

A. Introduction.

Janice's cross appeal takes issue with the Court of Chancery's imposition of legal interest on both her receipt of the two \$75,000 CDI Payments and her removal of approximately \$78,000 of funds from the Estate account.²

B. Janice is not just a beneficiary; she was also a fiduciary.

Janice is a beneficiary of the Trust. The Trust provided that she was to receive 23,000 shares of Fulton Stock, the Morgan Stanley account, and the CDI stock (or proceeds of sale of the stock).³

Janice is not the only beneficiary. Jesse is the Trust's residuary beneficiary.⁴ And the Trust specified gifts to seven other relatives and the Seaford Historical Society (the "Other Beneficiaries").⁵ The Other Beneficiaries have not received any distributions.⁶

Janice was a fiduciary at the time she received the CDI Payments and removed the funds from the Estate account. Janice was a co-trustee of the Trust and a co-executor of Mr. Conaway's Estate.⁷ She served in those capacities from the time of Mr. Conaway's death in May 2010 to when Mr. Baird was appointed as

² Jesse's Opening Brief, D.I. 19, Ex. G (Rule 54(b) Order).

³ A21

⁴ A21.

⁵ A20-21.

⁶ See A102.

⁷ A5, 29.

successor-trustee and executor in August 2013.⁸ Janice received the CDI Payments in December 2010 and 2011.⁹ Janice removed approximately \$78,000 from the Estate account between May 2012 and August 2013.¹⁰

C. The Petition for Instructions sought the legal interest rate; Janice only contested the rate of interest, not whether it was due.

Mr. Baird's Petition for Instructions requested that the Court of Chancery order that Janice be charged the legal interest rate on the CDI Payments and on the improperly removed Estate funds.¹¹

The interest rate issue arose during the parties' effort to craft an order implementing the Court of Chancery's August 17, 2015 main bench ruling. During that stage of the proceedings, Mr. Baird proposed that the Court use the legal interest rate regarding the funds used by Janice.¹² Janice countered that the Court should instead use a nominal rate of interest similar to those utilized by money market accounts, but she did not argue that no interest should be imposed.¹³

⁸ A101.

⁹ A109.

¹⁰ A113-115; Jesse's Opening Brief, D.I. 19, Ex. G (Rule 54(b) Order).

¹¹ A110, 115.

¹² B118-128

¹³ B134-142.

D. The Court of Chancery specifically noted Janice’s fiduciary position when deciding on the interest rate to impose.

The Court of Chancery held a supplementary hearing to resolve the parties’ differences regarding the implementing order. At the hearing, the parties and the Court discussed many issues, including what interest rate to use:

[MR. BAIRD’S COUNSEL]: I would need Your Honor to rule upon the appropriate interest rate for Janice Conaway.

THE COURT: This is the legal interest rate.

[MR. BAIRD’S COUNSEL]: Which is what I put in there. And there was some – we didn’t actually say in the bench ruling.

THE COURT: That’s quite true. It was open. And I have read [Janice’s counsel’s] position. I have read your position. **That was something that, as a fiduciary, she diverted to herself.** I know she did it under a claim of right, but the proper rate of interest is the legal interest rate in that situation.¹⁴

The emphasized portion of the transcript ruling shows that the Court of Chancery, when deciding on the proper interest rate, expressly took into account the fact that Janice was a fiduciary at the time she received the funds in question.

¹⁴ Jesse’s Opening Brief, D.I. 19, Ex. F, 16:14 - 17:3 (emphasis added).

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ORDERED JANICE, A FIDUCIARY, TO PAY THE LEGAL INTEREST RATE ON THE FUNDS SHE RECEIVED.

A. Question Presented

Did the Court of Chancery properly require Janice, a fiduciary, to pay the legal rate of interest on both her premature receipt of the two CDI Payments and her removal of approximately \$78,000 of funds from the Estate account?¹⁵

B. Scope of Review

The Court of Chancery's choice of remedy is reviewed for an abuse of discretion.¹⁶ The Court of Chancery "has broad latitude to exercise its equitable powers to craft a remedy."¹⁷ "[T]he Court of Chancery's decision whether to award interest, to what extent, and at what rate is reviewed for an abuse of discretion."¹⁸

C. Merits of Argument

Janice ignores a critical fact in her argument that the premature advancement of the CDI Payments and her use of Estate funds for personal expenses should simply be credited against her eventual Trust distribution – Janice was a beneficiary *and a fiduciary* when she received and used those funds. The Court of

¹⁵ A110, 115; B118-142; Jesse's Opening Brief, D.I. 19, Ex. F, 16:14 - 17:3.

¹⁶ See *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002).

¹⁷ *Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993).

¹⁸ *Schock v. Nash*, 732 A.2d 217, 232, n.74 (Del. 1999).

Chancery expressly noted that Janice was a fiduciary when imposing the legal rate of interest as a remedy. The Court of Chancery's choice of remedy was not an abuse of discretion.

i. Janice failed to preserve her argument that no interest should be imposed.

Janice failed to preserve her argument that no interest should be imposed on the funds she received too early or improperly. Janice, in her Opening Brief on appeal, makes the primary argument that no interest should have been imposed on her receipt of funds because a beneficiary is not usually liable to trusts.¹⁹ However, when the parties were litigating the form of implementing order before the Court of Chancery, Janice only contested the *rate* of interest and not whether interest should apply at all.²⁰ Because Janice did not fairly present this argument to the Court of Chancery, under Rule 8 this Court should not consider it here.

ii. Janice, as a fiduciary, was prohibited from self-dealing and personally benefiting before other beneficiaries.

As a co-trustee and co-executor, Janice was a fiduciary who owed a duty of loyalty to the other beneficiaries.²¹ “As a part of the duty of loyalty, a trustee must exclude all selfish interest and all consideration of the interests of third persons.”²²

¹⁹ Janice's Opening Brief, D.I. 24, at pgs. 40-48.

²⁰ B134-142.

²¹ *Vincent v. Baize*, 2011 WL 4695622, at *2 (Del. Ch. Sept. 30, 2011); *Matter of Estate of Hedge*, 1984 WL 136921, at *2 (Del. Ch. Feb. 8, 1984).

A clear conflict of interest arises when a fiduciary is also a beneficiary, making the duty of loyalty all the more important.²³ “A trustee is ... under a duty to deal fairly with the beneficiaries and not to place h[er] personal interests (in this case, also as a beneficiary) ahead of the interests of the Trust and its other beneficiaries.”²⁴

iii. Janice’s reliance on authority regarding a beneficiary’s liability to a trust ignores her status as a fiduciary.

Janice’s argument that a beneficiary is not usually liable to a trust ignores the critical fact that she was a fiduciary when she received those payments.²⁵

She argues that if a beneficiary receives a premature or improper payment, the appropriate remedy is to charge the amount against the beneficiary’s remaining interest. Applied here, Janice contends that the CDI Payments and withdrawal of Estate funds should just be credited against her expected final Trust distribution.

But Janice relies solely upon Restatement sections concerning non-fiduciary beneficiaries.²⁶ She ignores the Restatement section that addresses “Trustee-beneficiaries” like Janice and authorizes remedies against a breaching trustee-

²² *Paradee v. Paradee*, 2010 WL 3959604, at *10 (Del. Ch. Oct. 5, 2010) (quoting George Gleason Bogert & George Taylor Bogert, *THE LAW OF TRUSTS AND TRUSTEES* § 543 (2d ed.1993)).

²³ *See Walls v. Peck*, 1979 WL 26236, at *5 (Del. Ch. Oct. 24, 1979) (pointing out “a clear conflict of interest” where executors bid on estate land at public sale).

²⁴ *In re Estate of Howell*, 2002 WL 31926604, at *2 (Del. Ch. Dec. 20, 2002).

²⁵ Janice’s Opening Brief, D.I. 24, at pgs. 40-48.

²⁶ Janice’s Opening Brief, D.I. 24, at pgs. 40, 45-46 (citing *RESTATEMENT (THIRD) OF TRUSTS*, §104 & *RESTATEMENT (SECOND) OF TRUSTS* §255).

beneficiary beyond simply reducing her interest.²⁷ Moreover, Delaware law prohibits a fiduciary like Janice from gaining a personal benefit at the expense of the Trust's other beneficiaries.²⁸ If Janice breached her fiduciary duties owed to the Trust beneficiaries, she is liable to the beneficiaries for interest on improperly-removed assets.²⁹

In this case, Janice breached her fiduciary duties to the Trust beneficiaries by placing her personal interests ahead of theirs. The Other Beneficiaries have not received their promised Fulton Stock more than six years after Mr. Conaway's death. Janice, however, has received the CDI Payments and removed Estate funds to pay personal expenses; placing her personal interests ahead of the Other Beneficiaries by prematurely and improperly receiving payments before ensuring that the Other Beneficiaries received their distributions. Therefore, the Court of Chancery properly imposed a remedy – applying the legal interest rate on the funds Janice received – to address her breaches and compensate the harmed Other Beneficiaries.

²⁷ RESTATEMENT (SECOND) OF TRUSTS §257.

²⁸ *See supra* footnotes 21-24.

²⁹ 12 *Del. C.* § 3581.

iv. The Court of Chancery’s imposition of the legal interest rate was within its broad discretion to craft a remedy.

Janice advances a variety of arguments in an effort to convince this Court that the Court of Chancery abused its discretion in deciding upon this remedy. Each of those arguments fail under an abuse of discretion standard of review.

Janice’s opening argument is that the Court of Chancery did not explain its rationale in choosing the legal interest rate.³⁰ This argument cannot be squared with the transcript. The Court of Chancery clearly stated the reasons for its ruling: “That was something that, as a fiduciary, she diverted to herself. I know she did it under a claim of right, but the proper rate of interest is the legal interest rate in that situation.”³¹

Next, Janice erroneously faults the Court of Chancery for failing to explore the implications of imposing the legal interest rate.³² But Janice never raised such implications to the Court of Chancery. It therefore cannot be an abuse of discretion for the Court of Chancery to fail to address arguments that were not presented.

Janice finally argues that the legal interest rate is too high and that the Court of Chancery should have taken the more lenient approach used in the *Lomker*

³⁰ Janice’s Opening Brief, D.I. 24, at pg. 42.

³¹ Jesse’s Opening Brief, D.I. 19, Ex. F, 16:14 - 17:3 (emphasis added).

³² Janice’s Opening Brief, D.I. 24, at pgs. 42-43.

case.³³ This argument misses the mark as well. Janice cannot use the discretionary decision of another judicial officer in a different case to demonstrate that the Court of Chancery committed an abuse of discretion here. “[T]he Court of Chancery's decision whether to award interest, to what extent, and at what rate is reviewed for an abuse of discretion.”³⁴ The Court of Chancery has broad discretion to craft a remedy for a breach of trust.³⁵ Here, the Court of Chancery was very familiar with the facts, arguments, and realities of this case, having presided over disputes related to the Trust for almost six years. The Court of Chancery was within its discretion to impose the legal interest rate.

³³ Janice’s Opening Brief, D.I. 24, at pg. 46-48.

³⁴ *Schock*, 732 A.2d at 232, n. 74.

³⁵ *McNeil*, 798 A.2d at 509; 12 *Del. C.* § 3581.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Court of Chancery's decision to impose the legal interest rate on the payments received by Janice.

BAIRD MANDALAS BROCKSTEDT, LLC

Stephen A. Spence

Stephen A. Spence, Esquire (#5392)

1413 Savannah Road, Suite 1

Lewes, DE 19958

(302) 645-2262

sas@bmbde.com

*Attorney for Kevin M. Baird, Court-Appointed
Executor of the Estate of Everett T. Conaway and
Court-Appointed Trustee of the Everett T.
Conaway Revocable Trust*

DATED: November 11, 2016