

**Judgment 14/2004**

**Brown v Orion Trust Ltd – Royal Court  
(Civil Action file 394) 10 May, 2004**

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**Royal Court (Courts and Fees) Rules, 2000 – application by Defendant Trustee for taxation of full indemnity costs – Beddoe’s applications had been granted – determination as to the costs which are now to be met from the trust assets.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 10th day of May, 2004 before Andrew Christopher King Day, Esquire, C.B.E. Lieutenant Bailiff; sitting alone.

In the matter of

Between **CLAIRE KUEN HUI BROWN** Plaintiff

and

**ORION TRUST LIMITED** Defendant

On the application of the Defendant dated the 4<sup>th</sup> day of November, 2003, in the terms attached hereto;

WHEREAS THE COURT, on the 27<sup>th</sup> day of April, 2004, having heard Advocates M.G.A. Dunster and A.M. Merrien, Counsel for the Defendant and Plaintiff respectively, RESERVED JUDGMENT;

THE COURT, this day, handed down judgment in the terms attached hereto and GRANTED the Defendant’s application to the extent that FORTY FIVE THOUSAND SIX HUNDRED AND SIXTY EIGHT POUNDS (£45,668.00) indemnity costs shall be paid.

M. A. TOSTEVIN  
Her Majesty’s Deputy Greffier.





perhaps, in the region of four hundred trusts with overall assets of many million pounds. One such trust is the Penang Trust which was purportedly (I use the description advisedly as it is the subject of dispute) set up in 1995 by a lady resident in Malaysia called Cheah Gim Siew, who is the mother of the Plaintiff. Whilst it might be said that the Penang Trust was a “standard” discretionary trust, the beneficiaries basically are members of the Brown family, including this Plaintiff.

3. In 1994, another subsidiary of Richmond had been established, the Pensioneer Trust Company Ltd. (“Pensioneer”), with the necessary authorisation to act as advisor to and trustee of international pension schemes, as a commercial reaction, I believe, to a growing interest in and demand for such vehicles for investment business. Specifically, the original and continuing purpose of Pensioneer was and is to act as trustee to employee benefit, retirement annuity and retirement benefit schemes. One such scheme had been devised by Mr. Trevor Brown, husband of the Plaintiff and an independent pension’s consultant, in 1993, whereby Small Self Administered Pensions Schemes (“SSAS’s”) could be exported to the Channel Islands.
4. Mr. Brown was introduced to Richmond at about the time of the incorporation of Pensioneer. It was intended that he would act as a director of Pensioneer, but soon after incorporation he resigned as his introduction of business to the company created a conflict of interests. Richmond itself was responsible for the day-to-day control of Pensioneer.
5. As just indicated, a number of SSAS clients were introduced by Mr. Brown to Richmond (“the Pensioneer clients”), for which Mr. Brown was paid a fee. By virtue of various other “in-house” corporate structures the fees earned by Mr. Brown found their way into the Penang Trust. Thus whilst the original assets of the Penang Trust may have been settled by Mr. Brown’s mother in law, the accumulating and accumulated assets were and are in effect monies earned by Mr. Brown.
6. We have the picture, therefore, of the overall Richmond group, through its different constituent parts, providing extensive services, Pensioneer being the trustee of the various exported pension schemes, and the Defendant acting as trustee, amongst a large number of other trusts, of the Penang Trust into which were paid the fees earned by Mr. Brown.
7. The details of SSAS schemes I can ignore for present purposes, but the increasing number of such and similar schemes being promoted in the early to mid 1990’s apparently caused great concern to the Pension Schemes Office. As a result, in early November, 1994, it was announced in the House of Commons that in future any schemes losing approval after the date of the announcement would be liable to a charge of 40% based on the value of the trust fund on the day before the loss of approval; thus, these new financial provisions were intended to deter and/or prevent the continued export of SSAS’s. These new provisions were naturally of much concern

to Mr. Brown, and no doubt his current and future pension scheme clients, as also professional trustees in off-shore jurisdictions such as the Channel Islands who were commercially involved in such schemes. The Opinion of leading Counsel was thus obtained. A Mr. E. Nugee Q.C. of Lincoln's Inn opined that the announcement of November, 1994, and the relevant provision (section 61) of the 1995 Finance Act failed to achieve the object sought, so I understand. As a consequence pension schemes began to be exported once more, as the advisor to the particular scheme, Mr. Brown, was of the clear view that no tax would be payable upon its export.

8. In November, 1996, Advocate Ashton (of Carey Langlois, the Guernsey advisors to the Richmond group) became involved in advising on the validity of the schemes. By chance, he was provided by Mr. Brown's office of part of an Opinion from a Mr. Brian Green Q.C. which apparently raised the question of the potential criminal liability of those involved in facilitating a scheme. Accordingly during 1997, further opinions were obtained from leading revenue and criminal Counsel with regard to the separate fiscal and potential criminal aspects of the schemes, as also a second local opinion from Advocates Ozannes. In essence, the legal message which the Richmond group was receiving was, perhaps unsurprisingly, that considerable doubt was thrown on the validity and legality of the schemes, thereby potentially exposing Guernsey trustees both to fiscal and criminal sanctions.
9. As a consequence, to put it simplistically, relations between Mr. Brown and the Richmond group became strained. To such extent that at the end of March, 1999, the Plaintiff issued proceedings against the Defendant, under the Trusts (Guernsey) Law, 1989, alleging that the Defendant was in breach of its fiduciary duties to the beneficiaries in failing to manage the assets of the trust for the benefit of them, or at all, and failing properly to exercise its discretion. She accordingly sought the removal of the Defendant as trustee and the appointment of a new trustee, with the same address in Surrey as herself and Mr. Brown, with appropriate ancillary relief.
10. In early August, 1999, the Defendant made a *Beddoe's* application, namely for an order that it be at liberty to institute proceedings for a declaration that the Penang Trust was void as being a sham and/or void for illegality, with costs on a full indemnity basis. Alternatively, the Defendant sought an order that it be at liberty to defend the Cause until discovery and inspection, again with costs on a full indemnity basis out of the trust assets. Prior to filing the *Beddoe's* application, and after the tabling of the Cause, the Defendant made three separate but related applications to the Court, namely to serve notification of the proceedings on the other immediate family members (Mr. Brown, Miss Brown and Madam Sieu), a similar notification on the solicitor's office of the Inland Revenue in London, as also on a number of individuals who had been involved or were involved in the pension export schemes and who had thus paid fees to Mr. Brown.

11. In due course I came to hear the second part of the *Beddoe's* application (leave to defend) which was predominantly, as is usual, on an *ex parte* basis, though I did order that certain limited information should be made available to the Brown family, namely an edited version of an affidavit by Mr. Chick as a director of the Defendant, though without many of its documentary attachments, and that their local Counsel could make general submissions thereon. Mr. Brown also availed himself of the opportunity afforded to him of making various written statements in response to the information with which he had been provided. I was, of course, alone with the Defendant, privy to a raft of evidence including the advice from leading Counsel in London on what appeared to me to be the central issues (to which I have already referred). In the result I granted the *Beddoe's* application, granting leave to defend down until discovery and inspection for the time being, together with full indemnity costs. In that regard, in my judgment of the 14<sup>th</sup> April, 2000, I specifically stated this:

*“For clarification, I would add that as far as full indemnity costs are concerned, they are allowed from the date the Beddoe application was originally filed down to the completion of discovery and inspection. To what extent these costs include those incurred prior to the filing date, as being necessary to the formulation of the application, are, or may be, a matter for taxation.”.*

**B The taxation application; the issues raised and submissions thereon**

12. In due course, and after I suspect much discussion between Counsel, the Defendant filed the following application in relation to the indemnity costs. The application is in these terms:

*“ORION TRUST LIMITED whose address for service is at 7 New Street in the parish of Saint Peter Port in the Island of Guernsey*

*APPLIES TO THE COURT*

*For the following orders pursuant to the Judgment, in this Cause, of the Deputy Bailiff dated 14<sup>th</sup> April 2000 (“the Judgment”):*

- 1. That the historical costs incurred by the Defendant, by which is meant those costs incurred by the Defendant prior to filing the application dated 4 August 1999 and filed in these proceedings, be taxed on an indemnity basis.*

*The whole in accordance with the judgment and the attached affidavit of Alan Michael Chick dated 29 October 2003.”.*

13. The Bill of Indemnity costs (of the historical nature described in the application) which the Defendant has served on the Plaintiff, and which it now asks the Court to endorse, is in the sum of £95,138.02, broken down as follows:-

SCHEDULE OF MONIES (BY WAY OF DISBURSEMENTS)

EXPENDED BY THE TRUSTEE

1. ACCOUNTS RENDERED BY CAREY OLSEN SINCE CAUSE OF ACTION IN

BROWN –V- ORION TRUST LIMITED WAS ISSUED:

Prior to filing of Beddoe Application on 4 August 1999:

28 May 1999	£1,500.00
30 June 1999	£631.50
30 July 1999	£1,736.50
	£3,868.00

2. COUNSELS' OPINIONS:

(all obtained prior to Causes being issued or Beddoe Applications being granted)

15 January 1997	£6,000.00	Christopher JF Sokol
29 May 1997	£6,000.00	Peter Francis Rook QC
14 October 1997	£11,700.00	Nicholas Warren QC
14 October 1997	£5,700.00	Peter Francis Rook QC
6 May 1999	£12,000.00	Vincent FJ Barrett
15 September 1999	£15,000.00	Vincent RJ Barrett
Sub-Total	£56,400.00	

90% allocated to Brown v. Orion Trust Limited = £50,760.00

10% allocated to Heeley v. Chick & Elder = £5,640.00

3. FEES PAID TO CAREY OLSEN FOR GENERAL ADVICE PRIOR TO CAUSES OF ACTION BEING ISSUED SEPARATELY BY MR HEELEY AND MRS BROWN AND SEPARATE FILES BEING OPENED:

30 January 1997	£6,596.00
4 September 1997	£6,294.00
3 October 1997	£6,846.00
20 January 1998	£4,841.00
31 March 1999	£6,195.00

Sub-Total £30,772.00

90% allocated to Brown v. Orion Trust Limited = £27,694.80

10% allocated to Heeley v. Chick & Elder = £3,077.20



the government fiscal objectives had not been achieved in the legislation, and that his schemes were therefore still valid and marketable. All the subsequent legal advice was obtained for the schemes generally. As Mr. Merrien rightly and meticulously pointed out, none of the costs incurred were submitted to the Defendant to settle; rather they were for the account of either Richmond or Pensioneer. Thus the overall picture is that the Richmond group had over a period of time incurred considerable legal costs, but the Defendant itself had not in fact (my emphasis) incurred any of that expenditure at all.

17. Mr. Dunster argues that once the Plaintiff had instituted her proceedings in respect of the trusteeship of the Penang Trust, it was necessary, and right, for the Defendant to refer to, and thereafter make use of, the advice which the Richmond group collectively had obtained with regard to the pension export schemes, which use I endorsed in granting the *Beddoe's* application. In making any *Beddoe's* application, it was incumbent on the applicant to provide as full a picture as possible, "warts and all", a submission which must be correct. The work involved, for which the costs had previously been incurred, was directly necessary in formulating the *Beddoe's* application, and accordingly it was right to assign all those costs to the Penang Trust (and the other linked matter).

18. Advocate Merrien naturally takes the opposing stance. None of the costs incurred were, or could have been, in contemplation of any future specific proceedings, and had been incurred by those parts of the Richmond group which had a direct professional and/or commercial interest in obtaining them, namely Richmond itself and Pensioneer. Far too much time had elapsed since the obtaining of the vast majority of that legal advice for the costs of it to be properly attributable to the formulation of the *Beddoe's* application. Additionally (and this I have already indicated), none of the costs incurred were incurred by Orion on behalf of the Penang Trust. They were naturally and rightly incurred by other parts of the Richmond group which had a direct general interest in that advice. It was not right that those entities should now be recompensed out of the assets of the Penang Trust.

19. In addition to those general arguments which related to most of the items in the Bill of Costs, Mr. Merrien also strongly queried the £27,000 that had been paid in 1999 to a Mr. V.F.J. Barrett, stated to be a Swiss tax advisor (though in fairness, Mr. Dunster clarified in oral argument that that gentleman was in addition a UK tax advisor).

### **C. Conclusions**

20. In reaching my conclusions I bear in mind a number of considerations. I believe it is right in principle that some, at least, of the cost involved in obtaining legal advice from late 1996 to early 1998 should now be attributed to the Defendant as trustee, and therefore to the assets, of the Penang Trust. I say that because if Orion, faced with the action instituted against it in early 1999,

did not have available to it legal advice of the quality which had been provided to the group in those earlier years, then it would, rightly, have had to obtain it.

21. That, of course, does not answer the question as to how much of the cost of that earlier legal advice can be properly attributed now to the Penang Trust. Were all the questions which were previously asked of English Counsel necessary to deal with the matters raised by the Plaintiff's Cause, and indeed was all the advice obtained locally necessary or desirable? I must also be, and am, mindful of the fact that a great deal of legal advice obtained by professional trustees (which is exactly what the Richmond group are) benefits them as professionals, and the knowledge they obtain becomes part of their working stock-in-trade. With that general benefit accruing to them, therefore, it might not be right additionally to charge any particular client for the cost of obtaining that advice and knowledge. Again, whilst it is right that I look at the particulars of the Bill of Costs, I must also take a general overview of what seems to me to be the appropriate, and proportionate, amount of those costs which should be attributed to the assets of the Penang Trust.
22. I turn to the Bill of Costs itself, and particularly items 2 to 5.
23. I can say immediately that I delete from the Bill of Costs the fees of £27,000 in obtaining advice from Mr. Barrett. During the course of argument it became clear that Mr. Dunster himself was not overly impressed by including that item in the Bill of Costs attributable to Orion.
24. Bearing in mind the complexity of the questions of law and fact involved and the standing of Counsel (as advised in the White Book at 62/14/1 on the basis of *R. v. Whitley (decd) (1962) 1WLR 922*), I consider that the majority of the remainder of item 2 (the cost of English Counsel's opinions) is justified, but to allow the whole would be unreasonable, as I suspect that not all the advice was necessary for the *Beddoe's* application. Taken in the round, I think £24,000 (out of £29,400) is about right overall, so 90% of that sum is to be attributed to the Penang Trust (£21,600).
25. However, giving that, perhaps somewhat generous, allowance under item 2, requires a balancing, more miserly, approach to items 3 and 4, the costs incurred in relation to the simultaneous advice obtained from Guernsey lawyers. The cost of the advice obtained between January, 1997, and January, 1998, from Carey Langlois & Co and Ozannes together amounted to some £32,000. The Defendant cannot have it both ways, so as to encumber the Penang (and other) Trust with all the costs. Having sought the expert opinion of English Counsel, it cannot also justify the cost of obtaining, largely unnecessary, local advice. Thus, in round figures, I think that £12,000 (of the £32,000) is more than sufficient under this heading, which together with the item of £6,195 for the 31<sup>st</sup> March, 1999, makes a total under items 3 and 4 of £18,195. 90% of that figure is therefore attributable to the Penang Trust (£16,375.50).

26. In respect of item 5, I allow the majority of the costs associated with obtaining the advice from English Counsel, say £3,000 out of £3,760. I would allow about half of the costs attributable to consultations with Advocate Ashton alone, say £800. The total allowable under item 5, therefore, is £3,800.
27. There seemed to be no dispute in respect of item 1, being the accounts rendered by Carey Olsen between the filing of the Cause and the lodging of the *Beddoe's* application.
28. In summary, therefore, my finding as to the indemnity costs which should be paid from the Penang Trust assets, as being the limit of what should be reasonably incurred by it, is as follows:-

Under item 1	£3,868.00
Under item 5	£3,800.00
Under items 2, 3 and 4, 90% of £42,195.00	= <u>£38,000.00</u> (rounded up)
Total	<u>£45,668.00</u>

29. The Defendant Trustee's application is therefore allowed to that extent.