Judgment 20/2008 **Shaham v (i) Lloyds TSB Offshore Treasury Ltd and (ii) Fooks (as Administrator of the Guernsey Estate of Dan Ron) intervening – Royal Court (Civil Action File 862) – 25 June 2008**

Royal Court Civil Rules, 2007 (Rule 82) – discretion of the Court when awarding costs – exceptions to the rule that costs follow the event - issue based approach adopted in this case – award of recoverable costs to the Intervenor, reduced by 20% (See Judgment 11/2008)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 862

The 25th day of June 2008, before Richard John Collas Esquire, Deputy Bailiff sitting alone

Between RACHEL SHAHAM Plaintiff

and

LLOYDS TSB OFFSHORE TREASURY LIMITED Defendant

and

CATHERINE FOOKS (AS ADMINISTRATOR OF THE GUERNSEY ESTATE OF DAN RON) Intervenor

Whereas on 22nd May the Deputy Bailiff considered an application by the Intervenor for an Order for costs against the Plaintiff on a recoverable basis and heard thereon Advocates R. I. C. E. Harris and N.J. Barnes counsel for the Plaintiff and Intervenor respectively the Deputy Bailiff this day ORDERED that the Plaintiff shall pay to the Intervenor 80% of the Intervenor's costs assessed on a recoverable basis.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**RACHEL SHAHAM**	**Plaintiff**
	-v-	
	LLOYDS TSB OFFSHORE TREASURY LIMITED	**Defendant**
	and	
	The Estate of Dr Dan Ron Deceased	**Intervenor**

Date of hearing: 22nd May 2008

Judgment handed down: 25th June 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiff: **R I C E Harris**
Advocate for Intervener: **N J Barnes**

Cases, texts, legislation and other material referred to:

1. Civil Procedure Rules, Rule 44.3
2. A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507, CA
3. Elgindata (No.2), Re [1992] 1 W.L.R. 1207, CA
4. Summit Property Limited v Pitmans [2001] EWCA Civ 2020
5. National Westminster Bank plc v Kotonou [2007] EWCA Civ 223
6. Shirley v Caswell [2000] Lloyds Rep PN 955, C, A

JUDGMENT AS TO COSTS

1. This judgment follows a trial before myself and three Jurats of the Royal Court concerning a bank account held at the Defendant, which was once in the names of the late Dr Ron and his mother. Following the death of his mother, sole ownership of the bank account passed to Dr Ron. Shortly after his mother had passed away, Dr Ron died unexpectedly.

2. The Plaintiff alleged that during the period between the death of his mother and his own death, Dr Ron transferred the bank account into the joint names of himself and the Plaintiff. The finding of the Jurats was that at the time of Dr Ron's death, the account belonged to him alone and hence passed to his Estate on his death.

3. The Intervenor has applied for an Order for costs against the Plaintiff on a recoverable basis.

4. The Plaintiff argues that the Intervenor should not recover all her costs but that instead, I should make an issue based Costs Order as the Intervenor did not succeed on all issues pleaded by her. Advocate Harris, on behalf of the Plaintiff, alleges the Intervenor failed on three of the issues pleaded by her namely:

   "(a) Whether Dr Ron had intended to make a gift of the funds in the account to the Plaintiff his housekeeper.

   (b) If the account was transferred into the joint names of Dr Ron and the Plaintiff, the Intervenor alleged he was acting under undue influence.

   (c) If the account was transferred into their joint names, then the Intervenor argued in the alternative that it was only done as a matter of administrative convenience."

5. Advocate Harris says the two issues upon which the Intervenor succeeded were:-

   (a) Was documentation signed by Dr Ron and the Plaintiff when they attended a meeting at the Defendant bank in Guernsey on 4th November 2002 sufficient to assign the benefit of the account into their joint names. This was an issue pleaded by the Plaintiff on which the Plaintiff failed as a matter of law.

   (b) Did the Defendant bank impose conditions as to documentation required to be produced before it would transfer the account into their joint names? If so, the Jurats found such conditions were not fulfilled and hence the transfer was never effected.

6. I am not concerned in this judgment with the Defendant's costs.

7. When awarding costs at the conclusion of proceedings, the Royal Court has a wide discretion under Rule 48 of the Royal Court Civil Rules 1989 and now under Rule 82 of the Royal Court Civil Rules 2007. In exercising that discretion, the Royal Court looks for guidance to English case law and at the principles in Part 44.3 of the CPR. The commentary in the White Book explains that the CPR has led to a change of approach, or at least a change of emphasis in approaching cost decisions. At paragraph 44.3.1, commenting on Rule 44.3, the White Book says as follows:

> *"Although this rule preserves the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, Lord Woolf M.R. was anxious to move away from the position that any success is sufficient to obtain an order for costs. He therefore envisaged far more partial orders for costs which more accurately reflect the level of success achieved by the receiving party; see A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507, CA.*
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> *As a result of the authorities since the decision in Elgindata (No.2), Re [1992] 1 W.L.R. 1207, CA it is no longer necessary to establish that a successful party has acted unreasonably or improperly in raising an issue in order for it to be deprived of its costs and ordered to pay the unsuccessful party's costs of that particular issue. The issue based approach requires the court to consider issue by issue where the costs in each discrete issue fall: Summit Property Ltd v Pitmans [2001] EWCA civ 2020."*

8. The White Book also states at paragraph 44.3.8 in relation to Rule 44.3 (2) that:

> *"A Judge making an award of costs has essentially to determine whether to apply the general rule that costs follow the event, or award costs on an issue by issue basis."*

9. Counsel for both parties agreed there was a new approach, but Advocate Barnes interpreted it as being less far reaching than Advocate Harris suggested.

10. Advocate Barnes, on behalf of the Intervenor, sought to distinguish *National Westminster Bank plc v Kotonou [2007] EWCA Civ 223* on the grounds that, unlike the Defendant in that case, the Intervenor in the present case, did not raise the undue influence issue improperly or unreasonably. He also distinguished it from *Shirley v Caswell [2000] Lloyds Rep PN 955, C, A*, on the ground that in *Shirley*, extravagant claims had been made and points had been taken and issues tried which had no prospect of success. He relied upon a passage in a judgment of Longmore LJ in *Summit Property Limited v Pitmans [2001] EWCA Civ 2020*, at page 17, in which he held:

> "*It is thus a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, in a suitably exceptional case, to make an order which not only deprives the successful party of his costs of a particular issue, but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."*

11. Advocate Barnes relied upon the reference to *"a suitably exceptional case"*, and argued that nothing in the present case, including the undue influence

issue, made the present case exceptional. In my view, he placed too much emphasis on the requirement for the case to be suitably exceptional. The guiding principle is, I believe, to be found in the judgment of Lord Woolf MR in *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd. [1999] 1 W.L.R. 1507*, starting at page 1522H:

> *"I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."*

12. I believe that principle should guide the Royal Court in exercising its discretion wherever possible. The fact that the Royal Court has a wide discretion both under the 1989 Rules and the 2007 Rules and the fact that the *"change of practice"* had already started in England before the Civil Procedure Rules came into force, entitle the Royal Court to adopt (if it has not already done so), that practice even in cases which are still governed by the 1989 Rules.

13. It follows, in my view, that the proper approach for me to adopt in the present case is to look at the Intervenor's success, or otherwise, on the issues raised at the hearing so as to decide whether to depart from the general rule that costs follow the event and make an issue based order.

14. My initial view, at the conclusion of the hearing and before the parties had made any submissions, was that the undue influence issue had taken up a considerable amount of time at the trial. Before hearing submissions from Counsel, I had indicated that this might be a case where an issue based costs order would lead to the conclusion that each party should bear their own costs. I now accept I had over-estimated the amount of time devoted to the undue influence issue and it emphasises how important it is to seek to distinguish between evidence that was only relevant upon an unsuccessful issue from evidence that would have been given in any event because it was relevant to an issue.

15. Much of the evidence relevant to the undue influence issue was relevant to decide what Dr Ron's intentions were. The Jurats had to decide what Dr Ron intended as to the ownership of the account prior to a meeting at the Defendant

bank on 4th November 2002. The Jurats unanimously decided that between 31st August and 4th November 2002, Dr Ron informed the Plaintiff of his intentions: (a) to transfer to himself and the Plaintiff, joint ownership of the sums held in the bank account in Guernsey, and (b) to make that transfer to her by way of gift.

16. By a majority of 2 to1, the Jurats held that those were Dr Ron's true intentions and that he had not expressed those intentions to the Plaintiff merely to give her the impression of intending to make the transfer of ownership without intending to do so. In answer to a question as to whether Dr Ron decided not to make that transfer of ownership to the Plaintiff at any time after 4th November 2002, one Jurat answered "*yes*", another Jurat answered "*no*" and another Jurat answered *"not proved"*. So, as Advocate Barnes argued, although the Jurats unanimously decided it was Dr Ron's intention to transfer the ownership of the account to the Plaintiff before the meeting at the bank, and by on or about 13th November 2002, Dr Ron knew he had to satisfy conditions before the account could be transferred, it can only be inferred that he either decided not to add the Plaintiff to the account, or that he had neither decided to do so, or not to do so. The significance of this issue, he argues, is that the background to the transaction was always going to be relevant, whether or not a claim of undue influence was made.

17. I agree that it would not have been possible to ignore the background to the transaction. The most important evidence in the case was probably the evidence relating to the meeting at the bank on 4th November 2002, at which three persons were present, the Bank Manager Mr Samman; Dr Ron; and the Plaintiff. Mr Samman's evidence of what was said, was contradicted by the evidence of the Plaintiff who could only tell the Court what Dr Ron explained to her occurred at the meeting, because her English was inadequate to understand directly.

18. It was inevitable that the Plaintiff would give evidence as to why Dr Ron wanted to transfer his bank account into joint names with himself and her (his housekeeper), thereby disinheriting his Estate in the event of him pre-deceasing her. It was also inevitable that the Plaintiff's credibility would be an issue.

19. Having reflected very carefully, I am satisfied that much of the evidence would have been required in any event, but that the scope of the questioning would have been more restricted if undue influence had not been raised as an issue. So, in accordance with the new practice, I consider that an issue based approach is appropriate in this case.

20. Another unsuccessful issue to be borne in mind is the *"*administrative convenience*"* issue raised in the pleadings. It was not pursued in Court, but I accept Advocate Harris' argument that some time would have been devoted to it in preparing for the hearing.

21. I further considered this is an appropriate case where the way to reflect success is by rewarding a percentage reduction in the costs that the Intervener would have otherwise recovered.

22. How much of a percentage reduction should be allowed? I have not seen any detailed bills of cost as the Advocates had not prepared detailed bills at the time of the hearing. Advocate Barnes gave me an indication that he considered he spent an equal amount of time on preparing for the trial as he did in appearing at the trial. Advocate Harris estimated that the time could be divided into three approximately equal parts namely preparation before trial; time in Court; and preparation for each day's hearing during the course of the trial.

23. Inevitably, without having conducted a detailed analysis of the time of costs, I have to estimate a percentage reduction. After careful reflection, I consider that the appropriate reduction is 20%.

24. I therefore make an Order that the Plaintiff shall pay to the Intervenor 80% of the Intervenor's costs assessed on a recoverable basis.

