

Judgment 9/2010

International Committee of the Red Cross [ICRC] v (1) Thommassen (2) Butterfield Trust (Guernsey) Ltd – In re the Mischca Trust and the International Foundation for Arts and Sciences [IFAS] – Royal Court (Civil Action File 1041) - 8 March 2010

Application by ICRC to be indemnified on a full indemnity basis out of the assets of the Trust or of IFAS – this application distinguished from a ‘Beddoes Order’ – principles relevant to the Court’s jurisdiction to make pre-emptive costs orders – application dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(CIVIL CAUSES DIVISION)

Civil 1041

The 8th day of March 2010, before Richard John Collas Esquire, Deputy Bailiff, sitting alone,

THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Applicant

-v-

OLAF MICHAEL THOMMESSEN

Defendant

-and-

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
As Trustee of the Mischca Trust**

First Respondent

-and-

**BUTTERFIELD TRUST (GUERNSEY) LIMITED
As Trustee of the International Foundation for
Arts and Sciences**

Second Respondent

Whereas on the 9th of February 2010 the Deputy Bailiff considered an application in the following terms;

- “1. That the Applicant be indemnified on a full indemnity basis out of the assets of the [Mischca] Trust (or of IFAS) in respect of all costs which have been, or will be reasonably and properly incurred by the Applicant (to be taxed if not agreed) as a result of or as incidental to the foregoing proceedings and any attempt to settle the various applications.*
- 2. That the Applicant be indemnified on a full indemnity basis out of the assets of the [Mischca] Trust (or of IFAS) in respect of all costs reasonably and properly incurred by the Applicant (to be taxed if not agreed) as a result of or incidental to this application.*
- 3. Such other orders or directions as the Court shall see fit.”*

and heard thereon Advocates J P Greenfield, C H Edwards and W P T Nicol-Gent counsel for the Applicant, First and Second Respondents and the Partie Publique respectively and whereas on 9th February the Deputy Bailiff DISMISSED the said application the Deputy Bailiff this day handed down the reasons for his decision in the terms attached hereto.

S M D ROSS
H M Deputy Greffier

Approved Judgment
8 March 2010

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Applicant

-v-

OLAF MICHAEL THOMMESSEN

Defendant

-and-

BUTTERFIELD TRUST (GUERNSEY) LIMITED
As Trustee of the Mischca Trust

First Respondent

-and-

BUTTERFIELD TRUST (GUERNSEY) LIMITED
As Trustee of the International Foundation for
Arts and Sciences

Second Respondent

Date of Hearing: 9 February 2010

Judgment handed down: 8 March 2010

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Applicant:

Advocate J P Greenfield

Advocate for the First and Second Respondents:

Advocate C H Edwards

Advocate for the Partie Publique:

Crown Advocate P N Nicol-Gent

Cases and texts referred to:

In re Buckton [1907] 2 Ch.406

Thommessen v Butterfield Trust (Guernsey) Limited and International Committee of the Red Cross [2009-10] GLR 102

Public Trustee v Cooper [2001] 1 WTLR 901

Lewin on Trusts (18th Edition)

National Anti-Vivisection Society v Duddington (Times Law Reports 23 November 1989)

McDonald v Horn [1995] 1 All ER 961

Alsop Wilkinson v Neary [1996] 1 WLR 1220 at 1226F

In The Matter of The will of Real Estate of Phyllis Elizabeth Middlebrook (Royal Court, 22 November 2005)

1. This application by the International Committee of the Red Cross (“the Applicant”) relates to proceedings that commenced in August 2006 with an *ex parte* application by Butterfield Trust (Guernsey) Ltd (“the Respondents”) as trustee of both the Mischca Trust and the International Foundation for Arts and Sciences. That application was later replaced by a revised application dated 21 August 2009.

2. The Respondents' application is opposed by the named settlor of the Mischca Trust, Olaf Michael Thommassen ("the Settlor"), who brought his own application dated 21 December 2006 that he later replaced with a revised application dated 18 September 2009.
3. On 14 March 2008, on the application of the Applicant and with the consent of counsel on behalf of the Settlor and the Respondents, the Court ordered that the Applicant be joined as a party to both the Respondents' application and the Settlor's application. The Court also ordered that certain documents be disclosed to the Applicant. The third limb of the Applicant's application, whereby it sought an order that the First Respondent pay the Applicant's costs on an indemnity basis, was adjourned *sine die*.
4. The Applicant now seeks the following orders (by application dated 18th September 2009):
 1. *That the Applicant be indemnified on a full indemnity basis out of the assets of the [Mischca] Trust (or of IFAS) in respect of all costs which have been, or will be reasonably and properly incurred by the Applicant (to be taxed if not agreed) as a result of or as incidental to the foregoing proceedings [i.e. the applications of the Settlor and the Respondents] and any attempt to settle the various applications.*
 2. *That the Applicant be indemnified on a full indemnity basis out of the assets of the [Mischca] Trust (or of IFAS) in respect of all costs reasonably and properly incurred by the Applicant (to be taxed if not agreed) as a result of or incidental to this application.*
 3. *Such other orders or directions as the Court shall see fit.*
5. I have previously advised the parties that I have refused to grant the order sought in the first limb of that application. This judgment contains my reasons for that decision.
6. The Mischca Trust was settled by the Settlor on 29 December 1987 at the request of a successful stage designer, Maria Bjornson ("Maria"). The Settlor was only the named settlor. The trust funds have been settled by Maria, derived principally from royalties paid to her in respect of her stage set designs for the highly successful musical, *Phantom of the Opera*.
7. There were three named beneficiaries of the Mischca Trust (named in the Third Schedule to the Settlement): Maria, her mother, and the Applicant. Maria died on 13 December 2002 and her mother died on 9 June 2004. The Mischca Trust bestows wide discretionary powers on the trustees and the trustees have the power to add beneficiaries but none have been added so the Applicant is presently the only member of the class of beneficiaries.
8. There is a further provision, in clause 5(e) of the Mischca Settlement, appointing as ultimate beneficiaries in the event of failure of the trust, the persons who would be entitled to benefit under the Guernsey law of intestacy to the personal estate of the Settlor.
9. One of the areas of factual dispute that the present application has highlighted is whether the Respondents are correct when they say that it was never intended that the Applicant should receive benefit from the Mischca Trust.
10. In his sixth affidavit Paul Hodgson, the managing director of the Respondents, states that there is no evidence that Maria wished the Applicant to benefit from the trust. He says it was named purely as a 'default' or 'long-stop' beneficiary.
11. The Applicant denies that it was only intended to be a default beneficiary. It draws attention to the default provisions in clause 5(e) which are sufficient to ensure a beneficiary will always exist. On its behalf, Advocate Greenfield described the provisions of that clause as 'rather odd'. The Settlor is not the economic settlor of the trust funds and there is no indication that his family were intended to benefit from Maria's work. Furthermore the Settlor is Norwegian, he is not domiciled in Guernsey and hence Guernsey law will not govern the distribution of his estate. He argued that the existence of the default provisions in Clause 5(e) demonstrates that the Applicant was not intended to be merely a 'default' beneficiary.

12. Advocate Greenfield submitted that further evidence that the Applicant was intended to benefit from the Mischca Trust is to be found in the Settlor's fourth affidavit describing links between the Applicant and Maria. Her mother was a Romanian refugee. Also, her great-grandfather supported the nomination of Henry Dunant (the founder of the Applicant) for the very first Nobel Peace Prize.
13. I am unable to decide whether the Applicant was intended to receive benefit from the Mischca Trust without hearing evidence. Advocate Edwards encouraged me to indicate what I might consider to be the merits of the argument. I will not do so as I do not want to run the risk of expressing a view on a matter that will be for the Jurats to decide at the trial.
14. The International Foundation for Arts and Sciences ("IFAS") was formed by the Second Respondent pursuant to a declaration of trust dated 20th December 1995 (made during Maria's lifetime). The objective was to enable Maria to give effect to her charitable intentions. She did not enjoy a lavish lifestyle, she had no dependants other than her mother, and the income earned from her work vastly exceeded her own modest needs.
15. The IFAS declaration of trust bestowed wide discretionary powers on the trustee. The Applicant is a named beneficiary and it is also the ultimate default beneficiary. There is a discretionary power to add beneficiaries, a number have been added and have received benefit from the trust.
16. The IFAS has purportedly been added as a beneficiary of the Mischca Trust although the validity of that addition is one of the issues to be resolved in these proceedings.
17. There are a number of other entities in the trust structure but there is no need for me to describe them in this judgment.
18. In the Respondents' applications dated 21 August 2009, they seek a number of orders to approve past and proposed actions. Such past actions include approving the creation of the IFAS or alternatively approving that payments made from the Mischca Trust to IFAS were lawfully made. In terms of future actions, the Respondents seek the approval of the Court to transfer all of the assets in both trusts to an English charity that has been created for the purpose of receiving such funds, known as the Maria Bjornson Memorial Fund.
19. The Respondents' application is opposed by the Settlor who, in his revised application, seeks the following: an order that the First Respondent be replaced as trustee of the Mischca Trust by EFGCI Trust Company Limited; a declaration that the IFAS was unlawfully added as a beneficiary of the Mischca Trust; and a number of orders in respect of related and ancillary matters.
20. There is much common ground between the parties as to the legal principles that govern this present application. They also agree that it is not an application for a 'Beddoes Order' but an application for a prospective costs order by a beneficiary or prospective beneficiary.
21. Both parties have referred me to the classic categorisation of applications of this nature in the judgment of Kekewich J. in his well known decision, *In re Buckton [1907] 2 Ch.406*. They agreed we are not dealing with his first category (applications by the trustee to construe the trust instrument or to determine a question that has arisen in the administration of the trust).
22. Advocate Greenfield argued, on behalf of the Applicant, that we are dealing with the second category (applications by a beneficiary to resolve some difficulty of construction or administration). He said that is the substance of the proceedings if one ignores the hostility between the Settlor and the Respondents in the conduct of this litigation.
23. In support of that submission, he relied upon my reported judgment on an application by the Settlor for specific discovery of certain documents at an earlier stage in these proceedings: *Thommassen v Butterfield Trust (Guernsey) Limited and International Committee of the Red Cross [2009-10] GLR 102*. At paragraph 17 of the report, I agreed that the proceedings fell

within the second category of applications identified by Hart J. in *Public Trustee v Cooper* [2001] 1 WTLR 901 at page 923:

“[W]here the issue is whether the proposed course of action is a proper exercise of the trustees’ powers where there is no real doubt as to the nature of the trustees’ powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.”

24. Having re-read that decision I do not find that, by reason of the conclusion I came to on the specific discovery application, I am bound to hold that the participation of the Applicant in these proceedings will not be hostile as between it and the Respondents.
25. Advocate Greenfield also drew my attention to paragraphs 21-81 to 21-83 of Lewin on Trusts (18th Edition) as to the circumstances in which the Court will make prospective costs orders in favour of a trustee or beneficiary.
26. In my view it is important to look at the reasons why the Applicant wishes to be represented in the proceedings. As I have said, it does not accept the Respondents’ view that it was never intended to receive any benefit from the trust funds. It wishes to ensure that such rights as it may have, if any, are preserved. To do so, I understand that it will argue against the Respondents’ application and in favour of the Settlor’s application. To my mind, that has the potential to become hostile. One of the most hostile acts a trustee can commit towards a beneficiary is to exclude it from any benefit to which it is lawfully entitled.
27. Whether there will be hostility between the Applicant and the Respondents in these proceedings will depend on how the Applicant’s case is presented at trial. Advocate Greenfield has not specified the benefit, if any, that the Applicant claims it is entitled to receive from the trusts. It may be that at the hearing the Applicant will accept that it is not entitled to any benefit. At this stage I do not know. Indeed one of the difficulties in dealing with the present application is that, as Advocate Edwards pointed out, the Applicant has not said what it is proposing to do if it is represented at the hearing. I therefore have to allow for the possibility that the Applicant will argue that the Respondents are wrongly seeking to exclude it. If so, we would be closer to the third than the second of the Re Buckton categories.
28. Advocate Edwards submitted that I should have regard to the factors identified by Mummery J (as he then was) in National Anti-Vivisection Society v Duddington (Times Law Reports 23 November 1989) as relevant to the court’s jurisdiction to make pre-emptive costs orders:
 - (i) *The prospects of success of the claim.* As I have already said, I do not consider it would be proper for me to form a view on the prospects of success.
 - (ii) *That unless the judge is satisfied that it was likely that the court would after trial make an order that the costs be paid out of the trust fund, it was not in general right to make such an order before trial.* I will come back to this issue.
 - (iii) *A pre-emptive order should not be made if there was a real possibility it would operate unjustly.* I am not persuaded that it would operate unjustly. Advocate Edwards’ main argument seemed to be that it would be unjust because the Respondents do not have a similar order in their favour. I am not convinced that is a sufficient reason to hold that an order in the Applicant’s favour could operate unjustly.
 - (iv) *Other special factors apply.* Examples of such are when one beneficiary, e.g. a member of a pension fund, brings a claim on behalf of others or that may benefit others. There are no such special factors in this case.

29. It is the second of those factors which is the most relevant to the present application. Advocate Edwards argued that the second factor was tightened by the Court of Appeal in McDonald v Horn [1995] 1 All ER 961 as followed by Lightman J in Alsop Wilkinson v Neary [1996] 1 WLR 1220 at 1226F. In McDonald v Horn, Hoffmann LJ (as he then was) said:

“I would be inclined to put the matter rather more strongly. I think that before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary, the judge must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant’s costs to be paid out of the fund. Otherwise the order may indeed fetter the judge’s discretion.”

30. I consider those decisions of the English courts to be persuasive in this jurisdiction and represent the law of Guernsey

31. As I have already said, I do not know how the Applicant proposes to advance its case at the trial and, therefore, I cannot say whether it will fall within the second or the third of the Re Buckton categories. If it argues strongly that it was intended to benefit from the trust funds and adduces evidence and advances legal arguments to that effect, I might consider that it would be inappropriate to allow the Applicant to recover all its costs from the trust funds.

32. I was referred to directions given by Sir de Vic Carey LB on 22 November 2005 in In The Matter of The will of Real Estate of Phyllis Elizabeth Middlebrook which counsel believed to be the only case in which the Royal Court had previously made a prospective costs order. The case concerned an application to rectify a will of realty in circumstances where it was alleged that there had been a clear drafting error. The Court ordered that two prospective beneficiaries be joined as a party to the application and required that they be legally represented in order to ensure that the matter was fully argued before the Court with the conflicting points of view being adequately presented.

33. It appears from the directions given by the Lieutenant-Bailiff that there was a possibility that the beneficiaries would not benefit from the eventual outcome of the case and I assume he was concerned that if they could not be guaranteed to have their legal fees paid, they might play no part in the case. In those circumstances, I am of the view that the case can clearly be distinguished on its facts. It therefore does not assist me in establishing the principles that govern the jurisdiction to make prospective costs orders.

34. Another factor to consider is the role of the *partie publique* who has been appointed to represent the general charitable interest. The Applicant undoubtedly falls within the general scope of the general charitable interests that Crown Advocate Nicol-Gent represents. I accept his view that he cannot be expected to put forward a positive case on behalf of the Applicant. However, he will be able to discuss the matter with the Applicant if it is not otherwise represented and may be able to make its views known to the Court without advancing any special case on its behalf.

35. The Applicant has sufficient funds to instruct an Advocate to represent it in the proceedings if it so wishes but does not consider that would be an appropriate use of its funds. Nicholas P Didisheim, a Swiss Advocate instructed by the Applicant has sworn an affidavit in which has declared that (paragraph 1.8): *“Given the ICRC’s mandate and the source of its funding it is inappropriate to use those funds to participate in litigation.”* I do not consider that the Applicant should be treated as if it was impecunious. I am not persuaded that there is any other reason to treat the Applicant differently from any other prospective beneficiary of trust funds who makes an application of this nature.

36. During the hearing of the present application, Advocate Greenfield suggested that if the application is successful, the Applicant would instruct new counsel to represent it. That came as a surprise to me and to the other Advocates involved.

37. When the Applicant first indicated it wished to participate in these proceedings, the Advocates for the Respondent and Crown Advocate Nicol-Gent raised issues as to whether it could properly be represented by Carey Olsen whilst they are also acting for the Settlor. At that time, Advocate Greenfield said he was satisfied there was no conflict and that he could represent both parties. That view appears to have been maintained by Adv Didisheim in an affidavit sworn in support of the present application in which he said it was unlikely that there would be any conflict of interest with the Settlor's position that would require the Applicant to change counsel.
38. During the hearing of the present application after Advocate Greenfield had indicated that, if this Application is granted, the Applicant would seek separate representation, he was pressed to say whether that was because of a conflict of interest. He again denied that there was any conflict and said he did not envisage the Applicant would play an active part but it would wish to make its own submissions at the conclusion of the case and he was of the view that such submissions would be more effective if made by an Advocate who was not also representing the Settlor.
39. I do not believe that is a sufficient reason to justify the appointment of new counsel at this late stage (the hearing is due to commence on 8 March) nor to justify the cost of an Advocate sitting through a two week hearing in order to make submissions at the end of the hearing. It leaves me a little suspicious as to exactly what are the true intentions of the Applicant and the extent to which it intends to advance its own case at the trial. However, those thoughts have not influenced my decision which would be the same whether separate counsel was needed or not.
40. In conclusion, I do not know what part the Applicant intends to play in the substantive proceedings. It may adopt a passive stance but it is not obliged to do so. If it presents a case that argues there was always an intention that it should benefit from the Mischca Trust and if that argument is unsuccessful I might be persuaded, at the end of the hearing, that I should make a costs order against the Applicant. It would therefore be wrong for me to make an order now that would fetter the exercise of my discretion later. If I decide it is appropriate that the Applicant should recover its costs in full, I will make such order at the end of the hearing.
41. By way of post-script, I note that after preparing this judgment in draft, I have been advised that the substantive proceedings have been settled subject only to the sanction of the Court.