Judgment 32/2012

Albany Trustee Company Limited and Jeandin and Cristofolini
Royal Court
Civil Action File No 1669
10th September 2012

Application for costs.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 10th day of September 2012 before Richard James McMahon Esquire, Deputy Bailiff, alone

ALBANY TRUSTEE COMPANY LIMITED

Applicant

-and-

Me. E. JEANDIN
(as Notaire of the Estate of the late
Paolo Felice Tullio Carlo Cristofolini)

First Respondent

-and-

MARIA ALBERTA GEMMA
CRISTOFOLINI
(NEE GRAZIANI)

Second Respondent

WHEREAS on the 5th July 2012 the Deputy Bailiff considered an application by the parties relating to costs following a judgment delivered at the end of the substantive application in this matter the Deputy Bailiff this day handed down judgment in the terms attached hereto and Ordered the First Respondent, as unsuccessful party, to pay the costs of the Second Respondent and the Applicant, both sets of costs to be taxed if not agreed on the standard recoverable basis.

S M D ROSS
H M Deputy Greffier

Approved Text
10.09.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(CIVIL DIVISION)

Between: **ALBANY TRUSTEE COMPANY LIMITED** **Applicant**

-and-

Me. E. JEANDIN **First Respondent**

(as Notaire of the Estate of the late Paolo Felice Tullio Carlo Cristofolini)

-and-

MARIA ALBERTA GEMMA CRISTOFOLINI (NEE GRAZIANI) **Second Respondent**

Hearing date: **5th July 2012**

Judgment handed down: **10th September 2012**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Advocate for the Applicant: **Advocate S L Brehaut**

Advocate for the First Respondent: **Advocate J T Le Tissier**

Advocate for the Second Respondent: **Advocate R G Morris**

Cases, texts & legislation referred to:

Lewin on Trusts, 18th ed. (2008)

IRC v Raphael [1935] AC 96

The Royal Court Civil Rules, 2007

Re Buckton [1907] 2 Ch. 406

Alsop Wilkinson (a firm) v Neary [1995] 1 All ER 431

E, L, O and R Trusts [2008] JLR 360

Breadner v Granville-Grossman [2001] WTLR 377

Professor Paul Matthews, *All about bare trusts* (2005) Private Client Business 266 and 336

Introduction

1. This judgment deals with the applications made by the parties relating to costs following the judgment that I delivered at the end of the hearing of the substantive application in this matter on 5 July 2012. On behalf of the Applicant trust company, paragraph 4 of its application

dated 7 December 2011 sought "*An order that the Applicant's costs incurred … be paid from the trust property or in such manner or by such persons as the Court thinks fit*". The Second Respondent sought her costs from the First Respondent or, in the alternative, from the trust fund. She also argued that the Applicant's application for its costs should be rejected. The First Respondent aligned himself to the Second Respondent on the question of the Applicant's costs and indicated that he would find it difficult to resist the Second Respondent's costs application if I concluded that the Respondents had been involved in hostile litigation. However, if the Application made by the trust company is to be categorised as being one seeking guidance of the Court, then all parties would be entitled to their costs from the trust fund. All Counsel were agreed that, although costs are discretionary, the proper approach to adopt is to categorise the litigation first in accordance with what I will describe as "the *Buckton* classification" and then apply the usual costs order relating to that categorisation.

2. Given the competing arguments, I reserved my judgment on the costs issues and permitted the parties to lodge any further written submissions, particularly on the question of whether, in the case of a bare trust, the same principles apply to awarding costs out of the trust fund. The Applicant and the First Respondent availed themselves of that opportunity. The latter's primary submission became that the Applicant had fallen into error "*in preparing a declaration of trust that could only be construed by the Court*", with the consequence that the Applicant, rather than getting its costs, should pay both Respondents' costs on the standard recoverable basis. His alternative position was that the litigation was of a type that led to the conclusion that all parties should have their costs from the trust fund.

3. Unfortunately, the summer vacation has intervened, meaning that it has taken me longer than I would have liked to produce this judgment, for which I apologise. I am grateful to all Counsel for their helpful written and oral submissions.

Substantive issues

4. Before I can deal with the competing submissions on costs, I need briefly to explain the context of the substantive issues I had to determine and the positions taken by the parties.

5. Indigo Finance Limited (hereafter "Indigo") was incorporated on 26 October 2000 under the laws of the Cayman Islands. It is an investment holding company. On that day, two shares were issued at par to a Kim McLaughlin and immediately transferred into the ownership of Michael Collins and a Jeremy Parfit. On 28 December 2000, Mr Collins transferred his single share to Mr Parfit and Indigo allotted 499,998 further shares to Mr Parfit and 500,000 shares to Paolo Cristofolini. In Marion Piercey's Affidavit she explained that she understood Paolo Cristofolini, as a Swiss resident, was only able to hold 50% of the shares in Indigo, so the other 50% needed to be held elsewhere. On 29 December 2000, Mr Parfit transferred 500,000 shares in Indigo (hereafter "the Indigo shares") to Albany Trustee Company Limited (hereafter "Albany"). On 30 December 2000, Mr Parfit wrote to Albany indicating that they should take their instructions about the Indigo shares from Mr Collins. On the same day, Mr Collins wrote to Albany saying that Albany should take its instructions about the Indigo shares from Paolo Cristofolini and in the event of his death Alberta Cristofolini. Also on the same day, Albany executed the Declaration of Trust. No one suggested that the Declaration of Trust was completely invalid, with the consequence that I had no difficulty in making the first declaration sought that the Declaration of Trust was valid.

6. Paolo and Alberta Cristofolini divorced on or about 9 April 2009. Paolo died on 3 January 2010. On Paolo Cristofolini's intestacy, according to the law of Monaco, where he was by then domiciled, his heirs are his mother and father, who are jointly entitled to half of his intestate estate, and his brother and sister, who are entitled to one quarter each of that estate.

7. The application dated 7 December 2011 brought by Albany was in respect of the validity and construction of a Declaration of Trust made by it on 30 December 2000. Advocate Brehaut, on behalf of Albany, made no submissions in relation to these matters at the hearing. Albany

had filed Affidavit evidence setting the scene and a short Skeleton Argument explaining that it was caught in the middle of rival claims to be beneficially entitled to the property held on trust. Albany also filed a further Skeleton Argument dated 21 May 2012, responding to the Respondents' position in relation to costs only.

8. In Skeleton Arguments and at the hearing, Counsel for the First and Second Respondents, Advocates Jeremy Le Tissier and Morris respectively, made their submissions about the ways in which the Declaration of Trust should be construed. The First Respondent, Maitre Jeandin, represents the interests of the estate, or the heirs, of the late Paolo Cristofolini. The Second Respondent, Alberta Cristofolini is the former wife of the late Paolo Cristofolini. Both Respondents claimed to be beneficially entitled to the trust property to the exclusion of the other Respondent. Counsel were agreed that the evidence was largely irrelevant because the task for the Court was to construe the Declaration of Trust, meaning there was no need to look beyond that document for assistance.

9. The Declaration of Trust bears the common seal of Albany and is signed by two directors, Mr Collins and Mrs Piercey, and provides as follows:

> "*THIS DECLARATION OF TRUST is made the 30th day of December 2000 by ALBANY TRUST COMPANY LIMITED (hereinafter called "the Company") a Company incorporated and existing under the Laws of Guernsey being domiciled there and having its Registered Office at Pollet House, The Pollet, St. Peter Port, Guernsey, Channel Islands*
> *W H E R E A S:-*
> *(A) With a view to the Declaration of Trust intended to be hereby made the Company is holding the Securities set out in the Schedule hereto (hereinafter called "the Shares") in an account designated "Albany Trustee Company Limited A.T. 479".*
> *(B) The Company wishes to declare such Trusts for the benefit of MR. PAOLO CRISTOFOLINI and, in the event of his death, for the benefit of his wife, MRS. ALBERTA CRISTOFOLINI, both of 13 Chemin Martinet, 1291 Commugny 41, Switzerland (hereinafter together called "the Cristofolinis")*
> *NOW THIS DEED WITNESSES as follows:*
> *The Company shall hold the Shares set out in the Schedule hereto for the Cristofolinis IN TRUST absolutely and undertakes UPON DEMAND to execute or procure the execution of a transfer to the Cristofolinis or to any other person as the Cristofolinis may from time to time direct of the Shares and to pay to the Cristofolinis and/or to the Cristofolinis' nominee the proceeds of any sale thereof AND IT UNDERTAKES to pay any dividend received in respect of the Shares as the Cristofolinis may from time to time direct.*"
> The Schedule then reads "*500,000 shares, evidenced by Share Certificate No. 4 in INDIGO FINANCE LIMITED, a Company incorporated in the Cayman Islands*".

10. I derived guidance, as suggested by Counsel, about the approach to take in construing the operative wording of the Declaration of Trust from the English law approach set out in para. 6-03 of Lewin on Trusts, 18th ed. (2008):

> "*Lifetime settlements are no different from other documents in that the subjective intentions of their authors are irrelevant. What counts is the objective meaning that the words of the document convey to the court when considered as a whole in light of the surrounding circumstances. Save in one exceptional case, the admissible circumstances do not include the subjective intention of the settlor. Jessel M.R. said in construing the after-acquired property covenant in a marriage settlement [Smith v Lucas (1881) 18 Ch.D. 531 at 542)],*
>
> > *"The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it; but of course, as I*

> *very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties."*
>
> *The intention that the court seeks is the intention as expressed [I.R.C. v Raphael [1935] A.C. 96 at 142]; that is, the way in which the document is to be understood, not the purpose or motive, desire or other subjective state of mind of the settlor. The reason for the rule is that, otherwise, no lawyer would be safe in advising on the construction of a written instrument, nor any party in taking under it. The traditional formulation of the parol evidence rule is that no evidence of extrinsic circumstances is admissible to add to, contradict, vary or alter the terms of a deed or other written instrument. This is to be understood, however, not as excluding parol evidence of the surrounding circumstances to explain the objective meaning of a settlement, but only as forbidding evidence called to show that the subjective intention of the settlor was different from what the settlement itself expresses. If it does not express the true intention of the settlor, it may be possible to alter it in rectification proceedings; but that is rectification, not construction. Evidence has always been admissible to show what the words mean. Though the rule is called the parol evidence rule, it does not only exclude oral evidence, but all extrinsic evidence. For instance, drafts of a deed cannot be referred to in order to interpret it, nor can preliminary negotiations. Nor can the written opinions of counsel who drafted a settlement be looked at to ascertain the subjective intention of the settlor. An unambiguous declaration of trust will not be altered even by a recital of the intention of the settlor, let alone by any extrinsic expressions of intent or the settlor's part."*

11. I noted that the operative words in the Declaration of Trust are not entirely unambiguous because, without some assistance, I would not know how to construe "the Company", "the Shares" and "the Cristofolinis". However, each of those terms is defined elsewhere in the instrument. Aside from those three terms, the operative words were, in my view, unambiguous.

12. The first two definitions were uncontroversial: "the Company" means Albany and "the Shares" means the shares in Indigo, as more specifically described in the Schedule. The real question, therefore, was what the term "the Cristofolinis" meant.

13. The fact that the term is written in the plural was not conclusive, but I regarded it as being significant. Objectively, that usage implies that more than one person is being covered. Because "*the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts*" (see *IRC v Raphael* [1935] AC 96, 143 per Lord Wright), having regard to the words in parentheses at the end of recital (B) indicating that the way of defining the term is that "together" Paolo and Alberta Cristofolini are "the Cristofolinis", I concluded that that was the construction I should give to the term in the operative words of the Declaration of Trust.

14. I considered that trying to introduce into a definition of the term additional wording relating to what would happen on Paolo Cristofolini's death improperly sought to have regard to a subjective intention, whether that asserted on behalf of Paolo Cristofolini and/or Albany. I agreed with Advocate Le Tissier's submission that, had the intention been to bring about a life interest for Paolo Cristofolini, with the remainder to Alberta Cristofolini, the instrument should have taken quite a different form.

15. Accordingly, as between the competing assertions of beneficial interests of the First and Second Respondents, I found in favour of the Second Respondent and made a declaration that the legal ownership of the 500,000 shares in Indigo Finance Limited held by Albany pursuant to the Declaration of Trust was initially held jointly for both Paolo and Alberta Cristofolini and that, subject to any suggestion of a different outcome arising through the application of some other principle, derived perhaps from applying another jurisdiction's law, on Paolo Cristofolini's death they became held solely for the benefit of Alberta Cristofolini.

The *Buckton* classification

16. In the light of the construction I gave to the Declaration of Trust, Counsel submitted that the first task I should undertake before deciding how to exercise the Court's discretion as to costs under rule 82 of the Royal Court Civil Rules, 2007, is to categorise the proceedings in the light of the approach usually taken in this type of trusts matter. The first three situations were those described in *Re Buckton* [1907] 2 Ch. 406 by Kekewich J. Through a combination of the first and third category, there now also appears to be recognised a fourth category. Adopting the terminology of Counsel, I will refer to the categories as *Buckton* (1), (2), (3) and (4), as the case may be.

17. The easiest way of describing them is, I think, to quote the summaries set out in para. 21-79 of Lewin on Trusts, 18th ed. (2008):

> "*Conventionally these kind of proceedings [about construction of the trust instrument or determination of questions of law as to the validity or scope of trusts or powers under the trust instrument or imposed or conferred by law] are treated as being divisible into three categories following the classifications in the leading case Re Buckton:*
>
> *(1) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be given credit if he does so on advice. In a case where any doubt is a slight one, consideration should be given to an application to the court under section 48 of the Administration of Justice Act 1985 as a convenient and inexpensive method of securing appropriate protection for the trustees.*
>
> *(2) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first consideration and similar considerations apply as to costs.*
>
> *(3) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason. A case which clearly falls within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument, or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or rival view of the law. Here the general principles as to costs of hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation.*"

and then add some extracts from para. 21-80, as follows:

> "*Not all proceedings commenced by a trustee for the determination of some question affecting entitlement to the trust fund are within Buckton category (1), particularly in a case which does not involve the construction of the trust instrument but rather a dispute over the beneficial ownership of the trust fund [McDonald v Horn [1995] 1 All ER 961]. … Although in form the proceedings come within Buckton category (1), in substance the dispute comes from the third category, and the costs of the rival claimants should be governed by the principles of cases falling within the third category, for the proceedings are akin to an interpleader. This kind of litigation might perhaps be conveniently treated as a fourth category.*"

18. Because the application was made by Albany, no one is suggesting that *Buckton* (2) or *Buckton* (3) is engaged. In relation to the Buckton classification, all the submissions have proceeded on the basis that I have a straightforward choice between *Buckton* (1) and *Buckton* (4).

19. The determination of these proceedings involved construing the Declaration of Trust. To that extent, this case falls into the *Buckton* (1) category. I note that the opening sentence in para. 21-80 of Lewin refers to "*a case which does not involve the construction of the trust instrument*", which implies that this case may not, therefore, be a *Buckton* (4) case. However, in the part of the passage I omitted from the quotation set out above, referring to a case where there is a dispute about beneficial ownership where no proceedings are commenced by either disputant to resolve the issues between them, it continues "*the trustee, being advised that there are real doubts as to the true beneficial ownership of the trust fund, commences proceedings to determine which of the rival claimants is the true beneficial owner from whom he might obtain a good discharge*". That is, in my view, a reasonably accurate description of the situation in the instant case.

20. If one considers what the position might have been had Albany not made its application, it would, it seems, have been faced with a choice of giving effect to Alberta Cristofolini's instruction by letter dated 9 November 2011 to effect the transfer of the 500,000 shares in Indigo to her or treating those shares as forming part of the estate of the late Paolo Cristofolini and awaiting instructions on behalf of the estate. Either way, Albany knew that whichever choice it made might result in the rival claimant taking action, whether in Guernsey or elsewhere, to challenge the outcome. Had such a challenge been mounted by one of the rival claimants, as between the rival claimants, that litigation would be labelled "hostile" (see, eg, Lightman J in *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431), with the consequence that costs considerations would operate in the usual inter partes way in respect of what might be described as "ordinary" litigation. That litigation would be within the *Buckton* (3) category for present purposes. Where the substance of a case reflects this situation, but arises on a trustee application, this seems to me to be covered by the *Buckton* (4) category.

21. Given the way in which the case was argued between the First and Second Respondents and the rival claims made to own the Indigo shares, I am satisfied that, using the *Buckton* classification, this case falls into *Buckton* (4) rather than *Buckton* (1). On that basis, the prima facie outcome as between the First and Second Respondents will be that the First Respondent, as the unsuccessful party, should pay the costs of the Second Respondent on the standard recoverable basis. It is against that provisional conclusion that I move on to consider the position of the trustee's costs and whether anything further affects how the costs should fall as between the Respondents.

Applicant's costs application

22. Both Respondents have opposed Albany's application to have its costs, arguing that the proceedings would not have been required if the Declaration of Trust had been prepared by Albany properly and that the assistance provided by the trust company in the proceedings was inadequate, confusing neutrality with passivity.

23. On behalf of Albany, Advocate Brehaut drew my attention to the general guidance offered by the Royal Court of Jersey in the *E, L, O and R Trusts* case [2008] JLR 360 at para. 42:

> "*Everything will depend upon the facts of the specific case but the general approach remains that a trustee which is acting in good faith in what it perceives to be the best interests of the trust and the beneficiaries as a whole will not be deprived of its costs unless it has behaved unreasonably.*"

This is consistent with section 35(2) of the Trusts (Guernsey) Law, 2007, which provides that:

> "*A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust.*"

24. Albany also submits that the judgment of Lightman J in *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431 assists, in which it was clarified that:

> "*In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry's case) offer to submit to the court's directions, leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred, for example in serving a defence agreeing to submit to the court's direction and in making discovery, the trustee will be entitled to an indemnity and lien.*"

25. On behalf of the First Respondent, Advocate Le Tissier relies on *Breadner v Granville-Grossman* [2001] WTLR 377 (which is the costs decision flowing from the more fully reported substantive judgment of Park J at [2001] Ch 523). In that case, Park J concluded that the trustees should not be entitled to recoup their costs out of the fund and should instead be liable to pay the costs of the other parties. The learned judge drew attention to seven factors which, taken cumulatively, persuaded him to do so:

    a. He identified who the successful and unsuccessful parties were.

    b. He accepted "*that it is hard on the trustees that, when that have acted on the advice of counsel to seek the court's guidance and when they have no beneficial interest in the fund themselves, they should have to bear the costs out of their own resources. However, in the particular circumstances of this case I think that it would be even harder on [the beneficiaries] to expect them to pick up the bill, either directly or indirectly through their shares of the trust fund.*"

    c. He noted that "*The trustees are professional trustees. They charge for their services and they are insured.*"
    d. He further noted that "*The circumstances which gave rise to the proceedings were created by an error on the part of the trustees or their close predecessors.*"

    e. He also explained that the trustees had chosen to adopt a partisan role and so must be taken to have accepted the consequences of supporting the side which was ultimately unsuccessful.

    f. By reference to *McDonald v Horn*, he accepted that "*there can, albeit exceptionally, be cases of applications to the court by trustees which, although being internal in the sense that only the trustees and the beneficiaries are involved, are hostile or adversarial litigation.*" Further, he concluded that "*This case was adversarial litigation and the trustees chose to make it such.*"

g. The seventh factor was described as "*not a major point*" and one of which not much was to be made. It results from the fact that "*The trustees did not, by analogy with the familiar Beddoe applications (Re Beddoe [1893] 1 Ch 547) apply to the court in advance of the proceedings for confirmation that their costs would be recoverable from the trust fund … because Beddoe applications are made when trustees are contemplating embarking on litigation with a third party. They are not usual when the contemplated litigation is an internal matter involving only the trustees and different classes of beneficiaries.*"

26. One of the distinctions between the ***Breadner*** case and the instant case is that Albany has not openly aligned itself to either Respondent's position. To that extent, Albany cannot be equated with a successful or an unsuccessful party and potentially be fixed with the costs, or a share thereof, as a result of the outcome. Indeed, the First Respondent has suggested (in the original Skeleton Argument filed on his behalf) that Albany appeared to be favouring the position of the Second Respondent over the First Respondent. On that basis, Albany would be aligned with the successful party and the position would be that the First Respondent would be at risk of having to meet the Applicant's costs as well as those of the Second Respondent.

27. Of the other factors to which Park J referred, the most telling, in my view, is that the proceedings were commenced by Albany to clarify what the trustee must have regarded, after taking advice, as being an uncertain position. That uncertainty appears to me to be attributable to Albany itself, because the Declaration of Trust was made by Albany. Albany chose not to disclose the advice that it had received. I am therefore left rather in the dark as to whether Albany has acted out of an abundance of caution, and so arguably unnecessarily, or was more justified in initiating these proceedings than the outcome of the substance of the application suggests was the case. In making its application, Albany knew full well that it would precipitate rival constructions to be advanced by the Respondents. In other words, rather than acting in a particular way and waiting to see if that generated any response, Albany took matters into its own hands. Without having the benefit of knowing more fully the advice received, something the Applicant could have helped with, my conclusion is that it seems more likely than not that Albany precipitated these proceedings unnecessarily. The proceedings were less for the benefit of the trust and the trust property than for the rival claimants to resolve their dispute or for the trustee to resolve the uncertainty created by the wording of its Declaration of Trust. In such a case, the trustee is at risk as to costs.

28. In that regard, I have also noted the e-mail sent on behalf of the First Respondent's Advocate on 6 October 2011 in which it was suggested that the First Respondent would "*apply to Court seeking its interpretation of the Declaration of Trust*". Had such an application been forthcoming, the question of how the trustee's costs should be satisfied would still have arisen. The choice would potentially have been the same, namely whether the costs should come from the trust fund, be denied to the trustee as not having been "*properly incurred*" or whether the First Respondent should be ordered to pay the trustee's costs.

29. I am also conscious that the trust property in question is a shareholding held on terms that mean that the consequence of my decision on the substance of the application is that the shareholding can be transferred away from Albany at the direction of the Second Respondent. In effect, I have found that the Second Respondent is, and has been since Paolo Cristofolini's death, the sole beneficial owner of the Indigo shares and that Albany is her nominee. This begs the question, having regard to rule 82 of the 2007 Rules, of whether it would be "*just*" to order that the trust fund meet the costs incurred by Albany (and I can add, without hesitation, that the alternative argument of the First Respondent that everyone's costs should be met out of the trust fund can easily be rejected as being quite an unjust solution in this case).

30. At the hearing I questioned the wisdom of the argument that Albany, as a bare trustee, should be entitled to its costs from the trust property, which was effectively owned by the Second

Respondent, who had been successful in arguing for the construction I gave to the Declaration of Trust, ie, the Second Respondent would be penalised for succeeding. In her post-hearing Skeleton Argument, Advocate Brehaut drew attention to the articles of Professor Paul Matthews, *All about bare trusts* (2005) Private Client Business 266 and 336, in which he deals with indemnities (see page 345). As regards a proprietary indemnity, Professor Matthews noted that "*The main problem … is simply the adequacy of the trust assets. Once they are exhausted, the trustee is left with the expenditure or the liability, but no means of satisfying it*". Bare trustees, therefore, have "*the benefit of a second kind of indemnity, which is the personal indemnity of the beneficiary. This applies to expenditure made, or liabilities undertaken, by the bare trustee at the request of the beneficiary, or without request but within the scope of the bare trust, e.g., because of the nature of the trust property*" (original emphasis).

31. In the light of this learning, I accept that the Court is not precluded from granting Albany's application for its costs out of the trust property. However, the overall impression I get from the evidence and the submissions of the Second Respondent is that she did not request Albany to seek the Court's assistance. Her position was that the construction to be given to the Declaration of Trust meant that Albany should act on her instructions in relation to the Indigo shares and effect a transfer of them to her. The Second Respondent participated in these proceedings because, by making its application, Albany afforded the First Respondent the opportunity to challenge the entitlement of the Second Respondent as beneficiary to the Indigo shares. My decision on the substance of Albany's application accords with that position. In my judgment, it would not be just to award Albany its costs out of the trust property because that would be tantamount to awarding costs against the Second Respondent. Because Albany did not act at the request of the Second Respondent and its application was not directly within the scope of the trust, but more to resolve uncertainty generated by Albany's own acts, I do not consider that this is a case where Albany could claim to have a personal indemnity from the Second Respondent as the beneficiary under the trust.

32. Equally, I do not consider that it would be just in this case to follow precisely the order made by Park J in the ***Breadner*** case and order Albany to pay the costs of any other party. Accordingly, I have a choice between making no order as to Albany's costs, thereby reflecting the criticism levelled at Albany by both Respondents, or ordering that the unsuccessful party, the First Respondent, should also pay Albany's costs, or a portion of them.

33. I have already indicated that I have classified these proceedings in the *Buckton* (4) category. Had the First Respondent followed through its suggestion to initiate proceedings, the role of the trustee would have been to provide whatever assistance was appropriate to the resolution of the rival claims between the First and Second Respondents. In that type of action, the First Respondent would potentially have been at risk, if unsuccessful, of being faced with meeting the costs of all the other parties involved unless there was some other order that would meet the justice of the respective positions. On the basis that the case was really a straightforward argument between the two Respondents about who was entitled to the Indigo shares, with Albany caught inbetween them, I take the view that the unsuccessful party should also pay Albany's costs.

34. Whilst a trustee will usually get its costs on the basis of its indemnity, for the reasons I have just explained, this is not a case in which the indemnity operates. Instead, I take the view that Albany should be treated in the same way as any other party to litigation and, although I will order the First Respondent to pay Albany's costs as well as the Second Respondent's costs, this will be only on the standard recoverable basis. If Albany regards that outcome as harsh, by declining to award costs on an indemnity basis I am also reflecting that Albany got itself into this position through its own acts when executing the Declaration of Trust and through choice by seeking the Court's intervention in the full knowledge, or at least the expectation, that the Respondents would then mount rival claims to the Indigo shares and that the matter

would proceed as the hostile litigation I have found it to be. I accept that Albany has maintained a neutral stance but its role has come perilously close to passivity when being a little more forthcoming may have assisted everyone involved more.

Conclusion

35. I have classified these proceedings in the *Buckton* (4) category. Although initiated by the trustee, Albany, this was hostile, or adversarial, litigation between the First and Second Respondents. However, this is not, in my judgment, a straightforward *Buckton* (4) case where the costs between the rival claimants follow the event and the trustee takes its indemnity costs from the trust fund because that would not produce a just outcome for the successful Second Respondent. Although not exactly the same as the ***Breadner*** case, there are elements of that decision that assist me in reaching the conclusion that this is the type of exceptional case where an adjustment to what might be expected in a *Buckton* (4) case is warranted.

36. For the reasons given, the First Respondent, as the unsuccessful party is ordered to pay the costs of the Second Respondent and the Applicant, both sets of costs to be taxed, if not agreed, on the standard recoverable basis.