



**Investec Trust (Guernsey) Limited et al & Glenalla
Properties Limited et al**
Court of Appeal
21st January, 2015

**JUDGMENT
04/2015**

Decision on costs of the Intervener applications.

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

(On appeal from the Royal Court of Guernsey Ordinary Division)

Appeal No. 467

21st January 2015

**Before: James Walker McNeill, QC
John Vandeleur Martin, QC
Robert Logan Martin QC**

BETWEEN

**(1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED**

Plaintiffs

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants

(1) RAWLINSON & HUNTER TRUSTEES SA

Defendant/Third Party Claimant

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants to Third Party Claim

Advocate P Richardson for the Proposed Intervener Robert Tchenguiz
Advocate C Hay for the Proposed Intervener Heather Bird
Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants
Advocate IC Swan for the Fifth Defendant

MARTIN JA:

1. On 10 September 2014 this Court (the Bailiff and McNeill and Martin JJA) dismissed applications (“the intervener applications”) by Robert Tchenguiz and Heather Bird (respectively “RT” and “HB”, and collectively “the proposed interveners”) to intervene in these appeals. The grounds on which the intervener applications were made, and the court’s reasons for dismissing the applications, were set out in the court’s judgment of the same date. This judgment assumes knowledge of the terms of that judgment.
2. We now have to deal with the costs of the intervener applications, and with certain other ancillary matters.
3. The parties’ positions on costs are as follows:
 - (a) the Plaintiffs (“the Former Trustees”) and the first to fourth Defendants and Third Parties (“the BVI Companies”) seek orders that the proposed interveners pay the costs incurred by the Former Trustees and the BVI Companies respectively in relation to the intervener applications on an indemnity basis, the liability of the proposed interveners being joint and several;
 - (b) the Fifth Defendant (“the Current Trustee”) says that the costs should be reserved;
 - (c) RT’s position is that the costs of the applications should be costs in the cause, or should be reserved, or that there should be no order as to those costs;
 - (d) HB adopts RT’s position, and also contends that the costs attributable to her application should be considered separately from those attributable to RT’s application.
4. It is convenient to consider the question of liability for costs before dealing with the basis on which any costs ordered should be paid.
5. On the face of it, the position is that the proposed interveners have made applications that have failed, and they must expect to have to pay the costs of their applications.
6. However, both the proposed interveners say that it is premature to make any order for costs at this stage. That is, so they say, because the purpose of their interventions was to ensure that this Court had available to it relevant documents that RT alone was then in a position to adduce (if he was able to obtain the leave of the English courts to deploy those documents in the appeal); because it remains possible that those documents will be in evidence at the resumed hearing of the appeal, if the Current Trustee succeeds in an application to adduce them; and because, if those documents turn out to be of relevance to the outcome of the appeal, the applications to intervene will or may have been justified.
7. In my judgment, there is no reason to defer consideration of the question of liability for costs until after conclusion of the appeal. The applications were made on the basis that there were 22 documents of relevance, with a further 58 that might be so. As matters stand, following a decision of the English Court of Appeal given on 31 October 2014 ([2014] EWCA Civ 1409), only one of the 22 documents can in principle (that is to say, if this court gives permission to

the Current Trustee to amend its notice of appeal so as to rely on them) be used in these proceedings in unredacted form, and the rest only in redacted form. Moreover, the English court's reasoning - which turns on the existence of a high public interest in maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension and in maintaining the confidentiality of documents arising in the course of liaison on such matters (see paras 82 and 83) - suggests that it is very unlikely that leave will be given to deploy any of the 58 documents in unredacted form. Yet further, the English court had (as this court has not had) an opportunity to consider the content and potential relevance of the 22 documents; and it concluded at paragraph 88 that the documents did not have the high degree of importance to this appeal that Lord Goldsmith QC (whose advice formed the foundation of the intervener applications) attached to them. See also the convincing analysis of the relevance of the documents in paragraph 78 of the judgment. In these circumstances, it seems to me that those parts of the 22 documents in principle capable of being deployed on this appeal cannot have the potentially determinative effect on the appeal that was urged on the court in June 2014 by reference to Lord Goldsmith's advice. It is highly unlikely that the intervener applications would then have been given any serious consideration by this court had it then been known that they related to one unredacted document and 21 redacted documents which, taken together, had limited relevance to the issues. In the absence of any serious suggestion that the documents have real relevance, there is no substance in the argument that the costs should not be determined until it can be seen what effect the documents have on the appeal.

8. RT next contends that there are three separate sets of costs to be considered: the costs of the adjournment of the hearing scheduled for 23-28 June 2014; the costs of preparation for the intervener applications; and the costs of applications that RT, HB, the Former Trustees and the BVI Companies would have made on 9 September 2014 but for the Court's dismissal of the intervener applications.
9. RT himself acknowledges, however, that these three sets of costs all derive from a single underlying source, which he describes as "the fact that there exist documents disclosed in the SFO Proceedings which are (at the lowest) potentially relevant to the Court of Appeal proceedings, but which it has proved complex and difficult to seek to admit in these proceedings". This is said to mean that "intervention of some sort was necessary in June 2014 in order to seek to adjourn [the Current Trustee's] appeal so that relevant fresh evidence could be obtained"; that "if fresh evidence is ultimately admitted then RT's and HB's applications will have been justified"; and that "if the fresh evidence turns out to be of assistance in reaching a conclusion that the December 2013 judgment is wrong and/or unsafe and should be remitted for hearing then the costs will have been a necessary part of arriving at that conclusion".
10. These contentions are premised on the proposition that the 22 documents (and maybe also the 58 documents) have a sufficient degree of relevance to justify the intervener applications. As I have said, the judgment of the English court of appeal indicates that that is very unlikely to be so. Even if the current trustee applies to this court for leave to adduce some or all of those documents, and obtains it, thereby establishing that the documents have *some* relevance to the appeal, there is no basis on which it can be said that that relevance will be sufficiently high to justify the disruption to the appeals brought about by the intervener applications. The hearing in June 2014 was adjourned when otherwise it would not have been: what costs were incurred as a result, and whether the appeal could have been concluded at that hearing but for the intervener applications, are questions for the tribunal assessing the costs, not for us. The hearing in September 2014 was for the sole purpose of considering and determining the intervener applications: those applications failed, and the costs of the other parties of preparing for the hearing and attending at it must plainly follow the event, although again the amount of those costs is a matter for assessment. I would, however, say that I do not accept RT's contention that some or all of the other parties' costs of the applications should be disallowed on the basis that they "have not 'won' anything that they sought to argue". The

Former Trustees and the BVI Companies were entitled to attend at the hearing to resist the intervener applications, and to make proper preparations for that hearing; the fact that the applications were resolved on a basis different from that which they had prepared to argue is simply irrelevant. It also seems to me that the Former Trustees and the BVI Companies were entitled to make proper preparations to resist the applications that the proposed interveners would have made had their applications to intervene succeeded, and were entitled to make proper preparations for the future conduct of the appeals in the event that the intervener applications succeeded; and in each case they should in principle have their costs of making those preparations.

11. Three other points required to be considered in relation to the question whether costs should in principle be awarded. First, as to HB's argument that the costs incurred by her application should be disposed of separately from those incurred by RT's application, it seems to me that the position is this. HB has throughout aligned herself with RT's position; she relied on the evidence that supported his application; she was not herself able to adduce any documents; her aim – perfectly understandable, but legally irrelevant – was to protect the interests of her and RT's children. I do not think that she can in those circumstances distinguish between the costs incurred by her application and those incurred by RT's application. The costs of the preparation related to material on which she relied just as much as RT did, and the disruptive consequences of the applications are attributable as much to hers as to his. In those circumstances, I consider that their liability for costs must be joint and several.
12. The second point relates to the costs of an application made by the Former Trustees to strike out the intervener applications. This application was made in response to the expansion of the intervener applications to cover the 58 documents. RT's objection to having to pay the costs of that applications are that the merits of it have never been determined; but in my view the real objection is that it seems to me to have been an unnecessary overreaction to the threat of the expanded intervener applications. The issues raised by the application to strike out would have been identical to those raised by the intervener applications themselves, and a more sensible course would have been merely to wait for the intervener applications to come on and resist them. I would disallow the costs of the strikeout application.
13. The final point concerns a suggestion by the BVI Companies that any costs award in their favour should cover additional legal costs incurred in connection with the liquidations of the companies because of the delay caused by the adjournment of the appeal. We have not had this issue properly argued, and it is in any event a matter for assessment rather than of principle; but I express considerable scepticism about the suggestion, which appears on the face of it to advance a claim going far beyond what is properly attributable to the intervener applications.
14. For the reasons I have given, I would order the proposed interveners jointly and severally to pay the costs of and arising from the intervener applications. I now turn to consider the basis on which those costs should be paid.
15. There is no dispute as to the relevant principles. They may be summarised as follows.
 - (a) All questions of costs are in the discretion of the court: Court of Appeal (Guernsey) Law, 1961, section 18.
 - (b) The circumstances in which an award of indemnity costs may be made are likely to be those set out in the Royal Court Civil Rules: *Hulme v Matheson Securities (Channel Islands) Ltd No 2* [1997] 24 GLJ 80.
 - (c) Rule 83 of the Royal Court Civil Rules makes provision for an order for costs on a full or partial indemnity basis where either, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the ordinary basis or "where any party has pleaded or otherwise pursued or

defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court".

- (d) The court's approach is similar to that adopted in Jersey in relation to similar rules. The Jersey approach is shown by the following two citations from decisions of the Jersey Court of Appeal:

"The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct": *C v P-S* 2010 JLR 645 at [11] per Beloff JA;

"The grounds for considering the making of an award of indemnity costs were most recently considered by this Court in *Leeds v Weston and Levi* [2012] JCA 088. In reviewing earlier decisions of this Court Jones JA noted that there had to be some special or unusual feature justifying such an award such as culpability, abuse of process, deceit, unreasonable behaviour, abuse of court procedures or the submission of unnecessary evidence; but not necessarily a lack of moral probity, malice or vexatious conduct": *Federal Republic of Brazil v Durant Intl Corp* [2012] JCA 160 per McNeill JA.

16. The Former Trustees contend that the conduct of the proposed interveners has been manifestly unreasonable such that the requirement of special circumstances is plainly made out. Reliance is placed on the facts that the intervener applications were filed on the business day before the date (23 June 2014) fixed for the hearing of the appeal; that the supporting evidence was voluminous and served even later than the applications themselves; that no reason was given or existed for the lateness of the applications in circumstances where the documents were available to RT from January 2014 onwards; and that the applications were expanded in what is described as an abusive manner between June 2014 and September 2014. The BVI Companies also rely on these matters; but they point additionally to the fact that no updated advice was obtained from Lord Goldsmith QC; upon the failure to apologise to the court for errors in RT's first affidavit; to the fact that RT was seeking to reopen matters which had already been concluded against the Current Trustee by this court; to the submission of "unnecessary and wholly irrelevant evidence aimed at tainting a non-party"; to the apparent misleading of the English High Court about the terms of this court's order sealed on 1 July 2014; and to what they describe as "the naked purpose of these applications, which was to disrupt the appeal hearing set down for 23 June 2014".
17. In my judgment, the circumstances of this case do not justify an award of indemnity costs. The intervener applications were made on the basis of advice obtained from Lord Goldsmith QC, which this court regarded as raising a sufficient concern to justify adjourning the appeal. I do not consider that RT can be said to have acted unreasonably in taking that advice at face value. It is true that the 22 documents had been in RT's possession since January 2014; but it is also true that those documents formed part of a very much more substantial number of documents disclosed by the SFO in the proceedings brought against it by RT, and it seems to me natural that the investigation into the relevance of the disclosed documents should have focused initially on their relevance to the proceedings against the SFO. The relevance of the documents to this appeal was in fact discovered only late in the day, and in those circumstances it is not surprising that the applications were made hard up against the commencement of the appeal and that mistakes were made in their preparation. Once it became clear that there were a further 58 documents in addition to the 22 originally identified that might have a bearing on the appeal, it was not unreasonable for RT to try to get into a position where he could rely upon them in the appeal. Whilst it is certainly the case that the effect of the intervener applications has been seriously to disrupt the due course of the appeal, I do not consider that there is sufficient material from which it may be inferred that that

disruption was the sole or main object of the applications. The intervener applications failed, but were not in my view advanced unreasonably.

18. In the circumstances, I would order the proposed interveners jointly and severally to pay on the standard basis the costs of the Former Trustees and the BVI Companies of and arising out of the intervener applications.
19. I turn finally to deal with the procedural relief sought by the Former Trustees and the BVI Companies against the Current Trustee. This relief is designed to ensure that the Former Trustees and the BVI Companies are informed about the progress of the applications made in England for permission to adduce documents in this appeal, and to ensure that any application to be made by the Current Trustee to amend its notice of appeal so as to seek leave to rely on additional documents should be made promptly and in good time before the resumed hearing of the appeal.
20. I would not myself propose to make any further directions. The resumed hearing of the appeal is to take place in the week commencing 16 February 2015. It is the intention of the court that the hearing of the appeal should be concluded in that week. The parties have known of the hearing date for several weeks. If the Current Trustee is to make any application to adduce further documents, it must recognise that the application must be made sufficiently far in advance of the hearing date to allow the other parties to make proper preparations, and it must recognise that any application must be prepared and presented in a way which allows it to be accommodated within the time already set aside for the hearing and without prejudicing the completion of the hearing of the appeal. It is in my view extremely unlikely that any application that fails to recognise these matters will be permitted by the court when it comes to deal with the matter again in February 2015. Beyond saying that, I would leave it to the Current Trustee to decide what it wishes to do.

MCNEILL JA:

I agree.

LOGAN MARTIN JA:

I also agree.