



Fatemah Al-Kazemi and AUB Trustees (Guernsey) Limited
Royal Court
5th February, 2015

JUDGMENT
06/2015

Costs decision, made on the papers regarding proceedings under The Trusts (Guernsey) Law, 2007.

Approved Text
05.02.2015

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between **FATEMAH AL-KAZEMI** **Applicant**
-and-
AUB TRUSTEES (GUERNSEY) LIMITED **Respondent**

Costs decision (made on the papers)

Judgment handed down: 5th February 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Advocate N J Robison
Counsel for the Respondent: Advocate S M McHugh

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
The Royal Court Civil Rules, 2007
Public Trustee v Cooper [2001] WTLR 903
Lewin on Trusts, 18th ed. (2008)
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
Shaham v Lloyds TSB Offshore Treasury Limited [2007-08] GLR 323
The Civil Procedures Rules 1998
Maurice v Chief Executive of the States of Alderney (unreported, 18 April 2011)
R (Boxall) v Waltham Forest London Borough Council (unreported, 21 December 2000)
Emezie v Secretary of State for the Home Department [2013] EWCA Civ 733
M v Mayor and Burgesses of the London Borough of Croydon [2012] 1 WLR 2607
Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited (unreported, 15 December 2014)

Introduction

1. The Applicant commenced proceedings against the Respondent under the Trusts (Guernsey) Law, 2007 by way of an Application dated 16 April 2014. This followed a considerable amount of correspondence. Although she initially sought an order that the case be heard in private, the Applicant abandoned that paragraph of her Application by the end of May 2014, at which time the hearing that had been listed was adjourned by consent for four weeks. Indeed, the matter was further adjourned on several occasions. At a hearing on 17 October 2014, the Applicant confirmed that she no longer wished to pursue the substantive relief sought in her Application. That relief was for the provision of information about whether a decision had been taken to exclude her from the Trust which forms the subject-matter of the dispute and, if so, for it to be set aside. The Applicant's position arose because matters had moved on since she brought the Application. However, she wished to pursue para. 5 of her Application for an order that the costs she incurred in bringing her Application be paid on the indemnity basis out of the assets of the Trust.
2. The position of the Respondent Trustee is that the parties were engaged in hostile litigation where the appropriate costs order should be the usual order following unsuccessful proceedings or by reference to principles applicable when proceedings are not pursued to their conclusion. Accordingly, it contended that the Applicant should be ordered to pay the Respondent's costs or, at worst, that there should be no order as to costs.
3. I directed that Skeleton Arguments be prepared in respect of the parties' competing positions and indicated that, unless the Advocates wished to be heard, I would then proceed to resolve the question of costs on those papers, provided that I felt I could properly do so. Having considered the documentation lodged in a substantial agreed bundle, as well as the written submissions, I am satisfied that I can reach a just conclusion on the papers consistently with the overriding objective in rule 1 of the Royal Court Civil Rules, 2007 and the power contained in rule 50(2)(1).

Categorisation of proceedings

4. The first issue that arises is how to categorise the proceedings that were commenced by the Application. This is because the Respondent submits that the proceedings were clearly a hostile claim by a beneficiary against the Trustee falling within category (4) of the distinct situations set out in *Public Trustee v Cooper* [2001] WTLR 903 and summarised at para. 29-292 in *Lewin on Trusts*, 18th ed. (2008). The Applicant's position is that the proceedings were primarily for the provision of information by the Trustee and so fell under the administrative, rather than the hostile, heading but that, in any event, the distinction does not need to be drawn because it is clear that it has been the conduct of the Trustee throughout that forced the Application to be brought and then withdrawn.
5. By way of background, the Trust was settled in 1998. It was established under the laws of Jersey. The beneficiaries are the Settlor's family. The Applicant has two brothers and two sisters. The Trust assets comprise two London residences. Due to liquidity problems, those two properties have fallen into a state of disrepair. There is now a split between the family members to such a degree that they do not communicate. The Settlor desired the Trustee Respondent to take guidance from the two brothers (or the survivor of them) and that the Trustee should hold the Trust assets in the like manner to the terms of the Settlor's Kuwaiti will. The effect of that will was that each brother would take twice the amount of one of their sisters with the Settlor's widow also taking one-eighth, ie, a quarter each to both brothers and one-eighth each to the widow and each of the three sisters.
6. In the autumn of 2012, the Respondent contacted the Applicant indicating that a distribution of one-eighth of the Trust assets, as valued earlier that year, was envisaged, following which she would be excluded from benefiting from the Trust. This was put as a proposal for her

approval. It was suggested she take her own legal advice. This was the first occasion on which the Respondent had contacted the Applicant.

7. Exchanges of correspondence followed. The Applicant made a counter-proposal under which she would purchase the larger of the two properties comprising the Trust assets. The Respondent eventually replied that it was not minded to sell any of the Trust properties to any of the beneficiaries. The Applicant enquired what the intentions of the Trustees were in order to obtain sufficient liquidity to make the proposed distribution to her prior to her exclusion as a beneficiary. The Respondent explained that it had arranged alternative funding, which was subsequently explained to be a loan from the brothers, and requested the Applicant to provide details enabling the Trustee to make a payment. There was also a suggestion that if she failed to respond the distribution to the Applicant would be appointed to a separate sub-fund, with the costs of doing so being borne by that sub-fund.
8. At this stage, being the summer of 2013, the Applicant instructed English solicitors, who continued the correspondence with the Respondent. That correspondence related in part to whether the Trust would meet the Applicant's reasonable legal costs incurred as a result of the Trustee's proposal. Requests were made for further information about how the decision apparently reached had been taken. After some months, the reasons for the proposed course of action, principally being the breakdown in the family relationship, were explained. The Applicant indicated she was prepared to reinstate her offer to purchase the larger of the two properties held in the trust. There was a conference call at which various options were explored in late 2013. In a letter dated 20 January 2014, the Applicant's solicitors wrote: "*We understand that the Trustees are minded to accept the offer of the loan and therefore have taken the decision to make the proposed distribution to [the Applicant] and to exclude her as a beneficiary of the Trust.*"
9. By a letter dated 17 February 2014, the Respondent's Advocates further explained how two different values could be placed on the Applicant's one-eighth share, depending on whether the two properties forming the Trust assets were repaired and refurbished. Accordingly, the Respondent proposed a figure approximately midway between those two values, reflecting the fact that the Applicant would not then be sharing as an ongoing beneficiary in the costs associated with the works to be undertaken to realise the higher value. That letter also stated:

"As we explained to you during the conference call, the trustee was minded to exercise its discretion to distribute 1/8 of the trust fund to your client and thereafter to exclude her from further benefit. The purpose of the conference call was to give you an opportunity of putting forward any information or matters on behalf of your client so that the trustee could take that into account before reaching a final decision."

10. It was that letter which led to the Applicant's Advocates being instructed and forwarding to the Respondent's Advocates a draft of the Application. There followed further correspondence between the Advocates. Some of the information requested was supplied. The position of the Respondent was summed up as being that the Trust is a discretionary one and the Respondent "*has chosen to exercise its discretion and exclude [the Applicant] from the trust*". It was stressed that the Respondent took the view that the Applicant had no right to indemnity from the trust fund and would be at risk of costs if she pursued her Application. The Application was then formally made, with supporting Affidavits of the Applicant and her English solicitor sworn on 8 and 10 April 2014 respectively.
11. From that brief summary of the stages prior to making the Application, I have reached the conclusion that it cannot be said that this was entirely a category (4) case. Paragraph 3 of the Application sought information. Paragraph 4, seeking the setting aside of any decision reached, was always dependent on confirmation that there was a decision to be set aside. This would have been an issue had the matter come to trial. On the face of the material preceding the Application, in particular the letter of the Respondent's Advocates dated 17 February 2014, it does not appear to have been the case that a final decision had been taken. I take the

view that this letter contradicts the understanding of the Applicant’s solicitors set out in their letter of 20 January 2014. Later comments about the Respondent having “*chosen to exercise its discretion*” do no more than lead to further confusion that could only be clarified by a clear statement from the Respondent as to what it had decided. In any event, the question arose as to whether this was a final, irrevocable decision, the consequences of which could only be avoided by an application to set it aside, or whether it was revocable and so capable of being dealt with outside the courtroom, assuming the Applicant did not choose to accept what the Respondent had done.

12. To that extent, therefore, the Application read as a whole does not fall squarely into the category of being hostile litigation. Insofar as it is relevant, I can properly treat the Application as having two stages. The first stage is information-gathering and the second stage, if needed, would clearly be a direct challenge to a decision already taken and so hostile in nature.

Post-Application events

13. As I have already noted, the Application never proceeded to any formal determination. Evidence opposing the Application is contained in an Affidavit of Jeremy Mahoney, an Associate Director of the Respondent’s administrator, sworn on 15 May 2014. He suggests that the Applicant had known from October 2012 of the Respondent’s intention to exclude her and one of her sisters as beneficiaries of the Trust and so does not require the information sought. At para. 74 of that Affidavit he states that “*the Respondent has decided that the way to resolve the issues between the beneficiaries is for the Applicant (and her sister [L]) to be excluded and to be paid a distribution of a 1/8th share of the Trust funds, in accordance with Sharia Law and, as far as reasonably possible, with the Settlor’s wishes, given that it is neither practical or realistic for each beneficiary’s share in the trust to be retained therein*”. There was, however, no reference to any formal decision having been recorded as to how that decision was reached and the mechanics of giving effect to it.
14. Further correspondence ensued. Updated valuations of the properties were obtained. A one-eighth share of those updated values results in an amount becoming payable to the Applicant that is greater than the previous figures indicated by the Respondent, including its approximately midway point between the higher and lower figures referred to in the letter of 17 February 2014. The Trustee had also changed its position slightly by deciding that both properties should be sold and the Trust terminated. This change has been attributed to the offer of taking a loan from the brothers to enable them to be refurbished having been withdrawn. The Applicant is apparently satisfied with the latest proposal of the Respondent, save for how to accommodate a payment towards the costs she has incurred. Various figures in respect of the amount of costs payable have been advanced on both sides, with the difference between them narrowing but not resulting in any particular amount being offered and accepted. Because the parties have failed to resolve the question of costs amicably (despite the final figures put forward being only £10,000 apart), it falls to me to rule on the principles engaged and the outcome.

Legal principles

15. It is accepted by both parties that costs are in the discretion of the Court. Section 71 of the 2007 Law provides:

“The Royal Court may order the costs and expenses of and incidental to an application to the court under this Law to be paid from the trust property or in such manner and by such persons as the court thinks fit.”

In terms of general provisions relating to costs, section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969 provides that:

“The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid.”

Further provision is then made in the Royal Court Civil Rules, 2007, rule 82(1) of which provides:

“The Court may, in any action –

(a) make such order as to the costs of the proceedings, or of any stage or application in the proceedings ...

as the Court thinks just.”

16. The position in this case is that no final decision has been reached by the Court indicating who won and who lost. Accordingly, the general principle that costs follow the event is of no direct application. In *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323, the Court acknowledged that guidance could be obtained through referring to the way certain outcomes arise in England and Wales through applying the Civil Procedure Rules. I appreciate the fact that those Rules do not operate in exactly the same way in Guernsey, at times being more prescriptive as to how costs orders are reached, and that my task is to reach an order that is just in all the circumstances.
17. In the present case, the substantive relief sought by the Applicant has been withdrawn. Advocate Robison submits that the withdrawal arose because the Respondent's changed position rendered pursuing the Application unnecessary. The Respondent in turn highlights that the Court has previously ruled on how to deal with costs when the substantive issues have been resolved out of Court (see, eg, *Maurice v Chief Executive of the States of Alderney* (unreported, 18 April 2011)). The approach in England and Wales has developed from the position referred to in that case, ie, the guidance given by Scott Baker J in *R (Boxall) v Waltham Forest London Borough Council* (unreported, 21 December 2000, at para. 22), to that set out in *Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733, in which it was stated (at para. 4) that *"The starting point now is whether the claimant has achieved what he sought in his claim."* In turn, the developing guidance referred to in that case was that offered by Lord Neuberger MR in *M v Mayor and Burgesses of the London Borough of Croydon* [2012] I WLR 2607 (see, in particular, para. 60 as expanded upon in the subsequent paragraphs).
18. As I indicated in a decision handed down after the Advocates made their submissions in the present case (*Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited* (unreported, 15 December 2014)), by reference to what Lord Neuberger MR stated in the *M* case (*supra*), a distinction is drawn between a situation where the claimant is regarded as wholly successful, where the usual order for costs would be in the claimant's favour, where he is partly successful, where a more detailed analysis along the lines pursued in the *Boxall* case can be undertaken, and *"a case where there has been some compromise which does not actually reflect the claimant's claims"*, where (see para. 63 of Lord Neuberger's judgment):

“... the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.”

19. The position adopted in the *Maurice* case (*supra*), referring to the guidance in the *Boxall* case (*supra*) was:

- “(i) *The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.*
- (ii) *It will ordinarily be irrelevant that the claimant is legally aided.*
- (iii) *The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.*
- (iv) *At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issue been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.*
- (v) *In the absence of a good reason to make any other order the fall back is to make no order as to costs.*
- (vi) *The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.”*

Discussion

20. I have, therefore, approached the Applicant’s Application in respect of her costs and the Respondent’s opposition on the basis of where I consider the justice of the matter to lie. Had I been unable to reach a conclusion either way, I would have resorted to the default position of making no order as to costs. However, for the reasons that follow, I am satisfied on my review of what has taken place that it is appropriate to grant para. 5 of the Application.
21. In my judgment, the Respondent has attempted to mis-characterise the nature of the proceedings brought by the Applicant. At the stage reached, this was not an outright attack by her, as a beneficiary, on the actual exercise of a power after the event. It is apparent that there had been no final decision reached. Had there been, the Respondent Trustee would not have been in the position of re-visiting what it would do with the trust property once the offer of lending from the brothers was withdrawn. I regard the position reached by the Respondent as being at best an in principle decision to distribute one-eighth of the trust fund to the Applicant and thereafter to exclude her. However, a formal decision to exclude her on those terms was not reached and had not been carried out. Had the information sought by the Applicant crystallised into an acknowledgement that the Applicant had been excluded in that way, then there would have been the second stage of the proceedings involving a hostile attack on that exercise of the Respondent’s powers. That stage was not reached and, instead, the Respondent has reached a revised position that is acceptable to the Applicant, namely to terminate the Trust completely through selling the properties and then distributing the receipts.
22. Further, to that extent, the Applicant bringing the proceedings had produced a slightly more positive outcome for her than would have been the case had the Respondent’s provisional decision to distribute a smaller amount come to fruition. Moreover, the Applicant takes satisfaction from the fact that she and her sister are not simply being excluded but that the entire Trust is now to be terminated. In her mind, which is a position I accept, the equal treatment of all the beneficiaries rather than the Respondent distinguishing between the two sides of the family, is a better outcome for her. Consequently, I also reject the Respondent’s submission that the bringing of the Application was premature. It appears to have served to focus minds and result in a resolution of what would otherwise have been a dispute. That strikes me as something benefiting the Respondent and also all the beneficiaries of the Trust

because otherwise the trust fund may have been depleted through conducting hostile litigation of a very bitter inter-family type.

23. These factors, in my view, clearly point away from the conclusion that the Applicant should be ordered to pay the Respondent's costs of these proceedings. Indeed, I can see nothing in the way that the dispute arose between the parties and has been settled that could possibly lead to such an outcome. The only reason that the Applicant no longer needs to pursue the substantive relief she sought by bringing her Application is that the Trustee's position no longer requires her to invite the Court to rule on those paragraphs in her Application. This is not the withdrawal of her action because she realises she will not succeed or that the risks of proceeding are too high and she wishes to minimise her exposure to costs, but rather that the outcome she wished to achieve has already been achieved, albeit perhaps not in exactly the manner the Application envisaged. Accordingly, this is not a situation where the consequence of commencing litigation and then not pursuing the action to a favourable judgment is to make an award costs against the party withdrawing the proceedings.
24. The more difficult element of my consideration is whether this is a case where I can properly say that an award of costs in favour of the Applicant does justice. In granting para. 5 of the Application I am conscious that the order relates to the "*costs of the Application*". Looking at events prior to the issue of proceedings, and possibly also some of what has happened since, not all of the costs the Applicant has incurred are likely to be treated as costs of the Application. Those that are, if they are not agreed, will have to be resolved through taxation. However, because of the outcome achieved by the Applicant through her persistence in not simply accepting the initial proposal put to her by the Respondent Trustee, I find myself in a similar position to the Court of Appeal in *Re F* (unreported, 21 June 2013) in that "*I have concluded that it would be wrong that [the Applicant] should be put to expense personally*" (see para. 39). Put simply, the whole tenor of the exchanges I have reviewed leaves me feeling that the Applicant has had an uphill task to get the satisfaction she was seeking of being treated fairly or of having her counter-proposals considered for what they were. Subject to what I have indicated about actual recoverability as "*costs of the Application*", it does not feel right to me that the Applicant should be required to incur personal expense in bringing and pursuing her Application.
25. In saying that, I understand that the Respondent will regard itself as having given effect to the Settlor's wishes in turning to the brothers for guidance. There is nothing wrong in it having done so. However, because of the level of breakdown in the relationship between the different sides of the family, and the ultimate way that matters have resolved themselves into a decision to sell the two properties without refurbishing them and to treat all beneficiaries in equal ways (subject to different proportions of beneficial interest), it appears to me to be a just outcome that the trust fund should bear the expense of what has happened so that all the beneficiaries contribute, in effect, rather than the position being that the Applicant loses some or all of the advantage she has, in my view, obtained through these proceedings when the other beneficiaries of the Trust do not. Further, I appreciate that this decision has an indirect effect on the position of the other beneficiaries of the Trust. However, I do not regard that impact as resulting in an unjust outcome because the impression I have formed is that the Applicant's brothers were instrumental in persuading the Respondent to take the course of action it has taken and so should face their fair share of the consequences for their involvement in influencing the decision-making process.
26. A side issue has arisen about the entitlement of the Applicant to recover the legal expenses she has incurred in engaging London solicitors who have then assisted in the pursuit of the Application. Given the origins of how the dispute arose and, at least in part, how it has been resolved, I cannot say that this is a case where claiming costs incurred in instructing non-Guernsey lawyers necessarily must be disallowed. To that extent, the principles derived from cases such as *Ladbroke plc v Galaxy International Ltd* [2007-08] GLR 101 and *Jackson v Dear* (unreported, 8 July 2013) potentially assist the Applicant rather than the Respondent. I share the concerns expressed by Advocate McHugh that some of the expenses incurred may not be associated with the actual proceedings and may not be reasonable in amount, but that

will have to be a matter for further discussion between the parties or to be addressed on any taxation of the bill of costs, if that is to be requested. For the purposes of making a costs order, I will, therefore, say nothing further on that issue.

27. The final question I need to deal with is the way in which offers in respect of the Applicant's costs were made, but did not result in any agreement. The Respondent has pointed to the fact that it offered £40,000 in full and final settlement of the costs liability to the Applicant. The Applicant's lowest offer was £50,000, representing a discount of more than 50% of what she claims to be entitled to recover. From the papers, this looks like a case in which some form of settlement should have been possible. I imagine that the additional costs incurred in preparing the written submissions on costs may well account for the difference between the two offers. Sadly, this is an example of where the willingness of the parties to compromise fell marginally short of what was needed and where pragmatism should, in my view, have been allowed to override pride, if that is what has prevented the gap between their final offers being split, whether equally or in some other proportion.
28. On the basis that I have concluded that para. 5 of the Application should be granted, I cannot decide today whether the amount to be recovered by the Applicant will exceed the offer made by the Respondent. I suspect that it will, which is why I am not minded to adjust the costs award I am making at this stage. However, if the amount of the costs award, including the costs associated with arguing para. 5 of the Application, crystallises at a figure lower than £40,000, the costs incurred by the Applicant after the date of that final offer should be disallowed and the costs incurred by the Respondent after that date should be paid, on the recoverable basis, by the Applicant to the Respondent. I consider that any such adjustment can properly and fairly be made if a taxation is requested or through agreement between the parties. If that entails a revision of the bare order granting para. 5 of the Application, I will, of course, make that modification.

Conclusion

29. Looking at matters in the round, I am satisfied that the Application was not premature. The position had been reached where the Respondent's Advocates had indicated that a final decision had not yet been reached and then purported to indicate that it had. In those circumstances, I take the view that the Applicant was justified in seeking clarification through bringing the proceedings and including in the Application the relief she would seek if the Court concluded that a final decision to exclude the Applicant as a beneficiary of the Trust had been taken. In the event, the parties continued to discuss the most appropriate way forward. Further, the factual basis on which the Respondent had reached its provisional decision to distribute a share to the Applicant and thereafter exclude her as a beneficiary changed. In those circumstances, with the Respondent having adopted what I regard as a different outcome in respect of the entire Trust, pursuing the Application was no longer required. This is because the Applicant had obtained something with which she was content. It might not have been exactly what the proceedings would have given to her, but it has resulted in a situation where progressing what would have been the hostile element of the Application has been avoided. Put another way, the information-gathering relief fell away because of the changed position of the Respondent and that, in turn, meant that all the relief sought through the Application, save for costs, could be withdrawn. Accordingly, this is a case where, when looking at the underlying claims in the Application, the Applicant has largely succeeded and so should not have to pay the costs of bringing her Application. In effect, this was resolved as if it were a normal trust administration application where the Applicant could expect the trust fund to indemnify her.
30. For these reasons, the just order to make in respect of costs is to grant para. 5 of her Application, subject only to the caveat that a more refined order might be needed once the amount of costs she is entitled to be paid on the indemnity basis is agreed or has been taxed.