



**Rawlinson & Hunter Trustees SA v Investec Trust  
(Guernsey) Limited and Bayeux Trustees Limited**  
Court of Appeal  
6<sup>th</sup> December 2016

**JUDGMENT  
50/2016**

Costs and extension of time for leave to appeal to the Privy Council.

**IN THE COURT OF APPEAL OF GUERNSEY  
(Civil Division Appeal No. 503/504)**

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

**6<sup>th</sup> December 2016**

**Before:**

**James McNeill QC, President  
Clare Montgomery QC  
Jonathan Crow QC**

**(1) Rawlinson & Hunter Trustees SA**

**Plaintiff and Appellant**

**and**

**(1) Investec Trust (Guernsey) Limited  
(2) Bayeux Trustees Limited**

**Defendants and Appellants**

**Advocate N Robison for the Plaintiff  
Advocate J E Roland for the Defendants**

**JUDGMENT OF THE COURT  
ON ANCILLARY MATTERS**

**McNeill, JA**

**Introduction**

1. This decision deals with ancillary matters following upon a judgment of this court dated 4 October 2016 dealing with appeals between the parties from a decision of the Royal Court dated 11 November 2015.

2. In our October judgment (43/2016) we dealt with an appeal by each party. The plaintiff appealed the determination of the learned Deputy Bailiff holding that a claim for compensation, in respect of alleged failures on the part of the defendants in prosecuting earlier litigation, had no real prospect of success. For their part, the defendants appealed against the refusal of the learned Deputy Bailiff to find the plaintiff in abuse of process for seeking to raise in the present Cause allegations in respect of investment decisions and possible breach of trust which were very closely connected to allegations made by the present plaintiff in earlier Guernsey litigation.
3. For reasons set out at paragraphs 87 to 93 of that October judgment we sustained the first, and principal, of the defendants' three grounds of appeal. For the reasons set out at paragraphs 140 to 147 we did not sustain the plaintiff's appeal.
4. In these circumstances the defendants (the "Former Trustees") seek various orders. In the first place, they seek an order that judgment be entered in their favour on the Cause and they submit that this is the combined effect of the judgment of this court and of the judgment of the learned Deputy Bailiff, no order having been finalised in respect of the latter. In their submission it is appropriate that an order be made confirming that the action has been determined in their favour. That application is not opposed by the plaintiff (the "Present Trustee") and we consider that the Former Trustees are entitled to an order that judgment be entered in their favour on the Cause.
5. The Former Trustees also seek an order for their costs of the action on the recoverable basis. Such an order would embrace both the costs of the application before the Royal Court and on appeal, and otherwise incurred in the proceedings from commencement in June 2013.
6. There is no dispute between the parties that this court has an unfettered discretion in the awarding of costs but that the winning party is usually awarded its costs against the losing party.
7. The Former Trustees submit that there are no circumstances arising which warrant this court from departing from the usual order of costs following the event, where they had been completely successful.
8. On this matter the Present Trustee contends that any order for costs in favour of the Former Trustees should exclude their costs of and incidental to Ground 3 of their notice of appeal and should also exclude their costs of and incidental to that part of their initial application to the Royal Court in December 2014. As to Ground 2, it is contended that the parties should bear their own costs.
9. The third ground of appeal for the Former Trustees had been that the learned Deputy Bailiff had erred in finding that the common law doctrine of election did not apply in relation to the allegations by the Present Trustee concerning what has been referred to as the "Framework Agreement". As can be seen from paragraph 96 of our October judgment, because of the principal views which we had reached it was not necessary to reach a detailed view on the competing arguments under the third ground of appeal. Accordingly, the Former Trustees did not fail in this ground. Given the restricted ambit of the arguments on this ground, we do not consider that it would be appropriate or proportionate to make an issues-based costs order and, therefore, we do not sustain the submission for the Present Trustee.
10. The second ground of appeal for the Former Trustees had been that the learned Deputy Bailiff had erred in law in dealing with applicable principles. On this matter, the submission for the Present Trustee is that, as this court did not expressly allow Ground 2, the appropriate outcome was that each party should bear its own costs. In our judgment that submission does not fall to be sustained. Whilst, in the circumstances, we did not find it

necessary to deal with the second ground of appeal, it is clear from our views set out at paragraph 95 that we would have had difficulty in supporting the position of the learned Lieutenant Bailiff. Again having regard to severability and proportionality, we see no reason for departing from the ordinary, general, approach that, viewed overall, the Former Trustees succeeded before us.

11. Because the substantive proceedings in this matter are closely linked to other proceedings between the same parties, an issue arises as to the enforceability of any order for costs such as that on which we have just expressed our views. In related proceedings this court has held that the Present Trustee, acting in its capacity as a trustee, should not be personally liable for costs incurred while acting as party to litigation in which it had been made clear that it was acting as trustee. However, that finding, among others, is the subject of outstanding applications to Her Majesty in Council for Special Leave to Appeal. On the other hand, different considerations may apply in the present case where the conclusion of this court and of the Royal Court have included determinations as to abuse of process and entitlement to summary judgment. In the whole circumstances we consider that it is appropriate to determine that any enforcement action in respect of costs orders should be stayed. In our view the stay should be imposed until fourteen days after final determination of the various appeals to Her Majesty in Council (Nos 0016 of 2016, 0081 of 2016 and 0083 of 2016). Given that the full outcome of those appeals cannot be predicted, we consider it appropriate also to provide that, following determination of those appeals, the Former Trustees have permission to apply for an order that the Present Trustee's liability for costs should not be limited to the extent of the trust assets.
12. There is another closely related matter. The Former Trustees hold the sum of £850,000 by way of security for costs pursuant to paragraphs 2 and 5 of an order of the Royal Court dated 28 August 2014. The Former Trustees submit that they should be entitled to retain this sum in the meantime. The Present Trustee opposes that application, observing that this security was intended to cover the Former Trustees' costs up to and including disclosure. They contend that, in the event of the Former Trustees wishing to pursue an application for an order that they might retain a percentage of the security, such an application should be supported by evidence of costs to date.
13. In our judgment this issue should be considered broadly. Given the history of these litigations, the issue of costs is likely to be as hard fought as every other issue and, given that determinations from the Privy Council can be anticipated within a modest period, probably during 2017, it seems more proportionate to allow the security to be retained pending final determination of the appeals rather than have a satellite dispute at present as to how much may be retained. We shall order that the £850,000 may be retained until fourteen days after final determination of the appeals to Her Majesty in Council (Nos 0016, 0081 and 0083 of 2016). Again for the avoidance of doubt, we shall provide that the Former Trustees have permission to apply for an interim payment on account of costs following expiry of the period of the stay, and liberty to apply for a continuation of the stay thereafter if appropriate.
14. The Former Trustees have also made application, in respect of costs awarded in their favour, (a) that there should be an uplift on the recoverable hourly rate payable to their Guernsey Advocates and (b) that the outlays incurred by them in retaining English counsel should be recoverable at the same maximum hourly rate payable on the recoverable basis for their Guernsey Advocates.
15. In their submissions to us the Former Trustees acknowledged that it was conceivable that the extent of liability of the Present Trustee for costs might be a relevant factor in considering these two potential ancillary orders and, accordingly, that determination of the applications for the ancillary orders might be deferred until after determination of the substantive appeals in the Privy Council. Without reaching a view as to whether or not the extent of liability

would be a relevant factor for these ancillary orders, we agree that it is conceivable that it might be. Determination of these applications, therefore, will be deferred until after the determination of the substantive appeals to the Privy Council.

16. Turning to the applications on behalf of the Present Trustee, it has been submitted that it should be entitled to costs, on the indemnity basis, in respect of the withdrawal by the Former Trustees of an application to adjourn the Appeal hearing date when they were listed for the week commencing 26 September 2016. In its submission it is suggested that the application to adjourn appeared to have been made, and withdrawn, solely on the basis of the availability of English counsel retained by the Former Trustees, that the application was entirely unnecessary, and was a waste both of the court's time and of the Present Trustee's resources.
17. On an issue such as this we must proceed upon the basis of responsible submissions made by responsible counsel who are, of course, officers of the court. For the Former Trustees it is noted that, whilst they had previously requested the hearing be listed at the December 2016 sitting of this court, on the basis of counsel's availability, listing for September was confirmed in mid August. In light of that the Former Trustees, on 1 September 2016, had lodged the application for adjournment together with a short skeleton argument, in response to which the Present Trustee, on 9 September, had submitted a two page affidavit and short skeleton argument. On 13 September notification was given by the Former Trustees that, as counsel was now available, the application was being withdrawn.
18. We see no reason for doubting that the application was properly and reasonably made, and for reasons outside the control of the Former Trustees. It generated very little by way of extra work and was withdrawn very promptly. We discern no reason to make a separate award of costs in relation to this matter.
19. Separately, the Present Trustee applies for an extension of time in which to file with this court an application for leave to appeal to the Privy Council, our earlier order having been that all applications should be made within seven days from the date of handing down of the judgment dated 4 October 2016.
20. The application by the Present Trustee is silent as to reason why that time limit could not be adhered to and we observe that all other ancillary applications were made within the set time. The application is therefore refused.