



**Puma Brandenburg Limited v Aralon Resources and
Investment Company Limited & Nortrust Nominees
Limited**

Court of Appeal
6th June 2017

**JUDGMENT
29/2017**

Indemnity Costs

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 508

6 June 2017

Before:

**Nigel Pleming QC
George Bompas QC
Sir Michael Birt**

Between:

PUMA BRANDENBURG LIMITED

Appellant

-v-

**ARALON RESOURCES AND INVESTMENT COMPANY
LIMITED
NORTRUST NOMINEES LIMITED**

Respondents

**IN THE MATTER OF
PUMA BRANDENBURG LIMITED
-and-
IN THE MATTER OF
A SCHEME OF ARRANGEMENT PURSUANT TO
PART VIII OF THE COMPANIES (GUERNSEY) LAW
2008**

**Advocate J P Greenfield for the Appellant
Advocate A R Lyall for the Respondents**

JUDGMENT OF THE COURT

BOMPAS JA

- 1 On 18 May 2017 we gave a judgment dismissing the appeal of the Company, Puma Brandenburg Ltd, from the Bailiff's refusal to sanction its proposed arrangement ("the Scheme") under Part VIII of the Companies (Guernsey) Law 2008 ("the Companies Law").
- 2 The Respondents, Aralon Resources and Investment Company Ltd and Nortrust Nominees Ltd, then applied for an order that the Company should pay their costs of the appeal. This order was not opposed by the Company. However, the Respondents applied also for a direction that the ordered costs should be full indemnity costs. This the Company opposed. This present judgement, therefore, is concerned only with the basis on which the ordered costs are to be taxed.
- 3 This Court has power to order that the costs of an appeal should be paid by the paying party on a full indemnity basis. This power, which arises from the power given by section 18 of the Court of Appeal Act 1961, taken with Rules 82 and 83 of the Royal Court Rules, 2007, was recognised by this Court in Hulme v Matheson Securities (Channel Islands) Ltd (No.2) (1997) 24 GLJ 80. It is a discretionary power. In the Hulme case Southwell JA, giving the judgment of the Court, after setting out the relevant parts of Rule 48 of the Royal Court Civil Rules, 1989 (which were materially the same as Rules 82 and 83 of the present Rules) pointed out that the discretion is not to be fettered or circumscribed beyond the requirement that the exercise of the discretion must be "*appropriate*".
- 4 In our judgment, if an order for indemnity costs is to be considered appropriate in respect of any appeal, this is likely to be because there is some feature of the appeal, either because of the conduct of the paying party in relation to the appeal or because of the nature of the underlying proceedings or the appeal, which takes the case out of the usual run of ordinary contested litigation.
- 5 We note that Rule 83, which sets out the Royal Court's power to order costs departing from the norm and instead on a full or partial indemnity basis, refers to two sets of circumstances. One, in Rule 83(2)(b), is misconduct: this is 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*". The other, however, is much wider: this, in Rule 83(2)(a), is "*where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the 2000 Rules*".
- 6 In the present case the Respondents base their argument on the foundation that the Company's appeal is from an unsuccessful application under Part VIII of the Companies Law. The Respondents submit that, where a company seeks sanction for a proposed scheme under Part VIII, even a party opposing unsuccessfully the company's application may reasonably expect to have costs ordered in its favour. Indeed, Advocate A R Lyall on behalf of the Respondents submits that those costs should normally be ordered to be on the indemnity basis, not simply the standard basis, as that is an approach which has been taken before the courts in England and Wales. If this submission is correct, the next step in his argument is that the position of the Respondents in the present case is a fortiori: having been brought before this Court by the Company, and this Court having upheld the Royal Court's refusal of sanction for the Scheme, it would be wrong for the

Respondents to be refused a full indemnity for the costs of the appeal which they have reasonably incurred in seeking to oppose the appeal.

- 7 In contrast Advocate J P Greenfield on behalf of the Company submits that the present appeal is no different from any typical appeal in hostile litigation. The Company, as losing party, should in the ordinary way pay the successful party's costs, but again in the ordinary way these should be on the standard basis.
- 8 We accept that, as Advocate Lyall submits, the courts in England and Wales have come to develop an approach to costs which treats the proceedings for the court's sanction for schemes as having a different character from ordinary contested litigation. Not merely have unsuccessful objectors frequently been spared from being ordered to pay the successful company's costs, but commonly they have had their costs ordered to be paid by the applicant company. A decision that they should not pay may be justified, in conventional terms, by the consideration that the company would anyway have had to come before the court for sanction, so that only the additional costs (if any) incurred by the company in dealing with the objectors' opposition would be appropriately for consideration as possibly to be paid by the objectors. But an order that the company should pay their costs requires further explanation, as it is a departure from the general presumption that an unsuccessful party should pay the successful party's costs.
- 9 The distinction between what might be called typical litigation and schemes of arrangement is that in typical litigation one party is seeking to vindicate enforceable rights against the other, while in the case of schemes a company is necessarily applying to the court for the exercise of its discretionary power to sanction the company's proposed arrangement. The arrangement, if sanctioned, will ordinarily impact on, and may change substantially, the rights of the company's shareholders or creditors and where that is the case such persons are entitled to be heard on the company's application. In this connection Advocate Lyall drew to our attention the comment of Harman J in Re Esal Commodities Ltd [1985] BCLC 450 at 459, a case concerned with costs of winding up proceedings and of a scheme of arrangement: this comment was, "*It must be remembered that a winding up petition is not a normal lis between parties, nor is a scheme of arrangement petition. In neither of these does A beat B, or B beat A.*"
- 10 The case which is commonly cited as one of the first in which objectors costs were ordered to be paid is Re Thomas de la Rue & Co Ltd [1911] 2 Ch 361. That case concerned a scheme for a reduction of capital which was confirmed; but Eve J made it a condition that the costs of a dissenting shareholder should be provided for. Eve J explained this as follows:
- "As I do not wish to discourage shareholders affected by schemes of this kind from appearing at the hearing of the petition to obtain the Court's confirmation and pointing out matters to which the attention of the Court may properly be drawn, and as I have been materially assisted in this case by the criticism of this particular dissentient, I propose to make it a further term of my confirmation that his costs are provided for by the company."*
- 11 What was not discussed in Eve J's judgment, and does not appear from the report of the case, is what was intended to be encompassed within "costs": there was no reference to taxation, or the basis of any taxation, whether party and party, solicitor and own client, indemnity or trustee (the then bases for allowance of costs in proceedings in England and Wales).
- 12 In Re Peninsular and Oriental Steam Navigation Co [2006] EWHC 3279 (Ch), [2007] Bus LR 554, Warren J gave detailed consideration to numerous reported and unreported cases, including

the Thomas de la Rue one, which had been concerned with the costs of unsuccessful opposition to schemes. The headnote reads:

“The courts do not, as a rule, make costs orders against objecting shareholders or creditors in, respectively, shareholders' or creditors' schemes when their objections are not frivolous and have been of assistance to the court. Sometimes no order for costs is made, sometimes an order is made in favour of the objector. There is no established principle that this treatment applies to other objectors. The matter, however, remains in all cases at the discretion of the court (post, paras 38, 47).”

13 This summary fairly distils what Warren J said at paragraph 38 of his judgment:

“38 That completes the review of the authorities. What they establish is that the courts do not, as a rule, make costs orders against objecting shareholders or creditors (in, respectively, shareholders' and creditors' schemes) when their objections are not frivolous and have been of assistance to the court. Sometimes no order for costs is made, sometimes an order is made in favour of the objector. There is no established principle that this treatment, which differs from the ordinary rule in litigation that costs usually follow the event, applies to other objectors. ... The matter, however, remains in all cases at the discretion of the court.”

14 In the present case we are, of course, only concerned with the case of objecting shareholders, not with other interveners.

15 What Warren J said at paragraph 47 is relevant:

47 For my part, I decline to elevate to some great principle of public policy the idea that, save in exceptional cases, objectors must, in order to ensure proper scrutiny of a scheme, always be immune from the normal costs rules provided only that their objections are genuine and not frivolous. It seems to me that, as in any other litigation, the courts are perfectly capable of deciding, on a case by case basis, what the justice of the case demands in relation to costs. ...”.

16 Against this, at paragraph 48 of his judgment it is possible to read Warren J as having concluded that “shareholders whose shares are involved in the scheme” are “entitled at least prima facie to a costs order in their favour”.

17 But whether this is what Warren J meant, we accept that in England and Wales, on a scheme of arrangement which is to alter rights attaching to shares, shareholders objecting unsuccessfully may reasonably expect to have between them at least one set of costs ordered to be paid by the company, provided that their grounds of opposition are reasonable and worthy of proper consideration by the court when deciding whether or not to sanction the scheme. This is not to say that it would be the exception if costs were refused, but rather that if an objecting shareholder took reasonable objections and advanced them reasonably and so as to assist the court the objecting shareholder would have good grounds for having costs ordered in his favour.

18 In our judgment the approach described in the previous paragraph, an approach which is well-established and familiar in England and Wales, could be appropriately taken in Guernsey. Although, it is not easy to find any explanation, beyond the brief statement given by Eve J in the Thomas de la Rue case, of any principle which has provided a foundation for ordering a company

to pay costs to a shareholder who appears before the court and opposes the giving of sanction to a scheme of arrangement, for reasons we set out below we consider the approach to be principled.

- 19 Further, although we have not been shown any reasoned decision of the English court in which there has been a discussion of the basis of taxation or assessment of such costs when ordered to be paid, we conclude that there could be a principled basis for the Guernsey courts ordering (if thought fit to do so) the opposing shareholders' costs to be on an indemnity basis.
- 20 In support of his argument Advocate Lyall drew attention to the judgment of Kekewich J in Buckton v Buckton [1907] 2 Ch 406. He submitted that what the English court was doing when ordering an objecting shareholder to have his costs paid by the company seeking sanction for a scheme of arrangement was to treat the proceedings as analogous to non-adversarial litigation concerning a fund, in which there was no winner or loser, and in which the court could deal with the parties' costs in a similar way to those of a trustee.
- 21 In his judgment in the Buckton case Kekewich J was explaining the principles on which the English court acts in considering whether or not to extend to parties to trust litigation, who are not themselves trustees, an entitlement to costs by analogy with that accorded to trustees. He described three classes of trust litigation. For present purposes it is convenient to set out an extract from the judgment of Hoffmann LJ in McDonald v Horn [1995] 1 All ER 961 at 970 (a case concerned with the making of a pre-emptive costs order in favour of a pension scheme participant seeking to bring derivative-type proceedings against trustees). In this part of his judgment, under the heading "*Extension of special principle to beneficiaries*", Hoffmann LJ described and discussed Kekewich J's three classes:

"... The Chancery courts have however been willing in certain circumstances to extend to other parties to trust litigation an entitlement to costs in any event by analogy with that accorded to trustees. The classic statement of the principles upon which the court acts is by Kekewich J., who was acknowledged in his time as a master of Chancery procedure, in In re Buckton [1907] 2 Ch. 406 , 413–415. While warning that it was "well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases," he said that trust litigation could be divided into three categories. First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund. Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first. Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event. The judge acknowledged, at p. 415, that "It is often difficult to discriminate between cases of the second and third classes," but said:

"when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs."

I should add that it is also sometimes difficult to discriminate between the first and third categories. Not all proceedings commenced by trustees for the determination of some question affecting entitlement to the fund are within the first category. Particularly in a case which does not involve the construction of a trust instrument but rather a dispute

over the beneficial ownership of the trust property, the proceedings may be more akin to an interpleader.”

- 22 There are two other features of Kekewich J’s judgment in the Buckton case to note. First, when describing his first class of case Kekewich J concluded “*In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate*”. He said, in relation to his second class, that he extends the “*operation of the same rule as is observed in cases of the first*”. The importance of this is that the non-trustee party whose costs are ordered to be paid would not only be recovering costs, but would be doing so on a more favourable basis than ordinary party and party costs: at the time “*solicitor and client*” costs were, broadly, to cover the costs which a party would be required to pay his or her own solicitor. In present terms in proceedings before the High Court in England and Wales, these would be costs on an indemnity basis.
- 23 Secondly, the facts of the Buckton case are instructive in illustrating the possible difficulty which may be encountered in deciding whether a case is a class 1 or class 2 one on the one hand or a class 3 one on the other. The proceedings in the Buckton case had been started by a beneficiary of a will whose precise interest was uncertain. He wished to establish that he took an estate in tail male in certain property rather than a life interest only, and he therefore brought the matter to court. He joined those who would be entitled if he only took a life estate. It was therefore either a category 2 or a category 3 case. Although Kekewich J had initially thought it was hostile litigation (and therefore category 3), having heard it, he decided it was really designed to clear up a doubtful title and more akin to a category 2 case. He therefore ordered the costs of all parties out of the estate.
- 24 Advocate Greenfield did not dispute that the principles described in the Buckton case also have application in Guernsey in guiding the court when exercising its discretion as to costs in relation to trusts. His argument is that when a company applies to the Royal Court to have a scheme sanctioned and the sanction is opposed by a shareholder whose shares are to be affected by the scheme, it would be wrong to consider the case as being capable of being characterised as trust litigation within either of Kekewich J’s first two classes. He submits further that on the facts the present case is not akin to trust litigation within either of those classes, but is best characterised as hostile litigation in which the Respondents disputed the Company’s claim to acquire their shares through the machinery of the Scheme.
- 25 In our judgment Advocate Greenfield was correct to accept in general terms the relevance of Buckton as a guide to costs principles applicable in Guernsey in relation to trusts. We note, for example, the reference to the case made by the Royal Court (Sir Richard Collas, Bailiff) in International Committee of the Red Cross v Thommessen GLR [2009-10] 337, where the question concerned the making of a pre-emptive costs order. Although not stated in the judgment, it is apparent that Kekewich’s principles were treated as relevant. Thus at paragraphs 19 and 20 the Bailiff explained that:

“19 Both parties have referred me to the classic categorization of applications of this nature in the judgment of Kekewich, J. in his well-known decision, In re Buckton (3). They agreed we are not dealing with his first category (applications by the trustee to construe the trust instrument or to determine a question that has arisen in the administration of the trust).

20 Advocate Greenfield argued, on behalf of the applicant, that we are dealing with the second category (applications by a beneficiary to resolve some difficulty of construction

or administration). He said that is the substance of the proceedings if one ignores the hostility between the settlor and the respondents in the conduct of this litigation.”

- 26 However, we prefer the argument of Advocate Lyall to that of Advocate Greenfield so far as concerns the relevance of the Buckton case to schemes of arrangement in particular. Again, the case of McDonald v Horn is of assistance. In that case the Court of Appeal recognised that the pre-emptive costs order that it was upholding involved an extension of the special principle on which a non-trustee might be ordered to have costs paid from a fund. The starting point for the extension was an existing extension by which a pre-emptive costs order might be made in favour of a member of a company seeking to bring a derivative action on behalf of a company. The first extension, in the case of the derivative action, had been to treat the shareholder as if a trustee. Balcombe LJ explained (at page 975) that, “*When a novel case comes up the court will, where necessary, lay down principles and will usually seek to derive those principles by analogy from existing rules or case law*”.
- 27 In our judgment there can be a legitimate comparison between the first (and, of course, the third) class of cases identified by Kekewich J in his judgment in Buckton and a company’s application to court for sanction for a scheme of arrangement. Although the company is beneficial owner of its property and is not a trustee of the property for its shareholders, it is possible to compare the position of the company and its shareholders to be affected by a scheme with that of a trustee and its beneficiaries. The analogy is far from perfect; but it makes understandable the awarding of costs to a shareholder who appears and opposes the sanction being sought, but whose costs are ordered to be paid on the ground that his arguments have been helpful to the court. But further, if such a shareholder’s costs are to be paid, the court could properly conclude that the approach should be in line with that which, according to Kekewich J, he would take with cases falling within his first class, and should be on an indemnity basis.
- 28 Support for this conclusion can be found in the approach taken by Evans-Lombe J in Axa Equity and Law Life Assurance Society plc [2001] 2 BCLC 447. That was a case in which insurance companies were seeking the court’s sanction for an insurance business transfer scheme of arrangement. A policy holder affected by the scheme wished to oppose. A pre-emptive costs order was made in his favour, the judge having concluded (at page 465) among other things that “*his presence or the presence of an objector such as [him] is necessary for the proper testing of the provisions of the scheme as to whether they are fair under the relevant legislation*”. One of the authorities relied upon by Evans-Lombe J was the unreported judgment in the case of Equitable Life Assurance Society v Hyman in which Sir Richard Scott V.-C. had made a pre-emptive costs order in favour of an appellant policy holder who had been joined by a mutual insurance company in proceedings brought by the company to determine the rights of its policy holders (who were also members). In these cases not only were the relevant companies (and hence their assets) bearing the burden of the costs of the other party, but those costs were not expressed to be limited to party and party costs in contrast with the costs which the party was to pay its lawyers to continue the party’s opposition.
- 29 As Advocate Greenfield points out, however, we have not been shown any reasoned judgment in which a court, when awarding an unsuccessful objector’s costs to be paid by a company following an application for sanction for a scheme, has directed that those costs should be on an indemnity basis. All that we have been shown is a copy of an order made by Sir Geoffrey Vos, Chancellor of the High Court, following his judgment in Re Dee Valley Group plc [2007] EWHC 184 (Ch) sanctioning a scheme of arrangement. In that case the order made was for the Company to pay indemnity costs to three sets of objectors, despite the fact that the objectors had been unsuccessful.

- 30 We accept that the order made in the Dee Valley case is of little help. At least, though, it is consistent with the argument advanced by Advocate Lyall, namely that an objector whose costs are ordered to be paid by the company may properly have those costs on an indemnity basis. More importantly, we do not consider the absence of any reasoned judgment on the point destructive of Advocate Lyall's submission. There is no judgment which contradicts the submission, and we conclude that it is open to us to accept it.
- 31 On his appeal we are not of course deciding the costs of the proceedings before the Royal Court, much less on the costs of cases which will come before the Royal Court in the future when a company seeks sanction for a Part VIII scheme of arrangement. In each case it will be for the Royal Court to exercise, on the facts of the case before it, the discretion given by the Royal Court Rules, 2007.
- 32 As to the costs of the appeal to this Court, however, we note the first question that we had to decide concerned the effect of section 313(3) of the Companies Law. That was a threshold, jurisdictional, obstacle in the way of the Scheme. It was right for the Respondents to be before this court to assist with that question, and we consider that even had the Respondents failed on that question their costs, at any rate on that question, should have been on an indemnity basis.
- 33 There was a second question before us: this concerned the Bailiff's exercise of discretion. If the costs below had been ordered to be paid on an indemnity basis on the ground that on this question, as on the jurisdictional one, the arguments of the Respondents had been of assistance to the Court and suitable for a favourable costs order, even if unsuccessful, it would have an obvious order that the Respondents' costs of this appeal on that question too should be on an indemnity basis, so that overall the Respondents' should have indemnity costs.
- 34 We do not need, however, to approach our decision as to the costs of this appeal by considering further the appropriate characterisation of the Respondents' opposition to the proceedings before the Royal Court, or before this Court. We therefore do not need to trespass upon or pre-empt the decision on costs to be made by the Royal Court. In our judgment the costs can be decided by the following considerations, which may be stated shortly.
- 35 The Company, in choosing not to accept the Bailiff's decision and to prosecute this appeal, has used resources in which the Respondents, as owners of a substantial shareholding, are materially interested (recognising always that the Company, not shareholders, is the owner of its own property). Interested in the Company's resources to a much greater extent than the Respondents are the owners of the large majority of the Company's issued shares, who would have stood to benefit very substantially had the appeal been successful and the scheme sanctioned. In the circumstances the justice of this case points to the Company giving the Respondents an indemnity for their costs, for the simple reason that it would be unfair that they should have been faced with litigation in which they preserved their own interest in the Company, and the interests of other minority shareholders who have chosen not to sell, while resources in which they are interested are used to support the litigation against them, and the real beneficiary ultimately interested in the Company's success is able to see the burden of the difference between indemnity costs and standard costs fall on the successful Respondents to the exclusion of the Company.
- 36 On behalf of the Company, Advocate Greenfield submitted that it would have been wrong for the Company not to have pursued the appeal to this Court, having regard to the support given to the Scheme by those, other than the Respondents, who voted at the court directed scheme meetings. However, in our judgment there is nothing in this consideration. If correct, it does not undermine

the point that the Company failed on this appeal, and that the Respondents should not be left out of pocket principally to the advantage of the majority shareholders. But further, insofar as the consideration might have been relevant, we cannot accept it as a matter of fact. As a result of the Company's own-share purchases effected after the Royal Court's refusal to sanction the Scheme, those who had voted in support of the Scheme ceased to be shareholders, having had their shares purchased by the Company. They were therefore not interested in the outcome of the appeal. The persons for whose benefit the appeal was carried on by the Company were the majority shareholders, and they did not vote at all at the scheme meetings.

37 For this reason we order the Company to pay the Respondents the costs of the appeal on the indemnity basis.