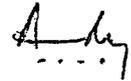


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Approved Judgment
10th September, 2001

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION



Between

ALAN STUART-HUTCHESON

Applicant

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V.

SPREAD TRUSTEE COMPANY LIMITED

Respondent

C

Judgment of Day DB in respect of the Applicant's application for costs in respect of his (unsuccessful) application that the Respondent deliver up various Trust and related documents.

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Hearing Dates: 15th June and 26th June 2001
Judgment handed down: 10th September, 2001

Advocate St. J. A. Robilliard appeared for the Applicant.

Advocate P. A. Allen appeared for the Respondent.

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Legislation referred to:-

The Trusts (Guernsey) Law, 1989, as amended ("the Trusts Law")

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Cases referred to:-

1. In Re. Buckton, Buckton and Buckton [1907] Ch. 406
2. McDonald v. Horne [1995] 1 AER 961
3. O'Rourke v. Darbishire and others (1920) AC 581
4. Re. Londonderry's Settlement (1965) Ch 918

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On the 16th March last I handed down my judgment in which I dismissed the Applicant's application that the Respondent deliver up various trust and related documents to him.

Despite that dismissal, I stated at the end of my judgment that I would listen to any

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submissions which the Applicant might have with regard to the cost of his application. This judgment arises from his costs application which ensued; the delay in its finalisation is very much regretted.

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A The details of the Applicant's substantive application, and indeed of related litigation
between the parties, can be found by reference to my judgment and the attachments thereto.
Suffice to say for present purposes that the substantive application related to matters of
B Guernsey law which fell to be determined for the first time by this Court, namely the extent
of the duties of a trustee and the reciprocal rights of beneficiaries under the Trusts Law,
particularly under sections 22 and 33, and generally; and that in advance of the substantive
hearing I had granted the Respondent's application (in effect a "Beddoes" application) in
respect of its reasonable costs, fees and expenses to be incurred in relation to the substantive
application, which Mr. Robilliard did not seriously challenge.

C Section 65 of the Trusts Law provides:-

*"65. The court may order the costs and expenses of, and incidental to, any application
to the court under this Law to be paid from the trust property or in such manner or
D by such persons as it thinks fit."*

For completeness, the relevant provisions of Rule 48 of the Royal Court Civil Rules, 1989,
provide:-

E *"48.(1) The Court may in any action –*

*(a) make such order as to the cost of the proceedings, or of any stage of or
application in the proceedings;*

F *(b) ---*

as the Court thinks just.

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G The awarding of costs is a matter entirely for the judge's discretion, and in this case may
include an order that they be paid from the trust property. It is an unfettered discretion
subject to it being exercised judicially.

H Mr. Robilliard referred me to Buckton (1), a case which involved questions of law as to the
succession of a particular property which was in trust. It is of particular relevance because
of the observations of Kekewich J in respect of costs in such cases (the question of costs in
this case arising at the conclusion of it). The relevant part of the headnote states:-

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A *"Held, --- and that, although in form it was a case of adverse litigation, yet in substance it was an amicable proceeding for the determination of a question to the benefit of all concerned, and therefore the costs of all parties must be taxed as between solicitor and client, and come out of the estate.*

B *Statement of the practice with regard to costs in cases arising on a adjourned summons."*

C Kekewich J (starting at p. 414 of the Report), having emphasised the desirability of uniformity in practice and especially in relation to costs, though acknowledging that that was an area in which uniformity was particularly difficult to secure because of the ever varying circumstances in which the discretion of the judge was to be exercised, continued -

D *"But when an opportunity occurs, it is as well to enunciate rules for the guidance of the profession, and a question arising in this case affords an opportunity which I think it right not to neglect.*

E *In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. 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. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.*

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A *There is a second class of cases differing in form, but not in substance, from the first.*
In these cases it is admitted on all hands, or it is apparent from the proceedings, that
B *although the application is made, not by trustees (who are respondents), but by some*
of the beneficiaries, yet it is made by reason of some difficulty of construction, or
administration, which would have justified an application by the trustees, and it is
not made by them only because, for some reason or other, a different course has been
deemed more convenient. To cases of this class I extend the operation of the same
rule as is observed in cases of the first class. The application is necessary for the
administration of the trust, and the costs of all parties are necessarily incurred for
C *the benefit of the estate regarded as a whole.*

There is yet a third class of cases differing in form and substance from the first, and
in substance, though not in form, from the second. In this class the application is
D *made by a beneficiary who makes a claim adverse to other beneficiaries, and really*
takes advantage of the convenient procedure by originating summons to get a
question determined which, but for this procedure, would be the subject of an action
commenced by writ, and would strictly fall within the description of litigation. It is
often difficult to discriminate between cases of the second and third classes, but when
E *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. Whether he ought to be ordered to pay the costs
of the trustees, who are, of course, respondents, or not, is sometimes open to
F *question, but with this possible exception the unsuccessful party bears the costs of all*
whom he has brought before the Court."

Kekewich J then proceeded to apply those principles to the facts of the particular case and reach his conclusions, which are summarised in the extract I have quoted from the headnote.

G Mr. Robilliard further referred me to the case of McDonald (2), a case involving an action by members of a pension scheme and, relevantly for present purposes, their application for a pre-emptive costs order for their costs, on an indemnity basis, to be paid out of the pension fund. The Court of Appeal upheld the judge in exercising his discretion to grant the order sought. I cite the relevant passage from the judgment delivered by Hoffmann LJ:-
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(ii) *Extension of special principle to beneficiaries*

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A Order 62, r6(2) does not in itself help the plaintiffs because although the litigation
concerns a trust fund, the plaintiffs are not trustees. 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
B 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 *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406 at 413-415. While warning
that it was 'well nigh impossible to lay down any general rules which can be
C 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
D 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
E 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. Kekewich J acknowledged that it is often difficult to
discriminate between cases of the second and third classes, but said ([1907] 2 Ch
406 at 415):

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*'...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.'*

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*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
H but rather a dispute over the beneficial ownership of the trust property, the
proceedings may be more akin to an interpleader."*

Mr. Robilliard emphasised that his client's application was limited to recoverable costs only.

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A He proceeded to remind me of two particular passages from my judgment of the 16th March. Firstly (at p. 3 A to E), that the substantive application related to points of law which had not previously been determined. He therefore argued that it was perfectly proper for his client to have brought his substantive application, which he described as a serious one. In the passage from my judgment to which I have just referred, I also referred to the fact that the
B Respondent itself had made a substantive application which had in effect been subsumed by that of the Applicant. The basic principles relating to trustees' duties and beneficiaries' rights were the matters upon which I had to adjudicate, as opposed to the details of the Applicant's application which might fall for later consideration.

C Mr. Robilliard, therefore, fairly posed the question as to whether his client should have left it to the trustees to go to Court. In that regard he additionally referred me to a further passage of my judgment (at p. 10 A to B), in which I acknowledged that whilst Mrs. Allen took a neutral stance on behalf of the trustees, she had very properly advanced contrary arguments to those which Mr. Robilliard had put before me. In other words, in order to determine the issues of law upon which I had to decide, it was both necessary and desirable that I should
D hear the fullest argument possible. With that I heartily agree. There were, indeed, fully arguable contrary points of view to be put forward. Hence my implied invitation to Mr.
E Robilliard with regard to costs.

Mrs. Allen, in response, accepted the three categories to which Kekewich J had referred in Buckton (1). However, she argued, that the Applicant's substantive application, whilst it
F might, in form, appear to be amicable was, in substance, a forerunner for adversarial litigation to be undertaken by the Applicant. She referred me to a quantity of hostile correspondence which the trustees had received from the Applicant, some of it threatening and some of it expressed in what I would describe as most intemperate language. That hostile attitude of the Applicant to the trustees was the real background both to the
G Applicant's substantive application and the "subsumed" application of the trustees. The Applicant's substantive application was part of a "fishing expedition" and should properly be placed within the third of Kekewich J's categories of cases, i.e. "*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.*". In
H the circumstances of the present case I would delete the last few words of that statement and replace them with "order the unsuccessful party to bear his own costs".

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A In reply, Mr. Robilliard expressed his profound disagreement with Mrs. Allen's view that his client's substantive application was hostile, and urged me to look at the substance of the case before me, namely the legal issues involved, and to ignore any possible motives.

B Very soon after I had heard Counsel's submissions as to costs (on the 15th June), the Applicant issued further substantive proceedings against the Respondent, the Cause being placed on the Witness List on the 22nd of June. In very brief summary, this new action sought relief against the trustees both of a monetary and injunctive nature, together with their removal as trustees and the termination of the trust. Only one word can be used to describe this new litigation – hostile. In view of the submissions which had been made to me on the 15th June, I was in the process of inviting Counsel to reconvene to hear any further arguments when Mrs. Allen herself sought that course of action to which I readily agreed. Hence I heard further argument on the 26th June.

D Unsurprisingly, Mrs. Allen argued that this latest saga in the acrimonious relations between the trustees and the Applicant showed how hostile the litigation indeed was, including, naturally, the Applicant's earlier substantive application.

E In response, Mr. Robilliard agreed that his client had never disguised his hostility towards the trustees, which arose, he contended, because his client had not been able to obtain the information which he wanted; and that applications involving trust property frequently involved hostility (e.g. O'Rourke (3) and Londonderry (4)). The essence of the matter, he argued, was that I should make my assessment as to whether or not his clients should be paid his recoverable costs from the trust property solely on the basis of the state of affairs as they existed in November, 2000, that is when I had heard argument on the Applicant's substantive application.

G There is unquestionably hostility between these parties, and the intentions of the Applicant are, in my view, abundantly clear. Nevertheless, it seems to me equally clear that whether I heard the Applicant's substantive application or the Respondent's substantive application (which, as I have said, was effectively subsumed by the former), it would have been desirable, at the least, to hear full legal argument from both Counsel.

H In those circumstances, I have concluded that the Applicant should be allowed his recoverable costs in respect of his unsuccessful substantive application. Those costs, however, must be limited to the arguments relating to the issues of law and the construction of the Trusts Law (including arguments relating to what might have been the position in

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A Guernsey law relating to the duties of trustees and the rights of beneficiaries prior to the Law's enactment). That is to say, costs should be limited to the hearing itself and all necessary preparation therefor. I trust that these limitations which I have imposed upon the amount of costs to be recovered are sufficiently clear so as to enable the parties to agree such costs, or, should it become regretfully necessary, be sufficient guidance for anyone who, in
B due course, may have to tax those costs.

Mrs. Allen also asked that the Applicant should be ordered to pay her client's recoverable costs in respect of his costs application. In view of the clear hostility, I have a certain
C sympathy for that request; but I have to recognise that I partially invited that application to be made. The trustees' own costs and the Applicant's costs are to be paid out of the trust assets.

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