

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 527

Before:

**John Martin QC
David Perry QC
Sir Michael Birt**

In the Matter of the R N Pharma Trust

Between:

**(i) Molard International (PTC) Limited
(ii) Pullborough International Corp**

Appellants

-and-

Rusnano Capital AG (in liquidation)

Respondent

**Advocate A C Williams for the Appellants
Advocate R G Morris for the Respondent**

Judgment handed down: 29th January 2020

Birt, JA

1. This is the judgment of the Court.
2. Following the issue of the judgment in this case on 17th December 2019 (“the Judgment”), we now deal with the question of costs. Pursuant to the directions issued by the Court, the parties have filed detailed written submissions, response submissions and reply submissions and we have considered the matter on the papers.

Background

3. The background to the proceedings is set out fully in the Judgment to which reference should be made as necessary. We propose therefore to give only a very brief summary of the position sufficient to explain the issues in relation to costs.
4. The case concerns the R N Pharma Trust (“the Trust”) of which the First Appellant (“the Trustee”) is the trustee and the Second Appellant (“Pullborough”) is appointor and enforcer. The Trust is a discretionary trust governed by the law of Guernsey.
5. The sole beneficiary of the Trust at present is the Respondent (“Rusnano”), which is a company within a group where the ultimate parent company is a Russian state owned entity, JSC Rusnano. There is however power to add to the class of beneficiaries.

6. Mr Pavel Erochkine was an employee within the group and worked on a transaction whereby investment was made by the group in a company referred to in the Judgment as PBB. The sole asset of the Trust is a shareholding in PBB. There is a dispute between the Rusnano group and Mr Erochkine as to whether, when the Trust was established, it was intended to be solely for Rusnano's benefit or whether there was an intention that Mr Erochkine and/or his team would benefit from the success of the investment in PBB through the mechanism of the Trust by being added subsequently as beneficiaries. The Trustee and Pullborough have at all times been wholly beneficially owned by Mr Erochkine.
7. On 16th March 2018, the liquidator of Rusnano wrote to the Trustee requiring the Trustee to terminate the Trust and distribute the trust property to Rusnano. The letter invoked section 53(3) of the Trusts (Guernsey) Law 2007 ("the 2007 Law") on the basis that Rusnano was the sole beneficiary of the Trust. Section 53(3) of the 2007 Law provides as follows:-

"Without prejudice to the powers of the Royal Court under subsection (4), and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under legal disability, they may require the trustees to terminate the trust and distribute the trust property among them."

8. The Trustee and Pullborough did not accept that Rusnano had the right to call for the trust property and accordingly Rusnano brought the matter before the Royal Court. The issue before the Deputy Bailiff was whether existence of the power to add beneficiaries meant that section 53(3) was not applicable. Rusnano argued that it was the sole beneficiary and was in existence and ascertained and therefore it was entitled to call for the termination of the Trust under section 53(3). The Trustee and Pullborough, on the other hand, argued that section 53(3) was intended to reflect the well-known rule of English law known as the rule in Saunders -v- Vautier (1841) Cr & Ph 240 ("the Rule") and that this only applied where the class of beneficiaries was closed. The class was not closed in the present case because of the power to add beneficiaries.
9. The Deputy Bailiff held that, on a proper construction of section 53(3), Rusnano was entitled to terminate the Trust under the subsection because it was the sole beneficiary and it was in existence and ascertained. The object of a power to add beneficiaries was not a beneficiary until in fact added.
10. The Trustee and Pullborough appealed that decision to this Court. In the Notice of Appeal, as well as submitting that the Deputy Bailiff had reached the wrong construction of section 53(3), the Appellants argued that section 53(4) conferred an overriding discretion upon the Royal Court to refuse termination even where subsection (3) was applicable.
11. In the Judgment, this Court upheld the decision of the Deputy Bailiff as to the proper construction of subsection (3) for the reasons which he had given. However, as both parties conceded during the appeal, subsection (4) did confer an overriding discretion upon the Royal Court. This matter had not been considered by the Deputy Bailiff and the appeal was therefore allowed to the extent of remitting the matter to the Deputy Bailiff to consider the position under subsection (4), which would require the hearing of evidence as to the intention of the parties at the time of the establishment of the Trust.
12. It is those circumstances that we must now consider the question of costs.

The costs issues

13. The submissions of the parties raise the following matters for consideration:-

- (i) the costs of the appeal;
- (ii) the costs of the hearing before the Deputy Bailiff;
- (iii) the costs of an application before the Royal Court for a stay of execution pending appeal;
- (iv) whether the Appellants should be able to reimburse themselves out of the trust fund for their costs and for any costs awarded against them;
- (v) whether there should be an order for payment on account of any costs order;
- (vi) whether we should direct an increase in the maximum hourly rates normally allowed on taxation and should include the costs of English counsel.
- (vii) whether Mr Erochkin should be added as a party on the issue of costs.

We shall consider each of these in turn.

(i) Costs of the appeal

14. Advocate Williams submits that costs should follow the event in that the appeal was allowed. The Appellants were therefore successful. The relief sought by Rusnano was for the termination of the Trust and the distribution to Rusnano of the trust assets. It had not achieved that as a result of the appeal.
15. He further submits that it was Rusnano's fault that the matter proceeded before the Deputy Bailiff by way of argument on a pure point of law in relation to subsection (3) when, as this Court pointed out at paragraph 59 of the Judgment, Rusnano brought its application under both subsection (3) and subsection (4).
16. We do not see the outcome of the appeal in that way. As appears from the judgment of the Deputy Bailiff and the note of the earlier case management hearing before him on 24th August 2018, it was agreed by both parties that the issue before the Deputy Bailiff was a pure issue of law as to the effect of subsection (3) and whether Rusnano could terminate the Trust given the existence of the power to add beneficiaries. It appears that, at that stage, none of the parties had subsection (4) in mind. It was only in the Notice of Appeal that the possible effect of subsection (4) was raised for the first time by the Appellants. We do not agree that the blame for this lies more with Rusnano than with the Appellants. If anything, it was incumbent upon the Appellants to raise the point (as they did in the Notice of Appeal) that, even if Rusnano was correct on its interpretation of subsection (3), the Court still had a discretion to refuse termination under subsection (4). However, we are content to proceed on the basis that both parties were equally at fault. The fact remains that, with the agreement of both parties, the sole issue before the Deputy Bailiff was the legal issue as to the proper construction of subsection (3). On that issue, the Appellants lost before the Deputy Bailiff and they have lost on appeal to this Court, which has upheld the decision of the Deputy Bailiff for the reasons which he gave.
17. It follows that, on the principal issue before this Court which took up most of the written and oral submissions, the Appellants lost. In principle, they should therefore pay the costs of their unsuccessful appeal.
18. However, the Appellants were successful in relation to the subsection (4) point notwithstanding the opposition of Rusnano. Rusnano therefore concedes that a deduction must be made from any costs order to reflect this fact.

19. In his written submissions, Advocate Morris has calculated the number of paragraphs devoted to the subsection (4) issue as a percentage of the total number of paragraphs. In relation to the Appellants' written case, this is less than 10%; in relation to Rusnano's written case, it represents about 5%; and in relation to the Judgment, it is approximately 10%. Advocate Morris estimates that the parties' oral submissions on the subsection (4) issue occupied about 10% of the hearing before the Court of Appeal.
20. We have not checked these calculations but the Appellants have not taken issue with them in any of their submissions. Nevertheless, given the fact that the appeal was ultimately allowed on this ground, we think we should err on the side of caution and accordingly we propose to make a deduction of 20%.
21. The next issue is as to the basis of this costs award. Rusnano submits that the costs should be awarded on the indemnity basis rather than the recoverable basis.
22. The circumstances in which indemnity costs may be ordered are well established. The position was concisely summarised in the judgment of Marshall LB in Investec Trust (Guernsey) Limited -v- Glenalla Properties Limited (29th August 2017, 39/2017 at para 46) in the following terms:-

“As regards the basis of costs, the usual award is of costs on the recoverable basis, but in exceptional cases the court can order costs on the more generous (to the receiving party) indemnity basis, see r. 83(2). This is a sanction which tends to mark some culpable or unreasonable conduct by the paying party, and the general principle is that the case should be ‘out of the norm’ to justify such an award.”

23. Advocate Morris submits that the Appellants behaved unreasonably (so as to take the case out of the norm) by failing to raise the point under subsection (4) until its Notice of Appeal on 5th April 2019. Whilst we can understand that that might be a possible argument in relation to costs before the Royal Court, we cannot see that it applies to the hearing before this Court. Rusnano knew at all times after April 2019 that the subsection (4) point was being raised. In those circumstances, we see no reason to depart from the normal rule, which is that costs should be on the recoverable basis.
24. In summary therefore, we order the Appellants to pay 80% of Rusnano's costs in relation to the appeal on the recoverable basis.

(ii) Costs of the hearing before the Deputy Bailiff

25. Each side applies for an order for costs in its favour in relation to the hearing before the Deputy Bailiff (“the Hearing costs”) and relies upon much the same grounds as in respect of the costs of the appeal.
26. However, we do not think we should make any order in relation to the Hearing costs. The role of this Court is to consider appeals against decisions of the Royal Court. But the Deputy Bailiff has specifically not yet made a decision as to the costs of the hearing before him. By an Act of Court dated 26 April 2019 made with the consent of the parties, it was ordered at paragraph 4 as follows:-

“4. Questions relating to the costs of the Application, and of the Stay Application are adjourned until after the final determination or abandonment of the Respondents' Appeal.”

27. Questions of who pays the costs of a hearing before the Royal Court are for the Royal Court to decide, subject to any subsequent review by this Court. It is not appropriate in general for this

Court to make original costs orders in respect of proceedings before the Royal Court where the Royal Court has expressly reserved its decision on costs.

28. Accordingly, we decline to make any order in relation to the Hearing costs. These will be for the Deputy Bailiff to determine in due course.

(iii) Costs of the stay application

29. Following the decision of the Deputy Bailiff, the Appellants requested Rusnano to agree to a stay of execution pending appeal. Initially, Rusnano was not willing to agree to such a stay, with the consequence that the Appellants prepared and filed in the Royal Court an application for a stay with supporting documentation. Subsequently, Rusnano agreed to a stay and an order to that effect was made by consent in the Act of 26th April 2019 referred to above. The Appellants submit that Rusnano should have agreed a stay pending appeal without the need for an application and the Appellants were put to unnecessary expense. They therefore seek an order for costs against Rusnano in respect of the work which they did on the stay application.
30. We can see the force of the Appellants' argument that they should be awarded the costs of this unnecessary work. However, the costs of the stay application were also dealt with in the Act of Court of 26th April 2019 and accordingly by consent have been reserved for decision by the Deputy Bailiff after the outcome of the appeal to this Court. He has not therefore yet made a decision as to the costs of the stay application and, for the same reasons as apply in the case of the Hearing costs, we do not think that we ought to make an order in the absence of a decision by the Deputy Bailiff. It is for the Appellants to raise the matter with the Deputy Bailiff in due course.

(iv) Reimbursement from the trust fund

31. Rusnano submits that the Appellants should not be allowed to reimburse themselves from the trust fund either for their own costs in connection with this litigation or for the costs awarded against them. This is essentially on the basis that they were acting in the interests of Mr Erochkin rather than in the interests of the beneficiary of the Trust.
32. As mentioned earlier, both the Trustee and Pullborough have at all time been beneficially owned by Mr Erochkin. Until May 2018, Rysaffe Sarl ("Rysaffe"), which is a company within the Saffery Champness Group, was the sole director of both the Trustee and Pullborough. However, once these proceedings began, Rysaffe found itself, as Mr Erochkin put it at paragraph 18 of his affidavit of 14th June 2018 "*responsible for conducting the defence of proceedings in which it had no real or direct interest*". Rysaffe therefore decided to cease acting as director of the Trustee and Pullborough. Mr Erochkin was appointed as sole director of the Trustee in its place and Mr Peter Horsman, a former partner of Saffery Champness, was appointed as sole director of Pullborough.
33. In response, Advocate Williams submits that this is not a case where either of the Appellants should be deprived of their costs out of the trust fund. The issue as to whether the sole beneficiary of a discretionary trust, where there is power to add beneficiaries, can take advantage of section 53(3) is an issue which has never previously been considered and there were respectable arguments on both sides. At the time when Rysaffe was the director of the Appellants, it took advice from Mourant Ozannes and was advised to resist the application of Rusnano on the ground that the requirements of section 53(3) were not satisfied. Although, following the appointment of the new directors in May 2018, the Appellants instructed Appleby (who were Mr Erochkin's advocates) in place of Mourant Ozannes, they simply continued the course set at a time when Rysaffe was the director of both Appellants. It could not be said that the Appellants had acted unreasonably so as to lose their right of reimbursement out of the trust

fund. This was a claim where the legal position was not clear and it was entirely proper and reasonable for the Appellants (particularly the Trustee) to seek a ruling from the Court as to how they should proceed.

34. In our judgment, one has to stand back and consider the underlying nature of these proceedings. They constitute in reality a dispute between contending potential beneficiaries. Rusnano says that it is entitled to the whole of the trust fund whereas Mr Erochkine says that the Trust was established with the intention of benefitting him and his team of employees; hence the power to add beneficiaries.
35. This is therefore in substance a contest between Rusnano and Mr Erochkine. In our view, the better way of proceeding before the Royal Court would have been for Mr Erochkine to be joined to the proceedings, the contest then being between Rusnano and Mr Erochkine, with the Trustee and Pullborough remaining neutral, content to administer the Trust on whatever basis was determined by the Court.
36. However, that course was not followed. The consequence has been that the Appellants, which are owned by Mr Erochkine and have instructed Mr Erochkine's advocates to act for them, have fought Mr Erochkine's battle for him. This is particularly so in relation to the appeal. The Appellants did not accept the ruling of the Deputy Bailiff (which would have resulted in Mr Erochkine and his team receiving nothing) but chose to appeal. In our judgment, by doing so the Trustee entered into the arena on behalf of Mr Erochkine. If the Appellants are allowed to reimburse themselves for their own costs and for the costs awarded against them out of the trust fund, and if ultimately, when the matter is finally determined by the Royal Court, it is held that the trust fund is held solely for Rusnano, the consequence would be that, despite being successful, Rusnano would effectively have paid the losing party's costs in relation to the section 53(3) argument. We do not think that that would be an appropriate outcome.
37. We emphasise that, for the reasons given earlier, we are only considering the costs on appeal, not the costs before the Royal Court. Whether the Appellants can reimburse themselves for those costs will be a matter for determination by the Deputy Bailiff in due course at such time as he thinks fit and having regard to such matters as he thinks fit. However, for the reasons we have given, we order that the Appellants are not entitled to reimburse themselves out of the trust fund for the costs which they have incurred in connection with this appeal, nor are they entitled to reimbursement in respect of the costs orders which we have made against them.

(v) Payment on account

38. Although, so far as we are aware, this Court has not previously ordered an interim payment in respect of costs, it was common ground between the parties that such jurisdiction exists; and indeed each side submitted that such an order should be made in the event of costs being awarded in its favour.
39. We agree that this Court has such jurisdiction. The power of the Jersey Court of Appeal to award costs pursuant to the Court of Appeal (Jersey) Law 1961 is in identical terms to that of section 18 of the 2007 Law in relation to this Court. In Crociani -v- Crociani [2014] (1) JLR 503, the Jersey Court of Appeal held that it had jurisdiction to order an interim payment. Beloff JA further expressed the view that such an order should usually be made in the following terms at para 16:-

“In my view, the achievement of justice, to which all exercises of discretion under procedural rules aspire, would usually require that a party who is, pursuant to a court order, entitled to his costs, should be paid on account a percentage of the amount he is likely to recover on taxation calculated on a conservative basis to avoid any real risk of overpayment.”

He went on to say at para 23 that, when ordering a payment on account the court should not seek to conduct a taxation or carry out a detailed review of the successful party's costs but should adopt a rough and ready approach in order to arrive at a figure which the successful party would almost certainly collect.

40. That has also been the approach of the Royal Court in this jurisdiction. Thus in Broadhead -v- Spread Trustee Company Limited 10th March 2015, 10/2015, Marshall LB said at para 74:-

“74. Although the principle behind an interim costs order is that of relieving the successful party, to some extent, from the effects of delay in repaying him costs to which he is entitled, the interim payment is a payment on account of costs, and is not a summary taxation. Conservatism is therefore appropriate, as the extent to which actual costs may fall to be reduced on taxation cannot be known. This means, in my judgment, that it is not appropriate for the court to aim to assess the minimum which the receiving party could be awarded on taxation and then award that sum, but rather to assess broadly the amount likely to be awarded and then build in a significant safety margin by awarding a conservative fraction of that sum, as a payment on account. What that fraction will be is a matter for the court's discretion and according to its instinct as to what is fair and right in all the circumstances of the case. It is very much a broad brush approach. Examples from previous decisions will be very fact specific and provide only examples of method rather than quantum.” [Original emphasis]

41. We endorse the approach articulated above in Crociani and Broadhead.
42. Experience in England and Wales and Jersey suggests that a figure of 50% of the likely recoverable costs is often taken but this is not a rule and a greater or lesser percentage may be appropriate according to the facts of the case.
43. Turning to quantum, Advocate Morris has submitted a summary of costs on behalf of Rusnano which suggests that, based upon the time spent charged at the rate allowed on the recoverable basis, Rusnano's costs in connection with the appeal come (to the nearest pound) to £102,106. The summary of costs suggests an additional figure for disbursements of £45,326, which consists largely of English counsel's fees. But unfortunately no indication is given as to whether these costs were incurred for the hearing before the Royal Court or for the appeal to this Court. It seems more likely that the costs were incurred before the Royal Court and, in the absence of any further information, we proceed on that assumption. Advocate Williams has not commented on the figures in the summary. We therefore take the figure of £102,106 as the starting figure for the likely costs on the recoverable basis.
44. The question then is what discount to make for the purposes of avoiding any real risk of overpayment following the taxation process. Advocate Morris suggested we should order an interim payment of £75,000 but he did not explain how this was calculated other than to say that it was the sum which was held by way of security for costs.
45. By way of comparison, the Appellants estimated their costs of the appeal at the recoverable rate as being £70,129. The approach which they then adopted for the purposes of calculating an interim payment was to reduce that sum to 70% as being likely to be recovered on taxation and then reduce that sum by a further 10% so as to be conservative. This would result in an interim payment of £44,181 if costs had been awarded in their favour.
46. All of these calculations are of course on the basis of a 100% award of costs. In fact we have only awarded Rusnano 80% of its costs. 80% of £102,106 is £81,685 and that is therefore the starting point for determining the likely costs.

47. Taking a broad brush approach, we award £45,000 by way of interim payment on account of costs and direct that this may be taken from the amount currently held as security for costs. Such amount is to be paid within 28 days.

(vi) Directions as to quantum

48. The Appellants submitted that, in the event of our awarding costs in their favour, we should go on to give directions that there should be an uplift on the standard hourly rates allowed on the recoverable basis, that it was reasonable for the parties to use English counsel in relation to the proceedings and as to the rates at which the cost of English counsel should be recoverable.

49. Rusnano submitted that it was not necessary for the Court of Appeal to deal with such detailed matters at this stage; they should be considered as part of the taxation of costs in due course.

50. In view of our decision that the costs orders are in favour of Rusnano, we propose to accede to Rusnano's submission. We therefore do not comment on the various submissions made by the Appellants as to the appropriate rates and the involvement of English counsel other than to say that, given the possible relevance of the Rule (which is a rule of English law), it was in our judgment entirely reasonable for both parties to obtain advice from English counsel and we see no reason why the reasonable costs of such counsel should not be recoverable.

(vii) Addition of Mr Erochkine as a party

51. Rusnano seeks an order adding Mr Erochkine as a party to the proceedings for the purposes of costs only, with liberty for Rusnano to apply for a non-party costs order against Mr Erochkine in respect of (i) Rusnano's costs of and occasioned by its application to the Royal Court, and (ii) Rusnano's costs of and occasioned by the appeal.

52. Given the background to this appeal and without giving any indication as to whether an application for non-party costs would be successful or not, we think it entirely reasonable that Mr Erochkine be joined as a party so that Rusnano may pursue such an application if it thinks fit and we so order.

Summary

53. In summary, we make the following orders:-

- (i) we award Rusnano 80% of the costs of the appeal on the recoverable basis;
- (ii) we make no order in respect of the costs of the hearing before the Deputy Bailiff;
- (iii) we make no order in respect of the stay application made to the Deputy Bailiff;
- (iv) we direct that the Appellants may not reimburse themselves out of the trust fund in respect of their own costs in connection with the appeal and the costs awarded against them under (i) above;
- (v) we order the Appellants to make an interim payment of £45,000 on account of the costs awarded under (i) above within 28 days, which sum may be taken from the amount held by way of security for costs;
- (vi) we make no order in respect of the rates to be allowed on taxation on the recoverable basis but we indicate that it was entirely reasonable for English counsel to be instructed;

(vii) we give leave to Rusnano to join Mr Erochkin to the proceedings for the limited purposes of applying for a non-party costs order against him in respect of both the application and this appeal and that he may be served by way of service upon Appleby.

54. Finally, as requested, we confirm that Rusnano has a right of appeal to the Privy Council in respect of the Judgment and accordingly we formally grant leave to appeal.
55. As to the costs incurred in connection with various submissions in relation to costs, these have been not insignificant. In our judgment, Rusnano has been successful in its submissions and we accordingly direct that the costs incurred by Rusnano in connection with the issue of costs should be paid by the Appellants on the recoverable basis.