Costs judgment as to whether or not the costs of the appeal ought to be borne by the Trust fund.

[2020]GCA066

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 539

23 July 2020

Before:

Clare Montgomery QC, President
George Bompas QC
Helen Mountfield QC

Between:

A

Appellant

-v-

THE TRUSTEES

("Applicants" or "Trustees")

-and-

(2) B

(3) C

(4) D

(5) – (12); (15)-(19) THE MINOR AND UNBORN BENEFICIARIES AND THEIR REPRESENTATIVES

(13) THE INCUMBENT PROTECTOR

("Respondents")

IN THE MATTER OF

THE TRUSTS (GUERNSEY) LAW 2007 (AS AMENDED)

-and-

IN THE MATTER OF

THE R TRUST

Advocate Simon Davies for the Appellant A and the Respondent B
Advocate A D Laws for the Second Respondent's Minor and Unborn Beneficiaries
Advocate Jeremy Wessels for the Respondent C
Advocate Paul Richardson for the Respondent D
Advocate C J Hay for the Fourth Respondent's Minor and Unborn Beneficiaries
Advocate Adam Cole for the trustee Respondents
Advocate Konrad Freidlander for the Respondent The Incumbent Protector

COSTS JUDGMENT

1. In a judgment delivered on 23 July 2020, the Court of Appeal dismissed the appeal brought in relation to the construction of the R Trust in connection with the clause governing the appointment of the Protector of the Trust by the Royal Court. The Court of Appeal held that the Appellant's construction argument was not reasonably tenable and, in significant respects, simply impossible to accept.

2. The arguments in support of the appeal were advanced by Advocate Davies on behalf of the Appellant, A and her older son B (the 2nd Respondent) and supported by Advocate Richardson on behalf of D, the Appellant's younger son (the 4th Respondent) and the 4th Respondent's Minor and Unborn Beneficiaries. They submit that their costs should be borne by the Trust fund on the basis that it was reasonably necessary for any doubt about the true construction of the Declaration of Trust to be resolved. They submitted that this put the case in the first category of cases identified in In re Buckton [1907] 2 Ch. 406, and therefore their costs should come out of the trust fund.

3. In In Re Buckton Kekewich J said at page 414: "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." Kekewich J also recognised that there were cases different in form but not in substance where the proceedings are brought by one or more beneficiaries, rather than by the trustees, but were concerned to resolve an issue of construction or of administration which would have justified an application by the trustees. In such cases he considered that the same result should follow.

4. We do not consider that the proceedings brought in this appeal fall within these categories of case. The costs on appeal were not, in our view, necessarily incurred for the benefit of the Trust Fund but were instead incurred in pursuing a hopeless construction argument that had already been determined by the Deputy Bailiff.

5. Assuming in favour of those advancing and supporting the appeal, that their argument may have been appropriately advanced at first instance before the Deputy Bailiff, they ought to have appreciated that the argument was not maintainable in the face of the compelling reasoning of the Deputy Bailiff who lucidly explained why the construction contended for was not correct.

6. We are also concerned that the construction argument and the appeal may have been pursued for the collateral purpose of derailing a 'blessing hearing' in relation to the partition of the relevant trusts. This process of partition has been underway since 2013. It is not necessary for us to determine this aspect of the case in relation to this appeal although it may have to be determined in relation to an appeal brought by the 4th Respondent that was heard immediately after this appeal. However, if the Appellant and those supporting her appeal were acting with this collateral purpose in mind, this would if established provide a further ground for refusing the application for their costs to come out of the trust fund.

7. Nevertheless, even making the assumption that there was no such collateral purpose, still the pursuit of this appeal was not to resolve some point of uncertainty in the Declaration of Trust so that decisions might be taken by reference to the correct meaning of the Declaration of Trust and scope of the powers given thereunder, but in order to give validity to the Appellant's pre-emptive step of having additional persons seemingly added to the office of the Protector, leading to the bypassing of the Thirteenth Respondent, the Incumbent Protector, and the replacement of the Trustee Respondents as the existing trustees. In our judgment this was hostile litigation involving an attack on the position of the Incumbent Protector and on the standing of the Trustees.

8. For these reasons, we consider that the costs of A, B, D, and his Minor and Unborn Beneficiaries should not be paid from the Trust Fund but should be borne by them personally.

9. By contrast with the position of these parties, the costs reasonably and properly incurred by the remaining respondents (other than the costs of the Trustees and the Incumbent Protector which we will deal with separately) in relation to the appeal clearly fall within the first category in In Re Buckton and should be paid out of the Trust Fund.

10. In respect of the costs of the Trustees and the Incumbent Protector, there is an application that these costs should be paid by the Appellant personally. In our judgment, given the hopeless nature of the appeal, the pursuit of the appeal can properly be characterised as hostile to the Trustees and the Incumbent Protector, as we have just explained, and adverse at least to the interests of C (the middle child of the Appellant and the 3rd Respondent) and her children. Thus although the appeal is brought in form in administrative proceedings, it should be treated as if it were ordinary adversarial litigation in substance. In those circumstances we consider it is appropriate to apply in principle the rules that costs should follow the event

11. We therefore order that the Appellant to pay personally the recoverable costs of the Incumbent Protector and of the Respondent Trustees, on a standard basis. They will still be entitled to be indemnified from the trust fund as to any costs not recovered from the Appellant. In the case of the Third Respondent and her children, we have been invited by her Advocate not to make an order for her costs to be paid by the Appellant, but rather in the interests of family relations to order the costs to be in the administration of the trust and paid from the trust fund. We are willing to make that order, as we have already indicated.

12. We have been informed by Advocate Davies that the Appellant is not in a position to pay the ordered costs without a distribution from the Trust fund. No doubt the Appellant and her advisers will have taken into account the possibility of the Appellant having to pay costs, should her appeal fail. But any application that the Appellant is to pursue in relation to the enforcement of any costs orders that we have made should be advanced on a proper evidential basis.