Decision on costs. All of the costs awarded to be paid by the respondent themselves and not to come out of the trust funds.

[2023]GCA085

Court of Appeal No. 576

IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

Before:

Clare Montgomery KC,

President James Wolffe KC

Paul Matthews

IN THE MATTER OF:

THE [WF] TRUST, THE [E] TRUST, THE [L] TRUST AND THE [I] TRUST (hereafter the "[M] TRUSTS")

-and-

THE TRUSTS (GUERNSEY) LAW, 2007 AND/OR THE INHERENT JURISDICTION OF THE ROYAL COURT OF GUERNSEY

BETWEEN

[B] AND [C] (COLLAS CRILL)

Appellants

-and-

(1) [G] (MOURANT OZANNES)

(2) [H] (MOURANT OZANNES)

(3) [K] (MOURANT OZANNES)

Respondents

MATTHEWS JA:

INTRODUCTION

1. On 17 November 2023, the court gave judgment in an urgent interlocutory appeal in these proceedings, allowing it. The court invited written submissions on costs, which were duly provided. However, it was apparent from these submissions that the parties were unaware of a very recent decision of this court (*CRGF GP Ltd v Fonds Rusnano Capital SA* [2023] GCA 64) which was relevant to the question of costs. Accordingly, a copy of this judgment was

supplied to the parties, with an invitation to make short supplementary submissions in light of that decision. Both sides did so. This is the court's decision on costs.

2. The appeal was from a decision of the Royal Court that the appellants, beneficiaries under the captioned trusts, should disclose certain documents to the respondents, also beneficiaries under those trusts, pursuant to section 69 of the Trusts (Guernsey) Law 2007. As stated, that decision was reversed.

POWER IN RELATION TO COSTS

3. The court has power in relation to *appeal* costs under the Court of Appeal (Guernsey) Law, 1961. This relevantly provides that:

> "18(1) The costs of and incidental to all proceedings in the Court of Appeal under this Part of this Law shall be in the discretion of the Court, and the Court shall have the power to determine by whom and to what extent the costs are to be paid."

Substantively this provision is to the same effect as section 50 of the (England & Wales) Supreme Court of Judicature (Consolidation) Act 1925, now contained in section 51 of the (England & Wales) Senior Courts Act 1981.

4. So far as concerns costs in *the court below*, the 1961 Law gives no express power to this court to make such orders. But it does relevantly provide that:

> "14(2) For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Royal Court …"

This is for all practical purposes the same as section 27(1) of the Supreme Court of Judicature (Consolidation) Act 1925, from which it is plainly derived, now replaced by section 15(3) of the Senior Courts Act 1981. Section 14(2) gives power to make an order in relation to the costs in the court below, in substitution for any order made there.

THE GENERAL RULE

5. There is no statutory rule in Guernsey equivalent to the general rule in CPR rule 44.2(2) in England, that the unsuccessful party should pay the costs of the successful. Instead, there is local caselaw to the same effect, *e.g., Shaham v Lloyds TSB Offshore Treasury Limited* 2007-08 GLR 323, [6]. But the discretion of the court, in Guernsey as in England & Wales, to make a different order is nevertheless emphasised.

6. Here the appellants are undoubtedly the successful parties. Is there a good reason not to order the respondents to pay their costs? The appellants say not. The respondents say there

is. The appellants claim not only the costs of their Guernsey lawyers, but also (i) the costs of their English lawyers in complying with the production order made below which this court has said was wrong, and (ii) the costs of their English barrister advising them in respect of issues relating to privilege and iniquity.

USE OF UNLAWFULLY OBTAINED EVIDENCE?

7. The respondents say that the appellants sought to rely on unlawfully obtained evidence and should be deprived of their costs as a mark of the court's disapproval. They refer to the decision of the English Court of Appeal in *Jones v University of Warwick* [2003] 1 WLR 954, [30]. Alternatively, they say that costs should be reserved until it is known what should happen to the documents in the hands of the English solicitors, or alternatively pending the restructuring of the trusts.

8. It has not been established whether the appellants sought to rely on "unlawfully obtained evidence". We are in no position to decide that question, and we cannot proceed on the basis that they did so. *Jones v University of Warwick* is therefore irrelevant. There is no basis for supposing that this will be proved in the future, and we see no utility in reserving costs decisions to a future contingency. In relation to the proceedings before us, the appellants are the successful parties and there is, on the material before us, no good reason for not applying the general rule. Accordingly, the appellants will have the costs of their Guernsey advocates, both in this court and below.

COSTS OF THE ENGLISH SOLICITORS

9. In our judgment, it was also reasonable for the appellants to engage the English solicitors to assist with compliance with the production order made below, given that the documents were in the hands of those solicitors in the first place. Someone had to review those documents to assess whether they fell within the scope of the order, and the appellants' English solicitors were in the best position to do so. These costs are not in respect of general legal advice from foreign lawyers (which would have to be specially justified), and there should be no "double counting". Accordingly, the appellants should have those costs too, but (since it would otherwise have been the appellants' Guernsey advocates who would have done the work) at a rate not to exceed the rate payable in respect of Guernsey advocates.

COSTS OF ENGLISH LEADING COUNSEL

10. However, in our judgment, there is no sufficient basis for the appellants to recover the costs of English leading counsel. The claim for this head of costs was put on the basis that there was no previous Guernsey precedent in relation to the iniquity exception and it was appropriate to look at English law. Leading counsel was put forward as an expert in this field in English law. It was accepted that general principles of legal privilege would probably not have required or justified the engagement of English leading counsel, but it was submitted

that the issues were "narrow and relatively esoteric", and related to "highly specialist fields of law, which arise rarely for decision by the Guernsey Courts".

11. In this respect we refer to our decision in *CRGF GP Ltd v Fonds Rusnano Capital SA* [2023] GCA 64, where we said:

> "43. As to the costs of researching the relevant English law, we do not accept that this would provide a basis for allowing the fees of external lawyers, at least on the facts of this case. This case did not involve any English law as such. It involved a dispute about the 1995 Law. That is a Guernsey statute, on which Guernsey advocates are competent – indeed, solely competent – to advise. Likewise, any issues of contract law which arose were issues in relation to the Guernsey law of contract. To the (again, limited) extent to which larger principles of partnership law were involved, we accept that there might well be a benefit in looking at the more substantial caselaw available in English law in order to decide what the law is in Guernsey. But it is often the case, in a jurisdiction such as Guernsey, that assistance may be obtained by looking at caselaw from England & Wales (and, indeed from other jurisdictions). At least in the ordinary run of cases, a Guernsey advocate may be expected to undertake such research where that is required in order to assist in determining the law of Guernsey."

12. The appellants sought to distinguish that case, on the basis that it concerned the construction of a Guernsey statute, rather than the general law. In our view, that is a distinction without a difference. In either case, the question is, what is Guernsey law, and that is *prima facie* a question for Guernsey advocates. We accept, as stated in the last sentence of the extract above from *CRGF*, that there may be exceptional cases where a Guernsey advocate could be described as insufficiently qualified to carry out the necessary research, but this is not one of them. The English law on the subject is contained in a relatively small number of decisions of the Court of Appeal of England & Wales and the House of Lords, which have stood for many years. Any competent Guernsey advocate could have researched them or consulted one of the many relevant textbooks. There is, frankly, nothing new or difficult about this.

THE TRUST FUNDS

13. In the respondents' submissions there was a suggestion that the costs should be paid in the same way as certain previous costs orders have been paid, pursuant to an earlier court order called "the Restructuring Order", that is, out of the trust funds. We see no justification for this in the present case. The respondents chose to make this application for their own private purposes. We have held that it should fail. For the avoidance of any doubt, therefore, we make clear that all of the costs awarded are payable by the respondents themselves. None of these costs come out of the trust funds.

CONCLUSION

14. The respondents must pay the costs of and occasioned by their application and the appeal, here and below, to cover (i) the costs of the appellants' Guernsey advocates and (ii) those of their English solicitors in complying with the production order, in each case at rates not exceeding the recoverable rate payable for Guernsey advocates. However, the costs of the appellants' English leading counsel are not recoverable.