

The Royal Court of Guernsey held that, in the absence of misconduct and given the administrative nature of the application, all parties to the ESMS Employee Benefit Trust costs proceedings are entitled to have their costs paid from the trust assets on the indemnity basis. The Court rejected arguments to deprive the Applicant of indemnity or to treat any party as a “winner” or “loser”, finding all convened parties were necessary for the resolution of the construction issue.

[2025]GRC086

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

IN THE MATTER OF THE ESMS EMPLOYEE BENEFIT TRUST

BETWEEN:

TRIDENT TRUST COMPANY (GUERNSEY) LIMITED

Applicant

-and-

(1) ESMS GLOBAL LIMITED

(2) ALASTAIR SCARBOROUGH & RITA FITZPATRICK

**(AS REPRESENTATIVES OF THE EMPLOYEE BENEFICIARIES OF
THE FIRST RESPONDENT)**

(3) RAJESH & SARITA SOOD

(4) SIMON & JENNIFER WEBSTER

Respondents

Date of hearing: 7th October 2025

Decision handed down: 3rd November 2025

Before: Sir Richard McMahon, Bailiff

Applicant’s representative: Advocate R G Morris
First Respondent’s representative: Advocate C H Edwards
Second Respondent’s representative: Advocate M G Ferbrache
Third Respondent’s representative: Advocate M W Rogers
Fourth Respondent’s representative: Advocate D J O’Hanlon

Cases and legislation referred to:

Re Buckton [1907] 2 Ch. 406

Lewin on Trusts (20th ed.)

Alsop Wilkinson (a firm) v Neary [1995] 1 All ER 431

Singapore Airlines Ltd v Buck Consultants Ltd [2011] EWCA Civ 1542

The Trusts (Guernsey) Law, 2007

The Royal Court Civil Rules, 2007

In re the Tchenguiz Discretionary Trust (unreported, 22 November 2017)

Albany Trust Company Limited v Jeandin (unreported, 10 September 2012)

Trilogy Management Limited v YT Charitable Foundation (International Limited) [2012] JCA 204

Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015)

C v P-S 2010 JLR 645

In re the Dunlop Settlement [2013] JRC 123

National Westminster Bank plc v Lucas [2015] BPIR 450

Introduction

1. This judgment is supplementary to the judgment I handed down on 28 December 2023 dealing with the preliminary issue that arose from para. 2 of the Application dated 31 May 2023 made by the trustee of the ESMS Employee Benefit Trust (“the EBT”), Trident Trust Company (Guernsey) Limited ([2023] GRC 075).
2. At a hearing on 8 August 2025, I decided that para. 3 of that Application should be stayed, but with liberty for any party to restore the Application on 7 days’ notice. I decided that paragraphs 4 to 6 of the Application should be progressed and set a timetable in respect of those paragraphs for the parties to follow. As these paragraphs again related to a construction issue and costs, they would be heard in open court as was the hearing on para. 2.
3. In the event, although argument was heard on para. 4, which focuses on clause 18.1 of the EBT Instrument, which was executed on 18 August 2014, I was persuaded that it was appropriate to adjourn further consideration of para. 4, albeit that in doing so the Applicant was aware that there may be adverse costs consequences of seeking that adjournment, with those costs formally being reserved. This arose because of the absence of certain materials from the evidence before the Court on which the Applicant needed to rely.
4. At the conclusion of the hearing on 7 October 2025, I reserved judgment. In the circumstances, this judgment deals with paragraphs 5 and 6 of the original Application insofar as they relate to the costs to be ordered for the hearing that took place in 2023 in respect of para. 2. It does not deal with para. 4, where the costs incurred have also been reserved, nor does it deal with the stayed para. 3. Instead, it concentrates solely on the appropriate order for costs in relation to para. 2.

Background

5. Sufficient background can be found in the substantive judgment on para. 2 without me needing to repeat anything further in this costs judgment.
6. At the time of the hearing in 2023, the principal evidence on behalf of the Applicant was the Affidavit from Ryan Dekker, sworn on 31 May 2023. On behalf of the Second Respondent, I considered Affidavits from Alastair Scarborough, sworn on 25 July 2023, and from Rita Fitzpatrick, sworn on 26 July 2023. As I explained in that judgment, I found I could not consider the Fourth Affidavit of Aaron Sanders, sworn on 6 October 2023, but I did consider the First Affidavit of one of the Third Respondents, Rajesh Sood, which he swore on 19 October 2023, and the Fifth Affidavit of Mr Sanders, sworn on 8 November 2023.
7. The new evidence for the resumption of proceedings this year comprises an Affidavit of Fern Dorey, who is an authorised signatory at the Applicant, which she swore on 7 March 2025, an

Affidavit of Grace Cummings, who assists Advocate Morris on behalf of the Applicant, which she swore on 18 August 2025, and which exhibits inter-partes correspondence, a Second Affidavit of Mr Scarborough, sworn on 8 September 2025, and a Second Affidavit of Mr Sood, sworn on 24 September 2025. Whilst some of this evidence relates to para. 4 of the Application, I have taken into account all the relevant evidence before determining the costs order applicable to para. 2.

Legal principles and contentions

8. On behalf of the Applicant, Advocate Morris has highlighted the categorisations given by Kekewich J in *Re Buckton* [1907] 2 Ch. 406 (at pages 414 and 415):

“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.

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 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 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 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 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 question, but with this possible

exception the unsuccessful party bears the costs of all whom he has brought before the Court.”

9. In the event, there was no dissent from applying these categorisations and all the Respondents acknowledged that this fell within the first of the classes described by Kekewich J. I could have readily referred to the summary given in *Lewin on Trusts*, 20th ed., para. 48-033. In respect of para. 2 of the Application, the trustee had sought assistance from the Court on a question of construction. In these circumstances, I do not need to consider further what Lightman J stated in *Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431 or even what Arden LJ set out in *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 that these categories “*should not be regarded as closed*” (para. 75). The real question becomes whether the Applicant should lose some or all of what would otherwise be its indemnity. The ancillary question is whether or not the power to make anyone else pay some or all of these costs should be ordered.

10. In the Trusts (Guernsey) Law, 2007, section 71 affords a wide discretion to the Court because it provides that:

“The Royal Court may order the costs and expenses of and incidental to an application to the court under this Law to be paid from the trust property or in such manner and by such persons as the court thinks fit.”

The breadth of the discretion available to the Court is also shown by rules 82 and 83 of the Royal Court Civil Rules, 2007. The former enables the Court to make such order for costs as it “*thinks just*” and the latter deals with costs on the full or partial indemnity basis.

11. Section 35(2) of the 2007 Law provides that:

“A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust.”

12. In addition to the provisions found in the 2007 Law, clause 18.1 of the trust instrument provides a form of contractual indemnity:

“All costs charges and expenses of, and incidental to, the preparation, operation and determination of the Trust (including any stamp duty and stamp duty reserve tax payable and remuneration of the Trustee) shall be payable by the Company (or any member of the Group) to the extent that they are not paid by the Trustee under this Instrument.”

It has not been suggested that there is any Group company to which to turn for payment. Further, clause 14.1 provides that:

“The Company shall keep the Trustee and each director, officer or employee of any corporate trustee fully indemnified against any actions, claims, costs, demands, expenses and all other liabilities to which it is (or becomes liable) as Trustee because of any act, event or thing except where such actions, claims, costs, demands, expenses and other liabilities are attributable to fraud, wilful misconduct or gross negligence by that person.”

13. Although these provisions might also be engaged on the issue of the costs relating to determining para. 2 of the Application, I am conscious that para. 4, which stands adjourned, squarely places clause 18.1 before the Court. Because the construction of clause 18.1 remains a live issue for when para. 4 is resumed, I do not propose to comment further on the terms of

that clause because it would be wrong to prejudice the outcome of the arguments relating to that provision. Instead, I will concentrate on the powers found in section 71 of the 2007 Law.

14. Having regard to the two rounds of Skeleton Arguments and the submissions made orally, there is an issue about whether the Applicant should be deprived of its costs as a result of misconduct. This in turn leads to consideration of the summary found in *Lewin on Trusts* by reference first to para. 48-006:

“The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in the execution of the trust. By this is meant costs which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is, the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee. Thus if breach of trust causing loss to the trust fund or misconduct is established against the trustee, the trustee may be deprived of his right of indemnity and further ordered to pay costs of other parties. The word “misconduct” should be widely construed and may include caprice and obstinacy, or neglect, negligence or carelessness, or even conduct which is unreasonable in the circumstances. While the mere fact that the trustee has made a mistake is not enough, it is equally clear that dishonesty is not requisite. Consequently, either “misconduct” should be widely construed so as to cover unreasonable conduct, or in the alternative the “inequitable conduct” on the part of a trustee which causes the right of indemnity to be lost or curtailed includes both misconduct in the sense of dishonesty and unreasonable conduct. We will here use “misconduct” in the wider sense.”

This passage is supplemented by the following paragraph (48-007):

“A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law.”

15. The argument that the Applicant should be deprived of at least some of its costs was advanced by the First Respondent, ESMS Global Limited (“the Company”), referring to what is stated in para. 48-035 of *Lewin*: “generally the proper role of the trustee is a neutral one”, otherwise the trustee is “at risk of being held to have acted unreasonably and so deprived of his right of indemnity”. When coupled with para. 48-007, there is a basis on which to deprive the Applicant of a portion of its costs because it engaged in multiple of the exceptions listed therein. In particular, it is suggested that the Applicant was not in the position of a cautious trustee being presented with competing constructions and seeking the Court’s guidance on construction, but rather that it pursued a positive case that was found in the substantive judgment to be wrong. Further, the reference in para. 48-006 to costs being “properly incurred” is consistent with the language used in section 35(2) of the 2007 Law.

16. The approach of the Second Respondent, being the beneficiaries of the EBT, represented by Alastair Scarborough and Rita Fitzpatrick, is not that the Applicant was involved in any misconduct, but instead to consider the outcome on para. 2 and to consider which parties can be said to have won and which lost on the arguments advanced. This arises from how Lieutenant-Bailiff Talbot had approached the issue in *In re the Tchenguiz Discretionary Trust* (unreported, 22 November 2017) and in particular para. 9, which deals with the position of “costs following the event”. As a consequence, the only real losers were the Third Respondents, meaning that the costs of all the parties should be paid from the Trust, save for those of the Third Respondents, but also that the Third Respondents should indemnify the Trust and/or the Company (if it fell to the Company to pay those costs) in respect of those costs. In effect, on the basis of costs following the event, the Third Respondents should bear the costs of the other parties and should do so on the indemnity basis.
17. On behalf of the Third Respondents, Advocate Rogers took issue with that suggestion. He supported the argument of Advocate Morris that the construction issue raised by para. 2 of the Application was administrative in nature. This was not a situation in which costs should be following the event anyway. Even if they did, there was nothing out of the norm about the approach taken by the Third Respondents warranting costs being payable by them on the indemnity basis. The position adopted by the Third Respondents was to support the arguments of the Applicant as to how clause 11.1 fell to be construed. Accordingly, the costs of all parties should be paid out of the trust property.
18. On behalf of the Fourth Respondents, Advocate O’Hanlon points out that the reason for the Third and Fourth Respondents being convened to the Application was because the First Respondent faced difficulties in advancing any case on how to construe clause 11.1 because of the deadlock between those two groups of parties. As such, Advocate O’Hanlon suggests that each of the Third Respondents and the Fourth Respondents were voluntary participants in the Application. As he notes, directors would not normally need to be convened to be heard because the Company would be the proper party. As a result, he submits that the costs incurred cannot properly be regarded as being necessarily incurred. The consequence is that it would be open to the Court to order that the Third Respondents pay the Fourth Respondents’ costs on para. 2 on the recoverable basis and that the Third Respondents should meet their own costs, whereas any shortfall for the Fourth Respondents should be capable of being paid out of the trust assets. The costs of the parties that were properly convened to the Application, being the Applicant, and the First and Second Respondents, could properly be paid out of the trust assets.
19. The only party suggesting that the Applicant should lose its indemnity due to misconduct is the First Respondent, the Company. The other Respondents do not align themselves to that submission and have accepted that there was no misconduct. The Second Respondent invites the Court to award costs against the Third Respondents on the indemnity basis. The Third Respondents suggest instead that this was a classic case in which the costs of all parties should be paid out of the trust assets and on the usual indemnity basis. The Fourth Respondents advance the case that the Third Respondents supported an argument that was rejected and so should be obliged to pay the Fourth Respondents’ costs, but assessed on the recoverable basis, with the Fourth Respondents sharing in the indemnity applicable to the other Respondents, save the Third Respondents, who would have to bear their own costs and pay those of the Fourth Respondents. These are the issues I have to resolve in respect of the costs on para. 2 of the Application.

Discussion

20. I will start by considering whether it is appropriate to make an order that deprives the Applicant of some or all of its indemnity. I have noted that *Lewin* indicates that the concept of misconduct should be approached on a broad basis.
21. I accept that there is nothing in the substantive judgment dealing with para. 2 of the Application that implies that this was an application that should not have been commenced. This was not, therefore, an instance of being too timid and I accept that the proper starting point is that this was a category 1 *Buckton* case.
22. The principal criticism levelled at the Applicant by the Company is that it played too prominent a role in relation to para. 2, especially when it became aware that the Third Respondents were broadly offering the same submissions as the case the Applicant sought to advance. In those circumstances, the role the Applicant played in the proceedings relating to para. 2 might be regarded as duplicating unnecessarily the arguments that would have been mounted in any event by the Third Respondents. It is this absence of neutrality that can be regarded as impacting on the Applicant's entitlement to rely on its indemnity. Put another way, the Applicant misconducted itself by descending into the fray instead of standing back and allowing the Third Respondents to run that argument.
23. However, Advocate Morris seeks to address these concerns by drawing attention to what I said in *Albany Trust Company Limited v Jeandin* (unreported, 10 September 2012) about maintaining a neutral stance: "*but its role has come perilously close to passivity when being a little more forthcoming may have assisted everyone involved more*" (para. 34). The inference to draw is that a trustee might be expected to advance a positive case.
24. The difficulty in referring to this decision is that this comment appears to be relied on out of context. The categorisation in those proceedings was *Buckton* (4). They were adversarial proceedings in which the costs I ordered reflected that there was a winner and a loser. There was no justification for awarding costs on the indemnity basis, so the order was that costs were payable by the unsuccessful party, which was the First Respondent, to the other parties, being the Applicant and the Second Respondent, but on the recoverable basis. The starting point in the present case is the general acknowledgement that this is a *Buckton* (1) case, in which the primary starting point is that the costs of all parties should be payable out of trust assets on the indemnity basis. This is a very different starting point, and the best that can be said about a principle drawn from the *Albany Trust v Jeandin* decision is that being active does not mean that it amounts to misconduct. However, in order to assess that question, I take the view that it is necessary to take a step back and consider the roles of the various parties that were convened.
25. The Company has been regarded by everyone as being a proper party. However, the deadlock between the directors meant that it did not play a positive role on para. 2 (see para. 2 of the substantive judgment). This was the reason why the two sets of directors needed to be convened. It was known that they had differing views about the Applicant voting on written resolutions. In those circumstances, there is an argument, now advanced by the Company, that the Applicant could have sat back and not made a positive case about the construction relating to para. 2. However, the Fourth Respondents could also have chosen to let the case be made by the Second Respondents, as beneficiaries of the EBT, and so refrained from duplicating those arguments. As Advocate O'Hanlon suggests that the Fourth Respondents should be indemnified from the trust assets for any shortfall if costs are paid to them by the Third Respondents on the recoverable basis, I think I can properly infer that the Fourth Respondents also regard themselves as being covered by the usual rule in respect of costs.
26. In these circumstances, I am not persuaded that there is a sound basis for depriving the Applicant of any of its indemnity. I have acknowledged that it was appropriate for the

Applicant to bring before the Court para. 2 of its Application. There was a genuine need for assistance as to the construction to give to clause 11.1 of the trust instrument. Although the issues the Company wishes to raise have been aired in correspondence, what matters are the submissions made before the Court. Advocate Edwards suggested that there was a basis on which the Applicant could be deprived of a substantial element of its costs. However, there has been no attempt to assess what is meant by “*a substantial element*”. On the basis that I have struggled to identify any misconduct that could properly be raised against the manner in which the Applicant conducted itself in respect of para. 2, I am not minded to deprive the Applicant of any of its costs on this basis. This applies equally to section 71 of the 2007 Law.

27. In reaching that conclusion, I have taken into account the way in which the arguments were developed at the hearing in 2023. As I have just pointed out, there were two sides to the arguments that were advanced at that hearing. The Company was in the position of not putting forward any particular case. That was left instead to the Third and Fourth Respondents. There was some support for the position of the Applicant from the Third Respondents and for the position the Second Respondents took from the Fourth Respondents. Subject to what Advocate O’Hanlon has now said in relation to costs, to which I will turn shortly, the hearing in 2023 lasted a long day, but was completed without needing to be adjourned part-heard. Ultimately, there was a balance between the two sides to the argument in permitting everyone, except for Advocate Edwards to advance their cases. To the extent that this was a *Buckton* (1) hearing, on which all parties have agreed, the starting point remains that the costs of everyone come from the trust property.
28. I will consider next the submissions of the Second Respondents that it is possible to identify winners and losers in respect of para. 2. I accept from the outset that there is a wide discretion to make an order that is just in all the circumstances, whether pursuant to rule 82 of the 2007 Rules or under section 71 of the 2007 Law. In saying that, there can be a departure from what Kekewich J set out in *Re Buckton*, as also confirmed more recently by the Jersey Court of Appeal in *Trilogy Management Limited v YT Charitable Foundation (International Limited)* [2012] JCA 204 (especially para. 13 and the first sentence of para. 14). There needs to be some justification, though, to depart from the typical approach to costs in a *Buckton* (1) case.
29. I do not find any real assistance from considering what happened in 2017 in the *TDI* case. In particular, I am not persuaded that this covers a *Buckton* (1) case where the Application was regarded by everyone as necessary to assist the Applicant in how to deal with clause 11.1 in the trust instrument. Had the Company been in a position to play a role, there would have been no requirement to convene the Third or Fourth Respondents. The participation of the Third and Fourth Respondents only arose because the two sets of directors were deadlocked. Indeed, Advocate Ferbrache submitted that all the parties had been properly convened. As I have already pointed out, there is an argument that all that was needed was for the two different constructions to be placed before the Court. In the event, there was support for the two options coming from the Third Respondents on the one hand and the Fourth Respondents on the other. In these circumstances, I am not satisfied that it is appropriate to treat any party as being a winner or a loser. Paragraph 2 of the Application raised a question of construction of the trust instrument and the Applicant was, I accept, the proper party to bring that matter before the Court. Indeed, no party has suggested otherwise. Adopting the words used in para. 13 of the *Trilogy Management* case, this proceeded “*without adversarial considerations*” meaning that “*the application is treated as being necessary for the administration of the trust and the costs of all parties are necessarily incurred for the benefit of the estate, regarded as a whole*”. Subject to addressing Advocate O’Hanlon’s possible gloss on that approach, I remain of the view that this was and remains a *Buckton* (1) case with those consequences.

30. In these circumstances, I do not need to consider whether an award against the Third Respondents should be on the indemnity basis, as suggested by Advocate Ferbrache. However, if I needed to do so, I would have agreed with Advocate Rogers' submissions that there is nothing taking the arguments on para. 2 "out of the norm" (*Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 21 January 2015), referring to the approach taken in *C v P-S* 2010 JLR 645 by Beloff JA in the Jersey Court of Appeal). For the reasons I have already touched on, I am not persuaded that the Third Respondents have behaved unreasonably (see, eg, para. 32 of *In re the Dunlop Settlement* [2013] JRC 123) that would take their participation outside of the norm. They were entitled to advance the case they did, supporting the position of the Applicant, just as the Fourth Respondents could support the position of the Second Respondents.
31. Advocate O'Hanlon starts from the premise that it was unusual for the Third and Fourth Respondents to be convened. To that extent, I agree. But I have already explained why they were convened to the Application, which arose out of the internal deadlock in the First Respondent. As the Company was affected by the construction to give to clause 11.1 of the trust instrument, its inability to make representations either way led to the decision to convene the two sets of directors so that each could, if they so wished, advance the different cases they wanted to. On one analysis, therefore, the two sets of directors were substituting for the Company, which has been accepted as properly being a party.
32. Some reference has been made to *National Westminster Bank plc v Lucas* [2015] BPIR 450, which relates to the estate of Jimmy Savile. Advocate O'Hanlon highlights para. 108 in the judgment of Patten LJ:

"CPR Part 46 PD 1 preserves the rule that a trustee or personal representative is entitled to an indemnity out of the trust fund or estate for costs properly incurred but makes no express provision for the costs of the other parties to an application for directions falling with the first two classes described in Re Buckton. But there is no doubt that the costs of any necessary parties to such an application will ordinarily be paid out of the fund or estate. The application is designed to allow the trustee or personal representative to obtain the sanction or guidance he needs for the proper administration of the estate or the court's determination of that issue necessarily involves a consideration of the position of those affected (beneficiaries or creditors as the case may be) taking into account any objections or other submissions which they make. Indeed the exclusion of the Trust from the negotiations about the Scheme was justified on the basis that it could raise any objections or suggestions for improvement once the Scheme was agreed and could be presented to the court for approval: see the judgment at [35] quoted in para 35 above."

In doing so, he suggests that the Third and Fourth Respondents both came to these proceedings with some risks as to costs. He drew attention to certain passages in the substantive judgment (paragraphs 39, 43 and 61) and suggested that what I need to do is to consider the fairness in all the circumstances. This leads him to propose that the Third Respondents should pay the Fourth Respondents' costs on the recoverable basis.

33. Whilst there is a superficial attraction to the fairness of that proposal, the primary difficulty is that, adopting the way Patten LJ dealt with it, both the Third and the Fourth Respondents were necessary parties to para. 2 of the Application. In my judgment, both the Third Respondents and the Fourth Respondents needed to be convened because of the inability of the Company, as First Respondent, to participate effectively. There has been no suggestion that the Company should not have been convened. Similarly, there has been no suggestion that the Second Respondents, representing the beneficiaries of the EBT, were not properly convened. However,

the Company's position was compromised because of the deadlock, so the only real option was to convene the two sets of directors. That is why I am satisfied that both were necessary parties to para. 2 of the Application. Once they are regarded as necessary parties, for a *Buckton* (1) case, the starting point remains that all parties necessarily convened should have their costs on the usual indemnity basis from the trust assets.

34. There is, however, a further consideration, which relates to the manner in which the Third and Fourth Respondents participated, having been properly convened. It is on this basis that the broad discretion in section 71 of the 2007 Law is re-engaged. I accept that it would be open to this Court to make the type of costs order proposed by Advocate O'Hanlon, but only on the basis that to do so would amount to a fair outcome. I am not satisfied that it would and so will not depart from the usual order in a *Buckton* (1) case.
35. I do not agree with Advocate O'Hanlon that the Third Respondents (and so also the Fourth Respondents) were volunteers to the proceedings on para. 2. They would not have needed to be convened if the Company had been in a position to advance any construction on clause 11.1 and I am confident that they would not have been convened had that been the case. In those circumstances, the costs issue would not have arisen and I expect that all the parties convened would have accepted that their costs be paid out of the trust assets. However, once the Third and Fourth Respondents are viewed as necessary parties, there would only be some basis for making a costs order other than that all parties have their costs out of the trust assets if there had been some conduct on the part of either of those Respondents making that a fair outcome. I have already rejected the winners and losers argument put forward by Advocate Ferbrache. In the circumstances of the arguments on para. 2, I am not persuaded that there was any winner or any loser. Paragraph 2 cannot, in my view, be approached as hostile litigation. Whilst, the Applicant might have sought a declaration on a slightly different basis, as I pointed out in the substantive judgment, I have also accepted that I should not remove any of the Applicant's indemnity on the basis of misconduct. By adopting a similar approach to the costs incurred by all parties at the one-day hearing, I consider that it is fair to order that all parties' costs be taken on the indemnity basis from the trust property. This order follows from section 71 of the 2007 Law and is the normal order made in a *Buckton* (1) case.
36. I am conscious, however, that there may be insufficient assets within the EBT for that to happen. Quite properly, no one has suggested that any of the shares in the First Respondent held in the EBT should be sold. The likelihood, therefore, is that the Company will have to step into the shoes of the Applicant and fund those costs, but I will say nothing further on that issue pending the resumption of the arguments relating to para. 4 of the Application. For now, it may well mean that all parties will have to wait before submitting their bills of costs. I further understand that the Company has sufficient assets to meet such claims and, where the resolution of the construction issue was for the benefit of the EBT, I am satisfied that there is no basis on which to award anything akin to costs following the event, because the resolution of the construction issue was for the benefit of the EBT.

Conclusion

37. For the reasons I have given, I have decided that the most appropriate order as to the costs incurred in respect of para. 2 of the Application is that all the parties should have their costs from the trust assets on the indemnity basis. That necessarily extends to the costs incurred in arguing what the costs order should be. In doing so, I have rejected the invitation from the Company that I should deprive the Applicant of any of its indemnity because I have not been persuaded there has been any misconduct. I have also rejected the suggestion from the Second Respondents, on behalf of the beneficiaries of the EBT, that the losers were the Third Respondents who should therefore have to pay the costs incurred, and the suggestion made by

Advocate O'Hanlon on behalf of the Fourth Respondents that the Third Respondents should pay the Fourth Respondents' costs on the recoverable basis. That was the most interesting argument advanced but ultimately it failed because I am satisfied that the Third and the Fourth Respondents were necessary parties to be heard on para. 2.