Rawlinson & Hunter Trustees SA v Advocate Steven Chiddicks

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	02 November 2018
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Text

[2018] JRC 203

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner**, **sitting alone**.

Between
Rawlinson & Hunter Trustees SA (in the place of Volaw Trustees Limited)
Representor
and
Advocate Steven Chiddicks, representing the minor beneficiaries of the ZII Trust
First Respondent
K, adult beneficiary of the ZII Trust
Second Respondent

Equity Trust (Jersey) Limited
Third Respondent
Fielden Holdings Limited
Fifth Respondent
Rawlinson & Hunter Trustees SA (as trustee of the Z Trust)
Sixth Respondent
Rawlinson & Hunter Trustees SA (as trustee of the X Trust)
Eighth Respondent
E
Ninth Respondent
E in his capacity as Executor of the Estate of the late C
Tenth Respondent

Advocate E. L. Jordan **for the Third Respondent**.

Advocate J. Harvey-Hills **for the Tenth Respondent.**

Authorities

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [2018] JRC 119.

Representation of Rawlinson & Hunter Trustees SA re Z Trusts [2018] JRC 164

Civil Proceedings (Jersey) Law 1956

Watkins v Egglishaw [2002] JLR 1

Re Buckton [1907] 2 Ch 406

J P Morgan [2013] (2) JLR 235

Alsop Wilkinson v Neary [1996] 1 WLR 1220

Re Jasmine Trustees Limited [2016] JRC 016

Re Dunlop [2013] JRC 123

Trusts —costs re: two judgments 3 rd July, 2018 and 10 th September, 2018 respectively.

IN THE MATTER OF THE REPRESENTATION OF RAWLINSON & HUNTER TRUSTEES SA (ORIGINALLY BROUGHT BY VOLAW TRUSTEES LIMITED)

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

THE COMMISSIONER:

1 Equity Trust (Jersey) Limited ("Equity Trust") and E in his capacity as Executor of the Estate of the Estate of the late C ("the Executor") have filed submissions on the issue of costs arising out of two hearings that led to the two judgments of the Court dated 3 rd July 2018, *Representation of Rawlinson & Hunter Trustees SA re Z Trusts* [2018] JRC 119 and 10 th September 2018, *Representation of Rawlinson & Hunter Trustees SA re Z Trusts* [2018] JRC 164 respectively.

2 These hearings took place within the context of the representations issued by Barclays Private Bank & Trust Limited in its then capacity as trustee of the ZIII Trust and by Volaw Trustee Limited in its then capacity as trustee of the ZII Trust. Rawlinson & Hunter Trustees SA is now trustee of the ZII Trust and may be appointed as trustee of the ZIII Trust pending Court directions. The assets of both trusts are being administered under the supervision of the Court and Rawlinson & Hunter Trustees SA has been substituted as representor in respect of the ZII representation.

3 Equity Trust has a very substantial claim to the assets of the ZII Trust and argued that its equitable rights as former trustee over the trust fund gave it priority to the rights of the current trustee, i.e. over all the claims of the other creditors to those assets. On 20 th October, 2015, the Court directed that the issue of whether Equity Trust had priority should be determined as a preliminary issue, together with two other issues, namely whether it could claim the costs of proving its more limited claim against the assets of the ZIII Trust and whether interest on its claims continued to accrue. The latter claim was not pursued. In its judgment of 3 rd July, 2018, the Court held that Equity Trust's equitable rights as former trustee did not give it priority over the claims of other creditors, and by its judgment of 10 th September, 2018, that it could not claim its costs in proving its claim against the assets of the ZIII Trust.

4 It is well established that under Article 2 of the *Civil Proceedings* (Jersey) Law 1956 the costs of and incidental to all proceedings in the Royal Court are in the discretion of the Court, and it has full power to determine by whom and to what extent the costs are paid. The general principles to be applied in *inter partes* litigation are set out in the well-known judgment of Commissioner Page in *Watkins v Egglishaw* [2002] JLR 1.

5 The issue in this case is how the two hearings are to be properly characterised. They arose in the context of representations brought by the trustees of two trusts whose assets were insufficient to meet the claims to those assets – for convenience referred to as ***"insolvent trusts"***. Equity Trust, together with the other claimants to those assets, had been convened to the applications, in which the trustees sought directions as to how to manage the insolvency of both trusts.

6 The beneficiaries were also convened but their only interest is in the remote possibility of the trusts returning to solvency. They have not played an active role in the proceedings.

7 Equity Trust argues that these hearings come within the first category set out in the well-known case of *Re Buckton* [1907] 2 Ch 406, where Kekewich J said this 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. 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."

8 The second class was in substance the same as the first class, but where the application had been made by the beneficiaries. He went on to say this in relation to the third class:-

> ***"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 Advocate Jordan, for Equity Trust, drew my attention to the words of Nugee JA in *J P Morgan* [2013](2) JLR 235, in the context of the categories set out by Lightman J in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, cautioning against treating such categories as a statute. As Sir Michael Birt, Commissioner, said in *Re Jasmine Trustees Limited*

[2016] JRC 016 at paragraph 41:-

> ***"The Court must always stand back, look at the case in the round, and decide on the overall nature of the litigation.*** In my judgement, this aspect of the litigation falls within *Buckton* category 2. Just as it was a matter of administration of the Trust for all parties to know who was trustee, it is equally a matter of administration for the parties to know who the Protector is …."

10 In the same paragraph, Sir Michael Birt clarifies that the mere fact that beneficiaries take different and opposing stances to an application, does not mean that the proceedings become hostile. As he says:-

> ***"It is often the case that beneficiaries put forward opposing stances in category 1 and category 2 cases, but this does not change the nature of the proceedings, nor does it lead to the loss of their normal entitlement to costs out of the trust fund on the indemnity basis, unless they have behaved unreasonably…."***

11 In this case, Advocate Jordan argued that these proceedings were brought by the trustees at the time in order to administer an insolvency procedure for both trusts. As part of that process, Equity Trust sought to clarify the priority point, which had to be done for the benefit of all the trust creditors. In this way, it was more akin to an argument between a beneficiary and a fiduciary about what a fiduciary's powers require or how they should be exercised in administering the fund as in *J P Morgan*.

12 Furthermore, she said the fact that Equity Trust has a financial interest in the outcome of the dispute does not render the priority argument hostile litigation. As Sir Michael Birt, Commissioner, said in *Re Dunlop* [2013] JRC 123 at paragraph 27:-

"It will often, and presumably usually, be the case that a beneficiary convened to an application by trustees will put forward a stance which he considers will be to his benefit. That is entirely natural and indeed, it is one of the purposes of convening a beneficiary in the first place. The Court needs to ensure that all proper arguments are put before it and it will expect beneficiaries to be likely to argue the point which favours their interest most."

13 *Re Buckton* was itself a case in which its form appeared to be adverse litigation within category 3, but in substance, was found to be an "amicable procedure for determining speedily and inexpensively a question the solution to which must sooner or later be found for the benefit of all concerned, including the trustees".

14 Applying these principles, Advocate Jordan submitted that the substance of the representation proceedings and the priority argument were within *Buckton* category 1, or at the very least, *Buckton* category 2. Albeit that this is an insolvent trust, the *Buckton* categories 1 or 2 should be applied, so that all the parties got their costs from the trust funds. She said that in practical terms, such an order may mean very little, because it would

be added to the parties' claims against the trusts, but as it is a matter of principle, she submitted that this was the correct order.

15 Advocate Jordan accepted, however, that such an order may be said to contradict the Court's finding on the judgment of 10 th September, 2018, that a trustee creditor cannot claim its legal costs of proving its claim in the insolvency proceedings. Accordingly, pending an appeal on that point, Equity Trust's submission was that on a principled basis, the Court should clarify that these proceedings fall within the category of *Buckton* 1 or 2, meaning that they are not hostile proceedings, but due to the ratio of the decision of 10 th September, 2018, and because these are insolvent trusts, all parties should bear their own costs.

16 Advocate Harvey-Hills, for the Executor, said there could be no doubt that this was hostile *inter partes* litigation, advanced by Equity Trust in its own self interest. On no basis could it possibly be said to be administrative trust litigation. To all intents and purposes, the trusts had ceased to exist and the assets are now simply held for the benefit of creditors to whom they will ultimately be distributed. The Court is not concerned with the ongoing administration of the trusts in the best interests of the beneficiaries as a whole. It is dealing with insolvency and the interests of individual creditors. This includes the proving of claims and issues of entitlement and distribution.

17 The fact that the Court has found that the costs of proving a claim are not recoverable from an insolvent trust is a clear demonstration, he said, of the fact that the Court is following the principles of insolvency law rather than the principles of trust administration.

18 18. Even if there was an analogy to be drawn with trust principles, this claim, he said, would clearly have fallen within category 3 of *Re Buckton*, and thus normal costs principles would apply. Equity Trust's claims were clearly self-interested claims to procure a personal advantage over the other creditors. Over an extended period of time it had advanced a position that it was entitled to priority over all other creditors that would have resulted in it *"scooping the pot"* to the significant prejudice of all of the other creditors, all of whom accepted that the position should be *pari passu*.

Decision

19 I agree with the submissions put forward by Advocate Harvey-Hills. Whilst in form, the proceedings have the appearance of an application by a trustee for directions to which the creditors had been convened, in substance these were adverse claims by one creditor against the others. The costs that Equity Trust had incurred in both hearings had not been incurred for the benefit of the trust estate, but for its own benefit.

20 I find, therefore, that it has the characterisation of hostile proceedings to which the ordinary

principles set out in *Watkins v Egglishaw* should be applied. It is clear that in respect of both matters, the Executor was the winning party. Where a winner is readily apparent, the overriding objective of doing justice between the parties is usually met by making an award of costs in its favour.

21 Accordingly, I order Equity Trust to pay the costs of the Executor of and incidental to both hearings, including the costs of making these submissions, on the standard basis, to be taxed if not agreed.