

# Representation of Lincoln Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Morgan, Newcombe
<b>Judgment Date:</b>	02 August 2007
<b>Neutral Citation:</b>	[2007] JRC 149
<b>Reported In:</b>	[2007] JRC 149
<b>Court:</b>	Royal Court
<b>Date:</b>	02 August 2007

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## Text

[2007] JRC 149

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Morgan **and** Newcombe.

In the Matter of Article 51 of the Trusts (Jersey) Law 1984, as Amended.  
In the Matter of the Representation of Lincoln Trust Company (Jersey) Limited.  
And in the Matter of the A and B Trusts.

**Advocate P. G. Nicholls for Lincoln Trust Company (Jersey) Limited.**

## Authorities

*Re Esteem Settlement* [2000] JLR N 67A.

*Re Internine* [\[2006\] JLR 176](#).

*Representation of Lincoln Trust* [\[2007\] JRC 138](#).

## COSTS JUDGMENT.

### THE COMMISSIONER:

- 1 On 17<sup>th</sup> July 2007 the Court handed down a written judgment in relation to an application for directions by Lincoln Trust Company (Jersey) Limited (“Lincoln”) in relation to what it referred to as the A and B Trusts. I refer to that judgment for the background and adopt the definitions used in it.
- 2 Two matters concerning Lincoln's costs remained to be dealt under that judgment, namely Lincoln's costs arising out of the application and in respect of its ongoing involvement in the English proceedings. I granted Lincoln's costs in respect of both and said I would set out my reasons in writing which I now do.

### Costs of the application

- 3 Mr Nicholls referred me to the judgments of the Royal Court in the cases of *Re Esteem Settlement* [2000] JLR N-67A and *Re Internine* [\[2006\] JLR 176](#). In the latter case Bailhache, Bailiff enunciated the general principle thus:

***“18. The general principle therefore is this. A trustee, acting reasonably and in the exercise of his duties, powers and discretions, is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred. This right or entitlement may be removed, in whole or in part, by the Court, but only by specific order to that effect. The rationale is quite simple. Persons undertaking the heavy responsibilities of acting as a trustee are not expected to perform any of these functions at their own expense. As Lord Jessel MR was quoted in *Re Spurling's Will Trusts* [1966] 1 All ER 745 as stating –***

***“It is not the course of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust”.***

***19. In Jersey it is a particularly burdensome duty to act as a trustee. The legislature has seen fit to regulate the position by requiring that any person seeking to carry on a financial service business as a professional trustee should first be registered by the Jersey Financial Services***

***Commission and approved to undertake such functions. The Commission is entitled to impose, and does impose, stringent conditions upon registered persons. These burdens are in addition to the usual responsibilities of a trustee under the general law. It is not in the public interest that an additional duty should be imposed upon trustees requiring them to pay out of their own pockets costs and expenses which have been reasonably incurred.”***

- 4 In its judgment of 17<sup>th</sup> July 2007, this Court criticised Lincoln for failing to provide the Court with all the information that it had or ought to have had in relation to the matters in respect of which it was seeking the directions of the Court and for failing to explain to the Court fully, or even adequately, what its financial options were.
- 5 Lincoln accepted that those criticisms were justified and apologised to the Court for the failings which the Court identified. Notwithstanding these failings Mr Nicholls contended that it would be wholly wrong for the Court to deprive Lincoln of its costs for the following reasons:
  - (a) In bringing the application Lincoln had not acted unreasonably but had done so in the exercise of its duties, powers and discretions.
  - (b) There can be no suggestion that Lincoln had been motivated by improper reasons or had been guilty of misconduct.
  - (c) Whilst Lincoln may be fairly criticised for the way in which the application has been brought, it cannot be fairly criticised for bringing the application.
  - (d) To deprive Lincoln, either in whole or in part, of its costs would act as an overt discouragement to trustees from seeking the assistance and protection of the Court which would be contrary to public interest.
  - (e) It is not in the public interest to impose on a trustee, whose role in Jersey is particularly burdensome given the requirements of the Jersey Financial Services Commission, the additional burden of paying its costs.
- 6 I accept that Lincoln acted quite properly in bringing the application – indeed it is arguable that it should have brought the application on a more timely basis bearing in mind that the Judicial encouragement of the High Court was given on 17<sup>th</sup> November 2006 and this application was only brought on 30<sup>th</sup> March 2007. I also accept that Lincoln had not been motivated by improper reasons.
- 7 The issue is whether, having brought the application, Lincoln acted reasonably or in accordance with its duties in failing to give the Court all the information it required. Mr Nicholls accepted that such a failure could justify the Court in depriving a trustee of some or

all of its costs.

- 8 In mitigation he pointed out that Lincoln, inter alia, was a small trust company and that being deprived of the whole or part of its costs would impact upon it disproportionately. Furthermore it had at all times been advised by English Solicitors who had had the conduct of the matter for some considerable time and who had prepared the application which had been brought under time pressure.
- 9 The Court having made its views clear in its Judgment of 17<sup>th</sup> July 2007 and having received an unreserved apology from Lincoln, I decided on the facts of this case to allow Lincoln the costs of the application on an indemnity basis.

### **Ongoing costs in the English proceedings**

- 10 In its judgement of the 17<sup>th</sup> July 2007 the Court declined to approve Lincoln resolving to participate in the English proceedings and to take such steps as Lincoln deemed appropriate in connection therewith, on the ground (as per paragraph 34 of the Judgment) that Lincoln had already submitted to the jurisdiction of the English Court and therefore had no option but to participate.
- 11 In her judgment of 6<sup>th</sup> June 2007 Baron J made it clear that the participation of Lincoln was vital for resolution of the claims between C and D as it played a pivotal role in the holding of family assets.
- 12 None of the parties convened to the application had appeared in the proceedings to argue that Lincoln had acted improperly in submitting to the jurisdiction of the English Courts and no criticism of that decision was voiced in the correspondence from those parties. There has been no finding, therefore, of misconduct in relation to Lincoln's decision to participate in the English proceedings. To deprive it of its ongoing costs in the English proceedings would be to require it to fund those proceedings personally which would run contrary to the general principle that a trustee should only lose its contractual right to costs including the costs of litigation, by misconduct (see *Re Esteem*).
- 13 Lincoln had now applied for directions in respect of its ongoing costs in respect of the English proceedings and accordingly in my view it was appropriate that Lincoln should have those costs on an indemnity basis.