Bertrand des Pallières v JP Morgan Chase & Company

Jurisdiction:	Jersey
Judge:	Nugee JA, Beloff JA, Logan Martin JA
Judgment Date:	26 July 2013
Neutral Citation:	[2013] JCA 146
Reported In:	[2013] JCA 146
Court:	Court of Appeal
Date:	26 July 2013

Text

Between

IN THE MATTER OF THE JP MORGAN 1998 EMPLOYEE TRUST

AND IN THE MATTER OF THE BETRAND DES PALLIERES DEPENDENT FUND

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 (REVISED EDITION)

Bertrand des Pallières
Appellants
and
JP Morgan Chase & Co
Respondent

[2013] JCA 146

Before:

The Hon. Michael Beloff, **Q.C., President**; Christopher Nugee, **Q.C., and**; Robert Logan Martin, **Q.C.**.

COURT OF APPEAL

Trust — appeal against a costs order.

Authorities

Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589 .

Trusts (Jersey) Law 1984 (revised edition).

Alhamrani v JP Morgan Trust Company (Jersey) Limited [2007] JLR 527 .

Re Buckton [1907] 2 Ch 406 .

United Capital Corporation Ltd v Bender [2006] JLR 269 .

Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd [1984] JJ 127 .

The Abidin Daver [1984] AC 398 .

Hadmor Productions v Hamilton [1983] 1 AC 191 .

Turner v Hancock (1882) 20 Ch D 303 .

In re Esteem Settlement [2000] JLR Notes 67A .

re Spurling's Will Trusts [1966] 1 WLR 920 .

Armitage v Nurse [1998] Ch 241 .

Lewin on Trusts (18th edn, 2008).

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

Capita Trustees v RS [2013] JRC 123 .

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

Alsop Wilkinson v Neary [1996] 1 WLR 1220 .

Advocate N. G. A. Pearmain **for the Appellant**.

Advocate N. M. Sanders **for the Respondent**.

Nugee JA
Introduction

1 This is an appeal against a costs order made by Clyde-Smith, Commissioner on 30 January 2013. The Respondent, J P Morgan Chase & Co (“JPM”), is the Settlor of an employee benefit trust known as the JP Morgan 1998 Employee Trust (“the Trust”). The Trust has a number of sub-trusts, one of which is the Bertrand des Pallières Dependent Fund (“the B Sub-trust”) which was established for the benefit of the Appellant, Bertrand des Pallières, (“B”) and his family. The proceedings concerned the question whether JPM was obliged as Settlor to give disclosure to B as beneficiary.

2 For reasons given in its judgment of 28 June 2012 the Royal Court (Clyde-Smith Commr, assisted by Jurats Le Breton and Milner) declined to exercise its supervisory jurisdiction to order disclosure against JPM and discharged JPM from the re-amended representation. Clyde-Smith Commr subsequently heard argument on costs, and for reasons given in his judgment of 30 January 2013, ordered that the costs of the proceedings should be borne as follows:–

(i) JPM's costs should be paid out of the B Sub-Trust on the trustee basis

(ii) B's costs should be paid out of the B Sub-Trust on the indemnity basis.

3 B now appeals against this Order, with the leave of Clyde-Smith Commr given on 14 May 2013. He seeks an order setting aside the Commissioner's Order and instead ordering that JPM be paid its costs personally by B on the standard basis. JPM seeks to uphold the Commissioner's Order; but if it is set aside seeks an order for B to pay it its costs on the indemnity basis.

4 In my judgment there is no ground for this Court to interfere with the Order as to costs made by the Commissioner, and I would dismiss this appeal.

Facts

5 The facts are clearly set out in the substantive judgment of the Royal Court of 28 June 2012. It is necessary however to give some detail of the nature of the proceedings, as this is material to the question of costs.

6 JPM established the Trust as settlor in 1998. It is neither a trustee, nor entitled to benefit from the Trust as beneficiary, but it does retain some powers in relation to the Trust. The sole trustee of the Trust is Royal Bank of Canada Trustees Ltd (“the Trustee”).

7 B was employed by JPM, initially in 1992 in Paris, and from 1993 in London. His employment came to an end in 2005. As an employee of JPM B qualified as a beneficiary of the Trust, and in 2000, the Trustee made an appointment creating the B Sub-Trust of which B and his family are beneficiaries. Its value in 2009 was some US$30m.

8 These proceedings arise out of B's concern that if he or his family derive any benefit from the B Sub-Trust there will be a substantial liability to UK income tax and National Insurance contributions. B, who was resident in the UK during his employment in London but not domiciled, sought to persuade the Trustee to engage in various actions which might enable him and his family to enjoy benefits from the B Sub-Trust without attracting these tax and NI consequences, but without success. He considers that he may have claims against JPM as his employer for statements it made to him before the B Sub-Trust was established, or against the Trustee.

9 The claims have undergone significant amendment in the course of the proceedings as follows:–

(i) A draft representation prepared for B in July 2010 had sought the removal of the Trustee, an account of losses caused to the B Sub-trust by the Trustee, and payment of the amount found due. JPM was not named as a party.

(ii) The representation as presented to the Court in November 2010 was not quite the same. Although it retained allegations which it was accepted had been drafted principally for the removal of the Trustee, the relief sought was limited in the main to one of disclosure, against both the Trustee and JPM, under Article 51 of the Trusts (Jersey) Law 1984 (“Article 51”), although there was added a claim for the costs of obtaining tax advice which were said to have been wasted, which was clearly a hostile claim.

(iii) On 13 April 2011 Clyde-Smith Commr stayed this for 6 weeks to enable the parties to see if they could resolve matters, and gave B leave to file an amended representation within 28 days of the expiry of the stay. In his judgment the Commissioner set out what he would expect to see in an amended representation seeking disclosure.

(iv) The parties did not resolve matters and an amended representation was filed in August 2011 (out of time). This now contained what were undoubtedly hostile claims against JPM and the Trustee and JPM, alleging that as a result of false representations by JPM and failures by the Trustee B had lost the opportunity for tax planning and claiming damages from both JPM and the Trustee, as well as disclosure from them.

(v) Both JPM and the Trustee issued summonses to strike out the amended representation as being out of time and not complying with the Commissioner's judgment of 13 April 2011 in that it continued to combine claims for disclosure by B as beneficiary with hostile claims.

(vi) B then sought leave to file a re-amended representation which removed the other claims and was confined to seeking disclosure from JPM and the Trustee. On 15 December 2011 Clyde-Smith Commr gave B leave to file the re-amended representation and directed that the issue of disclosure against JPM be dealt with

separately.

10 It was this re-amended representation, so far as it sought disclosure against JPM, that came before the Royal Court and was dealt with in its judgment of 28 June 2012. As stated above the Court declined to require JPM to give any disclosure and discharged it from the representation.

11 In its judgment the Court decided as follows:–

(i) JPM had two powers under the Trust which were agreed by the parties (and accepted by the Court) to be fiduciary: a power to remove trustees and appoint and remove new or additional trustees; and a power to appoint a protector.

(ii) JPM had a power to make certain amendments to the Trust with the consent of the Trustee. The Court rejected a submission on behalf of B that this was also fiduciary, holding that it was a limited power, subject to the implied obligation of good faith as described in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589.

(iii) It was common ground, and the Court agreed, that JPM was not a trustee for the purposes of Article 51 as it did not have any of the trust property vested in it. However it was also common ground, and the Court again agreed, that the Court had jurisdiction over JPM under Article 51(2)(a)(iii) as a person ***"having a connection with a trust"***.

(iv) This did not mean that JPM could be required to disclose any documents whatever that it had in relation to the Trust. The Court's jurisdiction was to be exercised in accordance with principle, and on the basis that B as a beneficiary had the right to seek disclosure of the documents held by JPM in connection with its fiduciary powers under the Trust.

(v) Having examined the list of documents of which B sought disclosure, the Court saw no need to exercise its supervisory powers to order disclosure from JPM. Much of the documentation could be, and had been, sought from the Trustee. As to the exercise of the fiduciary powers, there had been no suggestion that a protector be appointed; and although there had been discussion about JPM exercising its powers to remove the Trustee and appoint a new trustee, the issue had not been over whether JPM would be willing to do so but as to the tax consequences of such a step, and this issue had been dealt with in open correspondence.

(vi) Moreover the purposes for which disclosure was sought did not relate to the exercise of JPM's fiduciary powers: in the main they related to the Trust itself and should have been directed against the Trustee; in part they related to the explanations or representations given by JPM to B and to that extent constituted an attempt to obtain disclosure in advance of an action against JPM for misrepresentation and damages.

(vii) The Court therefore saw no reason to exercise its supervisory jurisdiction to order disclosure against JPM and discharged it from the re-amended representation.

The Commissioner's judgment on costs

12 The Commissioner gave a subsequent judgment on costs on 30 January 2013. In this judgment he decided as follows:–

(i) He noted that in accordance with the decision of this Court in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527 ("Alhamrani") a trustee is entitled to a full indemnity as a matter of statute (Article 26 of the Trusts Law), contract and the inherent jurisdiction of the Court; but that JPM was neither a trustee entitled under Article 26 nor had any right under the terms of the trust deed of either the Trust or the B Sub-Trust.

(ii) However he held that third parties who were not themselves trustees but had fiduciary functions in relation to a trust fund had an implied equitable right to an indemnity for costs incurred by them in the discharge of those fiduciary functions.

(iii) Although a settlor was not able to bring an application under Article 51 as of right, he could do so with leave of the Court. Faced with a demand for disclosure of the kind made by B, JPM could have sought the guidance of the Court as to the extent of its obligations as fiduciary to comply with that request, and the granting of leave would have been axiomatic.

(iv) The underlying principle was that a person exercising fiduciary powers could not be expected, absent a finding of misconduct, to meet the costs reasonably incurred by him in the exercise of those powers out of his personal assets, and therefore that the fiduciary's implied right to indemnity was to be equated to a trustee's right to reimbursement in full (subject to the right of the trustee and beneficiary to challenge the costs and expenses on the ground that they were unreasonably incurred or unreasonable in amount).

(v) That then raised the question whether the case was to be regarded as falling within the second or third categories described by Kekewich J in *Re Buckton* [1907] 2 Ch 406 ("Buckton"), which the Commissioner described as a difficult question to answer.

(vi) The Commissioner noted that in part the application for disclosure was an attempt to obtain pre-action disclosure; and that despite the Court's attempt to retain the administrative nature of the proceedings, it was clear that B was seeking disclosure so he could be advised as to his personal tax position, and so he could consider bringing a claim against JPM personally for damages. It was not immediately obvious why this could be regarded as being for the benefit of the trust estate.

(vii) However, B had extracted the hostile claims from the representation so that it was clear that he was invoking the supervisory jurisdiction of the Court pursuant to Article

51; and the issue between the parties was the extent of the obligations of a settlor owing fiduciary duties to make disclosure. The key point was that JPM was actioned in its capacity as a fiduciary, and it was as a fiduciary that it raised before the Court the issue of the extent of its obligations. It therefore incurred these costs in the discharge of its fiduciary functions.

(viii) The Commissioner therefore concluded that the issue of the extent of JPM's obligation as a fiduciary to make disclosure was a question which arose in the administration of the Trust and the B Sub-Trust and fell within the second category set out in *Buckton*, with the result that the costs of both parties should be payable out of the trust fund.

13 He therefore made the order already referred to above that the costs of JPM (on the trustee basis) and of B (on the indemnity basis) be paid out of the B Sub-Trust.

14 When giving leave to appeal he referred to the fact that he had acknowledged firstly the difficulties in distinguishing between the first and second categories on the one hand, and the third category on the other in the *Buckton* categories; and secondly that it was not immediately obvious that B's actions were for the benefit of the trust estate. He also commented:–

> ***"I am also conscious that although [B] does not seek to challenge my findings as to the principles to be applied in relation [to] a fiduciary's costs, this is a novel area, upon which the Court has not opined before and it would be helpful therefore for the trust industry to have the matter considered by the Court of Appeal."***

Principles in relation to appeals against discretionary decisions

15 It is not disputed that the re-amended representation was an application under Article 51. That means that in dealing with the costs of the proceedings, the Court was exercising its power under Article 53 of the Trusts Law, which provides as follows:–

> ***"The court may order the costs and expenses of and incidental to an application to the court under this Law to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit."***

This Article self-evidently confers a discretion on the Court, although one that has to be exercised in accordance with established principles.

16 The circumstances in which this Court can overturn the exercise of a discretion are limited. In *United Capital Corporation Ltd v Bender* [2006] JLR 269, Beloff JA, following the earlier Court of Appeal decision in *Abdel Rahman v Chase Bank (C.I.) Trust Co Ltd* [1984] JJ 127, referred to the 3 grounds set out by Lord Brandon in *The Abidin Daver* [1984] AC 398 at

420, namely where:–

> (i) the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised;
>
> (ii) he had taken into account matters which he ought not to have done, or had failed to take into account matters which he ought to have done; or
>
> (iii) his decision was plainly wrong.
>
> Beloff JA also cited the speech of Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191, from which a fourth ground can be derived, namely where
>
> (iv) there has been a change of circumstances since the order which would justify varying it.

17 In the present case there is no question of a change of circumstances since the order; and Advocate Pearmain, appearing for B, has made it clear that he does not in the main challenge the applicable principles as stated by the Commissioner in his judgment; but he does submit that the Commissioner misapplied those principles to the facts of the case, resulting in an erroneous decision.

Principles applicable to the costs of a fiduciary

18 Since Advocate Pearmain for the most part does not challenge the Commissioner's statement of principles, I can state the principles which I regard as applicable quite briefly. This is not intended to be a comprehensive statement of the principles applicable to all trust proceedings. Trust proceedings can take many forms ranging from the almost consensual application for directions to cases involving the most hostile allegations, and as the cases show it is not easy to formulate principles which can be safely applied to different types of case in all their diversity. I will therefore only seek to identify the principles which I consider to be relevant to the present appeal. I propose to set out my own analysis of the relevant principles before considering the particular points taken in the Grounds of Appeal advanced on behalf of B.

19 First, the starting point is the principles applicable to costs incurred by trustees. These were considered by this Court in *Alhamrani*: as the Commissioner said, a trustee has a right of indemnity which arises under statute (Article 26 of the Trusts Law), contract and the inherent jurisdiction. As appears from *Alhamrani*, this is *prima facie* a complete indemnity so that the trustee is not left to bear any part of the costs out of his own pocket, although it is always possible for a beneficiary to challenge costs as being unreasonably incurred or of an unreasonable amount.

20 The trustee's right to a complete indemnity can of course be lost if the trustee is guilty of

misconduct. Article 26(2) only entitles the trustee to reimburse himself for expenses ***"reasonably incurred in connection with the trust"*** and a trustee who has been found guilty of a breach of trust is likely to find that he has to bear personally the costs of unsuccessfully defending himself — although even then it does not automatically follow from a finding that a trustee has committed a breach of trust, however minor, that he will have to bear the costs: see the remarks of Sir George Jessel MR in *Turner v Hancock* (1882) 20 Ch D 303 at 305:–

> ***"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."***

This remains good law in England, and the same principles are applicable in Jersey: see *In re Esteem Settlement* [2000] JLR Notes 67A (Bailhache B) where the note of the judgment includes the following:–

"A trustee's contractual right to costs, including the costs of litigation, is only lost by misconduct, and not if he has fulfilled his duties or if he has committed an innocent breach of trust."

It is not necessary for the purposes of this appeal to explore this particular point further or to seek to define any more closely the circumstances in which a trustee might lose his right to an indemnity.

21 For present purposes what is significant is that a trustee's right to an indemnity may be lost through misconduct; but it is not lost through allegations of misconduct. If therefore the trustee is sued for breach of trust and the claim fails, the trustee is entitled to rely on his indemnity for the costs of defending himself: see *re Spurling's Will Trusts* [1966] 1 WLR 920, *Armitage v Nurse* [1998] Ch 241 at 263. This is so even though the litigation is, as it is likely to be, of the most hostile character and even though the trustee in defending his own conduct is acting primarily, or indeed solely, for his own benefit.

22 It should not be overlooked that this question of the trustee's indemnity is quite distinct from the question of what costs should be made *inter partes*. If a beneficiary sues a trustee for breach of trust and fails, the Court will be likely in the exercise of its discretion over the costs of litigation to order the unsuccessful beneficiary to pay costs to the successful trustee. If the circumstances warrant it, this may be on the indemnity basis, but in many cases it may only be on the standard basis; even if ordered on the indemnity basis, this may not provide a complete indemnity, and in any event the beneficiary may not be able to pay. None of this affects the right of the trustee to his indemnity out of the fund, so that he is entitled to reimburse himself for any costs incurred that he does not in fact recover from the other party. If therefore a beneficiary who fails in a claim against a trustee is ordered to pay costs on the standard basis to the trustee, the trustee can still reimburse himself the difference between costs recovered from the beneficiary and his actual costs (so long as not unreasonable) out of the fund. A clear example of the principle is given in *re Spurling's Will Trusts* where the plaintiffs were legally aided and the order that could be made against them was limited to what it would be reasonable for them to pay; this did not affect the

trustee's right to his indemnity out of the fund even though the plaintiffs had become absolutely entitled to it.

23 Second, although JPM is not a trustee, it is a person with functions in relation to the Trust which are fiduciary. I agree with the Commissioner (at paragraph [17] of his judgment on costs) that such a person is entitled to an implied equitable indemnity in respect of costs reasonably incurred by it in the discharge of such functions: see Lewin on Trusts (18th edn, 2008) § 21–31. Advocate Pearmain before us accepted that the Commissioner was right so to hold. The Commissioner said (at paragraph [20] of his judgment on costs):–

> ***"The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets.*** The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation under Rule 12/3 of the Royal Court Rules 2004."

I entirely agree, and since there is no dispute as to the principle, it is unnecessary to say more.

24 Third, I agree with the Commissioner that the proceedings brought by B against JPM were brought against JPM in its capacity as a person with fiduciary powers in relation to the Trust (and the B Sub-Trust). The representation was brought under Article 51; the jurisdiction that was invoked was the Court's supervisory jurisdiction over trusts; and the issues that were argued in the substantive hearing were which of JPM's powers were fiduciary powers, and what obligations of disclosure JPM was under in connection with those powers. As the Commissioner put it (at paragraph [27] of his judgment on costs):

> ***"the Settlor was actioned in its capacity as a fiduciary and it was as a fiduciary that it raised before the Court the issue of the extent of its obligations.*** It therefore incurred these costs in the discharge of its fiduciary functions."

Again I agree; and the contrary argument is to my mind unsustainable.

25 Advocate Pearmain accepted before us that the application was brought under Article 51; that the application was brought on the basis that because B was a beneficiary and JPM was a person exercising fiduciary powers, JPM owed duties of disclosure to B; and that the argument put forward by Advocate Hoy (who appeared below for B) was to the effect that JPM's fiduciary obligations obliged it in effect to run a parallel office to the Trustee so as to keep itself fully informed as to the administration of the Trust (as recorded at paragraph [37] of the judgment of the Royal Court of 28 June 2012). However he emphasised in his submission to us that JPM had a much more extensive role in relation to the Trust than a mere third party with fiduciary powers, being not only the settlor who had established the Trust in the first place but also B's employer. He said that the reason JPM had established

the Trust was to enable it to attract highly talented individuals to work for it, and that therefore it had its own interests in relation to it that went far beyond the interest that for example a protector might have.

26 All this is true, but JPM was not brought before the Court in its capacity as the person who had established the Trust in the first place, or as B's employer. It was brought before the Court as a person with fiduciary powers in relation to the Trust. That seems to me to be determinative of the capacity in which it was involved in the proceedings and put to the cost of defending them. I do not think this question (was JPM being actioned in its capacity as a fiduciary?) should be confused with the separate questions (i) whether the proceedings were hostile or not; and (ii) whether in resisting the proceedings JPM was acting primarily in its own interests.

27 It follows in my judgment that unless JPM was guilty of any misconduct it was entitled to an indemnity out of the trust fund for the costs reasonably incurred in the proceedings. It has not been found guilty of any misconduct; its position in the proceedings was entirely vindicated and no order was made against it; and it was discharged from the proceedings. In these circumstances I can see no error of principle in the Commissioner's decision that it should have its costs out of the fund on the full indemnity basis applicable to a trustee. Indeed this seems to me the only possible order consistent with the principles which he had correctly identified, and far from being plainly wrong was in my judgment indisputably right.

The principles in Buckton

28 Why then did the Commissioner say that he found it a difficult decision? The answer I think lies in the principles laid down by Kekewich J in *Buckton*. These principles have often been cited and are rightly regarded as still providing valuable guidance today on the exercise of the Court's discretion over costs in trust proceedings. They have been endorsed as applicable in Jersey by this Court in *Trilogy Management Ltd v YT Charitable Foundation (International) Ltd* [2012] JCA 204, and very recently applied by the Bailiff in *Capita Trustees v RS* [2013] JRC 123. But like every other statement of principle found in a judgment, they are not to be construed like a statute and have to be read in context.

29 It may be worth setting out what Kekewich J said in full. What he said (at 414f) was as follows:–

> ***"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."

The particular case was one where there was a question of construction arising under a will. On one view the plaintiff took a life interest in certain property; on the other he took an estate in tail male (which, since the entail had been purportedly barred, would in effect mean he acquired a fee simple estate). On either view he was entitled to present possession of the estate. The trustees had not brought proceedings (as there was no immediate need to resolve the point), but the plaintiff wished to establish that he took an estate tail under the will rather than a mere life estate so as to clear up any doubt over his title. He therefore brought the matter into court, joining those who would be entitled if he took a life estate, and successfully established his title. It was therefore either a category (2)

or a category (3) case; and although Kekewich J had initially thought it was hostile litigation, having heard it he decided it was really designed to clear up a doubtful title and more akin to a category (2) case. He therefore ordered the costs of all parties out of the estate.

30 It can be seen that Kekewich J does not say anything about the trustees' right of indemnity, or indeed very much about the costs of the trustees at all. In the case before him there does not appear to have been any argument about the trustees' costs — the question was whether those in whose interest it was to argue that the plaintiff only took a life interest, who had been joined for that purpose, and who had unsuccessfully resisted the plaintiff's claim, should have their costs out of the estate; or be made to pay the plaintiff's costs; or at least bear their own. The principles that Kekewich J laid down are therefore (as the Bailiff correctly said in *Capita Trustees Ltd v RS* at [23]) principles as to the costs of beneficiaries; and in particular as to when they can have their costs out of the estate despite not succeeding in their argument. The answer Kekewich J gave is that if trustees think it right to bring a matter before the Court, the beneficiaries get their costs out of the estate (a category (1) case); whereas if beneficiary A brings a claim joining beneficiary B to argue the other side, the Court has to decide if this is really analogous to a trustees' summons (a category (2) case) in which case the same applies; or hostile litigation between rival claimants (a category (3) case) in which case the losing claimant pays the costs of the winning one. It seems plain to me that in describing hostile litigation as a category (3) case, Kekewich J had in mind claims between rival claimants to the fund or part of it. He was not dealing at all with hostile claims against trustees.

31 In my judgment there is nothing in *Buckton* which affects the principle by which trustees are entitled (by statute, contract and under the inherent jurisdiction of the Court) to an indemnity for costs reasonably incurred, which can only be lost by misconduct being established. Since I have accepted above that persons exercising fiduciary functions are entitled to a similar indemnity in equity for costs reasonably incurred in relation to their fiduciary functions, it follows that there is nothing in *Buckton* which affects their right to an indemnity either.

32 The reason why the Commissioner found the question of costs difficult is because he approached it by asking if this were a *Buckton* category (2) case or a *Buckton* category (3) case. As Kekewich J says, this can often be a difficult question because where beneficiary A initiates proceedings against beneficiary B, the form is the same in both cases although the substance is different. What distinguishes the two cases is really the degree to which the case is one of administration — resolving some question of construction or administration which arises in the course of carrying out the trusts and needs to be resolved — or is hostile litigation. Since in the present case the proceedings brought by B, although in form raising a question of administration, were plainly intended as a precursor to hostile claims against JPM and the Trustee, one can see why, if the critical question is how hostile the proceedings are, the Commissioner did not find that entirely easy to answer.

33 But for the reasons I have given, I do not think that is the question that needs to be answered. It is not necessary, at any rate for resolving the question of JPM's entitlement to costs out of the fund, to attempt to decide how hostile the claim is, with a view to shoehorning the case into either category (2) or category (3); and I do not think category (3) is in any event really an appropriate characterisation of a case where a beneficiary is making a claim not against another beneficiary or rival claimant but against the trustee or other person alleged to be liable in respect of fiduciary functions. In such a case it does not matter whether the claim is, in form or substance, administrative or hostile: the trustee or fiduciary is prima facie entitled to his indemnity, and can only lose it by misconduct.

34 Thus the question in fact litigated in these proceedings (was JPM under a duty to disclose documents to B?) could have been raised in a number of different ways:–

(i) It could, as the Commissioner rightly said, have been raised by JPM itself bringing an application under Article 51. This would have required leave, but I agree with the Commissioner that the granting of leave would have been axiomatic: a fiduciary faced with a demand that it is advised is or may be ill-founded and where the law is unclear must in all normal circumstances be entitled to seek the guidance of the Court as to what its fiduciary duties require of it. This would have been analogous to a *Buckton* category (1) case, and the costs of both parties would no doubt have come out of the fund.

(ii) It could, as in fact was the case, have been raised by B invoking the Court's supervisory jurisdiction under Article 51. Such a case may well be a *Buckton* category (2) case, or analogous to one, where although the beneficiary is the one who initiates proceedings, the issue is one which requires resolution. Or as Kekewich J put it:–

> ***"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"***

Save that JPM is not a trustee but a person with fiduciary functions, this would be an apt description of the present case if the question was one which required resolution.

(iii) But the same issue could have been raised by B issuing proceedings for breach of duty against JPM in failing to make disclosure, and claiming compensation for the breach. Such a claim would have been openly hostile, but this would not matter so far as JPM's costs are concerned. As I have sought to explain above, if the claim had failed, JPM would still be entitled to its indemnity.

35 So it does not matter, so far as JPM's right to an indemnity is concerned, whether the proceedings are analogous to a *Buckton* category (2) case or are openly hostile. It may make a difference so far as B's position is concerned, as it may affect the question whether he should have his costs out of the fund, be left to bear his own costs, or ordered to pay JPM's costs (and if so should this be on the standard or indemnity basis). This is a point I

revert to below. But this does not affect the principle that in the absence of misconduct, which has not been established here, JPM is entitled to an order giving it a complete indemnity out of the fund.

Grounds of appeal: Grounds 1(i) and 2(i).

36 Having set out what I consider to be the correct principles, I can now consider the particular grounds of appeal put forward on behalf of B. Not all of these were addressed by Advocate Pearmain in his oral submissions to us, but they were all argued in the written contentions prepared by Advocate Hoy.

37 Grounds 1(i) and 2(i) can be taken together. Ground 1(i) is that the Commissioner erred by treating this as a *Buckton* category (2) case whereas he ought to have held that it was a category (3) case. For reasons already given, I do not think this question is the real question so far as affects JPM's right to costs.

38 It was submitted that the Commissioner misdirected himself at paragraph [28] of his judgment by holding that simply because it was brought by a beneficiary the case automatically came under category (2). This is not a fair reading of the judgment. What the Commissioner said at paragraph [28] was:–

> ***"I conclude therefore that the issue of the extent of the Settlor's obligation as a fiduciary to make disclosure to B as a beneficiary was a question which arose in the administration of the Trust and the B Sub-Trust and it was for the benefit of the trust estate that the issue be determined.*** Because it was brought before the Court by a beneficiary, it fell within the second category set out in the case of Buckton."

The first sentence here is the Commissioner's conclusion based on what he had said in the preceding paragraphs, most particularly in paragraph [27] where he had said that the key point was that JPM had been actioned in its capacity as a fiduciary. These paragraphs cannot be read as suggesting that the Commissioner thought that simply because the claim was brought by a beneficiary it was a category (2) case, nor, if the Commissioner had really thought this, would he have explained why he found it difficult to decide whether it was a category (2) or (3) case. All that I read him as saying in the second sentence quoted above is that having concluded that the nature of the case was an administrative one, it was therefore a category (2) case (having been brought by the beneficiary as opposed to the fiduciary which would have made it a category (1) case).

39 Ground 2(i) is that the Commissioner failed to consider whether the representation was in substance brought for the benefit of B rather than the trust fund or the beneficiaries as a whole.

40 It was submitted that the dividing line between *Buckton* categories (1) and (2) on the one

hand and *Buckton* category (3) on the other was whether the proceedings proffered any benefit to the trust. It was said that In the present case the proceedings initially contained openly hostile claims, and although these were removed by amendment, there remained a request for very wide ranging disclosure; and the purpose for which B was seeking that disclosure was (as the Commissioner said at paragraph [26] of the costs judgment) so that he could be advised on his personal tax position and so that he could consider bringing a claim against JPM for damages. It was submitted that JPM's defence of the proceedings was a defence mechanism to fend off possible future claims in misrepresentation and therefore essentially self-serving.

41 I accept that B was motivated in bringing the proceedings not by a desire to benefit the trust but to advance his own interests; and equally that JPM in defending what it saw (correctly as it turned out) as an unjustified request for disclosure was acting in its own interests. I also accept that it is not immediately obvious what benefit the other beneficiaries of the B Sub-Trust derived from the proceedings, although it is possible that they might benefit if tax could be saved. But for reasons I have given none of these points seems to me to affect the fact that JPM was only having to face the proceedings by virtue of its capacity as a fiduciary in relation to the trust, and as such, absent misconduct, had a right to be indemnified out of the fund in the same way that a trustee who in his own interests successfully defends a claim for breach of trust is entitled.

42 Where I think the question of benefit to the trust is potentially relevant is in deciding what order should be made in respect of the beneficiary's liability for costs. Where a trustee brings a claim (a *Buckton* category (1) case) it is usually because the trustee is facing some difficulty of construction or administration which needs resolution. The trustee may need to know on what trusts he holds the fund, or what the scope of his powers or duties is, or whether some proposed action is a proper course to take, or require some other guidance from the Court. In all such cases, the reason that the proceedings are regarded as for the benefit of the trust (and hence “the costs of all parties as necessarily incurred for the benefit of the estate” as Kekewich J says) is that there is a question which needs to be resolved in order for the trust to be properly administered. This is why, as Lewin says (at § 21–79), a trustee is at risk as to costs if he commences a construction claim (or I may add any other application seeking the Court's directions) unnecessarily. If there is really nothing on which the Court's directions need to be obtained, the proceedings are unnecessary and the costs do not need to be incurred. But where trustees initiate proceedings, almost inevitably on advice, the Court is very ready to accept that they have only done so because they considered that there was a point which needed resolution: see Kekewich J's remarks about extending the fullest possible protection to trustees. This remains the practice in my experience, and rightly so. It is in general better if there is a real doubt arising in the course of the administration of a trust that it is put before the Court than that decisions of doubtful validity are taken which might have to be argued over later; and the Court therefore encourages trustees faced with difficulties to apply for directions rather than proceed on a basis which might turn out to be mistaken.

43 Where however it is not trustees who bring proceedings but a beneficiary, it by no means

follows that the proceedings were necessary (and hence for the benefit of the fund) in this sense. If it is a point which needs to be resolved sooner or later, then it does not matter that it is the beneficiary who starts the proceedings: this is *Buckton* category (2). *Buckton* itself was a case of that type: the will contained a difficulty of construction that would have had to be resolved eventually, at the latest on the plaintiff's death, and if the plaintiff had not brought the proceedings when he did, the trustees would no doubt have felt compelled to do so at that point. But in other cases when a beneficiary brings a claim, it is not necessary in this sense at all. If the beneficiary brings a claim for his own purposes and it fails, the Court may well take the view that the proceedings would never have been brought unless the beneficiary wrongly conceived that he had some claim: this is ordinary hostile litigation in *Buckton* category (3), and the beneficiary who has brought the proceedings unnecessarily could not in such a case normally expect to recover his costs out of the fund.

44 I would only add that it should not be assumed that simply because a beneficiary has an interest in an issue being resolved in a particular way, it necessarily takes the case out of category (2) and into category (3). As the Bailiff said in *Capita Trustees Ltd v RS* (at [27]), it will often, and probably usually, be the case that a beneficiary puts forward a stance that he considers will be to his benefit; this does not of itself take the matter outside category (2), as indeed *Buckton* itself illustrates.

45 As I have sought to explain, classifying a case as *Buckton* category (2) or (3) does not affect the right of the trustee, unless found guilty of misconduct, to an indemnity out of the fund, but it does affect the position of the beneficiaries — both those who bring the claim and those who resist it. In the present case the effect of the Commissioner classifying the case as *Buckton* category (2) was therefore to entitle B, despite failing in his application for disclosure, to costs on the indemnity basis out of the fund.

46 Normally therefore it is the unsuccessful beneficiary who seeks to argue that the application was necessary and in the interests of the fund, so as to enable him to avoid having to pay the other parties' costs, and to claim his own costs out of the fund. One might therefore have expected B to have taken this position, and to be content with the order in respect of his own position that the Commissioner made. Paradoxically however it is B who argues that this case was not a necessary one, but fought for self-serving purposes and hence within *Buckton* category (3). The logical corollary of this is that instead of having his costs out of the fund, he should be ordered to pay JPM's costs personally, and this is indeed what he seeks in his Notice of Appeal.

47 However in the course of the hearing it became clear that the real question at issue between the parties is whether the Commissioner was right to order that JPM should be indemnified out of the fund (specifically the B Sub-Trust). If he were not, it was not disputed that JPM should have his costs against B personally, although there remained an issue as to whether this would in that eventuality be on the standard or indemnity basis. If however, as I have suggested above, the Commissioner's order in respect of JPM is upheld, there was in the end really no argument between the parties as to what B's position would be.

48 In that case JPM would not seek an order against B, but would understandably be content with the order that has been made: it will no doubt be easier for JPM to claim reimbursement from the fund than to enforce a costs order against B. Advocate Pearmain's final position on behalf of B was that although logically he was willing to submit to an order that he pay JPM's costs, there was no need for this Court to disturb the Commissioner's order giving him his costs out of the fund. If B did not want to take his own costs out of the fund, he was not obliged to; equally if he wanted to pay JPM its costs personally (so as to reduce JPM's claim on the fund) he could do that without an order. In those circumstances there was nothing left for the Court to decide.

49 That seems to me a sensible way forward. I should add that the persons who are in fact affected by B not being ordered to pay costs but instead being entitled to have his own costs out of the fund, are the other beneficiaries of the B Sub-Trust. Strictly speaking I think it would have been preferable for their interests to be protected on the hearing as to costs: see by way of analogy Lewin at § 21–98, to which we were helpfully referred by Advocate Pearmain, where the editors suggest that where there is a question of the trustee's indemnity which potentially affects beneficiaries who are not parties to the action, this should be determined after giving notice to those beneficiaries. In the present case, the interests of the other beneficiaries could in theory have been protected in this way; or no doubt by the Trustee, which, although not concerned in the hearing of this part of the proceedings, remains a party to the representation and has a general role to protect the fund in the interests of all the beneficiaries. In practice however the other beneficiaries are members of B's family and it is very doubtful if their interests really diverge from those of B.

50 It follows, if the other members of the Court agree with me that we should not overturn the Commissioner's order in relation to JPM's costs, that the parties are content for his order as to B's costs also to stand. That makes it unnecessary to resolve whether for these purposes the Commissioner was right to classify the case as *Buckton* category (2). I will therefore just briefly say that I understand why he found this a difficult decision. On the one hand, the proceedings were in form administrative; all the hostile claims had been deliberately removed from the proceedings; and the proceedings raised a question as to the scope of JPM's duties as a fiduciary which, as the Commissioner said, JPM could itself have raised. On the other hand, I accept the submission made on behalf of B that regard has to be had to the substance as well as the form of the proceedings (see *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 at [71]); there is no doubt that B brought the proceedings for his own benefit in an attempt to obtain what was in effect pre-trial disclosure with a view to bringing hostile claims against JPM and/or the Trustee; and it is doubtful that there would have been any need for the proceedings if B had not initiated them. I think in the light of these considerations that there would have been much to be said for the view that the case was not really one within *Buckton* category (2) and that B should have been left to bear his own costs, if not pay JPM's. But as I have said in the particular circumstances of this case it is not necessary to resolve this as it does not affect the propriety of the order that JPM should have its costs out of the fund; and we are not in that event asked to overturn the order that B should also have his costs out of the fund.

Ground 1(ii)

51 Ground 1(ii) criticises the Commissioner for disregarding the dicta in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220. It is said that he should have regarded the proceedings as falling within the category of a *"beneficiaries' dispute"* and that the costs should therefore have been determined by the principles applicable to ordinary hostile litigation.

52 *Alsop Wilkinson v Neary* was a case where a firm of solicitors, who had obtained judgment for substantial sums against a former partner who had misappropriated money from the firm, sought to set aside two settlements made by him for the benefit of himself and his family on the grounds that they were transactions intended to put assets beyond the reach of creditors. The question was whether the trustees of the settlements should be at liberty to defend the proceedings and have their costs of doing so out of the assets of the settlements whatever the outcome. This is a long way removed from the present case.

53 In the course of his judgment Lightman J said this:–

> ***"Trustees may be involved in three kinds of dispute.*** (1) The first (which I shall call "a trust dispute") is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be "friendly" litigation involving e.g. the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or "hostile" litigation e.g. a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw: see In *re Buckton* ; *Buckton v. Buckton* [1907] 2 Ch. 406. (2) ***The second (which I shall call "a beneficiaries dispute") is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future.*** This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and /or damages for breach of trust. (3) The third (which I shall call "a third party dispute") is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities e.g. in contract or tort assumed by the trustees as such in the course of administration of the trust."

On this classification the case before him was a *"trust dispute"* and he went on to consider the proper role of trustees in relation to a trust dispute where there was a challenge to the whole settlement.

54 He did not need to, and did not, spend any time considering the role of trustees in relation to a beneficiaries' dispute but did briefly say this:–

> ***"A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see per Hoffmann L.J. in*** *McDonald v. Horn* [1995] I.C.R. 685, 696 . ***"***

55 *McDonald v Horn* was a different type of case again. The question in that case was whether members of a pension scheme, who had commenced proceedings for breach of trust against the trustee of the scheme, could obtain a pre-emptive order entitling them to costs out of the scheme assets whether they won or lost. In the course of his judgment Hoffmann LJ summarised the 3 *Buckton* categories as follows:–

> ***"First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration.*** In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund. Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first. Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event."

It can be seen that Hoffmann LJ included in *Buckton* category (3) a hostile claim brought by a beneficiary against a trustee as well as against another beneficiary. As I have said above, I do not myself read Kekewich J's judgment as saying anything very much about trustees' costs and do not myself think he had in mind a claim of this type. He was dealing with summonses adjourned into Court (in other words applications invoking the Court's supervisory jurisdiction, similar to applications in Jersey under Article 51), and not with claims for breach of trust, which would at that date have been commenced by writ (as the claim in *McDonald v Horn* itself had been).

56 Be that as it may, Hoffmann LJ was clearly right to say that where a beneficiary makes a hostile claim against a trustee, it is treated in the same way as common law litigation and costs usually follow the event. If a beneficiary successfully sues a trustee for breach of trust, the trustee will normally both be ordered to pay the beneficiary's costs and have to bear his own personally; if the beneficiary fails in his allegations, he will normally be ordered to pay the trustee's costs.

57 But as I have already explained this only deals with the costs as between the parties. If a trustee is unsuccessfully sued for breach of trust, he is entitled to a full indemnity out of the fund; and can therefore reimburse himself the difference between the costs he recovers from the unsuccessful beneficiary and his actual costs (so long as not unreasonably incurred or unreasonable in amount). There is no reason to think that Hoffmann LJ, who would certainly have been well aware that this was the case, intended to cast any doubt on it: he was not concerned with the trustees' right of indemnity, but with the beneficiaries'

costs. The unusual feature of *McDonald v Horn* was that the plaintiffs, who were beneficiaries, were seeking (and indeed obtained) in hostile litigation against the trustees an order in advance assuring them their costs out of the fund whether they won or lost. The trustees' right to costs out of the fund if the claim failed was simply not in issue.

58 I can now revert to what Lightman J said in *Alsop Wilkinson v Neary*. His brief comment about the costs in a beneficiaries' dispute following the event is simply a cross-reference to what Hoffmann LJ had said. Hoffmann LJ, as we have seen, was himself dealing with the case where the beneficiary was making a hostile claim against the trustees, and I do not read Lightman J as saying any more than that in such a case the costs as between the parties follow the event. I very much doubt he intended to say anything else, and like Hoffmann LJ, I have no doubt that he was well aware of the right of a trustee who successfully defends such a claim to an indemnity out of the fund for any shortfall in costs recovered, and do not suppose that he intended to cast any doubt on it.

59 It is true that he had earlier defined his category of beneficiaries' dispute as including one where there is a dispute with a beneficiary as to the propriety of some act that the trustees had taken or might take in the future; and that it is not difficult to characterise the present case as one where B disputed the propriety of JPM's act in refusing to give disclosure. But to argue that this means that Lightman J would have regarded the current case as one where the costs follow the event is in my judgment to fall into the error of taking his words out of context and seeking to construe them like a statute rather than trying to understand the principles. He was not concerned with a case like the present where there is a disagreement (to use a more neutral word) between a beneficiary and a fiduciary as to what the fiduciaries' duties require, and where the Court is asked to resolve that disagreement on an application under Article 51 invoking its supervisory powers. It is a mistake to regard the dicta in his judgment on the costs of beneficiaries' disputes as mandating any particular outcome in such a case. In my judgment the Commissioner fell into no error in this respect.

Ground 1(iii)

60 Ground 1(iii) is that the Commissioner was wrong to place reliance on the proposition that JPM could itself have brought proceedings. It is said that this consideration had no legal bearing on JPM's right to receive an indemnity out of the fund.

61 So far as JPM's right of indemnity is concerned, I have already said that in my view what entitles JPM to the indemnity is the fact that it has been put to expense in connection with its functions as a fiduciary in relation to the trust, and that it does not matter that it did not initiate the proceedings.

62 On the other hand, the fact that JPM could have brought the matter before the Court would have been potentially relevant (although not determinative) to the question whether the case were a *Buckton* category (2) case or category (3) case for the purpose of resolving B's

position. As it is, for reasons already given, this does not need to be decided.

Grounds 2(ii) and 2(iii)

63 Ground 2(ii) is that the Commissioner placed undue weight on the fact that B was required to re-amend his Representation so as to bring it under the auspices of Article 51. It is said that that was the only option open to B to pursue what was in effect an application for pre-action disclosure.

64 For reasons already given this does not in my judgment affect JPM's right to its costs out of the fund.

65 Ground 2(iii) is that the Commissioner failed to find, as he ought to have done, that any fiduciary role on the part of JPM necessitated by the Representation was *de minimis* and in no way pertained to any administrative role concerning the trust within the context of the Representation.

66 The question as to whether JPM's fiduciary role was very limited, or even *de minimis*, seems to me beside the point. The foundation of the application was the fact that it was a person with fiduciary powers; however limited those powers were, the costs were incurred in connection with that role.

Ground 1(iv)

67 Ground 1(iv) is a general conclusion that the Commissioner was wrong to order JPM's costs to be paid out of the B Sub-Trust when it ought to have ordered them to be paid by B personally.

68 I have already given reasons why I do not agree.

Conclusion

69 I would dismiss this appeal.

Beloff JA

70 I agree.

Logan Martin JA

71 I agree.