# Trilogy Management v YT and Others 09-Nov-12

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| **Jurisdiction:** | Jersey |
| **Judge:** | McNeill JA |
| **Judgment Date:** | 09 November 2012 |
| **Neutral Citation:** | [2012] JCA 204 |
| **Reported In:** | [2012] JCA 204 |
| **Court:** | Court of Appeal |
| **Date:** | 09 November 2012 |



**Text**

[2012] JCA 204

COURT OF APPEAL

Before:

J. W. McNeill, **Q.C., President**, C. Montgomery, **Q.C., and** C. Nugee, **Q.C.**

Trilogy Management Limited
Representor
and
(1) YT Charitable Foundation (International) Limited
(2) HM Attorney General
(3) OM – LC2 Charitable Foundation International
(4) The Empowerment Charitable Trust
(5) The Saving Grace Charitable Trust
(6) OM – VC Charitable Foundation
(7) The Well Trust
(8) Mrs C

Respondents

**Advocate** S. M. Baker **for the Representor**.

**Advocate** J. P. Speck **for the First Respondent**.

**Advocate** N. F. Journeaux **for the Eighth Respondent**.

**The other Respondents did not appear and were not represented.**

**Authorities**

*Trilogy Management v YT and Others* [2012] JCA 152.

*Sheikh Fahad Ali M. Alhamrani v J P Morgan Trust Company (Jersey) Limited* [2007] JLR 527.

Trusts (Jersey) Law 1984.

*Sheikh Fahad Ali M. Alhamrani v J P Morgan Trust Company (Jersey) Limited* [2007] JCA 198.

Civil Proceedings (Jersey) Law 1956.

*In Re Esteem Settlement* [2000] JLR Notes 67a.

*Buckton v Buckton* [1907] Ch D 406.

*Abdel Rahman v Chase Bank* [1990] JLR 136.

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

Lewin on Trusts (18th edn).

*Sinel Trust (Nominees) Limited v Rothfield Investments Limited* [2003] JCA 048.

Court of Appeal (Jersey) Law 1961.

*FG Hemisphere Associates LLC v DRC and Gecamines* [2011] JLR 486.

*Daily Telegraph Newspaper Company v McLaughlin* [1984] AC 776.

Trust — judgment on consequential applications following judgment of the Court of Appeal dated 28 August 2012.

McNeill JA

1 We have before us various ancillary applications bearing to be made consequent upon the judgment of this court of 28 August 2012. That judgment determined a single issue arising out of a judgment of the Royal Court given on 10 May 2012 as to the proper construction of Article 96 of the Articles of Association of JY, a company closely associated with the trust in respect of which this litigation arises. In that decision we agreed with the arguments presented on behalf of the appellant, Mrs C. But we endorsed the views expressed by the Royal Court that, as all assets subject to the litigation were destined for charitable purposes, the family should be urged to put litigation behind them and either avoid or restrict the depletion of assets through litigation costs. We remain of that view. We turn now to deal with the various issues put before us.

2 This judgment should be read together with our judgment of 28 August 2012 on the substantive appeal, and we will use the same expressions as there defined.

**Costs**

3 Whilst the applications and responses before us indicate near unanimity on the issue of costs, there are two principal reasons for explaining our decision in greater detail: albeit as succinctly as clarity allows. The first is that, as appears from the end of the judgment of the Royal Court, this litigation is incurring very significant legal and accountancy costs which will deplete the monies intended ultimately for charitable causes. The second is that a further stage has been reached in trust litigation in Jersey, where it is appropriate for this Court to confirm certain other proper approaches to costs so that both those involved in trust litigation may be clear as to that approach and, consequently, that necessary submissions on the law as to costs can be kept to a minimum.

4 On the submissions presented to us the appellant (Mrs C) and the only appearing respondent, a trustee company associated with three of the eight family sub-trusts (Trilogy) are agreed that the costs both of the appellant and of Trilogy of and incidental to the Appeal should be paid by YT as trustee of the Foundation YT out of the assets of the Foundation on an indemnity basis. There is before us a response from YT indicating that it considered that this would be a not inappropriate order.

5 YT, as corporate trustee, had been forced to adopt a neutral position both before the Royal Court and before this Court as its board was split on the issues and its Articles required the Board to act unanimously. This position gives rise to a supplementary issue as to whether YT should be entitled to an award of costs.

6 The issue with which the appeal before us was concerned was as to the proper construction of Article 96 of the Articles of Association of JY. In our opinion it is proper to characterise that issue as a question relating to the administration of the trust; JY is of course not itself a charity or a trust but a company but it was established as a means of providing funds for the Foundation, and the correct operation of Article 96 is of considerable significance to the operation of the Foundation and the eight sub-trusts.

7 There is no determination of costs in respect of the proceedings below and there are no applications before us regarding costs in respect of the proceedings below which gave rise to the particular matter under appeal. The Royal Court had not heard applications for these costs, having ordered that the issue of costs be adjourned to a date to be fixed. In any event, a considerable part of the proceedings below dealt with matters not the subject of the present appeal.

8 Consideration of the proper incidence of costs in proceedings brought in relation to the construction of a trust instrument and the administration of trusts has required only sporadic consideration in the courts of this jurisdiction. However, various decisions in the *Alhamrani* litigation, referred to below, have indicated the approaches to be adopted.

9 As can be seen from the decision of this Court in *Sheikh Fahad Ali M. Alhamrani v J P Morgan Trust Company (Jersey) Limited* [2007] JLR 527, especially at paragraphs 68 and 69, the following is the general position for a trustee involved in pleadings dealing with the administration of trusts. A neutral trustee (that is acting in his capacity as trustee and not defending or advancing his own personal interests) is entitled to an indemnity from the trust fund in relation to all costs and expenses reasonably incurred. This arises from statute, contract and inherent jurisdiction and an express order to that effect is unnecessary. However, where costs or expenses have not been reasonably incurred or the trustee has acted in breach of trust or duty, the Court may, in appropriate cases, displace or override that general principle by ordering that the neutral trustee is not entitled to those costs or expenses. Nothing in this principle is to be regarded as allowing the trustee carte blanche to use the trust fund for the payment of legal, professional or other fees, costs or expenses in an unreasonable, improper, immoderate or disproportionate way. The use of the word ***"reimburse"*** in Article 26(2) of the Trusts (Jersey) Law 1984 means full reimbursement or indemnity: see paragraph 44.

10 *In a consequential decision* [2007] JCA 198 this Court explained that whilst a trustee had a right to be indemnified out of the trust fund in respect of all costs reasonably incurred, the position of a beneficiary of a trust is quite different and, if an award of costs was to be made in favour of a beneficiary in respect of trust proceedings, it will be pursuant to the power conferred by Article 53 of the Trusts (Jersey) Law 1984 which gives the Court discretion to order payment of such costs and expenses to be made out of the trust property or to be borne and paid in such manner and by such persons as the court thinks fit. Reference was also made there to Article 2 of the Civil Proceedings (Jersey) Law 1956: see paragraphs 4 and 5. Accordingly, as regards beneficiaries, an order may be made that costs are exigible on the indemnity basis provided for in Part 12 of the Royal Court Rules; but recognising that taxation on that basis would not necessarily result in reimbursement.

11 In part of the *Re Esteem* litigation, the Royal Court observed that, in the absence of evidence of misconduct, both the trustee and all parties convened to an application concerning a trust were entitled to have their costs paid out of the trust fund: see *In Re*

*Esteem Settlement* [2000] JLR Notes 67a. However, that determination does not appear to have given detailed consideration to the question of whether, and in what circumstances, beneficiaries and other parties would be entitled to costs on the indemnity basis.

12 In an older decision from England and Wales, Kekewich J gave detailed consideration to the practice with regard to costs in trust administration applications: see *Buckton v Buckton* [1907] Ch D 406. That approach appears to have been accepted by the Royal Court in *Abdel Rahman v Chase Bank* [1990] JLR 136, 149, lines 13 – 30 (Tomes, DB). The decision in *In Re Buckton* is still to be considered the appropriate general statement in England and Wales: see *Singapore Airlines Limited v Buck Consultants Limited* [2011] EWCA Civ 1542, especially at paragraph 71 (Arden LJ).

13 Under the approach of Kekewich J, where applications are made by reason of difficulties in construction or administration, and without adversarial considerations, 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. In such cases the costs of all parties are directed to be taxed as between solicitor and client and paid out of the estate. This may be seen as the equivalent of the indemnity basis.

14 The principles in *In Re Buckton* apply to proceedings at first instance. It does not necessarily follow that similar principles apply to appellate proceedings. Where there is a difficulty of construction or administration, proceedings at first instance may be regarded as necessary for the administration of the trust, and the costs of all parties regarded as necessarily incurred for the benefit of the estate, whatever the outcome. But it does not follow that an appeal is also necessary, and a trustee or beneficiary who appeals a decision does so at his or her own risk as to costs: if the appeal is unsuccessful, the unsuccessful appellant may well not receive costs out of the estate and may indeed be ordered to pay costs: see Lewin on Trusts (18 th edn) §21–84. On the other hand if an appeal succeeds, the costs incurred by the successful appellant can be seen to have been necessarily incurred in order to obtain the correct administration of the trust and a successful appellant, whether trustee or beneficiary, will normally therefore receive his costs out of the fund: see ibid. The costs of other parties to the appeal, even if unsuccessful, may also in such a case be regarded as incurred for the benefit of the estate (see ibid .) although we would caution against an assumption that it is always appropriate for the costs of unsuccessful respondents to be met out of the estate.

15 Apart from the decision in *Abdel Rahman* there appears to be no consideration of these particular issues in the courts in this jurisdiction. Whilst in *Sinel Trust (Nominees) Limited v Rothfield Investments Limited* [2003] JCA 048, the court allowed a successful appellant trustee (as well as two of the respondents to the appeal) to have costs from the trust fund on the indemnity basis, it appears that that entitlement arose by contract: see direction viii on page 13.

16 In our view, as indicated by this Court in the *Alhamrani decision* [2007] JCA 198, the

position in relation to beneficiaries and others is dealt with under the discretionary powers of the Trusts (Jersey) Law 1984 and the Civil Proceedings (Jersey) Law 1956. In the present day, the courts in this jurisdiction are the location for some of the most intricate and advanced trust litigation in the world and we do not consider it appropriate to set down, as an appellate court, a prescriptive matrix to be operated by the Royal Court, attempting to cover all potentially envisaged circumstances. That said, the present case is of potential importance both in that there has been no determination in the Royal Court (for the reasons set out above) and, also, that costs borne by the trust estate will ultimately be borne by the charitable objects of the various sub-trusts. The following, therefore, are our determinations on those issues and the reasons for them.

17 In the first place, Mrs. C, as successful appellant should be entitled to her costs in accordance with the principles referred to above. Whilst, as explained in the decision of this Court of 28 August 2012, the participation of Mrs. C in these proceedings is an unusual one, and whilst the issue under appeal was one of construction in relation to Article 96 of the Articles of Association of JY, we consider it correct that these proceedings before us can accurately be characterised as proceedings necessary in respect of the proper administration of the trust. Mrs. C's position is not an adversarial one in that she stands to gain no material benefit from successful contentions in the litigation. Rather, the board of the corporate trustee YT, being split on the issues before the Court, and YT's articles requiring the board to act unanimously, Mrs. C presented, in effect, the alternative arguments to those put forward by Trilogy. In our opinion it is appropriate that Mrs. C, having succeeded in her appeal, be entitled to her reasonable costs, on the indemnity basis, from the Foundation. This is accepted by Trilogy. YT takes the position that the costs of Mrs. C be met from the Foundation but leaves it to the Court whether or not they should be paid on the standard or indemnity basis. We will therefore order accordingly.

18 As regards Trilogy's costs it appears that Mrs. C and YT are agreed that Trilogy's costs should be met from the trust fund. Mrs C accepts that although Trilogy lost on the appeal it would be unfair for it to be saddled with the costs of the appeal. YT's position is that the question whether the costs should be paid on the standard or indemnity basis is one for this Court; but it does not oppose costs on an indemnity basis. Having agreed that the appropriate characterisation of the question before us was one arising in respect of the proper administration of the trust, and that it was reasonable for Trilogy to seek to uphold the decision of the Royal Court, it again seems to us that the position of Trilogy was not an ordinary adversarial one of seeking to gain an advantage but, rather, that some form of advantage might have flowed to Trilogy had we found in its favour. We therefore consider it appropriate for Trilogy to have its costs, on the indemnity basis, from the trust funds held by YT.

19 YT maintains that it is entitled to its own costs. Whilst Trilogy has accepted that Mrs. C should receive her costs of the appeal on an indemnity basis, they contend that there should be only one set of costs paid out of the trust fund. They maintain that YT should have responded in the hearing below and taken the decision as to how properly to respond in any appeal. It had maintained a neutral stance below but in proceedings before us was

unable to participate in these proceedings and was granted leave by us to withdraw.

20 As indicated in the *Alhamrani* decisions referred to above, trustees are entitled to recovery of their costs, reasonably and properly incurred: and the present is not a situation in which we would consider that there was any basis to preclude that result. In any event, on 13 June 2012 Advocate Speck for YT wrote to the Assistant Judicial Greffier explaining the position of YT as regards the appeal, indicating that he would not be in a position to participate actively, would not be able to file pleadings or contentions, nor be able to advance formal oral submissions. Quite properly, he indicated that he remained at the disposal of the Court of Appeal to attend the hearing and, insofar as he was properly able to do so in the absence of instructions, to deal with any questions which there might be for the trustee. Whilst actual costs might be an issue at taxation, we consider that, in principle, YT's position was the proper one to take. In the circumstances outlined by Advocate Speck in his letter, we would anticipate YT's costs in relation to the appeal to be minimal and, in any event, not to result in a duplication of effort with Mrs. C.

**Paragraph 62 of the Judgment of 28 August 2012**

21 In her submissions consequential upon our earlier judgment, Mrs. C asked this Court to consider amending paragraph 62 of the judgment by deleting the words ***"which they can do by a simple majority"***. Mrs. C contended in those submissions that a unanimous resolution would be required, that the point had neither been argued nor been an issue focussed in the Appeal, that the point was not a necessary part of the Court's reasoning and that it would be misleading for the words in question to remain in the judgment.

22 In response, Trilogy pointed out that the issue as to unanimity or majority vote was dealt with by the Royal Court in paragraph 140 of its judgment, that no criticism of that part of the judgment had been made, nor had application been made to amend the Royal Court judgment. The Court of Appeal was bound to act on the basis that paragraph 140 of the judgment below was accurate. No party had proposed this alternate construction of Article 96 until Mrs. C's written submissions filed on 20 September 2012.

23 We have also received a request from PC, one of the sons of OM and a director of YT, for leave to file submissions on this issue. Given that (i) the issue is a minor one which is not part of our substantive decision but an ancillary matter; (ii) we already have submissions from both Mrs C and Trilogy on the issue; (iii) PC is not a party to the appeal; and (iv) if we permit him to make submissions we are asked to receive counter submissions, we do not think it either necessary or appropriate to hear from PC. We therefore refuse such leave and have taken no account of the submissions which PC would wish to make.

24 We agree with the submissions for Trilogy. For this Court to make a determination in respect of the matter of construction, the issue would have to be before the Court in the Appeal itself, either raised by one of the parties or raised with the parties by the Court of its own motion. This did not happen. It follows that we have neither heard argument on the

point nor purported to decide a point which was not raised as an issue before us. But we see nothing inappropriate in what we have said in paragraph 62 of the judgment, nor do we regard it as in any way misleading, And although we have not decided anything, and this Court cannot deal with the point as an ancillary matter said to be consequent on the terms of the principal judgment, we are not persuaded that there is a real difficulty of construction, nor do we wish to give any encouragement to the parties to think that there is here an issue which requires to be resolved in further proceedings.

25 We will therefore leave paragraph 62 of our main judgment as it stands.

**Leave to Appeal**

26 Trilogy seeks leave of this Court to appeal to the Judicial Committee of the Privy Council. On this application we have been furnished with detailed contentions and counter contentions in respect of the right of appeal, the meaning of ***"decision"*** in Article 14 of the Court of Appeal (Jersey) Law 1961, the appropriate test for leave to appeal and the approach in other jurisdictions. Trilogy maintains that it has an appeal with reasonable prospects of success and has set out some twelve grounds of appeal.

27 We are grateful to the parties for their detailed consideration of these issues and, in the circumstances of the present case, can express our views shortly.

28 The parties are agreed that there is jurisdiction for this Court to grant leave in respect that our decision is a ***"decision"*** which Article 14 of the 1961 Law applies. Notwithstanding the singular nature of the proceedings before this Court, we agree.

29 Article 14, as it presently stands, is expressed in very general terms and clearly allows a wide degree of discretion to this Court as to whether or not to grant an application.

30 In the recent litigation in these courts in *FG Hemisphere Associates LLC v DRC and Gecamines* [2011] JLR 486, a differently constituted Court of Appeal was asked to consider an application for leave to appeal with specific reference to the decision in *Daily Telegraph Newspaper Company v McLaughlin* [1984] AC 776 where the Privy Council gave consideration as to the practice which it would adopt in respect of the granting of special leave. When granting leave in respect of one of the FG Hemisphere appeals this Court noted the Daily Telegraph decision, indicated that it did not intend to set out a prescriptive test to be followed by this Court and observed that the matter was one which really had to be approached on a case by case basis.

31 As we have set out above, we agree that the proper characterisation of the matter before us is as a question arising in respect of the proper administration of a trust established under and in terms of the law of Jersey. In addition, JY is a company incorporated under and by virtue of the Laws of this jurisdiction. Trust litigation is often necessary: it is always

expensive. Where an issue properly arises as to the appropriate administration of the trust and as part of friendly as opposed to adversarial litigation, the main weight of the costs incurred by parties will be borne by the trust and, in consequence, by its beneficiaries. Where such litigation has to take place it should ordinarily be perfectly sufficient for parties to accept the determination of this appellate Court. For our part we consider that it would only be in exceptional circumstances that we would burden the trust funds with the additional costs of litigation before the Judicial Committee. On this basis we discern no compelling reason to grant leave to appeal and the application is refused.

**Associated and Further Orders**

32 Trilogy also asks that this Court should order that costs be paid from accumulated profit and not out of the profit which will fall within the mandatory dividend provision of Article 96. To order otherwise, it is said, would be unfair: if the costs are treated as reducing the profit for 2012, the Trilogy Sub-trusts and the other five charitable sub-trusts will in practice be paying the costs of the proceedings in circumstances where it was wholly appropriate for the matter to be brought to the attention of the Court. The costs should be treated as expenses to be borne out of the profit retained for discretionary dividend as a result of the decision of the Court of Appeal and should not diminish the sums available for dividend under Article 96 in the current year.

33 There is no counter motion. However we are not persuaded that it would be appropriate to make the order sought.

34 We accept that the Court has power under Article 53 of the Trusts (Jersey) Law 1984 to order costs to be ***"borne and paid in such manner … as it thinks fit"*** and that this enables the Court to makes orders as to the incidence of costs that are to be paid out of a fund. We do not doubt that in an appropriate case this would enable the Court to direct that costs should be borne by particular assets held by a trust, or particular sub-funds of a trust.

35 But the difficulty we feel is that Trilogy's application is not, as we understand it, of that character. We have little information about the Foundation's assets but it has not been suggested to us that the Foundation has any assets other than its shareholdings in JY (namely 99% of the issued A shares and all the issued B shares); and what Trilogy refers to as *"accumulated profit"* and *"profit retained for discretionary dividend"* is, as we understand it, a reference to the amounts retained as profits by JY and which are available for dividend over and above the mandatory dividend required by Article 96. These are not assets owned by the Foundation as such; to state the obvious, they are assets owned by JY, not by JY's shareholder. We do not think the Court can properly require the costs which are to be paid out of the Foundation's assets to be borne directly by JY.

36 In order for YT as trustee of the Foundation to pay the costs it will therefore need to raise the money by exercising its rights as shareholder. These include asking the directors of JY to declare a sufficient dividend. The directors are obliged by Article 96 to declare a dividend

up to the level of mandatory dividend required by that article; but whether they declare any further dividend is, under the constitution of JY, a matter for them. We do not see that YT as shareholder has any right to require them to do so, although in practice the same individuals are directors of YT and JY so it is to be expected that JY will act as YT requires.

37 On analysis therefore what Trilogy is really asking the Court to do, as we understand it, is to require the directors of JY to declare a sufficient dividend to YT, over and above the mandatory dividend required by Article 96, to meet the costs of the litigation. Whether or not the Court technically has the power to do this (which we rather doubt) we do not consider it appropriate to intervene in the relationship between YT, JY and its directors in this way.

38 We are also informed by the parties that there is agreement between Trilogy, YT and the Appellant that this Court should make orders formally to correct the relevant provisions of the Act of the Royal Court of 10 May 2012 under appeal [1/12/49–52] by making:

> (i) a declaration that paragraph A(III) of the Act of the Royal Court of 10 May 2012 be replaced by a declaration (i) that for the year of account ending 31st December 2005 JY incurred a loss of $2.1million (ii) that JY has already distributed profits for the year of $16 million and (iii) that no mandatory dividend is due for 2005 under Article 96 of JY's Articles of Association; and
>
> (ii) an order that paragraph B(iii) of the Act of Court of 10 May 2012 be set aside.

39 These latter applications appear not to be controversial and we will so order.