Abacus (C.I.) Ltd, trustee of the Esteem Settlement and the Number 52 Trust v Sheikh Fahad Mohammed Al Sabah

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	12 March 2002
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Text

[2002] JRC 60

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, **and** Jurats de Veulle, **and** Georgelin.

In the Matter of a settlement made on 21st August 1981 between Sheikh Fahad Mohammed Al Sabah and Abacus (CI) Limited ("The Esteem Settlement")

And in the Matter of a settlement made on 24th August 1992 between Sheikh Fahad Mohammed Al Sabah and Abacus (CI) Limited ("The Number 52 Trust")

Between
Abacus (C.I.) Limited, trustee of the Esteem Settlement and the Number 52 Trust

The Trustee

and

Grupo Torras SA
Plaintiff
and
Sheikh Fahad Mohammed Al Sabah
First Defendant

and

Barbara Alison Al Sabah
Second Defendant

and

Mishal Roger Al Sabah
Third Defendant

and

Advocate Michael St. John O'Connell, representative of the minor and unborn beneficiaries of the Esteem settlement and the Number 52 Trust
Fourth Defendant

and

Advocate Michael St. John O'Connell, representative of any person who may in the future be the spouse or former spouse of any child or remoter issue of the first defendant
Fifth Defendant

and

Ceyla Establishment
Sixth Defendant

and

Esteem Limited
Seventh Defendant

Advocate J. A. Clyde-Smith **for Abacus (CI) Limited and for the Sixth and Seventh Defendants**

Advocate N.F. Journeaux **for the Plaintiff**

The First Defendant did not appear and was not represented

Advocate N.M. Santos-Costa **for the Second and Third Defendants**

The Fourth and Fifth Defendants did not appear and were not represented

Authorities

Mendonca v Le Boutillier (1997) JLR 142.

Brady v Stapleton (1952) 88 CLR 322.

Re Elgindata [1992] 1 WLR 1207.

Re Elgindata Ltd (No 2) [1993] 1 All ER 232 CA.

AEI Rediffusion v Phonographic Performance [1999] 1 WLR 1507.

Perry v Stopher [1959] 1 WLR 415.

Alsop Wilkinson v Neary [1996] 1 WLR 1220.

Sim v Thomas (2001) JLR 460.

Olcott Investments Limited v Mark Amy Limited and Viscount of the Royal Court (1998) JLR 62 CA.

Rahman v Chase Bank Limited (CI) Trust Company Ltd and Five Others (1990) JLR 136.

In Re Buckton [1907] 2 Ch 406.

The Digest of Justinian, (edited by Alan Watson) Vol IV, Book 42.

Planiol & Ripert (1938) Vol 2, Part 1, pp. 178–196.

Jacques Ghestin: Traité de droit civil, (3e edition) (2001), paras. 844, 846 & 855.

Planiol & Ripert: Traité pratique de droit civil français, (1931), paras. 228–279.

Aubry et Rau: Cours de droit civil français, (1902), pp.216–243.

Henri Bailhache: Droit Romain de l'action paulienne, [Thesis] (1875).

Virginia Law Review: “Fraudulent Conveyances at Roman Law” (December 1931).

Dalloz: (1860) Titre — Obligations: Chapter 6, section 3, Tome 33: pp.229–240.

Poingdestre: (1660) Les Lois et Coûtumes de L'Ile de Jersey pp.205–213.

Bankruptcy Act 1966: s. 121.

Oficial Trustee in Bankruptcy v Alvaro (1966) 483 FCA 1.

Vezier v Bellego (1994) JLR 75.

Judgment on the claim to profits in a Pauline action and to costs arising out of the Judgments delivered in the Royal Court in this action on 17th January and 11th March, 2002.

Deputy Bailiff

THE

1 We must now consider the question of who is entitled to profits earned on an asset alienated in fraud of creditors, but subsequently recovered pursuant to a Pauline action.

2 As described in the main judgment, following the sale of the farms in 1996, Ceyla loaned the net proceeds of sale to Abacus as trustee of the Esteem Settlement. The Settlement was of course the owner of the founder's rights of Ceyla. The loan was interest free. Certain of the assets loaned were placed on deposit by Abacus in accordance with a direction from the Court. The remainder were placed on deposit or invested by Abacus. It would appear that most if not all of the income arising, other than on the fixed deposit ordered by the Court, has since been spent on legal fees incurred in these proceedings.

3 The gift of the founder's rights in Ceyla having been set aside, GT argues that it should receive the interest earned by Abacus on the moneys loaned interest free from Ceyla to Abacus from the date upon which the loan was made. GT asks for the taking of an account in this respect.

4 Mr Journeaux accepts that the weight of authority is against him but submits that the texts in question are not binding on us and we should not follow them. In particular, we should hold that it is unfair that an innocent recipient should be able to keep the fruits of the thing given in fraud of creditors at the expense of the victim. Alternatively, he argues that the Court has an inherent power to award interest against those who are in a fiduciary position and he submits that we should treat the innocent recipient in a Pauline action as being in a fiduciary position towards the creditor who has been defrauded.

5 We deal first with two preliminary points taken by the defendants. First, they say that GT cannot raise this claim as it has not been pleaded. It is true that the pleadings do not specifically allude to this particular category of interest but they do make clear that GT will be seeking interest upon any sums recovered. Furthermore, paragraph 144 of GT's original skeleton argument filed before the hearing in October, 2001, outlined its claim to interest in this respect. We do not think that any prejudice is caused to the defendants. There is no reason for them to have been taken by surprise and we see no reason why GT should not advance its claim for interest on the Ceyla loan.

6 Secondly, the defendants argue that the assets transferred in fraud of creditors were the founder's rights in Ceyla. No income has arisen on those founder's rights; accordingly there are no fruits, as that expression is used by the commentators, of the thing which has been alienated in fraud of creditors. It is true that the normal way of receiving the profits from a corporate entity is by way of dividend paid to the shareholder, but if, instead of paying a dividend, the corporate entity lends all its assets interest free to its shareholder so that the shareholder earns and keeps the profit on the company's assets that would normally have been earned by the company itself, we think that that is equivalent to the shareholder receiving the fruits or profit derived from ownership of the company.

7 This, of course, only applies where the company's assets are applied in this way for the benefit of the shareholder rather than a third party. It is clear from the various writers on the Pauline action that the creditor must take the thing alienated in the condition in which he finds it upon its return. So, if the assets of Ceyla had been poorly invested, and had declined in value, that is tough luck on the creditor. Similarly, if Abacus had chosen to cause Ceyla to leave all its assets on current account at the bank, so that no interest was earned, the creditor would have no claim for the interest that ought to have been earned. But in our judgment the position in this case is different. In reality, Abacus has received the benefit of the income earned on the assets of Ceyla and the position is equivalent to a dividend or distribution having been paid on the founder's rights.

8 We must therefore turn to the question of whether a creditor in a Pauline action is entitled to the fruits of the thing alienated whilst the thing is in the hands of an innocent recipient who is a volunteer. The writers are consistent in saying, that subject possibly to two exceptions, he is not.

9 We refer first to Digest of Justinian (translated by Watson) where it is said as follows in connection with the Pauline action at book 42 at 8.25.4:

> ***"Restoration requires return of not only what was alienated but also, if it be land, of the produce growing in the land at the time of the alienation, because they passed in fraud of creditors, as well as that gathered after proceedings have commenced.*** Produce taken in the interim is not subject to restoration. Similarly, a child born in the interim to a slave woman alienated in ***fraud does not have to be handed over, for it was not part of the debtor's estate.*** Proculus says that if the woman conceived after her alienation and gave birth before proceedings began, there is no doubt that the child is not to be handed over; but if she was already pregnant when alienated, it may be said that the child, too, is to be restored. Labeo says that he is not wholly clear on produce growing on the land, whether that the praetor means only that which is already ripe or also that the unripe is included. But even if it be only that which is ripe, this would not add to the obligation to restore the land. For when land is alienated, all pertaining to it and its produce constitute one thing, the land and, whatever the form of its alienation, its produce goes with it" .

10 It would appear therefore that fruits in existence at the time of the alienation may be claimed by the creditor, as may fruits earned after litigation to set aside the alienation is commenced. But all fruits earned between these two dates remain with the recipient.

11 This view of Roman law is consistent with the understanding of Henri Bailhache who, writing in 1875, on Droit Romain de l'action paulienne said this at pages 48 to 49:-

> ***"Des difficultés sérieuses se sont élevées au sujet de la restitution des fruits.*** Elles naissent du conflict de la loi 10,§ 20, et de la loi 25, § 4. Nous devons, avant d'aborder cette difficulté, rappeler le principe qui régissait, en droit romain, la restitution des fruits. Le possesseur de bonne foi n'était tenu que de restituer les fruits par lui perçus depuis la litis contestatio, sans qu'il y eût à examiner si ceux qu'il avait perdus (Judge's note: This would appear to be a misprint for 'perçus) avant cette époque avaient été consommés par lui et ne se trouvaient pas encore existants à ce moment. Quant au possesseur de mauvaise foi, l'obligation dont il était tenu était plus rigoureuse et comprenait, outre les fruits perçus depuis la litis contestatio, non-seulement ceux qu'il avait perçus avant, mais encore ceux qu'il avait négligé de percevoir."
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> ***Quant aux fruits perçus depuis la litis contestatio, les principes généraux s'appliquant en matière d'action Paulienne.*** Bien plus, le possesseur même de bonne foi est obligé de comprendre, dans sa restitution, les fruits "Qui alienationis tempore terris cohaerebant," parce que ces fruits étaient alors in bonis debitoris. C'est ce que décide la loi. 1.25, § 4 h. t. Mais que dire quant aux fruits qui, dans l'époque intermédiaire entre l'aliénation et l'introduction de l'instance, ont été produits par le fonds et perçus par le possesseur? La méme, 1.5 § 4, prévoyant cette hypothèse, décide qu'ils ne pourront être exigés du défendeur: "Medio autem tempore perceptos in restitutione non venire." Certes, nous comprenons cette décision quant aux ***possesseurs de bonne foi, pour lesquels notre texte a déjà apporté une dérogation aux principes généraux, dérogation que semble critiquer Labéon, dans un passage rapporté un peu plus bas, par Venuleius.*** (L25, § 6.) .
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> ***Ce jurisconsulte fait, en effet, remarquer que, si un fonds valant cent, en hiver, vaut cent dix lors de la moisson ou des vendanges, il ne faut pas cependant voir là deux choses distinctes, le fonds qui vaut cent et les fruits qui valent dix, mais bien une seule chose, le fonds qui vaut cent"*** .

12 French law is to the same effect save that it is unclear whether an exception still exists for fruits arising after the litigation has commenced. Thus Dalloz Titre 4, Chapter 6, Section 3, Article 3, 1014, said this:-

> ***"Dans les cas où l'action en révocation peut être intentée, ou peut produire quelque effet à son ègard, le possesseur de bonne foi, évincé par l'action révocatoire, ne serait pas tenu de restituer les fruits perçus durant sa jouissance (V. MM.*** Toullier, t. 6, no. 354; Proudhon, de l'Usufruit, no. 2360;

Rolland de Villargues, v° Fraude, no 20). Mais le tiers aquéreur de mauvaise foi est tenu de les restituer" .

13 Aubry et Rau: Cours de droit civil francais, (1902) at page 234 have this to say:-

> ***"Quoique l'action paulienne, dirigée contre un acte d'aliénation, diffère essentiellement de la revendication, quant à son fondement et quant à son objet, elle est cependant, en ce qui concerne les fruits perçus par le défendeur, les améliorations qu'il a faites, ou les dégradations qu'il a commises, régie par des règles analogues à celles qui sont admises en matière de revendication.*** C'est ainsi que ce dernier est tenu de faire état des fruits qu'il a recueillis,à moins qu'il ne les ait perçus de bonne foi" .

14 Planiol & Ripert: Traité Pratique de Droit Civil Français in a passage already cited at paragraph 316 of the main judgment, which we will repeat for convenience, expresses the matter in the following way at paragraph 962 on page 267:-

> ***"L'acquéreur à titre gratuit au contraire, lorsqu'il est de bonne foi, n'est tenu que dans la mesure de son enrichissement, tel qu'il subsiste, lorsque la demande est introduite contre lui.*** Il ne répond pas de la perte ou des dégradations survenues à la chose, même par son fait; il garde les fruits déjà ***perçus et a droit au remboursement intégral de ses impenses; s'il a vendu la chose, il ne doit restituer que le prix qu'il a touché."***

15 Finally there is a statement to the effect that Jersey law is consistent with this approach. At page 211 of his Les Lois et Coûtumes de L'Ile de Jersey, Poingdestre states in connection with the Pauline action as follows:

> ***"Et de la aussy s'ensuit que puisque le contract est valable de Droict, jusques à Reuocation, l'Acquisiteur cependant demeure proprietaire & fait les fruicts siens"*** .

16 There is, therefore, an unbroken line of commentary to the effect that the innocent recipient does not have to account for the profits earned whilst he is the owner of the thing which has been alienated, at any rate prior to commencement of proceedings. Mr Journeaux contends that a rule such as that described is unfair and unprincipled; why should a volunteer receive a windfall profit from assets which should never have been transferred to him and for which he has given no value. The profits earned should be accounted for to the creditor who is out of pocket. The court should not follow these authorities.

17 The defendants argued that there was an underlying principle to the rule; namely that title of the thing alienated by the debtor had passed to the recipient. Unless and until he was deprived of that title by order of the court setting aside the alienation, the recipient was entitled to the fruits of the thing which he owned. The position was analogous to that

considered in *Mendonca v Le Boutillier* (1997) JLR 142 where the court held in reliance inter alia upon the principles expounded by Pothier (Traité du Contrat de Vente (1830 ed): para 326 at 363), that a transferee, who acted in good faith in accepting movable property from a transferor who did not have good title did acquire the right to receive any income or benefits from that movable property arising in the meantime, without having to account for them to the owner.

18 The defendants argued that if that rule applied to a transferee who did not have any title to the property, albeit that he thought he did, it must apply a fortiori to a person in the position of a recipient in a Pauline action who does have good title until the court sets his title aside. In other words the rule in the Pauline action was consistent with the approach in other areas.

19 Mr Journeaux argued that any injustice to the recipient in having to account for profits could be avoided by allowing him a change of position defence. However, as we have described in the main judgment, this requires the recipient to have incurred expenditure in a way that he would not have done but for receipt of the profits. It would often be difficult for a recipient, who no longer has the profit in his hands, to show that he changed his position rather than just spent the money in the ordinary way. The evidential difficulties are likely to be greater for him in the case of a modest stream of income than in respect of a one-off substantial capital payment; yet he might suffer financial hardship if called upon to repay the aggregate income all at once. It may be that considerations of this nature also underlay the decisions of Roman law and French law not to require the innocent recipient to account for profits earned.

20 In essence Mr Journeaux invited the Court to depart from Roman law, French law and Jersey law, as outlined by Poingdestre, on the grounds that it would be fairer to make the recipient account for the fruits subject to a change of position defence.

21 We accept that the customary law may be developed in order to suit the requirements of a modern community. But this must be done in accordance with the underlying principles. The Court cannot change a long established rule simply because the members of the particular Court may consider that some other rule would be fairer. The Pauline action at Jersey law has its roots in the civil law and in the light of the overwhelming evidence of the position at Roman, Jersey and French law that we have described, we do not think it is open to us to introduce a wholly new rule to the effect that an innocent recipient is liable to account for profits earned during his period of ownership of the thing transferred subject only to a change of position defence.

22 As an alternative argument, Mr Journeaux sought to rely on the passage from Justinian which states that crops in existence at the time of an alienation of land are to be accounted for to the creditor on the basis that they formed part of the thing alienated. From the further example given by Justinian of the pregnant slave girl, he drew the principle that it was only where some new act after the alienation had to be done in order to produce the fruits, e.g.

planting a new crop, conceiving a baby, that those fruits remained with the recipient. By contrast where cash or founder's rights were transferred no new act was required to earn the fruits.

23 We cannot accept this argument for two reasons. First we do not think that Justinian was laying down any such principle as contended for by Mr Journeaux. There is nothing in the text to suggest that he was and it does not seem to have occurred to any of the subsequent commentators to whom we have referred that he was laying down such a principle. Secondly, even if the principle does exist, we do not agree that, in the case of assets such as cash, shares, etc. the recipient does not have to do anything to earn the fruits. On the contrary it is the recipient who decides whether to place the cash on deposit and if so at what rate and for how long or how the assets of the company are to be invested, thereby determining the amounts which will become available as fruits.

24 As a further alternative, Mr Journeaux argued that the Court had an inherent equitable jurisdiction to award interest where money has been withheld or misapplied by a person in a fiduciary position. As with all equitable principles it should be applied to soften the rigours of a rule of law; in this case, the rule that we have described earlier concerning the application of fruits.

25 We have to say that we are quite unable to categorise an innocent transferee, who has no relationship with the creditor and who, by definition, is wholly unaware of the fact that he is not the owner of the asset transferred and therefore free to deal with it as he pleases, as owing fiduciary duties to that creditor, whose very existence he is unlikely to be aware of. Accordingly, we reject that argument.

26 However, it is clear from Justinian and the extract from Bailhache that, at Roman law, the position changed upon the issue of the proceedings to recover the asset which had been alienated in fraud of creditors. The creditor, if successful in setting aside the transfer, was entitled to fruits earned after the litigation started. It is true that Dalloz and Aubry et Rau, in the passages we have cited above, make no mention of this exception to the general rule concerning fruits; nor does Poingdestre. However, it is fair to say that all of these commentators dealt with the whole issue of fruits extremely briefly.

27 The extract from Planiol & Ripert, on the other hand, suggests that French law may be in accordance with the old Roman law. The text refers to the state of the recipient's enrichment “lorsque la demande est introduite contre lui”. This must refer to the initiation of proceedings. The passage then goes on to say that the recipient may keep the fruits “déjà perçus”. In the context this must relate back to the same time as considered earlier in the passage, namely at the institution of the proceedings. Accordingly Planiol & Ripert are saying that the fruits gathered before the creditor institutes legal proceedings may be kept by the recipient. They are silent as to what happens to subsequent fruits, but the natural inference would seem to be that the creditor may claim them.

28 Mr Santos-Costa argued that nothing changes as a result of the institution of legal proceedings. Unless and until the creditor is adjudged by the court to be successful, the asset belongs to the recipient and he is therefore entitled to its fruits. As an illustration of the fact that, even in modern times, this was an appropriate principle to apply, he referred to the position in Australia. The Bankruptcy Act 1966: s.121 provides that a disposition of property with an intent to defraud creditors is, if certain conditions are met, void. In the case of Official Trustee in *Bankrupcy v Alvaro* [1966] 483 FCA 1, the Federal Court of Australia had to consider who was entitled to interest earned on the monies fraudulently transferred. At page 56 the judgment had this to say:

> ***"Although s 121 states that a disposition to which it applies is void, the courts will treat the disposition as effective until impugned in proceedings brought by the trustee in bankruptcy.*** Thus, where there is a disposition of property to which s 121 of the Act applies, the title which the donee receives is a defeasible one. (See *Brady v Stapleton* (1952) 88 CLR 322 ***at 332–335 per Dixon CJ and Fullagar J*** ; *Harrods Limited v Stanton* (1923) 1 KB 516 ***at 520–521 per Bailhache J;521 per McCardie J. Until the title is defeased by the trustee in bankruptcy calling for delivery up or revesting of the property to the trustee or by instituting proceedings to establish the trustee's entitlement to the property, the donee may deal with the property as owner and is not required to account for any profit made.*** If the property is sold and the proceeds of sale dissipated by the donee prior to defeasance the donee is not personally liable for the value of the property (*Brady v Stapleton* ***at 332–335).*** Upon defeasance, if the property remains in its original form or in some derivative form in the hands of the donee, title to the property revests in the trustee in bankruptcy and the donee thereafter continues to hold the property as trustee for the trustee in bankruptcy and will be ordered to do all necessary acts to revest the property in the trustee in bankruptcy. Once the property is revested, the donee thereafter becomes personally liable to account for the property and any profits made by or from the use of that property since the time of revesting of the property. Thus, if the property comprises a money sum on deposit in a bank account earning interest the donee would not be liable for or be required to pay over interest earned prior to defeasance. On defeasance the beneficial interest in the chose in action being the debt owed by the bank to the donee equivalent to the amount of the money on deposit (*Croton v The Queen* ***at 330 – 331) would vest in the trustee in bankruptcy and the donee would be required to pay over or would be liable to the trustee for any interest earned from the date of defeasance"***.

29 We acknowledge the force of this principle. We can understand why it should apply with full vigour when the recipient believes himself to be the owner of the asset in question, free to do with it what he pleases and use the profits. However, it seems to us that the position changes once litigation is commenced by a creditor seeking to set aside the recipient's title. At that stage the recipient knows that his title is under attack. It behoves him to act cautiously before deciding to deal with the profits earned during that period. Indeed the passage from Alvaro cited above seems to equate defeasance with the bringing of

proceedings. We do not, however, think it would be right to hold that the creditor is entitled to the income during that period. Circumstances can vary enormously, and one can envisage cases where such a rule would cause hardship and injustice to the innocent recipient. But we think that the state of the authorities on this point, in particular the Roman law texts and Planiol et Ripert, enable us to hold that the Court has a discretion to award the fruits received after the start of litigation to the creditor if satisfied that the interests of justice so require.

30 Exercising our discretion, we see no reason why the income earned on the Ceyla loan account for the period after proceedings were commenced should not be paid to GT. Ceyla has been held to belong to GT and it is in the interests of justice that GT, as the defrauded creditor, should receive the income earned on the asset rather than the trustee. The question then arises of when the litigation commenced for these purposes.

31 The litigation in the 1999 action has proceeded in three stages. Initially GT brought a proprietary tracing claim and attacked the trusts on the basis of lifting the veil and other grounds. Later the claim was amended to attack certain gifts into the two trusts on the basis of a Pauline action. However, at that stage no claim was made in respect of the gift of the founder's rights in Ceyla. Such a claim was added only at a later stage.

32 Mr Journeaux argues that any amendment of a pleading, even by introducing a new claim, relates back to the date of the original institution of the proceedings. He referred us to *Vezier v Bellego* (1994) JLR 75, a decision given in the context of limitation periods. He argues that the relevant date, therefore, is not the date upon which the pleadings were amended to introduce the claim in respect of Ceyla, but rather the date upon which the 1999 action was commenced.

33 We do not think that the doctrine of relating back is relevant in this case. The reason for concluding that it is right for there to be a discretion in the allocation of profits earned from the thing transferred after the institution of proceedings is that the recipient is thereafter aware that he might not be the owner of the asset. Before then he is entitled to assume that he is the owner. It would be inconsistent with this principle to allow a creditor to relate matters back to a time before he made the claim in respect of the particular asset in question.

34 In our judgment, for the purpose of dealing with the profits of an asset transferred which is then the subject of a Pauline action, the relevant date is the date upon which the creditor first brought a claim to set aside the gift of that asset. In this case that is the date upon which the pleadings were amended to introduce the specific claim to set aside the gift of the Ceyla founder's rights.

35 Accordingly, we order that, if the sum in question cannot be agreed, an account should be taken before the Master of the Royal Court to ascertain the profits earned upon or derived

from the Ceyla loan account from the date, which we take it can be agreed by counsel, upon which the pleadings were amended to include a claim to the Ceyla founder's rights; the sum so found shall be paid by the trustee to GT.

36 We turn now to the question of costs which falls for decision by me alone. GT applies for costs on the standard basis against the defendants and for an order that the defendants pay the trustee's costs on a similar basis. The defendants on the other hand argue there should be no order for costs save that the trustee should be entitled to its costs on an indemnity basis out of the two trust funds.

37 The principles to be applied by the Court are those set out by Nourse LJ in *Re Elgindata No 2* (1993) 1 All ER 232 which was approved by the Court of Appeal in *Olcott Investments Limited v Mark Amy Limited* (1998) JLR 62. These principles are to be found at page 237 of Elgindata.

> ***(1) Costs are in the discretion of the court.*** (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rr 2(4), 3(3) and 10 respectively. The third depends on well established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs" .

38 Mr Journeaux argues that GT has essentially been successful. It brought three separate causes of action. The first was a proprietary tracing claim. It has been successful as the Court has held that it has a proprietary interest in 97 Dulwich Village and 242 Turney Road. The second is a claim in restitution as an alternative. The Court has held that GT would have succeeded in that if necessary. The third is the Pauline action. GT has succeeded in that to a substantial degree. The Court has held that there was an intention to defraud in respect of all the transfers except some income resettlements prior to March, 1990, and the sum of approximately £1.5 million paid as part of the £5,000,000 in March, 1990. It has succeeded fully in respect of the No. 52 Trust and the transfer of Ceyla. It has made a reasonable recovery in respect of the remaining gifts. In essence out of total assets in the two trusts approaching £11 $^{1}/_{4}$ million it has recovered approximately £5 million pursuant to the judgment.

39 He referred the Court to a Calderbank offer made by the defendants just before the trial

began. This offered £2.5 million plus payment of GT's costs. He submitted that if the defendants considered recovery of £2.5 million sufficient to justify GT recovering all its costs, the Court should consider a recovery of £5 million sufficient for that purpose. However Mr Santos-Costa argued that the letter should not be held against the defendants. It could not be right that the defendants should be in a worse position by making an unsuccessful Calderbank offer than if they had never made any offer at all. The Court should consider the question of costs without regard to the offer. We think that that must be right and accordingly we place no weight on the letter.

40 Mr Santos-Costa argued that GT had been unsuccessful in several respects: Thus:

> (i) In the proprietary claim GT had based its claim on a right to trace to the loan account between Esteem Settlement and Esteem Limited. The Court had found against GT on that aspect in trenchant terms. GT had succeeded on a very different basis to that relied upon, namely tracing to the underlying real property and improvements thereto. It had claimed £1,267,686 plus interest but had recovered only approximately £250,000.
>
> (ii) In the Pauline action GT had not only failed to prove the necessary intent to defraud in some cases but it had also essentially lost on the change of position argument in relation to the gift of £3.5 million in March, 1990, and the income resettlement gifts. This had taken up a large part of the hearing. In essence, in respect of the transfers to the Esteem Settlement (other than Ceyla), GT had claimed some £7.1 million but had recovered approximately £475,000.

41 Mr Santos-Costa submitted that the argument on the Esteem loan account in the proprietary claim fell within category (iv) of Nourse LJ's classification, so that GT should pay the defendants' costs in this respect. Category (iii) applied to the other issues upon which GT had been unsuccessful.

42 As a separate argument, Mr Santos-Costa referred to the fact that this was the trial of separate issues, namely the proprietary claim, the restitutionary claim and the Pauline action. These had been hived off from the remainder of the 1999 action at the request of GT (see the judgment of this Court 12th February, 2001, Jersey Unreported), largely on the basis that, if GT were successful on these issues, the trust funds would be exhausted and there would be no need for the trial of the remainder of the 1999 action with consequential saving of costs. He argued that events had shown this to be wrong as there were still assets of some £6 million left in the Esteem Settlement. I do not think that this is a relevant consideration. The Court decided after argument to order a separate trial of these issues. I do not think that GT should be penalised in relation to the outcome of this hearing merely because, as events have turned out, the trial of these issues has not necessarily put an end to the whole of the 1999 action.

43 I return therefore to the question of the costs of the trial of these preliminary issues. In my

judgment, this is not a case, such as a building dispute, where there are many wholly separate small items giving rise to a large claim. If the plaintiff succeeds in a few of these he will clearly only have succeeded to a modest extent and the costs will reflect this. Similarly, if, as in *Sim v Thomas* (9th October, 2001) Jersey Unreported, the plaintiff brings a claim based on two different causes of action and wholly fails on one of those causes of action, this, too, should be reflected in the costs order. But that is not the situation here. GT has succeeded on all three of its separate causes of action. It is true that it has not recovered as much as it originally claimed but it has undoubtedly succeeded in each of these causes of action. All of the arguments were about many different matters which went to make up the constituent elements of each cause of action. GT was not fully successful on all of these matters but I am satisfied that, taken in the round, GT has been successful to the extent that it should receive its costs. I do not consider, taking a broad view, that there are matters falling within (iii) or (iv) of Nourse LJ's categories which should lead me to deprive GT of any of its costs or order GT to pay any of the defendants' costs.

44 Accordingly I award GT its costs on the standard basis against the defendants.

45 As to the trustee's costs, it is entitled to an indemnity from the trust funds under an existing court order. The question is whether the defendants should be ordered to pay the trustee's costs on a standard basis so that only the difference between that and the indemnity basis will be borne by the trusts.

46 One has to bear in mind that it was the trustee who started these proceedings and the defendants were convened to them. The trustee has been directed to take a neutral stance on the issues leaving the defendants and GT to fight it out. In my judgment, the right course in this case is to leave the trustee to recover all of its costs from the trust funds. In relation to the Esteem Settlement this means that the trustee's fees will be borne ultimately by whomsoever is held to be the beneficial owner of the assets. That is usually the case where there is a dispute in relation to a fund such as this.

47 However, a specific issue arises in relation to the No. 52 Trust. By agreement between the parties, unless the Court orders otherwise, all the trustee's costs are to be apportioned between the two trusts so that the No 52 Trust bears 13.5% of these costs. This is on the basis of the value of the No. 52 Trust as compared with the Esteem Settlement. So if no other order is made, the No. 52 Trust will incur 13.5% of the trustee's costs in connection with the trial of these preliminary issues.

48 As the trust fund will all go to GT as a result of the Court's decision, this means that GT will indirectly bear all of these costs. In my judgment the costs of the case attributable to argument about the No 52 Trust were minimal. The question of whether the gift of £4 million in August, 1992, was made with intent to defraud was wrapped up very closely with the question of Sheikh Fahad's intention in relation to other gifts in 1992.

49 Furthermore, there was no argument on change of position. All parties agreed that GT should only recover what remained in the trust. In the circumstances I consider that it would be unreasonable for the No 52 Trust, and indirectly GT, to bear 13.5% of the costs when I consider that the time and effort attributed to the No. 52 Trust was very much less. Taking a broad view I consider that all the trustee's costs in relation to the trial of these preliminary issues should come out of the Esteem Settlement.

50 I make no order against the defendants in respect of the trustee's costs.