Jasmine Trustees Ltd v (1) L

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Birt
Judgment Date:	21 January 2016
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Court:	Royal Court

Text

[2016] JRC 16

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, sitting alone**

IN THE MATTER OF JASMINE TRUSTEES LIMITED

AND IN THE MATTER OF THE PIEDMONT TRUST

Jasmine Trustees Limited
Representor
and
(1) L
(2) M
(3) N

(4) O
(5) P
(6) Q
(7) R
(8) S
(9) Kairos Trustees (NZ) Limited
Respondents

IN THE MATTER OF JASMINE TRUSTEES LIMITED

AND IN THE MATTER OF THE RIVIERA TRUST

(1) Jasmine Trustees Limited
Representors
(2) Lutea Trustees Limited
Representors
and
(1) L
(2) M
(3) N
(4) O
(5) P
(6) Q
(7) R
(8) S
(9) Kairos Trustees (NZ) Limited
(10) T
(11) U
Respondents

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

Advocate A. Kistler **for the First Respondent**.

Advocate F. B. Robertson **for the Second Respondent**.

Advocate J. P. Speck **for the Third and Fourth Respondents**.

Authorities

Representation of Jasmine Trustees Limited [2015] JRC 196.

Re The JP Morgan 1998 Employee Trust, [2013] (2) JLR 235.

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

Re HHH Trust, [2013] (1) JLR 135.

MacKinnon v MacKinnon [2010] JLR 508.

Re Y Trust [2011] JRC 155A.

Re The V R Family Trust [2009] JLR 202.

Lewin on Trusts (19th Edition).

Re E, L, O and R Trusts [2008] JLR 360.

Alsop Wilkinson v Neary [1996] 1 WLR 1220.

In Re Buckton [1907] 2 Ch. 406.

Re the Dunlop Settlement [2013] JRC 123.

Trust — costs judgment.

THE COMMISSIONER:

1 This judgment deals with the costs of the proceedings which resulted in the judgment of the Court on 23rd September, 2015, *Representation of Jasmine Trustees Limited* [2015] JRC 196, ("the September judgment"). The effect of that judgment was to declare invalid the appointments of new trustees and of new protectors in relation to two trusts.

2 The detailed background to the proceedings is set out in the September judgment to which reference should be made as necessary. I propose therefore only to give a very brief summary of the position sufficient to explain the issues in relation to costs. I will use the same defined expressions and terminology as in the September judgment.

The proceedings

3 The proceedings related to two trusts, the P Trust and the R Trust ("the Trusts"). The P Trust is a discretionary trust. The current beneficiaries are the father, the elder son, the younger son, the daughter and their respective children; the elder son and the younger son each having three children and the daughter having one child.

4 The father was at all times the protector of the P Trust and Jasmine was the trustee from October 2008. By deed dated 31st January, 2014, the father purported to exercise his power as protector to remove Jasmine and appoint Kairos as trustee in its place.

5 The R Trust is also a discretionary trust of which the father is the protector and Jasmine and

Lutea were the trustees. The class of beneficiaries is the same as the P Trust with the addition of two other named individuals. On 31 st January, 2014, the father purported to exercise his power as protector to remove Jasmine and Lutea and to appoint Kairos as trustee in their place.

6 For the reasons set out at paragraphs 21–26 of the September judgment, Jasmine and Lutea were concerned as to the validity of the two appointments of Kairos and accordingly presented two representations (one in respect of each Trust) to the Court on 6 th May, 2014, seeking directions as to what if any action they should take in respect of their purported removal and the purported appointment of Kairos. The Court ordered that the various respondents to these two representations be convened.

7 The next significant event was on 16 th June, 2014, when the father, the elder son and the younger son executed a deed in relation to the R Trust whereby the father retired as protector and, pursuant to the relevant provisions of the trust deed, appointed the elder son and the younger son as protectors in his place.

8 On 7 th July, 2014, the father executed a letter retiring as protector of the P Trust. Under the terms of that Trust, the power to appoint a new protector in such circumstances rests with a majority of the adult beneficiaries of the Trust. On 8 th July, 2014, all the adult beneficiaries except the daughter (i.e. the father, the elder son, the younger son and the four adult children of the elder son and the younger son respectively) executed a deed appointing the elder son and the younger son as protectors of the P Trust.

9 On 11 th July, 2014, the daughter issued a summons in the existing proceedings instituted by Jasmine and Lutea seeking a declaration that the appointments of the elder son and the younger son as protectors of both the P Trust and the R Trust were invalid, alternatively that the Court should remove them as protectors.

10 In the September judgment, the Court considered first the validity of the appointment of Kairos as trustee. By the time of the hearing, no one was seeking to defend the appointment but the Court nevertheless had to consider whether it was invalid. For the reasons set out in the judgment, the Court concluded the father had failed to take into account material matters, namely the expertise, experience, financial standing etc. of the proposed trustee of two substantial trusts, took irrelevant matters into account (namely New Zealand's position vis-à-vis Italy) and in the circumstances had reached a decision which no reasonable appointor could have arrived at. The Court therefore declared the appointment of Kairos to be invalid in relation to both Trusts; this also covered the purported removal of Jasmine/Lutea with the result that they remained as the trustees.

11 Much the greater part of the hearing was taken up with the second issue, namely the validity of the appointments of the elder son and the younger son as protectors in place of

their father. The Court accepted that it had been envisaged when the Trusts were established that one or other of the sons might well be appointed as successor protector. However, for the reasons summarised in paragraph 153 of the September judgment, the Court concluded that, as a result of recent events, that was no longer appropriate and that an appointment of the sons as protector in the current circumstances was outside the band of reasonable decisions. The recent events referred to fell broadly under three headings:-

(i) There was litigation in the United States between the daughter on the one hand and the sons (together with the father) on the other. This gave rise to a significant conflict of interest and meant that the elder son and the younger son could not be considered as being in a position to act fairly as protector.

(ii) The sons had not shown themselves to be independent of the father and appeared to have paid little attention to their fiduciary duties in connection with companies in New York and Vermont of which they were directors.

(iii) There had been a breakdown in relations between the daughter on the one hand and the sons on the other which made it impossible for them reasonably to be seen as in a position to act fairly as protector.

The costs applications in outline

12 All parties were agreed that Jasmine and Lutea should be awarded their costs out of the Trusts on the usual trustee basis.

13 Subject to that, on behalf of the daughter, Advocate Robertson asked for the following:-

(i) In relation to the validity of the appointment of Kairos as trustee, the daughter and the sons should be awarded their costs out of the Trusts on the indemnity basis. As to the father, although Advocate Robertson originally contended that there should effectively be an order that the father pay the daughter's costs on the standard basis, he confined his application during the course of his reply to an order that the father simply be left to bear his own costs in connection with this aspect, so that he should not be indemnified out of the Trusts.

(ii) As to the issue of the validity of the appointment of the sons as protector, the sons and the father should effectively be ordered to pay the costs of the daughter on the standard basis, with the difference between those costs and the daughter's indemnity costs being reimbursed to her out of the Trusts. Advocate Robertson submitted that, to achieve this in the most convenient manner, the technical order should be for the daughter to be awarded her costs out of the Trusts on the indemnity basis, but with the sons and the father being ordered to reimburse the Trusts in an amount equal to the daughter's standard costs.

14 The father and the sons, on the other hand, submitted that all the parties should be

awarded their costs out of the Trusts on the indemnity basis.

The applicable principles

15 In *Re The JP Morgan 1998 Employee Trust*, [2013] (2) JLR 235 ("JP Morgan"), the Court of Appeal, in a judgment delivered by Nugee JA, emphasised that, when considering costs in relation to trust litigation, different principles apply depending on whether the person whose position is under consideration is a trustee (or other fiduciary) or a beneficiary.

(i) Fiduciaries

16 The starting point is that a trustee is entitled to be reimbursed for costs he has incurred. As Vos JA said in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527 at para 39:-

> ***"As a matter of law, therefore, the trustee is entitled to be reimbursed for the expenses and liabilities that he has reasonably incurred in connection with the trust.*** The concept of "reimbursement" implies full repayment and the authorities in England have always made it clear that a trustee has the right to full reimbursement of his expenditure properly incurred on behalf of the trust."

17 The position of a person with fiduciary functions in relation to a trust is the same in this respect as that of a trustee. Thus at para 23 of his judgment in *JP Morgan*, Nugee JA specifically approved the observation of Clyde-Smith, Commissioner in *Re HHH Trust*, [2013] (1) JLR 135 at para 20 where he said:-

> ***"20. 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 r.12/3 of the Royal Court Rules 2004."***

18 The question therefore is in what circumstances this right of indemnity is lost. I would refer to the following cases which provide some guidance:-

(i) In *JP Morgan* itself, Nugee JA said this at para 20:-

> ***"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 Jessel, M.R. in *Turner -v- Hancock* (15) (20 Ch. D 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* ***… where the note of the judgment in the Jersey Law Reports includes the following (2000 JLR N-67):—***

"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."

(ii) *MacKinnon v MacKinnon* [2010] JLR 508 involved litigation concerning an estate. A beneficiary brought proceedings against the executor of the estate seeking various information etc. This was opposed by the executor, although eventually conceded during the course of proceedings before the Royal Court. The Royal Court ordered the executor to pay the beneficiary's costs and also ordered that the executor could not recover his own costs out of the estate. On appeal, the Court of Appeal overturned those decisions and in the course of doing so, considered the circumstances in which a trustee or executor could be deprived of his indemnity out of the trust or estate. It is clear that the Court of Appeal considered that the principles for trusts and estates were identical. I would quote the following passages from the judgment of Beloff JA:-

"33. From these passages I derive the following propositions:—

(i) Dishonesty or fraud may be a sufficient but is not a necessary basis for either refusing the representative payment of his own costs out of the estate or for fixing him with liability to pay the other party's costs.

(ii) The basic test is whether the costs, to justify payment out of the estate, were properly incurred.

(iii) Mere negligence or honest mistake will not deprive the representative of payment; but other than that what is sufficient

misconduct cannot be precisely described and will be a matter of fact and degree.

(iv) The refusal of payment of his costs out of the estate does not necessarily entail as its consequence the fixing of him with liability to pay the other party's costs, but the court may penalise him in both ways.

…

40. In my view, Farwell J was holding only that the threshold of very gross or wholly indefensible negligence had on the facts of that case been passed. He was not setting any minimum threshold. Nonetheless, he does suggest that the unreasonableness required to deprive an executor of the usual order for payment of his legal expenses in his role as such out of the estate is high. The Commissioner's conclusion… that Andrew must be shown to have "cross[ed] the threshold of reasonably justifiable behaviour" seems to me to capture well the appropriate principle.

…

42. The Commissioner had held (ibid at para 40):-

"In my judgment, no material distinction is to be drawn in the context of the costs of an administrative action between the position of an executor and the position of a trustee. Both owe fiduciary duties, either to the legatees or to the beneficiaries, as the case may be. The question being discretionary, it is not possible to lay down any hard or fast rules. Nonetheless, one can state that the executor or trustee has what might be termed a margin of discretion. He must be free to conduct himself and to take decisions, within the parameters of a reasonable framework as he sees fit. It may be, although this must be left for decision on another day, that the margin of discretion for a professional executor or trustee who is being remunerated should be more narrowly circumscribed. But that is not the case here. An unremunerated executor or trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has ex post facto been shown to be misguided or even careless. At the same time, a legatee or beneficiary is entitled to expect a reasonable level of competence, proportionality and good sense from a person entrusted with protecting his interest. In short, an element of intransigence or unreasonableness is, in my judgment, required before an executor can be held liable to pay the costs of a legatee in an administrative action. It is not necessary to show fraud and dishonesty, but the executor's conduct must have crossed the threshold of reasonably justifiable behaviour".

I would respectfully endorse his reasoning in that passage…"

(iii) In *Re Y Trust* [2011] JRC 155A, Clyde-Smith, Commissioner said this at paragraph 10:-

> ***"10. As a matter of general principle a trustee is entitled to an indemnity out of the trust fund in respect of costs and expenses properly incurred by him in connection with the performance of his duties and exercise of his powers and discretions as a trustee but a trustee can be denied an indemnity for its costs if it is found to have acted unreasonably…. It was accepted by Mr Robertson that this was a high hurdle. As stated at paragraph 21–64 of*** *Lewin*:—
>
> ***"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceeding themselves, for example by taking procedural steps which needlessly increase costs by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others not the trustees or which ought not to be contested at all.***
>
> ***…"""***

19 Advocate Robertson submitted that the challenge to the appointment of the sons as protector was akin to an application to remove them (indeed that was the alternative prayer in the daughter's summons) and that accordingly the principles as to costs of an application to remove a trustee were helpful.

20 In support he referred to the following cases and text book.

21 In *Re The V R Family Trust* [2009] JLR 202, the trustees brought a representation seeking the removal of the protector of the trust. There were a number of criticisms of the protector but the key one was that he had made a personal claim to certain of the trust assets. In the end, the protector did not oppose his removal and the Court duly made an order. However the question then arose as to the costs incurred by the trustees and the convened beneficiaries in connection with the proceedings to remove him.

22 The Court ordered him to pay the costs of the other parties on the indemnity basis, stating that it was hard to envisage a conflict of interest more pervasive than where a protector was actively pursuing claims against the trust assets. Furthermore, the Court could not envisage any circumstances in which anyone in his position could reasonably contemplate remaining in office (para 33). The Court further stated at paragraph 38 that it found the protector's conduct to be *'wholly unreasonable and in flagrant breach of his duty as protector… to the beneficiaries'*.

23 Advocate Robertson also referred to *Lewin on Trusts* (19th Edition) at 27–191 where it states:-

> ***"The removal of trustees by the court may be sought under section 41 of the Trustee Act 1925 or under the court's inherent jurisdiction.*** In a case where a claim for removal of trustees forms part of the relief sought by a breach of trust action, the position as to costs would be governed by the general principles applicable to breach of trust actions. If a trustee is removed on the ground of misconduct, even if some of the charges of misconduct are rejected, the trustee who is removed will normally be ordered to pay the costs of the successful applicant as well as bear his own costs, although the court will consider whether the costs of discrete issues on which the trustee was successful should be treated differently. If a trustee is removed on the ground of conflict of interest and duty, the court might normally be expected to make an order for costs against the trustee, though might allow the trustee his costs in special circumstances, for example where the conflict is expressly authorised by the terms of the trust, but the court nonetheless considers that the trustee should be removed. If a trustee is removed on other grounds, the trustee is at less risk of being ordered to pay the applicant's costs, and will obtain an order for costs from the trust fund if he acted reasonably in defending the claim for removal. …"

24 The authority given in *Lewin* for the emphasised passage in the above extract is *Re E, L, O and R Trusts* [2008] JLR 360. In that case the trustee was trustee of a number of trusts of which some were primarily for the benefit of H and his family and the others were primarily for the benefit of his brother J and his family. The trusts held shares in a substantial trading company. A dispute arose between H and J in relation to that company and there was a real risk of litigation in connection with it where the H trusts would be on one side and the J trusts on the other. H asked the trustee to retire as trustee of the H trusts but it refused to do so. In due course proceedings were instituted seeking the removal of the trustee as trustee of the H trusts. Shortly before the case was due to be heard, the trustee agreed to retire. The question then arose as to the costs of the proceedings to that point.

25 The Court held [paras 34–35] that this was an elementary case of a plain and obvious conflict of interest. The brothers were in dispute, there were complex negotiations on the future of the trading company where the interests of the trusts were obviously adverse, and there was the real prospect of litigation where the H trusts and the J trusts were likely to be on opposite sides of the fence. The position was so obvious that there was no justification for the trustee seeking the directions of the Court. The costs were therefore unreasonably incurred from the point at which the Court held that the trustee should have recognised the impossibility of its position. It therefore ordered the trustee to pay the costs, partly on the standard basis and partly on the indemnity basis having regard to particular factors in relation to the proceedings.

26 However the Court concluded by emphasising this does not mean that an order for costs

should automatically follow a decision that a trustee should be removed. The Court said this at paras 41 and 42:-

> ***"41. We would not wish our judgment in this case to be taken as support for the proposition that a trustee must retire immediately upon being requested to do so and that it will be deprived of its costs if it seeks the directions of the court before agreeing to retire. That is most definitely not the case. Our decision in this case is based upon the fact that the conflict of interest referred to by the beneficiaries was as plain as could be and it was thoroughly unreasonable of the trustee not to recognise that it was in an impossible position and had no option but to retire.***
>
> ***42. In many cases, the position would be far less clear. There may be any number of reasons for tension to have arisen between a trustee and the beneficiaries and it will often be entirely reasonable for a trustee to seek a decision from the court before agreeing to retire or to oppose any application for removal. In many cases, even where the court's decision is that the trustee should retire or be removed, the court will not conclude that the trustee has acted in such a way that it should be deprived of its costs or remuneration. Everything will depend upon the facts of the specific case but the general approach remains that a trustee which is acting in good faith in what it perceives to be the best interests of the trust and the beneficiaries as a whole will not be deprived of its costs unless it has behaved unreasonably. That includes differences over whether or not the trustee should continue in office."***

27 In the passage cited at para 23 above, *Lewin* draws a distinction between removal because of a conflict of interest and removal on some other ground and suggests that a trustee is more at risk of being deprived of his indemnity and ordered to pay the applicant's costs in the former case than in the latter. I do not consider that the cases cited in the footnotes to this passage justify this proposition and I respectfully disagree with it. Certainly *E, L, R and O Trusts* does not draw any such distinction. In my judgment, whether the application for removal is based upon a conflict of interest or some other ground, the test remains the same, namely whether in resisting such an application, the trustee has acted reasonably. I consider that paras 41–42 of *E, L, R and O Trusts* cited in the preceding paragraph are of general application.

28 Finally, Advocate Robertson referred to the well-known case of *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 where Lightman J stated in passing that trustees could be involved in three kinds of dispute. The first (which he called a 'trust dispute') was a dispute as to the trusts upon which the trustees held the subject matter of the settlement. This might be friendly litigation or hostile litigation. In relation to the second category he said this at 1223–1224:-

> ***"(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."

29 He went on later at 1224 to say "a beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate."

30 Advocate Robertson argued that this was a beneficiaries dispute and that therefore costs should follow the event. However, in *J P Morgan* Nugee JA cautioned against treating the observations of Lightman J as a statute. He said this at para 59:-

> ***"59. It is true that [Lightman J] 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 trustee 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 fiduciary's duties require, and where the court is asked to resolve that disagreement on an application under art. 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.…".***

(ii) Beneficiaries

31 Turning to the costs of beneficiaries, the Court of Appeal in *J P Morgan* endorsed previous authority to the effect that valuable guidance was to be obtained from the observations of Kekewich J *In Re Buckton* [1907] 2 Ch. 406 at 414–415 where he said:-

> ***"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.
>
> ***…***

> ***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 which 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."***

32 The facts of *Buckton* are of some interest. The case was instituted by a beneficiary. There was uncertainty as to whether under the terms of the will, he took a life interest in certain property or an estate in tail male. The beneficiary wished to establish that he took an estate in tail rather than a mere life interest and he therefore brought the matter to court, joining those who would be entitled if he only took a life estate. It was therefore either a category 2 or a category 3 case. Although Kekewich J had initially thought it was hostile litigation (and therefore category 3), 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.

Application of the principles to this case

(i) The appointment of Kairos as new trustee

33 As already stated, the proceedings were begun by Jasmine and Lutea because of the concerns which they had about the appointment of Kairos and their removal. In my judgment, this is just the sort of case envisaged in paragraphs 41–42 of *E, L, R and O Trusts*. Given the surrounding circumstances described in the September judgment,

Jasmine and Lutea were wholly justified in bringing the matter before the Court and indeed none of the parties have suggested that they acted unreasonably in doing so. In my judgment their actions would have been reasonable even if the Court had in the event upheld the appointment of Kairos. It follows that they are entitled to be indemnified out of the Trusts.

34 Turning to the position of the daughter and the sons, they were clearly convened to the representations in their capacity as beneficiaries, as indeed were their adult children. In my judgment this aspect of the case clearly falls within *Buckton* category 1. It is a matter of the administration of the Trusts in that all parties need to know who is the trustee and whether Kairos has validly replaced Jasmine and Lutea. It is right therefore that the costs of the daughter and the sons should be paid out of the Trusts on the indemnity basis.

35 The position of the father is different. Although he is also a beneficiary, he was the person who as protector exercised his power to appoint Kairos and remove Jasmine and Lutea. He must be regarded as having been convened primarily in that capacity so as to be able to make submissions to the Court in connection with his exercise of the powers of appointment.

36 At the end of the day, he did not seek to uphold the appointments. Nevertheless, the proceedings only became necessary because of his actions in making the appointments. This raises the question of whether he should be deprived of his indemnity (as protector) out of the Trusts and/or whether he should be ordered to pay the costs of any other parties.

37 In my judgment he should not. Although there is a similarity of language in describing one of the tests for finding the exercise of a power of appointment invalid (‘irrational’ or ‘outside the band of reasonable decisions’) and the ground for depriving a fiduciary of his indemnity (‘misconduct’ or ‘acting unreasonably’), it is a mistake to consider the tests as being the same. They are not. As the cases referred to above make clear, the mere fact that a trustee has been found to be in breach of trust does not necessarily mean that he should be deprived of his indemnity. By parity of reasoning, the mere fact that an appointment by a fiduciary has been found to be invalid should not lead inexorably to the conclusion that he should be deprived of his indemnity. As Beloff JA said in *MacKinnon* in the passage cited at para 18(2) above, it is a matter of fact and degree in every case. The Court must have regard to the overall circumstances of the case and decide whether the nature and gravity of his misconduct is such that he should lose his indemnity and/or be ordered to pay the costs of the parties. It is very much a matter of discretion for the Court having regard to the particular facts of the case.

38 In this context, as held by the Court of Appeal in *MacKinnon* (para 42), an unremunerated family trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has *ex post facto* been shown to be misguided or even careless. In my judgment, that is the situation here. The father was misguided in the appointment of Kairos. He failed to have regard to relevant factors and

took into account irrelevant factors as described in the September judgment. However there is no finding, for example, that he acted in bad faith or for any improper purpose or with reckless disregard for his fiduciary duties. These are of course not to be taken as the only circumstances where a fiduciary may be deprived of his indemnity or ordered to pay the costs of another party but, in the circumstances I do not consider that the nature or gravity of his conduct has reached the level where it is appropriate to deprive him of his indemnity. Nor do I consider that his conduct in connection with the actual litigation was unreasonable. In the circumstances I agree that he should be indemnified out of the Trusts for his costs and should not be ordered to pay the costs of any other party.

(iii) The appointment of the sons as protectors

39 I propose first to consider the nature of this part of the litigation.

40 Advocate Robertson submitted that this was a beneficiaries dispute (using the terminology in *Alsop Wilkinson*) and was therefore to be treated as hostile litigation. The daughter's summons involved an attack on the validity of appointments made by fiduciaries (the father in the case of the R Trust and the majority of the adult beneficiaries in the case of the P Trust). It followed, he submitted, that the ordinary consequences should follow and that effectively the losing parties should be ordered to pay the costs of the winning party on the standard basis. Thus he effectively asked for an order that the father and the sons should pay the daughter's standard costs. However he also submitted that the difference between standard costs and the daughter's indemnity costs should be reimbursed to her out of the Trusts, although he did not explain why that would be appropriate if it was indeed to be treated as hostile litigation.

41 In my judgment it is right to bear in mind the cautionary words of Nugee JA in *J P Morgan* (referred to at para 30 above). It is important not to treat the language of Lightman J as if it were contained in a statute. The Court must always stand back, look at the case in the round and decide on the overall nature of the litigation. In my judgment, this aspect of the litigation falls within *Buckton* category 2. Just as it was a matter of administration of the Trusts for all parties to know who was the trustee, it is equally a matter of administration for the parties to know who the protector is. It seems to me that it would have been open to Jasmine and Lutea if they had thought fit, to have included in their representations (by way of amendment as these events occurred after presentation of the original representations) a request for clarification as to whether there had been a valid appointment of new protectors just as they sought clarification as to whether there had been a valid appointment of new trustees. I do not perceive any significant difference in nature between the issue of the appointment of new trustees and the issue of the appointment of new protectors. They all relate to the administration of the Trusts and the validity of any appointments needed to be resolved in the interests of the beneficiaries as a whole. It makes no difference that, in relation to the appointment of a new trustee, the beneficiaries were not in dispute whereas in relation to the appointment of the new protectors they took up adverse stances. It is often the case that beneficiaries put forward opposing stances in category 1 and category 2

cases but this does not change the nature of the proceedings, nor does it lead to the loss of their normal entitlement to costs out of the trust fund on the indemnity basis unless they have behaved unreasonably (see *Re the Dunlop Settlement* [2013] JRC 123 at paras 27 and 30–33, approved in *J P Morgan*).

42 Advocate Robertson reminded me that, before the commencement of the hearing, I had ordered that it should take place in public on the basis that it involved hostile proceedings. That is of course correct. However, just as in *Buckton* itself Kekewich J retreated from his initial impression that it was a category 3 case and concluded in the end after having heard the case that it was a category 2 case, I have concluded, having now heard the case, that it is more properly to be considered as a matter falling within category 2 (i.e. an administrative matter but one brought by a beneficiary) rather than hostile proceedings. It follows that, with the benefit of hindsight, I would not have ordered that it be held in public.

43 It follows from my analysis as to the nature of the proceedings that, to the extent that any party is convened in his or her capacity as a beneficiary, that party is entitled to his or her costs out of the Trusts on the indemnity basis save to the extent that such party has behaved unreasonably. On this basis, the daughter is therefore clearly entitled to her costs out of the Trusts.

44 The question then is in what capacity the father and the sons were participating in this aspect of the litigation. That is not entirely straightforward. They are of course all beneficiaries of both Trusts. It might be argued therefore that they were simply participating as beneficiaries.

45 However, in relation to the R Trust, the appointment of the sons was made by the father as retiring protector. It seems to me that the father participated as a fiduciary defending the exercise of his power of appointment, in the same way as in relation to the appointment of Kairos as trustee. Advocate Speck argued that the sons were also participating as fiduciaries because they were the putative protectors defending their appointment by the father. I do not agree. The dispute concerned the exercise of an appointment by the father in his capacity as a fiduciary. There was no challenge to any actions taken by the sons as fiduciary. It seems to me therefore that they should be considered as participating in their capacity as beneficiaries rather than as fiduciaries.

46 The position is different in relation to the P Trust. There, the power of appointment of a new protector upon the retirement of the existing protector rested with the majority of the adult beneficiaries. Thus the power of appointment in this case was exercised by the father, the sons and the sons' adult children. All of them were acting as fiduciaries in exercising the power of appointment of a new protector. I accept therefore that, in relation to the P Trust, the father and the sons are to be considered as participating as fiduciaries defending their exercise (as three of the adult beneficiaries) of the relevant power of appointment.

47 I turn therefore to consider first the position of the father as fiduciary of both Trusts and the sons as fiduciaries in relation to the P Trust. Advocate Robertson argues that they have been found to have made an irrational appointment. That alone is sufficient to hold that they have been guilty of misconduct such as to lose their indemnity. Secondly, they have behaved unreasonably in connection with the litigation itself by seeking to defend the indefensible. They were aware of the facts giving rise to the conflict of interest, of the sons' conduct in relation to their role as directors of the various US companies and of the breakdown in relations between the daughter and the sons.

48 As to the first of these aspects, I repeat the observation at para 38 above. The father and the sons are unremunerated members of the family exercising fiduciary functions in relation to family trusts. They are not lightly to be deprived of their indemnity. The father was 92 at the time of the appointments and it was entirely reasonable that he should wish to retire. The terms of the P Trust specifically envisaged that one or more of the father's children should be the successor protector and in relation to the R Trust, the letter of wishes requested that the elder son should be appointed as successor protector and that the younger son should be the elder son's successor. On the face of it the elder son and the younger son had the necessary skills and experience through their respective careers to fulfil the duties of protector. The appointments were therefore *prima facie* not unexpected and perfectly reasonable. Indeed the Court specifically said at para 152 of the September judgment that, were it not for the supervening matters referred to in para 153, there could have been no objection to the sons being appointed as protectors of the Trusts.

49 The question is whether the existence of the supervening matters (i.e. the conflict of interest arising from the litigation, the behaviour of the sons in relation to the US companies and the breakdown in relations between the daughter and the sons) means that the nature and gravity of the misconduct is such that the father and the sons should be deprived of their indemnity as fiduciaries. In my judgment, given the background of a family trust with unremunerated members, they have not been guilty of misconduct of this nature and gravity. Again, there is no finding in the September judgment that any of them acted, for example, in bad faith or for any improper purpose or with reckless disregard of their fiduciary duties. In essence, they made errors of judgment in thinking that the sons could be perceived as acting fairly as protectors in the light of the matters referred to. That was undoubtedly an error of judgment on their part for the reasons set out in the September judgment and it has led to the invalidity of the appointment. But I do not consider that their conduct is such that they should be left to bear their own costs, let alone ordered to pay the costs of the daughter.

50 As to Advocate Robertson's second point, namely that they acted unreasonably in defending the proceedings, I do not consider that that was the case. The facts of this case are far removed from those of *VR Family Trust* (where the Court stated it was hard to envisage a conflict of interest more pervasive and could not envisage any circumstances in which anyone in the protector's position could reasonably contemplate remaining in office) and *E, L, R and O Trusts* (where the Court held that it was an elementary case of a plain and obvious conflict of interest and was so obvious that there was no justification for the

trustees seeking the directions of the Court). As was made clear in the September judgment, it is not for the Court to substitute its own decision for that of the appointors in each case. Having had the benefit of listening to the case, the Court did not form the view that this was an open and shut case which the father and the sons were unreasonably seeking to defend. In those circumstances I do not consider it would be right to deprive them of their indemnity on that basis or order them to pay the daughter's costs. Nor do I consider, despite Advocate Robertson's submission to the contrary, that the manner in which they conducted the litigation (e.g. minimising their role in the preparation of the General Release) was sufficient to deprive them of their indemnity.

51 Turning to consider the position of the sons as beneficiaries in relation to the R Trust, for the same reasons, I do not consider that they acted unreasonably either in taking the position that their appointment should be upheld or in their conduct of the litigation. There is therefore no reason not to award them their costs out of the Trusts on the indemnity basis in relation to the R Trust.

52 During the course of the hearing on costs, a point emerged as to how the costs to be borne by the Trusts should be allocated as between the P Trust and the R Trust. Hitherto, the trustees have allocated the litigation expenses equally between the two Trusts on the basis that there has been no material distinction in the time spent in relation to each Trust.

53 It was suggested by Advocate Speck that, given the fact that the value of the R Trust is approximately 1/5th of the value of the P Trust, it might be fairer to allocate the costs pro-rata to the value of each Trust. The father was neutral as to the method of allocation and the daughter preferred to continue with a 50/50 split.

54 In my judgment, given that there is no distinction in the time spent on each Trust, the basis upon which the trustees have allocated costs so far and the fact that there is essentially a common class of beneficiaries (with minor exceptions), I think it would be simplest if costs continued to be allocated on a 50/50 basis.

55 Finally, I should deal with a technical point which arises as a result of my decision. There is an important difference in principle between a trustee or other fiduciary being indemnified as to costs which he has incurred and costs which are awarded to a party on the indemnity basis. The former arises as a matter of right (subject of course to the Court's power to deprive a fiduciary of such indemnity as discussed earlier) and confers a full indemnity subject only to such costs being reasonably incurred and in a reasonable amount, whereas the latter is awarded by the Court in exercise of its power to decide who pays the costs of litigation. Such costs are subject to taxation by the Greffier if not agreed. The former is commonly referred to in this jurisdiction as ‘costs on the trustee basis’ whereas the latter is referred to as ‘costs on an indemnity basis’.

56 In practice, given the recent changes to the method of taxing costs awarded on an

indemnity basis, there is unlikely to be a great difference in quantum between the two levels of costs, but there may well be some difference.

57 In order to remain true to the principle involved, so far as the costs of the proceedings in relation to the appointment of protectors is concerned, the sons should be indemnified on the trustee basis in respect of the P Trust and awarded costs on the indemnity basis in respect of the R Trust in order to reflect the fact that they were participating primarily as fiduciaries in relation to the former and were beneficiaries in relation to the latter. In relation to the issue of the trustee appointment, they were, as stated earlier, beneficiaries and therefore entitled to costs on the indemnity basis.

58 It would not be proportionate for there to be a taxation trying to allocate costs incurred between the P Trust and the R Trust or between the trustee issue and the protector issue. My view therefore is that I should take a broad view. I propose to allocate 10% of the overall costs to the trustee issue and 90% to the protector issue (attempting to reflect the course of the proceedings before the Court) and, as already stated, to allocate costs equally between the P Trust and the R Trust. The effect of this in relation to the sons would be that 45% of their costs would be recovered from the P Trust on the trustee basis and 45% out of the R Trust on the indemnity basis, with the remaining 10% being payable equally out of the P Trust and the R Trust on the indemnity basis.

Conclusion

59 In summary, for the reasons given, my conclusion is as follows:-

(i) Jasmine and Lutea may recover their costs on both the trustee and protector issue on the trustee basis, such costs being allocated equally between the Trusts.

(ii) The daughter is awarded her costs in relation to both issues on the indemnity basis out of the Trusts, such costs to be allocated equally between the Trusts.

(iii) The father may recover his costs on both issues on the trustee basis from the Trusts, such costs to be allocated equally between the Trusts.

(iv) The order in respect of the costs incurred by the sons is as follows:-

(a) 10% (being the amount I have attributed to the trustee issue) is awarded on the indemnity basis, such costs being allocated equally between the Trusts.

(b) 45% (being half the amount I have attributed to the protector issue) is awarded to the sons on the indemnity basis, such costs to be recovered from the R Trust.

(c) 45% (being the other half of the amount I have attributed to the protector issue) may be recovered from the P Trust on the trustee basis.

60 All the costs awarded on the indemnity basis are to be taxed if not agreed. In that respect the paying party is the trustee of the relevant Trust and it alone therefore has the right to demand a taxation. Nevertheless, in the interests of transparency, it would be well advised to circulate any bill of costs submitted by a party to all the other parties and invite comments, so it can take these into account when deciding whether or not to seek to negotiate a reduction in the bill submitted or require a taxation.

61 I have reached the above conclusions by application of the principles and for the reasons set out above. However, I am not unhappy to have come to this conclusion. During the course of submissions on the costs issue, Advocate Kistler asserted that, if the father were ordered to pay costs, he would be unable to do so because of restrictions imposed as a result of the US litigation and he would have to seek a distribution from the Trusts in order to pay such costs. No evidence was produced in support of this assertion and I have ignored it. Nevertheless, it is an indication of the sort of thing which, if it were to occur, would no doubt lead to fresh disputes within the family. It was sad to see the daughter sitting at the opposite end of the Court from the sons during the hearing when it is clear that, in the past, relations between them have been good. Now that this aspect of the case has been concluded, I would urge the parties to see if they can put these events behind them and move forward more harmoniously, if not for themselves then for their children, who are of course cousins and would no doubt benefit from harmony within the wider family.