# B v Erinvale PTC Ltd

| | |
|---|---|
| **Jurisdiction:** | Jersey |
| **Judge:** | J. A. Clyde-Smith OBE. |
| **Judgment Date:** | 25 January 2021 |
| **Neutral Citation:** | [2021] JRC 21 |
| **Date:** | 25 January 2021 |
| **Court:** | Royal Court |



**Text**

[2021] JRC 21

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., Commissioner sitting alone.

Between
B
Representor
and
Erinvale PTC Limited
First Respondent

and

C (by his delegate D)
Second Respondent

and

E and F
Intervenors

**Advocate** P. C. Sinel **for the Representor**.

**Advocate** B. J. Lincoln **for the First Respondent**.

**Advocate** P. D. James **for the Second Respondent**.

**Advocate** S. A. Franckel **for the Intervenors**.

**Authorities**

*B v Erinvale PTC Limited and Ors* [2020] JRC 213.

*Appleby Trust (Mauritius) Limited v Crociani & Ors*. [2018] JCA 136.

*Piedmont Trust and Riviera Trust* [2016] (1) JLR 14.

*In re Buckton* [1907] 2 Ch. 406

*McDonald v Horn* [1995] I.C.R.

*In the matter of the JP Morgan (1998) Employee Trust* [2013] (2) JLR 239

Trusts (Jersey) Law 1984 Law

Matrimonial Causes Law

*Watkins v Egglishaw* [2002] JLR 1

*MacKinnon v MacKinnon* [2010] JLR 508

*In re Y Trust* [2011] JRC 155A

Lewin on Trusts

Trusts — re costs.

**THE COMMISSIONER:**

1 The parties apply for orders for costs arising out of a number of matters in relation to these proceedings which have now been stayed.

2 The background is set out in the Court's judgment of 15 th October 2020 ( *B v Erinvale PTC Limited and Ors* [2020] JRC 213) ("the Judgment"), which I will take as read. By way of very brief overview, at its heart are divorce proceedings in the Family Division between C and B in which B is seeking ancillary relief. The divorce proceedings were commenced in May 2017, but the ancillary proceedings have yet to be determined ("the Ancillary Proceedings").

3 The unusual feature of this case is that in January 2019, B filed a representation in the Samedi Division (2019/007) invoking the supervisory jurisdiction of the Court over the A Settlement, a discretionary settlement established by C in September 2012 and into which he settled the whole of his free estate ("the Trust Proceedings"). The trustee is the First Respondent ("Erinvale"), a private trust company. The beneficiaries are C, his spouse and his children and remoter issue. There is one child of their marriage, who is therefore a beneficiary, and C has two children by an earlier marriage, the Intervenors, represented by Advocate Franckel, who are also beneficiaries.

4 Because C has settled all of his free estate into trust, both he and B are financially dependent upon the A Settlement. C, who is Jersey resident, receives distributions but for English tax reasons the modus operandi for payments made to or for the benefit of B in terms of her monthly financial support and her legal fees are accounted for by way of loan to her (see paragraph 40 of the Judgment). Invoices from Sinel's are submitted on a regular (usually monthly) basis and Erinvale discharges those invoices.

5 In the Trust Proceedings B is seeking, inter alia, the same relief as might be awarded to her in the Ancillary Proceedings. As the Court noted at paragraph 15 of the Judgment, the Trust Proceedings therefore gave rise to a parallel set of proceedings to those in the Family Division.

**Addition Application**

6 Following correspondence, B issued a summons on 18 th December 2019 under the Trust Proceedings, seeking *inter alia* an order that Erinvale appoint her as a beneficiary in her own right, part of the relief sought in the representation ("the Addition Application"). On 10 th January 2020 Erinvale resolved not to add her as a beneficiary in her own right at that time. She was, of course, a beneficiary as C's spouse.

7 By a consent order of 16th April 2020, Erinvale agreed that B's application to be appointed a beneficiary in her own right should be dealt with as a *cause de brièveté*. The Act of Court was clear that B's application was made under the representation in proceedings 2019/007 to be dealt with as a stand-alone issue and after a significant amount of correspondence the Bailiff confirmed on 17 th August 2020 that that was the sole matter to be dealt with at the hearing.

8 As a consequence of delays caused by COVID 19, that matter did not come before the Court until 3 rd and 4 th September 2020, when the Court reserved judgment, and on 15 th October 2020, the Court set aside the decision of Erinvale not to add B as a beneficiary in her own right for the reasons set out in the Judgment. Following the handing down of the Judgment, she has now been added by Erinvale as a beneficiary in her own right.

9 Advocate Sinel seeks an order that Erinvale should pay B's costs of the Addition Application on the indemnity basis and should be deprived of its right of indemnity against the trust fund so that it would bear those costs personally. He did not make any submissions about Erinvale's indemnity in respect of its own costs.

10 Advocate Lincoln, for Erinvale, seeks an order that its costs should be paid out of the trust fund, pursuant to its indemnity, a position supported by Advocate James for C and Advocate Franckel. Advocate Lincoln also sought an order that the costs of C and the Intervenors, as convened parties, should be paid out of the trust fund on the indemnity basis.

11 In so far as B's costs were concerned, Advocate Lincoln sought an order that the costs in respect of the arguments in which she was successful, namely the setting aside of the decision, should be paid out of the trust fund on the indemnity basis, but the costs in respect of the arguments in which she was not successful, whilst being paid out of the trust fund, should be borne by her personally by being added to the loan account due by her to Erinvale, a position essentially supported by Advocate James and Advocate Franckel.

12 Advocate Sinel's position was straightforward in that he said B has succeeded in the Addition Application. The Court had found the decision of Erinvale not to appoint her as a beneficiary in her own right was one which no reasonable trustee could have made. That justified an order in her favour on the indemnity basis (citing the Court of Appeal decision in *Appleby Trust (Mauritius) Limited v Crociani & Ors*. [2018] JCA 136 at paragraphs 21, 57 and 58) and furthermore, it justified Erinvale being deprived of its indemnity from the trust fund in order to meet those costs as a consequence of its unreasonable conduct as trustee (citing *In re the Piedmont Trust and Riviera Trust* [2016] (1) JLR 14).

13 Advocate Lincoln submitted that a number of plainly bad arguments had been made by Advocate Sinel, the costs of which should be borne by B and not by the trust estate, through those costs being added to her loan account with the A Settlement, and thus deducted from whatever distributions would ultimately be made to her following a final order in the Ancillary Proceedings.

14 It is necessary to consider first the nature of the Addition Application. Advocate Sinel makes reference in paragraph 24 of his skeleton argument to the categories set out in the case of *In re Buckton* [1907] 2 Ch. 406, which were summarised by Hoffmann LJ in *McDonald v Horn* [1995] I.C.R. 685 at 696:

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

15 As the Court of Appeal said in the case of *In the matter of the JP Morgan* (1998) Employee Trust [2013] (2) JLR 239 at paragraph 30:

> ***"The principles laid down in*** *Re Buckton* ***are …principles as to the costs of beneficiaries; and in particular, as to when they can have their costs out of the estate, despite not succeeding in their arguments…in describing hostile litigation as a category 3 case Kekewich J had in mind claims between rival claimants to the fund or part of it.*** He was not dealing at all with hostile claims against trustees."

16 Having referred to the categories in *Re Buckton*, Advocate Sinel did not indicate in which category the Addition Application came. Advocate Lincoln did not address the *Re Buckton* categories but having regard to the orders he sought, by implication his position was that this came within category 2.

17 The distinction between categories 2 and 3 is not always easy to make, but I am prepared to accept that the Addition Application comes within category 2 as it involved a question that arose in the administration of the A Settlement, namely whether in the light of the divorce proceedings B should have her status as a beneficiary confirmed independently of her marriage to C by being named as a beneficiary in her own right. The Trust Proceedings ostensibly invoked the supervisory jurisdiction of the Court over trusts through Article 51 of the Trusts (Jersey) Law 1984 Law ("the Trusts Law") or its inherent jurisdiction over trusts.

18 Whilst B was motivated in her application by her own interests, it is arguable, and I am prepared to accept, that clarification of this issue was for the benefit of the trust estate. That being the case, the costs of the beneficiaries should be paid out of the trust fund on the indemnity basis in the usual way. Such an order is fair in the case of C and the Intervenors as their conduct as convened parties in this application was reasonable and proportionate.

19 In my view, there is substance in Advocate Lincoln's contention that B's conduct was not reasonable and proportionate. He has set out in paragraph 72 of his skeleton argument the

matters argued by Advocate Sinel which were unsuccessful, which include the following:

*(i) The views of the beneficiaries were irrelevant to the decision taken by Erinvale*.

*(ii) [C's] original intention was to ensure that [B] received nothing, or very little, an intention that was irrelevant to the decision taken by Erinvale*.

*(iii) Erinvale's interpretation of the draft judgment of the Bailiff was incorrect, and therefore irrelevant*.

*(iv) What Erinvale may or may not do upon the death of [C] was irrelevant*.

*(v) Erinvale had failed to consider that, as things stand, the Matrimonial Court is immediately disempowered upon [C's] death*.

*(vi) Two of the directors of Erinvale, [L] and [M], were conflicted*.

*(vii) There was evidence of malice on the part of [C] and the directors of Erinvale and a plan that [B] would get nothing*.

*(viii) The Court could exercise the power vested in Erinvale under the trust deed to vary the [A] Settlement and make [B] a beneficiary in her own right by way of variation.* Furthermore, the Court had the power to vary the [A] Settlement pursuant to Article 51 of the Trusts Law and its inherent jurisdiction.

*(ix) Erinvale should have sought the consent of [D], [C's] delegate, prior to making the decision*.

*(x) The jurisdiction of the Court under Article 51 of the Trusts Law had no limit and the principle of non-intervention under English law could be distinguished.* This argument was particularly surprising as it was the same argument put forward by Advocate Sinel in the case of *S v Bedell Cristin* [2005] JRC 109 *(a case to which Advocate Sinel made no reference in his skeleton argument or his submissions) and rejected by that Court, a decision followed in a number of subsequent cases*.

*(xi) Advocate Sinel referred to a number of cases concerning the Court's power to appoint or remove trustees, which were found to be inapposite.* Advocate Sinel also placed reliance on the Privy Council decision of *Schmidt v Rosewood Trust Limited (Isle of Man)* 2003 UKPC 26, *which the Court also found was inapposite*.

*(xii) Advocate Sinel's skeleton argument stated that the application was made both under Article 51 of the Trusts Law and Article 27 of the Matrimonial Causes (Jersey) Law 1949 ("the Matrimonial Causes Law"), with the skeleton argument being devoted in equal parts to both Articles.* [B's] affidavit in support of 14 th May 2020 similarly extended to the Court's powers under Article 27 of the Matrimonial Causes Law.

20 The Court found, in essence, that whilst Erinvale had considered the effect on B if she were to lose her rights under the A Settlement, it had not truly taken her position and

concerns into account and given them sufficient weight (paragraph 64 of the Judgment). It is fair to say that in all other respects, Erinvale succeeded in its opposition to all of the arguments put forward by Advocate Sinel.

21 Advocate Sinel's approach at the hearing was that the Court had an unlimited jurisdiction to intervene and appoint B a beneficiary in her own right, an approach roundly rejected by the Court. It was the Court, assisted by Advocate Lincoln, that identified the true nature of the issue before the Court, namely a challenge by B as to the decision of Erinvale, which had not surrendered its discretion, not to appoint her a beneficiary in her own right (see paragraph 60 of the Judgment).

22 Although B was successful in having the decision not to appoint her as a beneficiary in her own right set aside, it would not be just for the trust estate to bear the costs of the many arguments put forward by Advocate Sinel that were of no merit, and which took up considerable time at the hearing. That would apply with particular force to the work that went into the arguments under Article 27 of the Matrimonial Causes Law (to which one half of the skeleton argument was devoted) and the alleged jurisdiction of the Court.

23 The task of assessing how much of B's costs were attributable to these failed arguments will be difficult and time consuming, involving the parties in yet more time and expense. Justice is served, in my view, by my taking a broad-brush approach and I determine that B should have 60% of her costs of and incidental to the Addition Application out of the trust fund on the indemnity basis. It would be arguable that an order should be made against B to pay 40% of the costs of the other parties on the indemnity basis, but no such order has been sought and in the exercise of my discretion I decline to make such an order.

24 If it is incorrect to place the Addition Application into category 2, then it is a hostile claim under category 3 which should be treated in the same way as ordinary common law litigation where costs usually follow the event. However, that is where there is a clear winner, but as stated in *Watkins v Egglishaw* [2002] JLR 1 it is a mistake to label one party as the winner when the complexity or other circumstances of the litigation do not lend themselves to such an analysis. In my view the circumstances here do not lend themselves to such an analysis for the reasons set out above.

25 Advocate Sinel sought an order for costs against Erinvale personally, on the assumption that this is hostile litigation, on the indemnity basis, citing the principles for the awarding of indemnity costs as summarised by the Court of Appeal in *Appleby Trust (Mauritius) Limited v Crociani & Others* [2018] JCA 136, and I accept his submission that the overarching theme in awarding indemnity costs in hostile litigation is unreasonableness of conduct in the proceedings. In support of this, he then cited the finding of the Court as to the reasonableness of the decision reached by Erinvale not to appoint B as a beneficiary in her own right, but he failed to cite any evidence of Erinvale conducting the proceedings in an unreasonable manner. It was not unreasonable for Erinvale to seek to stand by the decision it had reached, a decision supported by some of the beneficiaries or to oppose the many

arguments put forward unsuccessfully by Advocate Sinel. In particular, Erinvale co-operated in agreeing in April 2020 to have this application dealt with as a *cause de brièveté* and provided valuable assistance to the Court on the applicable law.

26 In my view, the conduct of Erinvale of these proceedings has not been such as to justify costs being awarded against it personally on the indemnity basis, and if this was hostile litigation, I would have awarded 60% of her costs against it on the standard basis. As it is, I have not approached this matter on the basis that it is hostile litigation under category 3.

27 The next and separate issue is whether Erinvale should be deprived of its indemnity against the trust fund either in respect of its own costs (for which Advocate Sinel did not contend) or whether it should pay the costs of B (and presumably the other convened parties) personally. Advocate Sinel referred to the judgment of Sir Michael Birt, Commissioner, in the case of *In re the Piedmont Trust and Riviera Trust* at paragraph 16:

> ***"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 J P Morgan Trust Co. (Jersey) Ltd* ***(1)*** [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.'"

28 Advocate Sinel then referred to this passage from Lewin 19th edition at paragraph 21–64 cited with approval in the case of *In re Y Trust* [2011] JRC 155A:

> ***"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 proceedings 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."*** (his emphasis)

29 By emphasising this part of the passage from *Lewin*, Advocate Sinel argues that Erinvale has acted in a partisan manner and has adopted an excessive role in the proceedings by contesting a claim that ought not to have been contested. He concluded that where a trustee had been held to have acted in a manner which no reasonable trustee would act, the trustee ought to be deprived of its indemnity from the trust fund.

30 As Advocate Lincoln submitted, the question is in what circumstances is it appropriate to deviate from this starting point. In *Re the JP Morgan 1998 Employee Trust* [2013] JLR 239, Nugee JA stated as follows:

> ***"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, MR 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."***

31 In *MacKinnon v MacKinnon* [2010] JLR 508, the Court of Appeal considered the circumstances in which a lay trustee or executor could be deprived of his indemnity out of the trust or estate (the principles for trusts and estates being identical). Beloff JA stated as follows:

> ***"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 [E] 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 or dishonesty but the executor's conduct must have crossed the threshold of reasonable justifiable behaviour.'

***I would respectfully endorse his reasoning in that passage."***

32 In *Re Y Trust* [2011] JRC 155A, I stated as follows at paragraph 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."

33 In the case of *In the Matter of the Piedmont Trust and the Riviera Trust*, Commissioner Birt, after considering the abovementioned cases, provided the following clarification at paragraph 37:

> ***"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 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. 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."***

34 In this case, there are a number of reasons why, in my judgment, Erinvale should not be deprived of its indemnity, namely:

> (i) Erinvale had consulted all the beneficiaries on B's request and the decision reflected the views of some of them.
>
> (ii) B was already a beneficiary in her capacity as C's spouse.
>
> (iii) The decision was carefully considered, as reflected in the detailed minute.
>
> (iv) It is clear that the directors (two of whom were *de facto* lay trustees) were guided in the process by legal advice.
>
> (v) Erinvale's conduct in general towards B was reasonable, in that it was supporting her financially and paying her legal fees (fees that at the time of the judgment had amounted to some £1 million). The allegation that they were motivated by malice was rejected by the Court.
>
> (vi) Erinvale's conduct of the proceedings had been reasonable and having reached a considered decision, it was reasonable for Erinvale to defend that decision supported by some of the beneficiaries.

(vii) The directors had not been affected by any conflict of interest.

35 In essence, there had been no finding that Erinvale acted in bad faith or for any improper purpose or with disregard, let alone reckless regard, of its fiduciary duties. There was no finding that it had adopted an excessive role or acted in a partisan manner. The nature and gravity of Erinvale's conduct has not reached the point where it should be deprived of its indemnity. It can, therefore, have recourse to its indemnity to discharge its own costs and will not be ordered to pay the costs of B or any of the other convened parties.

36 To the extent that B will not receive all of her costs of the Addition Application from the trust fund, she will no doubt look to Erinvale as trustee for the balance as per the current practice and from which it would seem that B's full costs would already have been discharged out of the trust fund. The costs order, however, still has relevance, because the trust fund itself, and therefore the trust estate, will only be burdened by the amount of the order made in her favour, namely 60% of her costs. The remainder of the costs will, as I understand it, be accounted for by addition to her loan account and this in exercise of Erinvale's powers as trustee in her favour.

**Further developments**

37 Following the handing down of the Judgment, there have been a number of developments in respect of which costs issues arise:

(i) There were listed to be heard before me on 17th November 2020 a general discovery summons issued by B and an application by C seeking a stay of the representation pending the outcome of the Ancillary Proceedings (renewing an earlier similar application).

(ii) By letter dated 8 th October 2020, Advocate Sinel gave notice that B would be making an application to remove Erinvale as trustee and/or remove its powers under the A Settlement and by letter of 9 th October 2020, he requested that the directors resign in favour of replacement directors.

(iii) Erinvale proceeded to consult with the adult beneficiaries regarding these matters and some of the views received were vehemently opposed to a change of trustee or a change of directors.

(iv) On 3 rd November 2020, Erinvale filed its own representation in the Samedi division seeking the Court's directions as to whether or not it should retire as trustee and/or whether or not it would be in the best interests of the beneficiaries of the A Settlement for the present directors to resign as directors of Erinvale. The representation was presented to the Court on 6 th November 2020 and convening orders made.

(v) On 5 th November 2020, Advocate Sinel wrote to the Court indicating that he would be making an application to amend the representation and *"to emasculate or remove the Trustee"*. On the same day, Mourant responded informing Advocate Sinel that it had filed its own representation dealing with the position of Erinvale and its directors on which all of the beneficiaries would be entitled to be heard, which would simplify matters.

(vi) On 6 th November 2020, Advocate Sinel circulated a summons ("the November Summons") by which B sought:

(a) The adjournment of her general discovery summons.

(b) Permission to amend the representation in accordance with a draft, which was said to be annexed to the summons, but which was not in fact annexed.

(c) The removal of Erinvale as trustee and/or the removal of the directors and/or an order directing Erinvale to surrender its discretion to the Court and to adopt a position of neutrality within these proceedings and the Ancillary Proceedings, in each case with an order that Erinvale bear the cost of the application personally ("the removal application").

(d) Directions in respect of the removal application.

(vii) On 9 th November 2020, the Court abridged time in respect of the November Summons so that it would be heard at the hearing on 17 th November, but on the express basis that such abridgement was for the purpose of giving directions only in respect of the summons.

(viii) Accordingly, it was expected that on 17 th November 2020 the Court would hear (i) the stay application and (ii) the November Summons for directions only, all within the Trust Proceedings.

(ix) Following exchanges of correspondence between the legal advisers, the parties agreed a consent order which, inter alia, vacated the hearing listed for 17th November and which provided that:

***"2 Save for the discrete applications and matters set out below within this paragraph, proceedings 2019/007, including all extant applications therein, are stayed pending the conclusion of the Matrimonial Proceedings:***

***a. The costs of the application to add the Representor as a beneficiary of the [A] Settlement (which application was substantively determined by the judgment of Commissioner Clyde-Smith dated 15 October 2020), for which a hearing has been listed on 7 December 2020; and***

***b. The Representor's application for leave to appeal the***

***interlocutory judgment of the Bailiff in these proceedings dated 2 September 2020, which was heard by the Bailiff on 11 November 2020 but in respect of which judgment is awaited*** .

***3 Costs shall be reserved to 7 December 2020"*** .

38 Advocate Lincoln could see no basis for disagreeing with the views put forward by Advocate James and Advocate Franckel that B be ordered to pay the costs of the other parties of the stay application and the removal application on the indemnity basis, but acknowledging that she was financially dependent upon the A Settlement, such costs were to be accounted for by way of set-off and deduction from any benefit she may receive from the A Settlement upon the conclusion of the Ancillary Proceedings; in effect, as I see it, those costs would be added to her loan account.

39 This order against B was sought for the following reasons:

(i) The Court had been clear both in the Bailiff's draft judgment of 21 st November 2019, (at paragraph 59), in the Judgment (at paragraph 15) and in the unpublished case management judgment of 11th September 2020 that the Trust Proceedings were duplicative of the Ancillary Proceedings.

(ii) It was clear after the determination of the Addition Application that the representation had exhausted its purpose.

(iii) The assertion by Advocate Sinel in his letter of 8 th October 2020 that the representation formed the bedrock of the removal application was unsupportable.

(iv) When the November Summons was sent to the Court on 6 th November 2020, Advocate Sinel knew that Erinvale had filed its own application covering the same subject matter, and he therefore knew that his application was duplicative. Furthermore, he made no mention of Erinvale's own application in his letter to the Court.

(v) From receipt of notice of the November Summons on 6 th November 2020 until the consent order, significant work had been done on the November Summons including:

(a) providing advice to Erinvale regarding the same;

(b) corresponding with the parties;

(c) the inclusion of a whole new layer of argument within Erinvale's skeleton argument for the hearing on 17 th November;

(d) when the parties eventually received a copy of the draft amended representation, considering and advising Erinvale on it, and

(e) negotiations for the consent order between the parties, including this added layer of the removal application.

(vi) In the light of the judicial commentary regarding the duplicative nature of the Trust Proceedings, Advocate Sinel proceeded to ramp them up with further applications.

40 In response, Advocate Sinel submitted there had been no finding on the merits of the representation, the removal application or the stay application. A stay of the Trust Proceedings had been agreed in response to Erinvale's own application and the decision of the Bailiff on 11th November 2020, to grant a large part of the discovery sought in the Ancillary Proceedings. All of these applications remain relevant and necessary for B which is why they have been stayed, rather than withdrawn or dismissed.

41 B was not served through Advocate Sinel with a copy of Erinvale's application until 9 th November 2020 and he did not receive the supporting documentation until 10 th November 2020. The parties had been engaged in this period primarily with the hearing before the Bailiff on 11 th November 2020 on the Ancillary Proceedings and the time involved in these matters would be *de minimis* and the cost of having them taxed disproportionate.

42 In conclusion, Advocate Sinel submitted that all of the costs in respect of these matters should be left over until determined or withdrawn/dismissed, but if not, the costs of all the parties should be paid from the trust fund (without allocation to any beneficiary) on the indemnity basis.

43 It was clear from the hearing on costs that there was a sense of grievance on the part of C, acting through his delegate, and the Intervenors, at the way they see the costs of all of the parties being increased by what they perceive to be the aggressive tactics of B, all to the prejudice of the trust estate. It is the case that at the time of the hearing in September, Erinvale had disbursed some £2.75 million in legal fees (£1 million going to B), an astonishing sum, bearing in mind the lack of progress in the Ancillary Proceedings. They perceive B as able to ramp up costs of all of the parties without the usual discipline that goes with hostile litigation and which acts as a healthy brake on the way in which parties conduct themselves in litigation. The legal fees of the parties are paid out on a monthly basis and I can understand that Advocate James and Advocate Franckel, in particular, were anxious to bring in some discipline to the process and this by the usual costs orders, where appropriate. Previous attempts by Erinvale to bring some accountability to the process were met with very strong resistance from Advocate Sinel (see paragraph 42 of the Judgment).

44 At the same time, the circumstances in which B finds herself are of understandable concern to her. This is a long marriage and the parties have one adult child. She finds that all of her now former husband's wealth has been placed into a discretionary trust, of which she was only a beneficiary in her capacity as a spouse, leaving C with no ability to meet any order the Matrimonial Court might make in her favour. Furthermore, she is dealing with

a private trust company, which according to its accounts has an equity of just over £3,000 and as far as I understand it, no insurance of any kind. It is owned by a purpose trust established by C, which has net assets of £6,750 (being its shareholding in Erinvale) and therefore no ability to support Erinvale in meeting its obligations. Two of the three directors are long-standing business colleagues of C, who are perceived by her not to be truly independent. Whilst Erinvale is administered by Equiom (Jersey) Limited, a regulated entity, that company does not stand as its financial guarantor. It might be thought that for a spouse to structure the entirety of his or her wealth in this way is likely to give rise to suspicion and concern where the marriage breaks down.

45 Taking first the November Summons this was placed before me for endorsement on 9 th November 2020, and I agreed to the summons being heard on 17 th November 2020 for the purpose of giving directions only. That was the same day on which Erinvale's representation was served upon Advocate Sinel on behalf of B, notice of it having been given on 5 th November 2020. Under express notice of Erinvale's application, the November Summons should have been withdrawn from the Court or, having been collected, at least not served as it was essentially duplicative of Erinvale's own application. Instead, it was served on the other parties, and as a consequence, costs were unnecessarily incurred by them in considering and dealing with it, albeit that the issue before the Court on 17 th November would have been the giving of directions.

46 In my view, the service of the November Summons in the light of Erinvale's own application and the clear indication given by the Court that the Ancillary Proceedings should take precedence was unreasonable conduct, and notwithstanding the fact that it has now been stayed by consent, it should sound in costs on the indemnity basis. I do therefore order B to pay the costs of the other parties of and incidental to the November Summons on the indemnity basis, such costs to be accounted for by way of addition to her loan account with the A Settlement. It is fair that she should pay all the costs of the summons as the adjournment of the general discovery application formed a *de minimis* part of it. The issue of general discovery was being dealt in the Ancillary Proceedings before the Bailiff and her application in these proceedings was certain to have been stayed as per Advocate James's application. The application to amend (extensively) the representation was to support the removal application, both of which formed the material part of the November Summons.

47 As for Advocate James's stay application issued on behalf of C, the issue is whether B should have consented to it earlier than she did. It was issued on 28 th October 2020 and I note that it was by letter dated 12 th November 2020 that Advocate Sinel invited the other parties to a meeting to be held on 16 th November 2020 to see if they could find a way forward on an agreed basis. That generated immediate correspondence and at Advocate Sinel's request, a draft consent order was produced by Advocate Lincoln on 13 th November 2020. That allowed for the stay application to be granted but stated that B should pay the costs of both that application and the removal application on an indemnity basis. This received a terse response from Advocate Sinel, but it seems to me that it was the issue of costs, not the stay itself, that occupied the time of the parties and which was finally left

over for the Court to deal with under the terms of the consent order.

48 In the circumstances, I do not regard it as just to order B to pay for any of the costs of the stay application. I propose to make no order as to costs in this respect on the basis that the parties would have had their costs paid by Erinvale as trustee in the usual way.

**Conclusion**

49 In conclusion:-

(i) I order Erinvale to pay 60% of B's costs of and incidental to the Addition Application out of the trust fund of the A Settlement on the indemnity basis to be taxed if not agreed.

(ii) I decline to deprive Erinvale of its right of indemnity against the trust fund of the A Settlement in respect of its own costs incurred in the Addition Application or to pay B's costs personally.

(iii) I order Erinvale to pay the costs of C and the Intervenors of and incidental to the Addition Application out of the trust fund of the A Settlement on the indemnity basis to be taxed if not agreed.

(iv) I order B to pay the costs of the other parties of and incidental to the November Summons on the indemnity basis to be taxed if not agreed and this by the amount of those costs being added to her loan account with the A Settlement.

(v) I make no order as to costs in relation to the Stay Application.

50 Finally, in relation to the costs of the costs hearing, I am minded to make no order on the basis that the parties would have had or will have their costs paid by Erinvale as trustee in the usual way.