Geneva Trust Company (GTC) SA (formerly k/a Rawlinson & Hunter Trustees SA) v Robert Tchenguiz

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	26 June 2019
Neutral Citation:	[2019] JRC 118
Date:	26 June 2019
Court:	Royal Court

Text

[2019] JRC 118

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between
Geneva Trust Company (GTC) SA (formerly k/a Rawlinson & Hunter Trustees SA)
Representor
and
Robert Tchenguiz
First Respondent

and

Fort Trustees Limited

Second Respondent

and

Balchan Management Limited
Third Respondent

and

Elizabeth (“Lisa”) Tchenguiz-Imerman
Fourth Respondent

Advocate C.J. Swart **for Geneva Trust Company (GTC) SA (formerly known as Rawlinson & Hunter Trustees SA)**.

Advocate P. D. James **for Robert Tchenguiz, Fort Trustees Limited, and Balchan Management Limited**.

Authorities

Geneva Trust Company (GTC) SA (formally known as Rawlinson Hunter Trustees SA) v Tchenguiz [2019] JRC 110A

Representation of Rawlinson and Hunter Trustees SA and Fort Trustees Ltd and Balchan Management Ltd [2018] JRC 131

Investec Trust (Guernsey) Ltd, Bayeux Trustees Ltd v Glenalla Properties Ltd, Thorson Investments Ltd, Eliza Ltd, Oscatello Investment Ltd, Rawlinson & Hunter Trustees SA (Guernsey) [2018] UKPC 7

D v Rawlinson and Hunter Trustees SA [2018] JRC 132

Royal Court Rules 2004, as amended.

Pell Frischmann v Bow Valley & Ors [2007] JRC 143

Costs.

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THE MASTER:

1 This judgment represents my written reasons following on from the main judgment in this matter handed down on 12 th June, 2019, reported at *Geneva Trust Company (GTC) SA (formally known as Rawlinson Hunter Trustees SA) v Tchenguiz* [2019] JRC 110A. The definitions used in the main judgment are adopted for this judgment.

2 This judgment contains my reasons for the following decisions:

(i) not anonymising the main judgment (and this judgment);

(ii) permitting copies of any affidavits filed in respect of the security for costs application to be used before the Guernsey Court in respect of any disputes in that jurisdiction concerning the TDT and in particular, whether and if so what assets held on the terms of the TDT should be sold and what liabilities should be discharged from any sale proceeds;

(iii) refusing to join Geneva Holdings SA (referred to in the main judgment as the parent company of the representor) as a party to the present proceedings; and

(iv) making no orders as to costs in respect of the first respondent's application for security for costs leading to the main judgment.

Anonymisation of the main judgment

3 In relation to the anonymization of the main judgment and the name of the first respondent, anonymization occurred in the judgment of Commissioner Clyde-Smith reported at *Representation of Rawlinson and Hunter Trustees SA and Fort Trustees Ltd and Balchan Management Ltd* [2018] JRC 131 and referred at paragraph 3 of the main judgment. Commissioner Clyde-Smith's judgment concerned an attempt to remove the representor as trustee of the three trusts. The dispute that now remains concerns whether or not the representor is entitled to be indemnified by the first respondent.

4 Having considered all the material before me, firstly it is clear that the remaining dispute is hostile litigation because the first respondent, in summary, contends that he never signed

the deed of indemnity in issue at all.

5 Secondly, the litigation which has led to the present dispute is in any event in the public domain. In particular, the judgment of the Privy Council reported at *Investec Trust (Guernsey) Ltd, Bayeux Trustees Ltd v Glenalla Properties Ltd, Thorson Investments Ltd, Eliza Ltd, Oscatello Investment Ltd, Rawlinson & Hunter Trustees SA (Guernsey)* [2018] UKPC 7 identifies the existence of the TDT and other trusts and that the first respondent is a beneficiary of those trusts.

6 Thirdly, there was no order asked for or made by me that the proceedings before me were in private.

7 There is therefore nothing in the present proceedings in relation to the dispute about indemnities which justifies these proceedings being in private in light of what is in the public domain in addition to the dispute being hostile. For all these reasons I rule that the main judgment be made public. I appreciate, this decision makes Commissioner Clyde-Smith's judgment public but his decision itself refers to the Privy Council decision and so identified the first respondent and the TDT in any event.

Use of affidavits in Guernsey

8 Advocate Swart also asked permission to use the affidavits filed in relation to the present application in the proceedings presently before the Guernsey Court. As the request was only raised for the first time and without any prior warning when the main judgment was handed down, I allowed Advocate James 7 days to make any observations he wished to make. As I did not receive any further observations from Advocate James, I granted Advocate Swart's request. My reason for doing so was that the first respondent appeared to be taking inconsistent approaches between different jurisdictions. I referred to this at paragraph 84 of the main judgment. In addition, in the decision of Commissioner Clyde-Smith between the first respondent as appellant and the representor as respondent reported at *D v Rawlinson and Hunter Trustees SA* [2018] JRC 132 at paragraph 17(4), the first respondent through his advocate argued as follows:-

> ***"17. D argues that R & H's claim in relation to the DDT should have been referred by the Greffier to the Court, which would, in turn, have referred the matter to the Guernsey Court, because:-***
>
> ***(iv) The Guernsey Court was in a better position to regulate these fees and costs claims because the lion's share related to work in the Guernsey litigation, of which the Guernsey court had direct knowledge and because it had seen other evidence of what had been charged previously and would be in a good position to assess the reasonableness of the costs claimed against those previously awarded."***

9 This led Commissioner Clyde-Smith at paragraph 22) to state as follows:-

> ***"22. The fundamental point is that R & H can only claim fees and costs that are properly payable out of the trust fund of the DDT held by the joint receivers, however reasonable its fees and costs regarded in isolation might be. What is properly payable out of this trust fund can only be determined at a hearing to which the joint receivers and the other creditors are convened. It is clear that the supervision of this potentially insolvent trust and issues as to priority as between creditors has been and is being undertaken by the Guernsey court and it would be an exorbitant exercise of this Court's jurisdiction to interfere at the instance of one former trustee by determining as a discreet issue the amount payable to it out of the trust fund."***

10 Despite this ruling, and the clear statement made on behalf of the first respondent set out above, a letter dated 23 rd April, 2019, from Babbé, Guernsey Advocates, for the first to third respondents included the following:-

> *"Administration, Accounting, and Directors Fees*
>
> *"These fees are disputed, and this dispute is the subject of confidential trust administration proceedings between F and B and GTC in the Jersey Royal Court.* Until that dispute is resolved, it is inappropriate for GTC to seek payment of GTC of fees out of the assets of the TDT."

11 This statement contradicts the submission made to the Royal Court cited above and the Royal Court's subsequent ruling which is why it is important that the Guernsey Court has access to the full picture of what has been said in this jurisdiction. There are also no proceedings before the Royal Court in relation to the fees of the representor payable from the TDT.

The application to join Geneva Holdings SA

12 Within its skeleton argument in support of its submissions on costs the first respondent included an application to join Geneva Holdings SA (formerly known as Rawlinson and Hunter SA) to the proceedings. Geneva Holdings SA is the entity I have described as the parent company to the representor in the main judgment.

13 The rationale for the application was that the undertaking offered might not be enforceable in Switzerland and therefore it was appropriate to join Geneva Holdings SA as a party to the current proceedings in Jersey.

14 There were however a number of problems with this analysis.

15 Firstly, the dispute in Jersey concerns an indemnity between the representor and the first respondent. There is therefore no issue at present between Geneva Holdings SA and the first respondent in respect of the indemnity. It is only if the first respondent's defence is successful and an adverse costs order is made against the representor which Geneva Holdings SA then refuses to honour in breach of the irrevocable undertaking given to the Royal Court does an issue arise. At that stage it would be open to the representor to bring separate proceedings before the Royal Court alleging contempt of court should Geneva Holdings SA not honour its undertaking.

16 Secondly, by that stage, the amount of any costs payable by the representor would have been ascertained because either these would have been agreed or a taxation would have occurred. What sum was due from Geneva Holdings SA pursuant to its undertaking would then be known. An opinion provided on behalf of the first respondent in support of the application to join did not address the question, given that the identity of the Swiss entity that had offered the undertaking was clear, once any amount due under any costs order had been assessed, whether that costs order was capable of enforcement in Switzerland. I was not therefore persuaded that the undertaking could not be enforced in Switzerland in due course.

17 Finally, if the above conclusions are incorrect, the power to join a party is contained Rule 6/36 of the Royal Court Rules 2004, as amended. Rule 6/36 provides as follows:-

> ***"6/36 Misjoinder and nonjoinder of parties***
>
> ***At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –***
>
> > ***(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;***
> >
> > ***(b) order any of the following persons to be added as a party, namely –***
> >
> > > ***(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or***
> > >
> > > ***(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between that person and***

that party as well as between the parties to the cause or matter ,

but no person may be added as a plaintiff without that person's consent signified in writing or in such other manner as the Court may direct."

18 In the present case, Geneva Holdings SA could not be added as co-respondent; it was not either involved in or opposed to the representor's claim under the indemnity. Nor was there an application to convene Geneva Holdings SA as a third party. The only basis that Geneva Holdings SA could therefore be joined as a party would be for it to be added as co-representor i.e. a co-plaintiff. However, Rule 6/36 is clear that to add a co-plaintiff would require Geneva Holdings SA to consent. No such consent has been offered.

19 In the absence of any consent, even if my other reasons for not joining Geneva Holdings SA are incorrect, Geneva Holdings SA cannot be added as a co-representor in any event without its consent.

20 The application to join Geneva Holdings SA as a party was therefore refused.

The costs of the security for costs application

21 In relation to what costs orders I should make following on from the conclusions I reached in the main judgment, Advocate James contended as follows:

(i) His client had obtained security which had not been offered voluntarily and so his client was the winner. Costs should therefore follow the event. The security offered was not just the £50,000 but also the undertaking from Geneva Holdings SA, the parent company of the representor.

(ii) The application flushed out the true financial position of the representor that it was unable to meet any adverse costs orders.

(iii) The second affidavit of Mr. Hillier which suggested that the representor was a substantial entity was not supported by the accounts that were ultimately produced.

(iv) The representor was also unsuccessful in trying to persuade the court to keep Mr Hillier's third affidavit and the accounts secret.

(v) Furthermore, disclosure of the accounts late in the day changed the basis of the application because it was clear from the accounts that the representor could not meet any adverse costs orders.

(vi) the representor's primary argument failed, i.e. that no security should be provided; its second alternative also failed i.e. that only the cost of enforcement should be

provided. Its third alternative of ordering a reasonable sum only was therefore very much a fall-back option only.

(vii) The representor had not made any without prejudice save as to costs offers to protect its position. The offer of an undertaking from the parent company was also only made during the hearing which still took a day to argue.

(viii) Although the first respondent was unsuccessful in seeking to recover security for the costs of R20 Advisory Limited, this was an arguable issue that had to be decided for the first time. There was therefore nothing inappropriate in raising this issue for the court to determine.

22 Advocate Swart in response argued that it was his client who had been successful because the first respondent had sought £750,000 as security but had only obtained £50,000. It was also clear from the first respondent's approach that he was not going to accept any lesser sum. Any offer would therefore have been rejected.

23 The intention of the first respondent was clear from paragraph 23 of Ms Martin's fourteenth affidavit quoted at paragraph 86 of the main judgment which I had ruled was entirely inappropriate. The first respondent was seeking £750,000 in order to stifle the representor's claim.

24 The fact that the application was tactical could be seen from it being served at 14:42 on 21st December, 2018, i.e. on the last full working day before the Christmas break. The application was also accompanied by two other summonses which Advocate Swart argued were not being pursued. The application also failed to identify the amount being sought and had not been foreshadowed by any correspondence seeking security on a voluntary basis.

25 Advocate Swart's position was that the representor had had the better of the argument because what had been ordered was far less than that contended by the first respondent. While he accepted his client had not made any offer, had an undertaking plus £50,000 been offered, this would still have been refused because the application was tactical in nature. When the undertaking was offered, this was rejected and the claim for security of £750,000 was maintained.

26 In respect of R20 Advisory Limited, the first respondent did not just lose on the principle; there were other very significant flaws with the claim for security for R20's costs. What was asked for was security of around £600,000 for R20 Advisory Limited with nothing being obtained at all.

27 Advocate Swart also reminded me of the approach to be taken set out in *Pell Frischmann v Bow Valley & Ors* [2007] JRC 143 in particular paragraph 3 which justified not treating the first respondent as the winner.

28 He was also critical of the inconsistent approaches taken by the first respondent in Jersey and Guernsey referred to at paragraphs 8 to 11 above which further supported why the application for security was tactical.

29 Advocate James emphasised in reply that in respect of the three summonses issued, on 21st December, 2018, one of the summonses had been referred to the Royal Court and the other summons had been adjourned pending determination of the Royal Court hearing. He therefore rejected that the issue of 3 separate applications was tactical. The accounts produced also justified the application because the representor was not in a position to meet Mr Hillier's assurance that the adverse costs orders would be met.

Decision on costs

30 In relation to my decision on costs, the starting point was paragraph 3 of the *Pell Frischmann* decision referred to by Advocate Swart which states as follows:-

> ***"3. In the case of*** *Watkins v Egglishaw* [2002] JLR 1, ***I endeavoured to summarise what I understood to be the guiding principles applicable in the Royal Court in the matter of costs as follows:—***
>
> > ***"(a) The Court's overriding objective in considering costs is, as in everything else, to do justice between the parties*** .
> >
> > ***(b) In many cases, that objective will be fulfilled by making an award of costs in favour of the "winning" party, where a "winner" is readily apparent.*** In any event, the "follow the event" rule can still be a useful starting point .
> >
> > ***(c) It is a mistake, however, to strain overmuch to try to label one party as the "winner" and one the "loser" when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms*** .
> >
> > ***(d) The discretion as laid down in art. 2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in*** *In re Elgindata (No.2)* ***and*** *A.E.I. v. Phonographic Performance*.
> >
> > ***(e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice.*** Its task is to take an overview of the case as a whole (Bank of Credit & *Commerce International.* v. Ali (No. 4), ***per Lightman J.).*** The new Civil Procedure Rules governing

> litigation in the English courts provide that the court "must have regard to all the circumstances" and then go on to spell out certain matters that such circumstances include, the "conduct of all the parties" being one and "whether a party has succeeded on part of his case, even if he has not been wholly successful" [on] another (Civil Procedure Rules, para. 44.3(4)). To a large extent, however, the particular matters mentioned do no more than state the obvious and it is unnecessary to import them verbatim, in any formal way, into the practice of the Royal Court.
>
> ***(f) It is implicit in this that, even though a party would otherwise be regarded as having been "successful", justice may require that costs should not automatically follow the event.***""

31 In relation to the representor, the representor lost its argument that no security should be provided because during the hearing Geneva Holdings SA had offered an irrevocable undertaking and because I decided that the undertaking should be supported by a payment into court of £50,000 by the representor. The assurance contained in Mr Hillier's second affidavit was not therefore sufficient to persuade me not to order security. There was also no without prejudice save as to costs offer made.

32 Mr Hillier's second affidavit and the statements contained in it were also not supported by the accounts of the representor (albeit they were supported by the accounts of Geneva Holdings SA, the parent company). In expressing this view, I make no finding as to whether those inaccuracies in Mr Hillier's second affidavit were deliberate or whether he innocently but mistakenly confused the financial position of the group as a whole with the position of the representor as a subsidiary.

33 The representor was also unsuccessful in its argument that Mr. Hillier's third affidavit should be kept confidential as should the accounts albeit I did make an express order limiting the parties and certain individuals involved only being able to use the accounts for the purposes of the present proceedings.

34 On the other hand, in relation to the position of the first respondent, he lost in respect of the argument in respect of R20 Advisory Limited. Yet this was the lion share of the costs claimed. Not only did the first respondent lose in respect of the principle; in addition, there were also significant flaws with the way in which the claim for costs for R20 had been formulated as set out at paragraphs 101 to 103 of the main judgment.

35 I also concluded that that the application brought by the first respondent was tactical. Paragraph 23 of Ms. Martin's affidavit, referred to at paragraph 86 of the main judgment, set out that the motive for bringing the applications for costs was to try to stifle the claim. I criticised her approach at paragraph 87 of the main judgment as being entirely inappropriate.

36 Although the summonses issued on Friday 21 st December, 2018, were in respect of issues that needed to be resolved, the timing of those applications to my mind was tactical by issuing them together and on the afternoon of the last working day before Christmas. In addition, in relation to the request for security for costs, it had not been foreshadowed by any voluntary request that security be provided. The summons also did not identify the amount sought.

37 The amount of past costs where security was also sought was only set out in Ms Martin's 11 th affidavit sworn on 1 st March, 2019, i.e. 10 weeks later. Such an interval is not acceptable. The first respondent's approach also failed at all to set out what future costs were going to be incurred and what security was sought for such costs. This was also contrary to what is required. In particular, the suggested approach of doubling the costs incurred to date was an approach that was without justification.

38 Just as the representor did not make any offer on a without prejudice save as to costs basis, neither did the first respondent's representatives. All that was sought throughout was security in the sum of £750,000. Yet I ordered far less than this sum to be paid into court.

39 The affidavits filed in the present application by Ms Martin did not help matters because they went far beyond giving evidence and instead contained matters of comment or submission. Despite the length of the affidavits filed, in addition I was not provided with the necessary evidence to form a view on the merits or in respect of the first respondent's case on estoppel (see paragraphs 78 and 79 of the main judgment). This further supports why the first respondent's approach was tactical.

40 The first respondent was also unsuccessful in his argument that any stifling had to be due to his conduct. This submission was not supported by any authority.

41 I was also critical of the first respondent for taking inconsistent approaches in respect of seeking to persuade me that there was adequate security for third party costs claims against the representor so that the representor did not need to call upon the indemnity, yet taking different approaches in Guernsey (see paragraph 84 of the main judgment).

42 The conclusion I therefore reached was that in deciding how to do justice between the parties, the criticisms I have listed above led me to conclude that trying to analyse who was a winner and who was a loser is not appropriate in this case. Rather this is a case where the observations at subparagraphs 3(c) and 3(e) of *Pell Frischmann* cited above apply. In particular, the criticisms I have made of the first respondent even though he has recovered some security, are considerations that I regarded as being material in respect of the overriding objective of doing justice.

43 I therefore concluded that the right order to make was no order as to costs. I ruled out costs in the cause because this would mean the successful party recovering the costs of the present application notwithstanding the criticisms I have made of both parties. The right order therefore was for each party to bear its own costs of this application whatever the final outcome of the dispute.