Trilogy Management Ltd v YT and Others

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 July 2013
Neutral Citation:	[2013] JRC 142
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Text

[2013] JRC 142

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **sitting alone**.

Between
Trilogy Management Limited
Representor
and
(1) YT Charitable Foundation (International) Limited
(2) HM Attorney General
(3) OM — LC 2 Charitable Foundation International
(4) The Empowerment Charitable Trust
(5) The Saving Grace Charitable Trust

(6) OM — VC Charitable Foundation
(7) The Well Trust
(8) Mrs C
Respondents

Advocate P. M. T. Tracey **for the Representor**.

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

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

The other Respondents did not appear and were not represented.

Authorities

Trilogy Management -v- YT and Others [2012] JRC 093 .

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

Trilogy Management -v- YT and Others [2012] JCA 204 .

Buckton -v- Buckton [1907] Ch 406 .

Capita Trustees Limited -v- RS [2013] JRC 123 .

Singh -v- Bhasin [2000] WTLR 275 .

Alsop Wilkinson -v- Neary [1995] 1 All ER 431 .

SGI Trust Jersey Limited -v- Wijsmuller [2008] JLR N 22 .

Trust — costs judgment.

Bailiff

THE

1 I am asked to rule on the costs of the proceedings which led to the judgment of the Court dated 10th May, 2012, ([2012] JRC 093) (“the judgment”).

2 The facts of this complicated matter appear from the judgment. I do not intend to describe the matter in full but only to the extent necessary for the purpose of ruling on costs. Expressions defined in the judgment are used in the same sense in this judgment.

3 On 3rd November, 2010, Trilogy brought a Representation against YT and the Attorney General, to which other parties were subsequently convened. JY is an investment company which is owned by YT as trustee of the Foundation. YT is a company which is owned essentially by a purpose trust. Its sole activity is to act as trustee of the Foundation and its directors are four members of the family together with Advocate Binnington. Under the terms of the Foundation, income must be distributed equally to eight charitable sub-trusts, with Trilogy being the trustee of three of those sub-trusts. It brought the Representation in that capacity.

4 The Representation was largely concerned with the level of dividends which had been paid by JY to YT as trustee of the Foundation and hence to the eight charitable sub-trusts. Thus sub-paragraphs 3(b) and (c) of the prayer of the Representation sought the following relief:–

> *"(b) a declaration as to the sums available for dividend for the purposes of Article 96 of the Articles of JY, alternatively an inquiry to the same intent;*
>
> *(c) an order that YT as trustee of the Foundation procure without delay the payment by way of dividend of the sums found to be available for dividend for the purposes of Article 96 pursuant to the forgoing account or inquiry."*

5 However, the Representation also made various further criticisms of YT as trustee and sought additional relief that the structure be unwound, either by YT procuring the distribution of the capital of the trust fund to the eight charitable sub-trusts or alternatively that it procure the transfer of 3/8ths of the assets of JY to the Trilogy sub-trusts. Further, or the alternative, it sought the removal of YT as trustee of the Foundation.

6 The Court concluded that the Representation fell naturally into two distinct parts. The first part dealt with the correct level of dividend which should have been paid by JY and the second dealt with whether YT should be removed as trustee and whether the structure should be unwound in any way. Accordingly, on 12th August, 2011, the Court ordered the trial of a preliminary issue in the following terms:–

> ***"that there be a trial of a preliminary issue ("the First Issue") as to the following:–***
>
> ***a) the correct construction of Article 96 of the Articles of Association of [JY] (as amended on 25 June 2004) as to the mandatory requirement for the payment of a dividend of not less than 75% of the profits of [JY] and the meaning of the words "profits of that year;***
>
> ***b) in light of such construction, the sums (if any) that should properly have been recommended pursuant to the said mandatory requirement for dividend to the company by the directors under the said Article 96 in relation to the 2003, 2004, 2005, 2006, 2007, 2008 and 2009 years of accounts; and***

c) the sums, if any, due to the Eight Charitable Sub-trusts of the [Foundation] arising from the determination of a) and b) above.

It being agreed by all that parties that these matters fall to be decided by the court under paragraphs 3 b) and 3 c) of the prayer to the Representation (although the matters prayed in said paragraphs are not restricted to these matters alone) and specifically pleaded at paragraph 17 sub-paragraphs 17.1 to 17.6 in the Representation."

Paragraph 17.4 of the Representation raised the issue of whether it had been correct to count the PTP dividend of US$80 million against the Article 96 obligation for 2004 (as the directors had done) and contended that it should have been treated as a dividend for 2002, so that a further dividend for 2004 was required.

7 The Court had earlier on 21st January, 2011, ordered Advocate Alan Binnington, as a director of JY and YT, to file an affidavit setting out the history of the matter and what the trustee had done. The Court took the view that, in relation to the preliminary issue, it was not necessary for there to be pleadings.

8 Although in the affidavit of Advocate Binnington and in subsequent correspondence, YT sought to justify and uphold the decisions it had taken in relation to dividends for 2003, 2004 and 2005, it adopted a neutral position shortly before the hearing of the preliminary issue (as set out at paragraph 18 of the judgment) because its board had split and was incapable of giving instructions (unanimity being required under the Articles). In these circumstances, the Court invited Mrs C to put the arguments in support of the decisions which had been taken by JY/YT and which were being criticised by Trilogy.

9 The preliminary issue came before the Court in December 2012. As Trilogy put it in its skeleton argument, the Court had to decide what was the proper minimum dividend for the years 2003, 2004 and 2005 respectively (succeeding years having by then been agreed). However, the decision in connection with each of those years turned on very different considerations. In relation to 2003, the issue was whether the amended Article 96 (which required a minimum annual dividend of 75% of the profits of that year) applied to 2003 at all, given that it had only been adopted during the course of 2004. In relation to 2004, the issue was whether the PTP dividend of US$80 million could be credited against the admitted requirement under the amended Article 96 to distribute 75% of the profits of 2004. In relation to 2005, the issue involved ascertaining what the profit was for that year, given the change in accounting policy to IFRS for the preparation of the accounts for that year.

10 In its judgment, the Court chose to express the issues in the following way:–

(i) Issue 1 — what were the profits of the year 2005 for the purposes of Article 96 of the Articles of Association?

(ii) Issue 2 — did the amended Article 96 apply to the 2003 accounts?

(iii) Issue 3 — could the PTP dividend of US$80m properly be counted against the 75% distribution requirement for 2004?

11 Although it received expert accounting evidence on the point, issue 1 was essentially a point of construction. This Court ruled that the revaluation of net assets for the purposes of switching to the IFRS basis was to be treated as a profit of 2005 and accordingly the profit for that year was some US$223 million. The Court therefore ruled that YT must procure that JY declare a further dividend of US$151,797,905 for that year.

12 In relation to issue 2, this Court held that the amended Article 96 did apply to 2003 and that accordingly YT should procure that JY declare a further dividend of US$9,501,368 for that year.

13 As regards issue 3, the Court found that the understanding at the time of the 2004 compromise was that the PTP dividend was separate from the requirement for a 75% minimum distribution going forward and that accordingly the PTP dividend of US$80 million could not be counted against the 75% requirement for 2004. It therefore ordered that YT should procure a further dividend from JY of US$26,308,103 in respect of that year.

14 Mrs C appealed the Court's decision on issue 1 to the Court of Appeal [2012] JCA 152 which overturned the decision and held that the profits for 2005 were to be calculated solely by reference to the figure shown as profit in the accounts for that year drawn up on the IFRS basis, with the result that no further dividend for that year was required. Subsequently, the Court of Appeal issued a judgment on costs [2012] JCA 204. It concluded that the issue before it (issue 1) was properly categorised as a matter necessary in respect of the proper administration of the trust and that the costs of all parties in relation to the appeal should be borne by the trust fund of the Foundation.

15 It is in these circumstances that the matter returns to me for ruling on the costs of the hearing at first instance.

Applicable Principles

16 In its decision on costs, the Court of Appeal endorsed the principles which are to be found in the leading case of *Buckton -v- Buckton* [1907] Ch 406. These were summarised by Kekewich J at 414 as follows:–

> ***"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 to 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 would 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."

17 These principles were considered further in the recent case of *Capita Trustees Limited -v- RS* [2013] JRC 123. The Court emphasised at paragraphs 26–29 that the mere fact that a beneficiary may put forward an argument which will be in his or her financial interest does not of itself necessarily take the matter outside category 1 (or category 2) of the *Buckton* categories.

18 These proceedings were commenced by Trilogy as a beneficiary (in its capacity as trustee of the three sub-trusts) of the Foundation and accordingly the matter cannot fall within *Buckton* category 1. The issue is whether each of the issues in the preliminary issue falls within *Buckton* category 2.

19 With that introduction, I propose to take each issue in turn.

Discussion

Issue 1

20 All the parties are agreed that, as held by the Court of Appeal, the proceedings on this issue are correctly characterised as proceedings necessary in respect of the proper administration of the trust and the costs of all parties should be paid out of the trust fund.

21 I agree that this issue falls within *Buckton* category 2 and I direct that YT should have its costs out of the trust fund on the usual trustee basis and that Trilogy and Mrs C should have their costs out of the trust fund on the indemnity basis.

Issue 2

22 This was also a matter of construction of the Articles of Association of JY. However, Advocate Tracey argued that a decision on this aspect should be adjourned for decision by the Commissioner who will be trying the remainder of the Representation in October of this year. He further submitted that the answer to this particular issue was obvious and that YT acted unreasonably by not conceding the point.

23 He also argued that YT should have applied for a *Beddoe* type direction. As it did not, this should be a relevant factor in the Court's decision on costs. He argued that if I was not willing to adjourn the matter for decision by the Commissioner, I should disallow YT its costs out of the trust fund.

24 He referred me to the English case of *Singh -v- Bhasin* [2000] WTLR 275 where the court said this:–

> ***"If the trustee omits to apply for a*** *re Beddoe* ***order, he defends the action at his own risk as to costs, and may find at the conclusion of the proceedings that the court adjudges that his conduct was unreasonable.*** If the court considers that it would have authorised the defence of the proceedings at the expense of the trust fund had such an application been made, it may in the exercise of its discretion permit the costs to be taken out of the trust fund. But if the court considers that it would not have given authority to defend the proceedings, it will not generally allow the costs out of the estate. In the latter case, the fact that the trustee was advised by counsel that he had a good defence may not be sufficient to persuade the court not to visit the costs on the trustee personally."

25 Advocate Tracey seemed to argue that YT should be penalised in costs because it had not sought any *Beddoe* type relief from the Court in advance of the trial of the preliminary issue. I do not think that this correctly reflects the legal position. The only relevance of a failure to

apply in advance for such relief is that a trustee embarks on litigation at his own risk without the comfort of knowing that he will definitely be entitled to his costs out of the trust fund. The Court still has to consider what the correct costs order is and, as the passage referred to above makes clear, the Court may well be assisted by what it considers it would have decided if a *Beddoe* type application had been made. But a trustee is not to be disentitled to his costs merely because he has failed to apply at an earlier stage for *Beddoe* type relief, nor is such a failure to count against him.

26 In my judgment, there is no distinction to be made between issue 1 and issue 2. Both of them turned on the correct construction of the Articles of Association of JY and are properly to be regarded as falling within *Buckton* category 2. I do not consider YT acted unreasonably in not conceding the point on issue 2. I rule therefore that YT should be entitled to its costs on this issue out of the trust fund on the usual trustee basis and the other parties on the indemnity basis.

Issue 3

27 Advocate Tracey argues that the costs of issue 3 should be adjourned for consideration by the Commissioner following the trial of the remaining issues. If I were to be against him on that, he argued that YT should not be entitled to reimbursement of its costs out of the trust fund and should furthermore be ordered to pay Trilogy's costs. As to Mrs C, she should be left to bear her own costs.

28 I would summarise his grounds for so arguing as follows:–

(i) He contended that issue 3 was not a *Buckton* category 2 matter but was a " ***beneficiaries dispute"*** as described by Lightman J in *Alsop Wilkinson -v- Neary* [1995] 1 All ER 431 at 434 in the following terms:–

> ***"Trustees may be involved in three kinds of dispute.***
>
> ***(1) The first (which I shall call 'a trust dispute') is a dispute as to the trusts on which they hold the subject matter of the settlement.*** This may be 'friendly' litigation involving, for example, the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or 'hostile' litigation, for example, a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw (see *Re Buckton, Buckton -v- Buckton* [1907] 2 Ch 406).

> ***(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.
>
> ***(3) The third (which I shall call 'a third party dispute') is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities, for example, in contact or tort, assumed by the trustees as such in the course of administration of the trust."***

Lightman J goes on to say at 435 that a ***"beneficiaries dispute"*** is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate.

(ii) In support of his contention, Advocate Tracey refers to the Court's finding at paragraph 135 of the judgment that the decision of YT to permit the Board of JY to count the PTP dividend against the obligation to distribute 75% of the 2004 profits was a decision to which no reasonable trustee could come. It follows, he says, that it was a breach of trust and YT as trustee should not therefore be entitled to its costs.

(iii) YT had not protected its position as to costs by seeking directions or *Beddoe* type relief. This militated against it now being awarded its costs out of the trust fund.

(iv) It was accepted that YT had no assets. Thus an order for costs against YT would of itself be of no assistance to Trilogy. However, Trilogy wished to convene the directors of YT (i.e. PC, AC, LC, MC and Advocate Binnington) in due course with a view to obtaining an order that they personally should be responsible for Trilogy's costs.

(v) He accepted that he would face quite a high hurdle in this respect (see for example *SGI Trust Jersey Limited -v- Wijsmuller* [2008] JLR N 22 where it was stated that personal costs orders are not to be made against company directors in the absence of some impropriety or bad faith). But, whether or not they would be made personally liable would depend upon a detailed examination of the way in which they had conducted themselves and why they had chosen to count the PTP dividend against the 2004 mandatory distribution and why they had not conceded the issue. The main hearing before the Commissioner would involve more detailed evidence on this topic than had been given at the hearing of the preliminary issue and accordingly the Commissioner would be in a better position to decide the matter. Furthermore, if the Court were now to make a costs order awarding YT its costs out of the trust fund, there would be a risk of inconsistent decisions if the Commissioner were to take a different view as to the culpability of the board of YT having heard further evidence.

29 I have carefully considered Advocate Tracey's submissions. But I have come to the clear conclusion that the correct order is that YT should have its costs of issue 3 out of the trust

fund of the Foundation and that Trilogy should similarly have its costs out of the trust fund on the indemnity basis. I would summarise my reasons as follows:–

(i) I consider that issue 3 is most correctly described as a *Buckton* category 2 matter. In particular this is not a case where Trilogy commenced adversarial proceedings for breach of trust. On the contrary, by virtue of paragraphs 3(b) and (c) of the prayer, it sought a declaration as to what were the correct amounts which should be distributed by way of dividend and an order that such distributions be made. It was the sort of matter which could equally have been dealt with by YT bringing a representation seeking directions. I do not therefore accept Advocate Tracey's argument that this is a beneficiaries dispute within the formulation of Lightman J in *Alsop Wilkinson*.

(ii) In this respect, I see no difference between issues 1 and 2 on the one hand and issue 3 on the other. In respect of each year (2003, 2004 and 2005), YT as trustee had taken a decision in relation to the level of dividend which Trilogy felt was wrong; it accordingly brought a Representation seeking payment of the correct amount. In relation to issue 1, the correct level of dividend turned on the interpretation of Article 96 in the context of the change in accounting policy in 2005. In relation to issue 2, the issue turned on whether the amended Article 96 (adopted in 2004) applied to the year 2003. In relation to issue 3, the issue turned on whether the decision to count the PTP dividend against the 2004 minimum distribution was contrary to what had been understood at the time of the 2004 compromise. Although the nature of the argument varied in each case, the ultimate issue was similar, namely whether YT as trustee had procured payment of the correct amount of dividend by JY having regard to the terms of Article 96. If issues 1 and 2 are correctly regarded as being matters of administration of the trust, I see no reason to conclude that issue 3 is something different and is not a matter of administration of the trust.

(iii) I accept that the Court held at paragraph 135 of the judgment that the decision in relation to the 2004 dividend was one to which no reasonable trustee could come. However that has to be read in context. The Court had explained at paragraphs 123 — 127 that the whole purpose of the 2004 compromise was to try and resolve the differences that had arisen amongst the family and that it was clearly intended that YT should take such steps as were necessary as to give effect to the compromise. The Court went on to say that, to the extent that there was an agreement or understanding concerning the relationship between the PTP dividend and the 75% distribution obligation introduced by Article 96, it was the duty of YT to give effect to that agreement or understanding and any refusal or failure to do so in its capacity as trustee of the Foundation would, in the absence of some fundamental change of circumstances, amount to a decision to which no reasonable trustee could come. It is also clear from the judgment that it was not easy to ascertain exactly what had been agreed at the time of the 2004 compromise, despite the fact that all the parties were represented at the time by leading firms of London solicitors as well as chancery counsel and Jersey advocates. We therefore have some sympathy with the directors in seeking to ascertain the exact relationship between the PTP dividend and the 75% distribution obligation for 2004. We had the benefit of being referred to a number of documents prepared at the time of the compromise and of oral evidence from

witnesses about the events surrounding the compromise. Conversely, the only document which the board of JY appears to have had when deciding whether to count the PTP dividend against the Article 96 dividend obligation for 2004 was the Act of the Court recording the compromise; and this document did not deal with the PTP dividend at all.

(iv) It seems to me that, technically, there is little difference in nature between the three decisions of JY/YT which were being considered and little difference in nature as to the role of the Court in relation to those three decisions. On the finding of the Royal Court, the decision in relation to the 2003 accounts was wrong and had to be changed (because Article 96 applied to 2003) and the decision in relation to the 2005 accounts was wrong and had to be changed (because the board had wrongly ascertained what were the profits for 2005). There seems little distinction between a decision which is wrong because of a misinterpretation or misunderstanding of the Articles of Association or the accounts and a decision which is wrong because the board had not properly reflected what turns out to have been agreed in the 2004 compromise. As already stated, the Court of Appeal regarded issue 1 (in relation to the 2005 accounts) as a matter of administration, so that the costs of all parties should come out of the trust fund. I see no such difference in nature in relation to issues 2 and 3 as should lead to a different outcome in respect of costs on either of those issues.

(v) For these reasons, on the particular facts of this case, I do not consider that the fact that the Court stated that the decision on issue 3 was a decision to which no reasonable trustee could come leads to a different conclusion on costs as compared with issues 1 and 2.

(vi) I accept that for most of the proceedings, YT supported the decision which it had taken but it is the case that, by the time of the hearing, it was taking a neutral stance because of a split amongst its directors.

(vii) I do not think it would be right to adjourn this matter for decision by the Commissioner. This would be a very unusual course. A judge who has heard the matter is usually best placed to make any decision as to costs. It may well be that the Commissioner will hear more extensive evidence and may ultimately take a different view as to the culpability of the board. However, he will be considering very different issues, namely whether YT should be removed and whether the structure should be unwound by distributing some or all of the capital. I do not think it would be appropriate for him then to rule on the costs in relation to the preliminary issue, which had a very different focus.

(viii) As already stated at paragraph 25 above, the fact that YT did not apply for *Beddoe* type relief prior to the hearing of the preliminary issue does not affect the position. I still have to consider what is the right decision on costs having regard to the facts of this particular case.

30 All parties agreed that, if I were minded to make a different costs order in respect of issue 3 from those in respect of issues 1 and 2, I should adopt a broad approach and fix a

percentage of the total costs as being attributable to issue 3 rather than condemning the parties to an expensive, time consuming and probably contentious dispute before the taxing officer so as to establish exactly what element of each party's costs was attributable to issue 3 rather than issues 1 or 2. They endorsed the approach which the Court had outlined in the *Capita Trustees* case at para 36. Having heard the parties briefly on this aspect and doing the best I can, I would have attributed 50% of the costs of the preliminary issue to issue 3 if I had decided to make a different order in respect of issue 3. However, this is academic in the light of my decision.

31 As to Mrs C, her position was indeed somewhat unusual in that she sought to be convened to the proceedings in order to give evidence as to the testator's wishes in relation to the Foundation. However, she took an active part in the trial of the preliminary issue largely at the Court's request once it became clear that YT was not in a position to put forward any positive case. It is clear from the transcript of the directions hearing on 1st December that I was concerned at the possibility of the Court being asked to resolve this matter without the benefit of adversarial argument and therefore gave leave to Advocate Journeaux, on behalf of Mrs C, to cross-examine the expert accountancy witnesses and to make submissions on their evidence and also on the evidence of the other parties. On the opening day of the hearing I widened this and invited Advocate Journeaux also to cross-examine the other witnesses. Given my finding that this is essentially a *Buckton* category 2 case and given these particular facts, I consider that Mrs C should have her costs out of the trust fund on the indemnity basis notwithstanding that her contentions on issues 2 and 3 were unsuccessful.

Conclusion

32 In summary, I order that YT should have its costs of and incidental to the trial of the preliminary issue (i.e. issues 1, 2 and 3) out of the trust fund on the usual trustee basis and that Trilogy and Mrs C should have their costs of and incidental to the trial of the preliminary issue out of the trust fund on the indemnity basis. To the extent (if any) that Trilogy is left out of pocket between the costs which it recovers on the indemnity basis and the costs actually incurred, it will be able to recover these out of the three charitable sub-trusts. To the extent that there is any difference between the costs incurred by Mrs C and those which she recovers on the indemnity basis, she will have to bear these herself.