Representation of Centre Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	25 June 2009
Neutral Citation:	[2009] JRC 133
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Court:	Royal Court
Date:	25 June 2009

Text

[2009] JRC 133

ROYAL COURT

(Samedi Division)

Before:

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

Between
Centre Trustees (CI) Limited and Langtry Trust Company (Channel Islands) Limited
Representors
and
Jacques Van Rooyen and Nikki Van Rooyen
First Respondents

and

Wilfred Pabst

Second Respondent

Advocate J. Harvey-Hills **for the Representors**.

Advocate N. G. A. Pearmain **for the First Respondent**.

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

Authorities

Royal Court Rules 2004.

Representation of Centre [2009] JRC 109 .

Easyair Limited (trading as Openair) -v- Opal Telecom Limited [2009] EWHC 779 Ch .

Noorani -v- Calver [2009] EWHC 592 .

Allason -v- Random House UK Ltd [2002] EWHC 1030 (Ch) .

Mars UK -v- Teknowledge Ltd [1999] 2 Costs LR 44 .

Hotchkiss -v- Channel Islands Knitwear Company Limited 2000/160D .

Re IMS Limited [1996] JLR 294 .

Court of Appeal (Jersey) Law 1961.

United Capital Corporation Limited -v- Bender [2006] JLR 269 .

COSTS JUDGMENT

THE COMMISSIONER:

1 On 27 th April, 2009, the Court ordered the removal of the Second Respondent Mr Pabst as the protector and appointor of the V R Family Trust. That order was not opposed and has not been appealed. The only issue before the Court was the costs of the Representor's representation in respect of which the Court gave its Judgment on 2 nd June, 2009, (*Representation of Centre* [2009] JRC 109). In its Judgment and adopting the same definitions the Court ordered Mr Pabst to pay the costs of the co-trustees and the children of and incidental to the representation, on an indemnity basis, subject to a reservation in relation to hearings on 16 th December, 2008, and 12 th February, 2009.

2 Two applications were made before the Court on 24 th June, 2009 and I take them in turn.

The interim payment

3 Centre Trustees (CI) Limited ("Centre") (Langtry Trust Company (CI) Limited having resigned as a co-trustee) seeks an interim payment of those costs on account. There is no Jersey authority on the power of the Court to order an interim payment on account of costs but all three counsel accepted that the Court had an inherent jurisdiction to do so. I was referred to the commentary in the CPR on Rule 44.3(8) the specific rule under English law, of which we have no equivalent, permitting interim payments, which makes it clear that quite apart from that specific rule the English Court had an inherent power to make such an order as part of its inherent jurisdiction to control its own processes.

4 Mr Harvey-Hills drew my attention to Rule 8 of the Royal Court Rules 2004 which makes provision for interim payments on account of damages, debts and other sums excluding costs. Its equivalent under English law is now contained in CPR Rule 25.7. This rule applies to interim payments pending final judgment and, consistent with the position under English law, clearly does not detract from any inherent power of the Court to order interim payments on account of costs orders it has made.

5 There is no reason to suppose that the inherent jurisdiction of this Court is narrower in this respect than that of the English Court and I therefore accept that the Jersey Court has an inherent jurisdiction to order an interim payment on account of costs.

6 It would appear that in England it is the usual practice now to order interim payments on account of costs; see *Easyair Limited (trading as Openair) -v- Opal Telecom Limited* [2009] EWHC 779 Ch. The general approach of the English Courts is to order one half of the untaxed costs of the successful party by way of an interim payment; see *Noorani -v- Calver* [2009] EWHC 592 at paragraph 34 which in turn makes reference to *Allason -v- Random House UK Limited* [2002] EWHC 1030 (Ch) and *Mars UK -v- Teknowledge Ltd* [1999] 2 Costs LR 44.

7 Mr Harvey-Hills puts forward no special reasons relating to the circumstances of Centre for my ordering an interim payment but relies on the general principle that a successful party should not be deprived from the fruits of its judgment without good reason; see *Hotchkiss -v- Channel Islands Knitwear Company Limited 2000/160D* at paragraph 11. If it is clear that the plaintiff will recover a minimum sum through taxation why should it not have the benefit of that sum now? Whilst the successful party will receive interest on any sums found due under the taxation process, I accept the proposition that, in fairness to the successful party, there is no good reason to keep it out of a sum which it is likely to recover on a conservative basis in any event.

8 Centre's untaxed costs are £290,902.07 but there are a number of factors which must be taken into account as it properly points out. Firstly, costs were not ordered in respect of the two hearings on 16th December, 2008 and 12th February, 2009. Secondly, costs have

been incurred by Centre in dealing with other matters not directly related to the Representation. These relate principally to consideration of claims that the V R Family Trust has against Mr Pabst and claims that he asserts against the V R Family Trust. Thirdly, costs have also been incurred in dealing with issues relating to the appointment of Langtry which are the subject of further proceedings.

9 Centre has made allowances against these factors and the fact that the costs were awarded on an indemnity basis, which would reduce the untaxed starting point to £205,000, and in accordance with the authorities cited, it seeks half of that amount, namely £100,000 as an interim payment. I have no criticism of the allowances put forward by Centre and accept the general approach of the English Courts to the proportion to be awarded by way of an interim payment but I am conscious that these are proceedings brought by way of representation as opposed to an Order of Justice. A representation does not allege a cause of action but simply lays an arguable basis for the making of the orders sought; see *Re IMS Limited* [1996] JLR 294 at page 30.

10 Furthermore it is difficult to form a view as to the accuracy of the allowances made. Accordingly taking these factors into account and applying a cautious approach on the facts of this case, I determine that the proportion should be less than 50% and I therefore order Mr Pabst to pay the sum of £75,000 on account of his liability to Centre for its costs. I was informed Mr Pabst was a man of wealth with an interest in two trusts administered in Jersey and I therefore give him 28 days in which to pay.

Application for leave to appeal

11 Mr Pabst applies for leave to appeal the decision on costs, both in respect of the co-trustees and the children, for which he requires leave under Article 13 (c)(ii) of the Court of Appeal (Jersey) Law 1961. Leave to appeal will only be generally granted where a) there is a clear case of something having gone wrong; b) a question of general principle is being decided for the first time; or c) an important question of law is raised upon which further argument and a decision of the Court of Appeal would be to the public advantage. The actual orders made by the Court have not been appealed. The application therefore relates solely to the exercise of the Court's discretion in relation to costs. Accordingly it is clear the categories b) and c) above do not apply.

12 As to matters having gone wrong, the Court of Appeal will only interfere in the exercise of the Court's discretion if, firstly the Judge misdirected himself with the regard to the principles with which the discretion had to be exercised, secondly the Judge had taken into account matters which he ought not to have taken into account or has failed to take into account matters which he ought to have, and thirdly, the decision is plainly wrong; see *United Capital Corporation Limited -v- Bender* [2006] JLR 269.

13 In considering the conduct of Mr Pabst the Court did so with regard to its perception of his duties as Protector and Appointor. Mr Pearmain did not assert that, in setting out its

understanding of those duties in paragraphs 22–32 of the Judgment, the Court had erred in law. Rather his complaint relates to the application of those principles to the facts. In essence Mr Pearmain repeated his submissions at the hearing that there was no meaningful conflict of interest because Mr Pabst was never actually asked to exercise his powers. It was only if he had been asked to exercise his powers that the issue of conflict would have had to be addressed. In practice Mr Pearmain said he could simply have released his powers in respect of any such request if one had been made. In my view simply releasing his powers in that *ad hoc* manner would leave the beneficiaries without the benefit of a Protector duly appointed and free to act as contemplated when the trust was established and as clearly intended by the settlor and that would not therefore be in their interests. They are entitled to have, in office, a Protector and Appointor free and able to act as and when required.

14 In essence Mr Pearmain maintained that it was perfectly acceptable for Mr Pabst, as a Protector and Appointor, to remain within the domestic confines of this trust as a hostile party advancing claims against it, entitled to ask for and receive confidential information in relation to it. For the reasons set out in the Judgment I see no prospect of such an argument succeeding on appeal.

15 Mr Pearmain referred me to the equitable rule that a fiduciary must not place themselves in a position of conflict but that it was perfectly acceptable for the settlor to place him in such a position. I can see that when these trusts were established it was the Settlor's intention that Mr Pabst would act as both Protector and Appointor notwithstanding the fact that he also had an interest through his trusts in the underlying mining ventures and would be a Director of Terret. However it was not contemplated, and in my view could not have been, that he would be involved in advancing claims in which he had a personal interest against the trust fund of the V R Family Trust. This was an entirely new and, as the Court found, pervasive conflict that made his position as Protector and Appointor untenable.

16 Mr Pearmain asserted that the representation had been issued without prior warning, but any such complaint is undermined by the fact that on its receipt Mr Pabst determined to remain as both Protector and Appointor.

17 Mr Pearmain did not assert that the Court had misdirected itself as to the principles to be applied or that the Court had failed to take into account matters which it ought to have taken into account, or had taken into account matters which it ought not to have. He did not assert that the decision was plainly wrong; his complaint is as to the decision the Court actually made applying the correct principles. It is clear that the Court of Appeal will not interfere with such a decision.

18 Finally he raised concerns as to the scope of the order in that the representation, he says, went beyond merely seeking an order for the removal of Mr Pabst. However it is clear that the Court did give consideration to the scope of the order it made making two reservations from it and the order cannot now be revisited. Leave to appeal is therefore refused.