

Parujan v Atlantic Western Trustees Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	25 June 2003
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Text

[2003] JRC 103

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff **and** Jurats Le Brocq **and** J L Le Breton

Between
Yashvina Parujan
Plaintiff
and
Atlantic Western Trustees Limited
Defendant

Advocate M H D Taylor for the plaintiff.

Advocate D F Le Quesne for the defendant.**Authorities.**

Parujan v Atlantic Western Trustees [\[2003\] JRC 045](#).

Parujan v Atlantic Western Trustees (16th October, 2002) Jersey Unreported; [2002/195].

Dixon & Ors v Jefferson Seal [\[1998\] JLR 47](#).

Trusts (Amendment) (Jersey) Law, 1989: Article 7.

Costs and other matters arising out of the substantive Judgment: [\[2003\] JRC 045](#).

Bailiff

THE**Introduction**

- 1 This judgment deals with a number of matters arising from the substantive judgment of the court delivered on 7th March 2003 ('the original judgment') and with an application by counsel for Mrs Parujan for costs on an indemnity basis. We deal first with the matters arising. For convenience, we shall continue to refer to Atlantic Western Trustees Limited as 'the trustee'.
- 2 First, in paragraph 13 of the original judgment, the court ordered the trustee to repay to the trust fund £31,086 in respect of fees overcharged to the so-called Pan-American Trust and Shearson. Not all the fees charged were actually paid. Counsel for Mrs Parujan agreed that this figure should be adjusted so as to represent the amount over-charged and actually paid. We therefore substitute a figure of £13,386.
- 3 Secondly, in paragraph 15 of the original judgment, the court ordered the repayment of monies taken by the trustee from the trust fund to pay its own legal fees in hostile litigation with the beneficiaries. The evidence of Mr Medlock was that these sums were £49,630.04 and £1,500. It now transpires that the trustee claims that part of these monies represents advice given to the trustee in relation to non-adversarial matters. It is surprising that this was not explained during the original hearing. However, it appears that the trustee has calculated that only £41,101.04 is repayable to the trust fund, and we were told that this amount was received by the new trustee on 4th March 2003, together with a second cheque in the sum of £1,507.96. The first cheque was drawn on the account of the trustee's legal advisers and the second was drawn on an account in the name of the trustee.

- 4 We are bound to say that we find this a highly unsatisfactory state of affairs. On 16th October 2002 Southwell JA stated in his judgment, [2002/195] on an interlocutory matter that, in the context of the use by the trustee of trust funds to pay its legal costs –

'I anticipate that the relevant monies paid to Viberts will now be restored to the trust.'

- 5 In the original judgment we stated –

'In the event that this has not already been done, we order the trustee to re-pay to the Maple Trust forthwith the amounts taken with interest at the court rate from the dates on which the fees were paid.'

The trustee and/or its legal advisers have nonetheless taken it upon themselves to decide that parts of the sums in question should not be repaid on the basis that they do not represent fees charged in relation to hostile litigation. Counsel for Mrs Parujan underlines his client's understandable concern that the trustee and/or its legal advisers should not be judge in their own cause as to where the line is to be drawn between advice given in relation to this litigation and that which was not so given.

- 6 During argument it was accepted on both sides that the proper course to follow was that the money should be repaid to the trust and that Viberts should then submit their account to the new trustee. If the new trustee is satisfied that it is properly payable out of the trust fund, no doubt the trustee will deal with the account appropriately. We understand from a note submitted by Mr Le Quesne that the trustee put Viberts in funds in relation to this claim some months ago. We accordingly order the Trustee to instruct Viberts to repay to the trust fund forthwith the sum of £8,529, together with interest due on that sum, if any, in accordance with the court's original judgment.
- 7 Thirdly, in paragraph 34 of the original judgment, the court made a finding in relation to the reasonable fees which should have been charged for Maple Trust, Lom and Acacia for the period 1995 – 2001. The court stated –

'To those figures must be added expenses which we understand not to be in dispute, except in relation to Lom. Mr Ellis found that the expenses were excessive to the extent of £2,302. We accept that evidence and that figure must be subtracted from the allowable expenses.'

The expenses set out in Mr Ellis' report were –

Maple Trust £25,755

Lom £3,317

Acacia £7,197

Unfortunately, whereas the expenses' column in Mr Ellis' report excluded legal fees in relation to Lom and Acacia, it included such fees in relation to the Maple Trust. The true figure for expenses for the Maple Trust was £49. That is made clear by Schedule E to the report which separates the legal fees from the expenses.

- 8 Mr Le Quesne submitted that the Court was bound by its original judgment and could not re-visit the issue of undisputed expenses. We agree. The undisputed expenses incurred for the Maple Trust amount to £49. As was submitted by counsel for Mrs Parujan, it would be perverse for the court to allow the sum of £25,706 in respect of legal fees improperly charged to the Maple Trust while at the same time ordering the trustee to repay such legal fees. Paragraph 34 of the original judgment is to be construed in relation to the Maple Trust as allowing expenses of £49.
- 9 The allowable expenses, which must be added to the reasonable fees set out in paragraph 34 of the original judgment, are therefore as follows –

Maple Trust £49

Lom £1,015

Acacia £7,197

- 10 Fourthly, we record an agreement between the parties that the allowable fees for the period 1st March 2001 to 7th March 2003, when the trustee was removed from office, amount to £14,927.54.

- 11 Fifthly, the court stated in paragraph 39 of its original judgment –

‘Article 30 of the Trusts (Jersey) Law 1984 creates a statutory indemnity in favour of the trustee removed from office. We give liberty to apply however to any party, and to Investec (Guernsey) Limited, should further submissions be necessary in that regard.’

It has been drawn to our attention that the word ‘indemnity’ is no longer contained in the heading to this article. A new heading ‘Position of outgoing trustee’ was substituted by Article 7 of the Trusts (Amendment) (Jersey) Law 1989 which also modified the provisions of paragraphs (1) and (2) of Article 30 of the 1984 Law. We confirm that we intended to refer in paragraph 39 of the original judgment to Article 30 of the 1984 Law, as amended; ‘statutory provisions’ makes better sense than ‘a statutory indemnity’ and paragraph 34 of the original judgment should be construed accordingly.

- 12 I turn to the question of costs which is a matter for the Bailiff alone. Mr Taylor has asked that the trustee be condemned to pay the costs of Mrs Parujan on an indemnity basis. Mr Le Quesne concedes that costs must be awarded against the trustee, but contends that they should be on the standard basis.

- 13 The head note to *Dixon, Richardson & Others v Jefferson Seal Limited* [\[1998\] JLR 47](#) provides:

'In order to make an order for costs on an indemnity basis, there has to be a special or unusual feature of the case.'

- 14 Counsel submitted that the special or unusual features of this case were as follows.

- (i) The trustee had grossly overcharged the Maple Trust and underlying companies. The affidavit of Mr Medlock of 30th September 2002 put the fees and disbursements at £369,048 whereas the court had assessed the reasonable fees as being in the region of £94,000.
- (ii) The trustee had committed a breach of trust by using trust assets to pay its own legal fees in hostile litigation.
- (iii) The trustee had failed to resign, despite indicating as early as 1999 that it was willing to resign.
- (iv) The trustee had maintained the existence of the Pan-American Trust, notwithstanding significant evidence to the contrary.
- (v) The trustee had made a profit from its irregular conduct.
- (vi) The trustee had refused an open offer to settle the dispute contained in letters of 29th September 2000, 24th November 2000, 27th November 2000 and 24th July 2001. The offer was one of £100,000 whereas the court had adjudicated that a lesser sum was due for the period to 28th February 2001.

- 15 Counsel submitted that an award of indemnity costs would discourage trustees from acting in this fashion in the future.

- 16 Mr Le Quesne opposed the application. He contended that there was no evidence of dishonesty on the part of the trustee. By contrast the court had found that HK was an unimpressive witness. Counsel submitted that his conduct had led to most of the extra work performed by the trustee and the expense incurred. The failure to resign had been primarily due to difficulties in agreeing the form of indemnity with the new trustee, which was not the fault of the trustee. As to the settlement offer, it was said that the fees allowed did exceed £100,000, but that submission was founded upon the court's acceptance of counsel's submissions relating to the legal fees of £25,706, which we have in fact rejected.

- 17 The overriding objective in considering applications relating to costs is to do justice between the parties. Southwell JA, in delivering judgment in the interlocutory application to which we have already referred, stated –

'Undoubtedly the trustee here has conducted itself foolishly. I am left, at the end of the day, with a strong impression that this is a trustee which has tried to play out the matter as long as possible, and has failed to have proper regard to the directions of the court below.'

I respectfully agree that the trustee has conducted itself foolishly, but I would go a little further. It seems to me that the trustee has wilfully refused to conduct itself with moderation in relation to the resolution of this dispute. Before my directions were given that this matter was to occupy no more than two days of the court's time, the trustee was pressing for a hearing lasting two weeks, during which every charge made by it would be examined. Such a hearing would have involved huge expense. I conclude that one of the underlying purposes was to put unfair pressure on Mrs Parujan, either to abandon her representation, or to increase the offer already made. The crucial factor is, however, in my judgment, that Mr Ellis' report was rejected by the trustee. Mr Ellis had been appointed by both parties to look at the disputed charges objectively. The court found that he had done exactly that. His recommendations should have been accepted by the trustee. Their rejection of the recommendations was, having regard to the history of the dispute and the matters relied upon by counsel for Mrs Parujan, in my judgment, a special or unusual feature justifying the award of indemnity costs from that point.

- 18 I therefore order the trustee to pay the costs of Mrs Parujan of and in relation to this representation. The costs will be paid on the standard basis until 27th April 2002 (the date of Mr Ellis' report) and thereafter on an indemnity basis. The trustee will also pay the fees of Mr Ellis in relation to the giving of evidence before the court in the sum of £1,500.