Tanya Marya Dick Stock v Pantrust International SA

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	22 March 2016
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Text

[2016] JRC 69

ROYAL COURT

(Samedi)

Before:

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

Between
Tanya Marya Dick Stock
Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley

Second Respondent

and

James Richard De Winton Wigley
Third Respondent

and

G B Trustees Limited
Fourth Respondent

and

John William Dick (Senior)
First Third Party Respondent

and

John William Dick (Junior)
Second Third Party Respondent

and

Darrin Stock
Third Third Party Respondent

Advocate S. C. Thomas **for the Representor**.

Advocate S. M. J. Chiddicks **for the First to Third Respondents**.

Advocate M. L. Preston **for the Fourth Respondent**.

Authorities

Representation of the Manor House Trust and the Russian Trust [2015] JRC 208 .

Stock -v- Pantrust Int and Others [2015] JRC 223 .

Stock -v- Pantrust [2016] JRC 021 .

Stock -v- Pantrust International and Others [2016] JRC 053 .

Leeds United Football Club Limited v Weston and Another [2012] JCA 088 .

In the matter of the E, L, O and R Trusts [2008] JLR 360 .

In the matter of the V R Family Trusts [2009] JLR 202 .

Edoarda Crociani and Others v Cristiana Crociani and Others [2014] JCA 095 .

Trust — application for costs orders against 1st to 3rd respondents on indemnity basis.

IN THE MATTER OF THE MANOR HOUSE TRUST AND IN THE MATTER OF THE RUSSIAN TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

JUDGMENT ON COSTS

THE COMMISSIONER:

1 The representor and the fourth respondent apply for costs orders against the first to third respondents on the indemnity basis, together with a payment on account.

2 There are two representations, the first dated 28 th May, 2015, concerning the Manor House Trust and second dated the 5 th June, 2015, concerning the Russian Trust. They are in similar terms and have been consolidated. The first to third respondents have filed Answers and Counterclaims (including Third Party Claims bringing in members of the representor's family as parties).

3 Initially, the representations sought only the removal of the first to third respondents as trustees of the Manor House and Russian Trusts, but they were amended on the 10 th August, 2015, to seek the setting aside of the deeds of retirement and appointment by which the proper law of the trusts was changed firstly from Jersey to Panama and then to England and Wales (referred to in the judgments as ***"the 2007 DORAS"*** and ***"the 2015 DORAS"*** respectively) and to seek an account of the administration of the trusts. The Master ordered that each side bear their own costs of that amendment.

4 There have been the following substantive hearings and subsequent judgments:-

(i) By summons dated 3 rd July, 2015, the first to third respondents sought to have the orders of the Court granting leave to the representor to serve the representations upon them out of the jurisdiction set aside, the central issue being whether Jersey was clearly the most appropriate forum. That application failed for the reasons set out in the Court's judgment of 8 th October, 2015, (*Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208). I will refer to that as the jurisdictional challenge.

(ii) In its judgment on the jurisdictional challenge, the Court, of its own motion, ordered that the issue of the respondents' removal should be dealt with as a matter of urgency.

That hearing took place on 27 th October, 2015, and on 6 th November, 2015, the Court removed the first to third respondents as trustees and appointed the fourth respondent as trustee in their place and this for the reasons set out in its judgment of that date (*Stock -v- Pantrust Int and Others* [2015] JRC 223). I will refer to this as the removal application.

(iii) In its judgment on the removal application, the Court gave directions for a discrete issue as to the security taken by the first to third respondents over parts of the trust funds to be dealt with at a further hearing. At that further hearing, a number of issues in relation to the transfer of assets by the first to third respondents to the fourth respondent were raised by the fourth respondent, and dealt with by the Court, which also set aside some of the security taken by the first to third respondents and this for the reasons set out in the Court's judgment of 22 nd January, 2016, (*Stock -v- Pantrust* [2016] JRC 021). I will refer to this as the security application.

(iv) In its judgment on the security application, the Court declined to set aside the second charge taken by the first respondent over St John's Manor and surrounding grounds and directed the filing of additional evidence for a further hearing on that issue. At that further hearing, the fourth respondent again raised issues over the transfer of assets by the first to third respondents to the fourth respondent and the Court, for the reasons set out in its judgment of 5 th March, 2016, (*Stock -v- Pantrust International and Others* [2016] JRC 053), ordered the transfer of one asset (3NP) and declined again to set aside the second charge over St John's Manor. I will refer to this as the St John's Manor application.

5 In discussion, it was agreed that the issue of costs in relation to the security application and the St John's Manor application would be left over to another day and I stand to deal, therefore, with the costs arising out of the representations up to and including the removal application.

Costs of the representor

6 In his skeleton argument, Advocate Thomas sought all of the representor's costs in relation to her representations from the outset, on the basis that the representor had succeeded firstly, in defending the jurisdictional challenge and secondly, in obtaining the removal of the first to third respondents as trustees. Advocate Chiddicks accepted on behalf of the first to third respondents that the representor had succeeded in relation to both of these matters and that his clients should be ordered to pay the representor's costs on those two matters (only) on the standard basis.

7 The issue, therefore, that I have to determine is whether the first to third respondents should pay the representor's costs on the standard or the indemnity basis and the scope of the order. The principles to be applied in relation to indemnity costs are well established and were summarised by the Court of Appeal in *Leeds United Football Club Limited v Weston and Another* [2012] JCA 088 in this way:-

"4. The circumstances in which it may be appropriate to award costs on the indemnity basis have been considered on a number of occasions by this court. In *Dixon v Jefferson Seal Ltd* [1998] JLR 47 , ***Collins J.A., withwhom Harman and Southwell JJ.A. agreed, concluded that there had to be 'some special or unusual feature in the case' to justify such an award. (Page 59). In****Marett v Marett* [2008] JLR 385, ***Pleming J.A., Sumption and Nutting JJ.A. concurring, said this:-***

'A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence. There are many examples in decided cases of the application of these broad principles (see *Dixon v Jefferson Steel Ltd. (6)* (1998) JLR at 52–53); *Maçon v Quérée (née Colligny)****(20); and****Jones (née Ludlow v Jones (No 2)****(11), noting the reference to 'some special or unusual feature' to justify the award of indemnity costs).*** There are also examples of cases where the court has made an indemnity order, even in the absence of culpability or abuse … … relying on the court's general discretion, in England and Wales, under the CPR, r.44.3' (Paragraph 73).

5. In *Leeds Association Football Club Limited and Another v The Phone-In Trading Post Limited t/a Admatch* [2011] JCA 110 , ***at paragraph 11, this court pointed out that the limitation placed on the exercise of the court's discretion by the use of the word 'only' in the first sentence of the foregoing passage must be regarded as an error.***

6. In *C v P-S* [2010] JLR 645 , ***the court rejected a submission that an indemnity costs order should only be considered where the actions of the paying party are malicious or vexatious. Beloff J.A., who delivered the judgment of the court said this:-***

'We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognizing that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct'. (Paragraph 11)

7. In making an award of indemnity costs on the ground of unreasonableness, the court is seeking 'to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances' . (*Pell Frischmann Engineering Limited v Bow Valley Iran Limited and Others*

[2007] JLR 479, ***paragraph 25, cited with approval in****C v P-S****at paragraph 7.”***

8 In its judgment of 6 th November, 2015, dealing with the removal application, the Court described the position of the first to third respondents as untenable and which it summarised at paragraph 9 in this way: -

> ***“We would summarise the position as follows:-***
>
> ***(i) The Panamanian Trustee has had its licence to conduct business cancelled by the Panamanian regulator, and it is therefore presumably illegal for it to remain as trustee of the Trust.***
>
> ***(ii) The Panamanian Trustee has by the 2015 DORAS appointed two of its own directors (the first director and the second director) as personal trustees, apparently in direct contravention of an order of the Panamanian regulator to allow the Settlor to decide who should be appointed in its place.*** Advocate Sinel was unable to say whether the 2015 DORAS were effective, and thus there is confusion as to which of the respondents is trustee.
>
> ***(iii) All of the respondents deny the existence of valid trusts – a stance hardly compatible with the office of trustee.***
>
> ***(iv) The respondents have conflict between their personal interests in the repayment of the Pantrust loans and their duties as trustees.***
>
> ***…***
>
> ***(v) Relations between the respondents and the family have irretrievably broken down, making it difficult for them to work in harmony in the interests of the trust estates.***
>
> ***(vi) There are trust assets which need to be administered.*** In particular, there is a large mortgage over the Jersey residential property, the interest of which has not been paid.”

9 The fall-out between the first to third respondents and the Dick family concerned, at least in part, the substantial loans allegedly made by the first respondent to or for the benefit of John Dick Senior, or entities connected with him. The second and third respondents are directors of the first respondent and the second respondent is the beneficial owner. The first to third respondents were open in stating that they resisted removal as trustees in order to secure their own personal position. It is well established that a trustee who is in a position of an obvious conflict of interest is under a duty to retire (see *In the matter of the E, L, O and R Trusts* [2008] JLR 360 and *In the matter of the V R Family Trusts* [2009] JLR 202).

10 It is clear to me that the first to third respondents challenged the jurisdiction of this Court, not because it was in the interests of the beneficiaries to do so, but in order to secure their own personal position. Furthermore, at the hearing, Advocate Sinel argued that the trusts

were governed by Panamanian law with the Panamanian courts having exclusive jurisdiction. In doing so, he relied upon the 2007 DORAS by which the proper law was changed to Panama and the first respondent was appointed trustee. Putting aside his clients' position that the trusts were shams and that the first respondent had had its licence to conduct company business removed by the Panamanian regulator, no reference was made either by the second respondent in his supporting affidavit or by Advocate Sinel in his skeleton argument to the existence of the 2015 DORAS, which the first to third respondents had executed in direct contravention of an order of the Panamanian regulator (see paragraph 62 of the judgment of 18 th October, 2015,) and by which the second and third respondents became trustees and the proper law was changed from Panama to England. Advocate Sinel had no copies of the 2015 DORAS available for the Court and felt unable to comment on their validity.

11 To compound the position of the first to third respondents, in its judgment of the 8 th October, 2015, on the jurisdictional challenge, the Court gave the first to third respondents the clearest warning about the consequences of their continuing in office as trustees:-

> ***"81 From what we have seen to date, it is very difficult to envisage any court committing Advocate Sinel's clients to remain in office.*** He was quite unable to put forward any reasons based on sound principles of trust law as to why they should remain in office. He questioned what practical effect their removal would have, as he said no more assets would appear as a result. If there were any beneficiaries, he said they didn't need protection – there was nothing to protect them from. He could not see how changing the trustee would advance the Colorado proceedings as if that were relevant. None of this stands up to scrutiny. By continuing to resist their removal, it may well be argued that they are acting unreasonably, which could have consequences in relation to costs."

12 Notwithstanding this warning, the first to third respondents continued to resist their removal and were ultimately removed by the Court on 6 th November, 2015.

13 I considered whether the first to third respondents should be ordered to pay indemnity costs from the point at which the Court gave them this warning, with standard costs applying up to that date. However, bearing in mind the untenable position that they were in, it was unreasonable for them as trustees, in furtherance of their personal interests and in conflict with the interests of the trust estates, to have mounted the jurisdictional challenge and to do so in reliance upon the 2007 DORAS and entirely ignoring the 2015 DORAS, which they had executed in contravention of an order of the Panamanian regulator. Their clear duty as trustees, at least from the point where the Panamanian regulator removed the first respondent's licence to conduct trust company business, was to proffer the resignation of the first respondent as required by the Panamanian regulator. I conclude that the representor should have her costs on the indemnity basis.

14 Advocate Chiddicks pointed out that in seeking an order for all her costs the representor was going beyond the ambit of the costs summons issued by the representor, which was limited to the application to remove the first to third respondents as trustees and the jurisdictional challenge. However, the reality is that the principal relief sought by the representor from the outset was the removal of the first to third respondents as trustees and in my judgment, it is fair that the representor should have her costs of and incidental to the representations up to and including the removal application on the indemnity basis to be taxed if not agreed, but I exclude therefrom (i) any costs relating to the setting aside of the 2007 and 2015 DORAS and to the seeking of an account and (ii) any costs relating to the Counterclaims and Third Party Claims.

Payment on account

15 The power of the Court to order an interim payment on account of a costs bill is now settled and the approach to the Court is set out in the Court of Appeal judgment in *Edoarda Crociani and Others v Cristiana Crociani and Others* [2014] JCA 095. The underlying principle is set out at paragraph 16 of the judgment of the Hon. Michael Beloff QC:-

> ***"16 In my view the achievement of justice, to which all exercises of discretion under procedural rules aspire, would usually require that a party, who is, pursuant to a court order, entitled to its costs, should be paid on account a percentage of the amount he is likely to recover on taxation calculated on a conservative basis to avoid any real risk of over payment."***

16 Advocate Thomas filed a summary of the costs incurred by the representor with Baker & Partners with the fees of the lawyers concerned at their usual charge-out rates, which adds up to a total of £500,856.81p including disbursements, of which the representor seeks an interim payment on account of 50%. Taking an overview of that summary, I note the following points:

(i) Time is claimed from 15 th March, 2015, until 10 th February, 2016. Substantial sums are claimed, therefore, for work prior to the issuing of the representations in May/June 2015 and after the handing down of the removal application judgment on the 6 th November, 2015, the removal application limiting the scope of the order I have made.

(ii) The time claimed may well include work on the Counterclaims and Third Party Claims.

(iii) The fee earner in charge of the file is James Sheedy, a barrister and senior associate, whose time comes to £173,162.50p, at a charge-out rate of £250 per hour, rising to £335 per hour from December 2015. Two partners in the firm have been engaged in the matter, namely Advocate Baker, whose time comes to £129,307.50p at £450 per hour and Advocate Thomas, whose time comes to a very similar

£129,190.50 at £365 per hour, going up to £450 per hour from December 2015. Both Advocate Baker and Advocate Thomas appeared at the jurisdictional challenge and Advocate Thomas appeared at the removal hearing. There is potential here for duplication as between the two of them.

17 Advocate Chiddicks raised a concern that some of the time claimed appears to relate to costs incurred by the representor's husband and brother, for whom Baker & Partners also act, but he made the point that the jurisdictional challenge and removal hearings lasted a total of 1 $^{1}/_{2}$ days and the amount claimed was, he said, wholly disproportionate. He complained about the lack of detail and asked for the submission of a much more detailed bill of costs before the Court considered ordering any interim payment on account. The Court should not, however, be drawn into a more detailed review, as made clear by the Court of Appeal in *Crociani*. Quoting from the judgment at paragraphs 22 and 23:-

> ***"22 In*** *Marange* **, *the Royal Court provided guidance as to the overall approach and correct procedure for making an application for a payment on account [at pp. 40–43, paras. 41 51].***
>
> ***23 Pursuant to such guidance the Court should not seek to conduct a taxation or carry out a detailed review of the successful party's costs, but should adopt, as per*** *Mars* **, *a 'rough and ready' approach in order to arrive at afigure which the successful party will 'almost certainly collect' [at p. 41, para. 44].*** In terms of the correct procedure [at p. 43, para. 50]:-
>
> ***'[ ] where costs have been awarded on the indemnity basis, the fees of the lawyers at the charge out rates claimed […] The Court should be provided with a summary of the time of the fee earners and the rates claimed to enable any serious issues as to the rates or quantum to be raised.*** Where costs have been awarded on the standard basis, then it seems to me that in seeking a payment on account it would be helpful to the Court to be provided with a summary of those costs at the taxation rates applying Factors A and B'"

18 Adopting that approach and taking into account the concerns I have noted in paragraph 16 above, which could have a material impact on the quantum of costs that will be achieved on taxation, I conclude that the representor will almost certainly achieve £100,000 and that is the sum which I will order the first to third respondents to pay jointly and severally on account. I invite brief written submissions from the parties as to the time period in which that sum should be ordered to be paid.

Costs of the fourth respondent

19 The fourth respondent was convened to the representation as the potential new trustee, should the application for the removal of the first to third respondents succeed. It played no part in the jurisdictional challenge and its role in the removal proceedings was limited. It seeks its costs from the first to third respondents on the indemnity basis.

20 The quantum of any order I make in favour of the fourth respondent will be a matter for the Judicial Greffier on taxation, but I take the view that the fourth respondent should receive its costs on the indemnity basis for the same reasons as I have ordered indemnity costs in favour of the representor. It is a necessary consequence of the unreasonable conduct of the first to third respondents.

21 The Judicial Greffier will no doubt bear in mind that the fourth respondent should not be able to recover the costs of its own due diligence and other work it would ordinarily undertake when considering whether or not to accept a new trusteeship, the cost of which is a business expense which it must bear. Whilst it had to attend the removal hearing, it played no part in the hostilities and its role was essentially limited to confirming to the Court its consent to being appointed as trustee as set out in paragraphs 23 and 24 of the judgment of 4 th November, 2015.

Payment on account

22 Advocate Preston submitted a summary of his firm's costs covering the period from 1 st June, 2015, to 22 nd January, 2016, applying its usual charge out rates and totalling £55,634.93p, plus disbursements of £320. However, the amount claimed to 6 th November, 2015, comes to £15,160.

23 The fourth respondent also sought its own internal costs in the sum of £70,703, for which no summary was provided. Advocate Preston justified this claim on behalf of the fourth respondent in this way:-

> "In addition to its legal costs, the fourth respondent seeks recovery of its own costs given that it has incurred fees over and above those that would ordinarily be incurred in performing its duties as Trustee, as a direct result of the respondents' unreasonableness in refusing to retire as trustees …."

24 Two points arise from this:-

(i) The fourth respondent was not performing any duties as trustee in the period concerned, as it was only appointed trustee when judgment was handed down on 6 th November, 2015.

(ii) I am not aware of any basis upon which a party to proceedings can claim its own internal costs, in addition to the legal costs it has incurred, through an order for costs made by the Court. Such internal costs, if they have been properly charged to the trust funds of both trusts, thus causing a loss or depreciation in the value of the trust property, could form part of a claim for breach of trust, but such a claim cannot, I

believe, be made through the medium of a costs order.

25 I decline, therefore, to order the payment of the fourth respondent's internal costs.

26 As to the legal costs of the fourth respondent incurred up to 6 th November, 2015, in the sum of £15,160, I take the view that it will recover at least £5,000 on taxation, and I will therefore order the payment of that sum on account and again, seek brief written submissions from the parties as to the period during which that payment should be made.

Summary

27 In summary:-

(i) I order the first to third respondents jointly and severally to pay the costs of the representor of and incidental to the two representations up to and including the removal application (and for the avoidance of doubt including the jurisdictional challenge) on the indemnity basis to be taxed if not agreed, but I exclude therefrom any costs relating to the setting aside of the 2007 and 2015 DORAS, the seeking of an account and the Counterclaims and Third Party Claims.

(ii) I order the first to third respondents jointly and severally to pay to the representor the sum of £100,000 on account of its liability for costs within such period as I shall stipulate when this judgment is handed down.

(iii) I order the first to third respondents jointly and severally to pay the costs of the fourth respondent of and incidental to the two representations up to and including the removal application on the indemnity basis to be taxed if not agreed.

(iv) I order the first to third respondents jointly and severally to pay the fourth respondent the sum of £5,000 on account of their liability for costs within such period as I shall stipulate when this judgment is handed down.