Capita Trustees Ltd v RS; NS; The Trustees in Bankruptcy of RS

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	25 June 2013
Neutral Citation:	[2013] JRC 123
Reported In:	[2013] JRC 123
Court:	Royal Court
Date:	25 June 2013

vLex Document Id: VLEX-792900709

Link: https://justis.vlex.com/vid/capita-trustees-ltd-v-792900709

Text

[2013] JRC 123

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE DUNLOP SETTLEMENT

Between
Capita Trustees Limited
Representor
and
RS
First Respondent

NS
Second Respondent
The Trustees in Bankruptcy of RS
Third Respondent

Advocate D. M. Cadin **for the Representor**.

The First Respondent did not appear and was not represented.

Advocate M. P. Renouf **for the Second Respondent**.

Advocate M. C. Goulborn **for the Third Respondent**.

Authorities

In the matter of the Dunlop Settlement [2013] JRC 029 .

Trilogy Management Limited v YT Charitable Foundation (International) Limited [2012] JCA 204 .

Buckton v Buckton [1907] Ch D 406 .

Singapore Airlines Limited v Buck Consultants Limited [2011] EWCA Civ 1542 .

Re Esteem Settlement [2000] JLR N 67 .

Alhamrani v JP Morgan Trust Company (Jersey) Limited [2007] JLR 527 .

Trust — costs judgment.

Bailiff

THE

1 This judgment concerns the costs of the proceedings which culminated in the decision of the Court contained in the judgment dated 6th February 2013 ([2013] JRC 029).

2 The full background to this matter is set out in the February judgment and I do not propose to repeat it. Terms defined in the February judgment bear the same meaning in this judgment. Suffice it to say by way of background that, in the February judgment, the Court accepted the surrender of discretion by Capita as trustee of the Dunlop Settlement ("the Trust") and authorised it to enter into an agreement ("the Agreement") with the Humberstone Trustees, Faircliff, Pestana (together "the Humberstone parties"), and the TIB, the effect of which was that all the assets of the Trust were paid to Faircliff or the TIB in settlement of

their respective claims against the Trust, with the consequence that there was nothing left for the beneficiaries.

3 That decision was reached against the opposition of NS as one of the beneficiaries of the Trust. She now applies for her costs out of the trust fund and that is opposed by Capita and by the TIB. The TIB also applies for an order for its costs against NS.

4 The reason that the Court accepted Capita's surrender of discretion in relation to entering into the Agreement was because of Capita's conflict of interest. This arose because the Humberstone parties had brought claims against Capita for breach of trust relating to its trusteeship of the Humberstone Trust on the basis that Faircliff and Pestana, both companies owned by the Humberstone Trust, had made unauthorised or unwise loans to Capita as trustee of the Trust, which loans had been used to acquire the assets of the Trust. It followed therefore that, to the extent that Faircliff or Pestana recovered assets from the Trust, that amount would go to reduce any liability of Capita for breach of trust in relation to the Humberstone Trust.

5 The Agreement provided that all the assets of the Trust would be split, after certain expenses, as to 25% to the TIB and 75% to Faircliff. During the hearing, I enquired of Advocate Cadin whether Capita had any financial interest in the costs application, on the basis that payment of costs out of the trust fund would reduce the value of the 75% recovered by Faircliff. I asked this question because I wished to be clear whether Capita had a personal interest in the stance it was taking in relation to costs.

6 However, I was informed that the claim against Capita in respect of the Humberstone Trust has been compromised following mediation and the amount payable by Capita pursuant to that compromise will not be altered by any reduction in the amount recovered by the Humberstone parties from the Trust. It follows that, to the extent that any costs of the proceedings are ordered to be paid out of the assets of the Trust, such costs will ultimately be borne as to 75% by Faircliff and 25% by the TIB because it is they who are entitled to the net assets of the Trust in those proportions following the execution of the Agreement.

7 In order to reach a conclusion on the matter of costs, it is necessary to give a brief summary of the proceedings.

History of the Proceedings

8 As explained in the February judgment, a company called Stirling Trustees Limited (“Stirling”) was previously the trustee of both the Trust and the Humberstone Trust and this company was acquired by Capita in December 2006. Subsequently, on 10 th September 2007, a formal merger took place between Capita and Stirling, which continued in the form of Capita. It followed that, as a matter of law, Capita was responsible for all actions taken by Stirling in relation to either trust. It is clear that both trusts were run in the past by a Mr Arthur

and the record keeping was very poor. Following detailed investigations, the current management of Capita concluded that the assets of the Trust had probably been purchased with monies provided by entities within the Humberstone Trust (Pestana or Faircliff) and that accordingly one or more of the Humberstone parties had potential claims against the Trust. They also concluded that the TIB, as trustees in bankruptcy of RS, the husband of NS and also a beneficiary of the Trust, had potential claims against the Trust.

9 Capita therefore instituted proceedings in this Court by way of Representation on the 8th July 2011. RS and NS were both convened in their capacity as beneficiaries of the Trust. As RS had had been declared bankrupt, notice was given to the TIB.

10 NS instructed a firm of English solicitors Messrs Blacks and they wrote on 12th August 2011 saying that she had little or no knowledge of the matters referred to.

11 In due course the matter came back before this Court on 15th November 2011. Blacks had confirmed that NS would not be attending that hearing. On that date this Court authorised Capita to write to the TIB, RS and NS with a ‘statement of facts' which set out in detail the position as Capita understood it to be. It was made clear at that hearing that the intention in due course was to supply this to the Humberstone parties with a view to seeking to negotiate a settlement. On 17th November, Capita's advocates wrote to Blacks inviting NS to engage in the matter. She was subsequently provided with a draft of the order which Capita would be seeking at the next hearing, which was to take place on the 4th January 2012. At that hearing, the Court was provided with an opinion by Elizabeth Jones QC dated 12th December 2011 which concluded that the claims by the Humberstone parties appeared to be of merit to exceed the value of the assets of the Trust. She therefore recommended making an offer of settlement to both the Humberstone parties and the TIB. I do not need to recite the details of that offer save to say that it included a provision that a field owned by the Trust, which had some hope value by way of development, should be allocated to NS and Faircliff.

12 On 8th February 2012, Blacks confirmed that NS was unwilling to accept the suggested offer, was considering counter proposals but had no objection to mediation. A mediation meeting was subsequently arranged for 16th March 2012 and this was attended by Capita, the Humberstone parties and the TIB. NS did not attend. Blacks had written on 14th March stating that their papers were with counsel and that NS thought it premature to meet.

13 At the meeting on 16th March, agreement was reached between those parties who attended and that was reflected in the Agreement, which the Court subsequently authorised Capita to enter into in the February judgment. The key difference between the Agreement as reached and the proposal originally suggested by Miss Jones was that NS was no longer given any interest in the field. The effect of the Agreement was therefore to pay over all the assets of the Trust to Faircliff (as one of the Humberstone parties) and the TIB in the proportions previously stated.

14 Capita subsequently brought a Representation to the Court seeking the authority of the Court to enter into the Agreement. On 30th March 2012, the Court adjourned the matter to 23rd April, ordered that the papers be served on RS and NS and further directed that any beneficiary wishing to rely upon any evidence at the hearing should file the same by 13th April. The hearing date for 23rd April was subsequently vacated and re-fixed for 17th May. No other alterations were made to the directions given on 30th March, so that NS should have filed any evidence upon which she wished to rely by 13th April. On 14th May, RS, supported by NS, sought to adjourn the hearing fixed for 17th May, but this was rejected by the Court. Nevertheless, on 17th May, the matter was in fact adjourned, but this related to a problem over associated proceedings heard on the morning of 14th May concerning a company called BDOS.

15 On 16th May, Advocate Renouf, on behalf of NS, had provided a copy of a witness statement by NS which suggested that the monies used to purchase the assets of the Trust had not come from Pestana or Faircliff but had come from other assets contributed by RS. The February judgment concluded at para 36(ii)(b) that this statement was 'effectively demolished' by a witness statement filed on behalf of TIB and by the eleventh affidavit filed by Fiona Milne, the employee of Capita who has been in charge of reconstructing what occurred.

16 The adjourned hearing of Capita's Representation had now been fixed for 28th June. On 26th June, Advocate Renouf, on behalf of NS, filed a skeleton argument and an opinion from Nicholas Le Poidevin QC dated 22nd June 2012, which cast doubt on some of the points made by Miss Jones as to the strength of the claims against the Trust. In the light of this late development, the Court adjourned the matter on 28th June and directed that Miss Jones should provide a detailed supplemental opinion in relation to the claims, that Mr Le Poidevin should have the opportunity of considering that supplemental opinion and that a meeting should then take place between Miss Jones and Mr Le Poidevin to prepare a list of those matters on which they agreed and those on which they did not. The resumed hearing was fixed for 6th August 2012.

17 On 10th July, Advocate Renouf made an offer *"without prejudice save as to costs"* on behalf of NS seeking payment of £240,000 in return for vacating within 3 months the real property owned by the Trust in which she and her husband had been living for the last 10 years. This was rejected by the TIB.

18 By the time the matter came back before the Court on 6th August, Miss Jones and Mr Le Poidevin were agreed that, on the information presently available to them, there were no viable defences to three claims on behalf of the Humberstone parties which exceeded the value of the assets of the Trust, although they were not agreed on the strength of the claim in respect of the Kildwick Hall loan. Miss Jones was of the opinion that there was a valid claim whereas Mr Le Poidevin considered that the evidence as to the provision of the initial funds could only be regarded as 50/50 with a possible defence of limitation if the claim was made by Faircliff rather than Pestana. The claims upon which they agreed that there was

no defence came to at least £2,438m with the assets of the Trust being valued at £2,375m. If the Kildwick Hall claim was accepted, the total claims came to just under £4.4m.

19 At the hearing on 6th August, Advocate Renouf, on behalf of NS, argued that the Court should not approve the Agreement on the basis that:–

(i) Although there appeared to be agreement between Miss Jones and Mr Le Poidevin that the three claims totalling £2.438m were likely to succeed, the fact remained that it was not certain that they would do so. It was therefore wrong to capitulate at that stage without seeking discovery in the Humberstone proceedings.

(ii) The trustee could only act in the best interests of the beneficiaries. As there was no benefit to the beneficiaries as a result of the Agreement, it should not be approved.

(iii) The application should be adjourned for further negotiation to see if an improved offer could be obtained from the Humberstone parties and / or the TIB.

(iv) There would be no disadvantage if the Court refused to approve the Agreement at that stage. The result would be merely to put Faircliff / Pestana and the TIB to proof of their respective claims.

20 The Court rejected those submissions and authorised Capita to enter into the Agreement. The reasons were subsequently provided in the February judgment.

The submissions

21 It is against that background that NS applies for her costs out of the trust fund on the indemnity basis. I would summarise Advocate Renouf's submissions on her behalf as follows:–

i) She is a beneficiary who has been convened to an application by the trustee seeking directions on a matter of administration of the Trust. The normal order in such cases is that a beneficiary should have his costs out of the trust fund on the indemnity basis unless he has behaved unreasonably.

ii) That is particularly so in a case where the trustee has surrendered its discretion to the Court because of a conflict of interest. In those circumstances, it is entirely reasonable for a beneficiary to check the validity of the case being put forward by the trustee and to put forward any arguments which can reasonably be put forward in opposition to the course being suggested, so that the Court is fully aware of all the arguments.

iii) It was therefore entirely reasonable to obtain the opinion from Mr Le Poidevin so as to check the validity of that obtained by Capita. That opinion raised valid concerns.

iv) Although NS had a financial interest in the stance that she was putting forward, this was often the case where a beneficiary supported a particular course of action or a particular interpretation in relation to a trust. The fact remained that she was convened as a beneficiary and it was reasonable for her to put forward arguments which upheld the interests of the beneficiaries.

v) Her failure to engage earlier had not materially added to the costs and her stance at the final hearing had not been unreasonable despite the measure of agreement between Miss Jones and Mr Le Poidevin.

22 Advocate Cadin submitted as follows:–

(i) He accepted the general principle as to the position of beneficiaries but contended that this did not apply where the beneficiary was acting purely as a matter of self-interest. These proceedings had in effect become adversarial in nature and the normal costs order in adversarial proceedings should follow.

(ii) In any event, NS had behaved in an unreasonable manner. She had failed to participate in the mediation; she had produced an opinion from Mr Le Poidevin only two days before the hearing fixed for 28th June in breach of the directions as to the filing of evidence made earlier by the Court; she had filed a statement which was "demolished" by Miss Milne's eleventh affidavit and the statement of the TIB; and she had failed to accept the inevitable once Mr Le Poidevin had agreed with Miss Jones that there were valid claims in excess of the assets of the Trust.

(iii) The degree of her financial interest was considerable in that she was occupying Kildwick Hall and her mother was occupying The Mullions. The fact that the proceedings had become adversarial was shown by her offer that she would be willing to vacate within three months in return for a payment of £240,000.

Applicable principles

23 The Court of Appeal has helpfully summarised some of the principles as to costs in trust litigation in *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012] JCA 204. In relation to the costs of beneficiaries, the Court of Appeal endorsed the long-standing approach summarised in the case of *Buckton v Buckton* [1907] Ch D 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."

24 The categories in *Buckton* have been the subject of recent consideration by the English Court of Appeal in *Singapore Airlines Limited v Buck Consultants Limited* [2011] EWCA Civ 1542. The facts of that case were unusual in that the plaintiff had instituted proceedings for negligence against the defendant in connection with the drafting of some rules of a pension scheme. It was decided that, as a preliminary issue in those proceedings, the Court needed to ascertain the correct meaning of the relevant part of the scheme and the defendant was appointed to represent the members of the scheme on that preliminary issue. The trial judge decided the preliminary issue in a manner which was broadly favourable to the contentions put forward by the defendant. He ordered the plaintiff to pay the defendant's costs of the preliminary issue on the standard basis and no issue was taken as to that. However, he went on to order that the defendant should recover the difference between its costs on the standard basis and the indemnity basis from the assets of the scheme because the matter fell within the second *Buckton* category and, although the defendant had a considerable personal interest in the outcome, the preliminary issue was not hostile litigation against the trustee of the scheme.

25 The Court of Appeal disagreed. Arden LJ said this at paragraph 71:–

> ***"In my judgment, in determining whether category (2) in*** *Re Buckton*

> ***applies, regard has to be had to the substance as well as the form of the application.*** This indeed was the basis on which the litigation initiated by the beneficiary against the trustee in *Re Buckton* ***was placed in category (2) although it appeared from its form to be within category (3).*** In this case, when ***the question of substance is confronted, it immediately becomes apparent that [the defendant] had a direct financial benefit in the outcome of the preliminary issue.*** In my judgment, contrary to the conclusion of the judge, that factor takes this case outside category (2). The issues arising on the preliminary issue were designed to bring to an end the allegations (or some of them) of professional negligence made against it. …"

26 Arden LJ, with whom the other judges agreed, went on to say that the categories of proceedings enumerated in *Buckton* should not be regarded as closed and that there may be circumstances which fall outside the three categories. The Court went on to hold that the defendant was in part acting to assist the administration of the pension scheme (by ascertaining the correct interpretation of its provisions) but was also acting in its own personal interests as part of the adversarial litigation whereby it was defending itself from an allegation of professional negligence. In those circumstances, the Court held that, given that the defendant was acting in a dual capacity, it should be entitled to recover half of the difference between standard costs and its indemnity costs from the scheme but would be left to bear the remaining half of the difference itself

27 Advocate Cadin seized on the words of Arden LJ at para 71 and submitted that NS was clearly acting in her own personal interest in the present proceedings because she stood to benefit if all the assets of the Trust were not paid away in settlement of various claims. She should therefore be left to bear her own costs. The facts of the *Singapore Airline* case were very unusual and the remarks of Arden LJ at para 71 must be read in the context of the facts of the case, where the defendant was engaged in adversarial litigation and clearly had a financial interest in the outcome of the preliminary issue. But if she was intending to suggest that, merely because a beneficiary has a financial interest in the outcome of the point at issue before the court, that of itself takes the matter outside category (2) of the *Buckton* categories, I must respectfully disagree. It will often, and probably usually, be the case that a beneficiary convened to an application by trustees will put forward a stance which he considers will be to his benefit. That is entirely natural and indeed it is one of the purposes of convening the beneficiaries in the first place. The Court needs to ensure that all proper arguments are put before it and it will expect beneficiaries to be likely to argue the point which favours their interests most.

28 Indeed, if one considers the facts of *Buckton* itself, that was a case where the beneficiary initiated the litigation which was designed to establish that he had an estate in tail male in relation to the trust property. He was clearly arguing the case in his own financial interest. Despite that, the judge concluded that, although not strictly falling within the category, the case could fairly be treated as being of the character of category (2) because it ascertained the correct interpretation of the will trust in question.

29 Similarly, in the *Trilogy* case, the Court of Appeal said this at paragraph 18:–

> ***"Having agreed that the appropriate characterisation of the question before us was one arising in respect of the proper administration of the trust, and that it was reasonable for*** *Trilogy* ***to seek to uphold the decision of the Royal Court, it again seems to us that the position of*** *Trilogy* ***not an ordinary adversarial one of seeking to gain an advantage but, rather, that some form of advantage might have flowed to*** *Trilogy* ***had we found in its favour.*** We therefore consider it appropriate for *Trilogy* ***to have its costs, on the indemnity basis, from the trust funds held by YT."***

Decision

30 In my judgment, the proceedings in this case fall within category (1) of the *Buckton* categories. Capita, as trustee, wishes to seek the assistance of the Court in relation to the administration of the trust fund. It wishes to enter into the Agreement, which will have the effect of exhausting the trust fund. That is clearly a matter of the first importance and it is reasonable for a trustee to wish to seek guidance from the Court in such circumstances. The Court will almost invariably, in such cases, convene the beneficiaries so that they have an opportunity of putting forward their view as to the correct method of administering the trust. The mere fact that they may put forward an argument which will be in their financial interests will not be a surprise and does not of itself, in my judgment, take the matter outside category (1). It does not turn the proceedings into adversarial litigation.

31 Thus one starts from the position that NS, as a beneficiary who has been convened to the application, should have her costs paid out of the trust fund on the indemnity basis.

32 Has she done anything to deprive her of that *prima facie* entitlement? In *Re Esteem Settlement* [2000] JLR N 67 it is stated that all parties convened to an application concerning a trust are entitled to have their costs paid out of the trust fund in the absence of evidence of misconduct. I have to say that the note in the Jersey Law Reports does not accurately reflect what Bailhache B actually said in the judgment. He made that observation in the context of the trustee being entitled to its costs. He did not consider what grounds would be sufficient to result in a beneficiary being deprived of his costs. Furthermore, his observations in relation to a trustee have been overtaken by the decision of the Court of Appeal in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527 which make clear that a trustee may lose its costs indemnity by acting unreasonably rather than the higher test of being guilty of misconduct.

33 In my judgment, the approach of the Court in relation to a beneficiary is more flexible but, once it has been decided that a case falls within category (1) or (2), a beneficiary should normally be entitled to his costs out of the trust fund on an indemnity basis unless he has behaved unreasonably.

34 Applying that to the facts of this case, I do not consider that NS acted unreasonably in deciding to instruct alternative counsel to consider the opinion of Miss Jones and whether the claims brought against the Trust were as strong as Capita was suggesting. This was particularly so bearing in mind that Capita had a conflict of interest and was therefore surrendering its discretion to the Court. The Court only had an opinion from a trustee who stood to benefit (by reducing the claim in the Humberstone proceedings) to the extent that any monies were paid from the Trust to the Humberstone parties. Thus in principle, incurring the costs of considering the strengths of the various claims and putting forward matters to the Court with a view to ensuring that the Court was aware of any contrary arguments was perfectly reasonable on the part of NS.

35 However, I do consider that NS's conduct in relation to the proceedings was unreasonable in certain respects:–

(i) She failed to participate in the mediation. Had she done so it is possible that a slightly different agreement would have been reached which would have been acceptable to her and she would at least have had the opportunity of seeking to influence the discussions.

(ii) She failed to comply with the directions of the Court as to the filing of evidence and produced Mr Le Poidevin's opinion only two days before the hearing, which resulted in it being adjourned, with further costs subsequently incurred. I do not consider that she had any valid reason for this failure to act more promptly. The adjournment incurred extra costs for all parties.

(iii) She filed a witness statement which was palpably wrong and was ‘demolished’ by evidence from the TIB and Capita. Advocate Renouf submitted that she was cautious in her witness statement by saying only that she ‘believed’ certain facts to be the case rather than making definite assertions; but the fact remains that she filed the witness statement in order to raise an issue as to whether the funds had come from sources other than the Humberstone parties when it transpired that it was perfectly obvious that they had not. This put the other parties to extra and unnecessary work.

(iv) I consider that once Mr Le Poidevin and Miss Jones had met and had agreed that there was no viable defence to the three claims which exceeded the value of the trust assets, her continued opposition thereafter became unreasonable.

36 Given these findings, one could conceivably try and construct an order which would disallow her costs in respect of certain issues or after certain dates. But this would require a complex argument on taxation and would result in the parties running up extra costs in considering the matter in great detail upon taxation. I am a firm believer that in such cases the Court should adopt a broad approach and simply make some percentage order in order to try and reflect the Court's view, with the objective of saving the parties from further expense on taxation. Doing the best I can, I consider that NS should be awarded half of her costs out of the trust fund on the indemnity basis. In referring to the indemnity basis, I am of

course referring not to the trustee indemnity basis but to the indemnity basis provided for in Part 12 of the Royal Court Rules (see paragraphs 9 and 10 of *Trilogy* for a convenient statement of the difference).

37 Finally, I turn briefly to the application of the TIB for costs. Given my conclusion that these proceedings fall within category (1) of the *Buckton* categories, the starting point must be that no adverse costs order should be made against NS as a beneficiary, particularly given that the application is made by a party whose interest is adverse to that of the Trust. However, Advocate Goulborn submits that NS should be ordered to pay some of the TIB's costs because the TIB have been put to extra work to 'demolish' NS's erroneous witness statement and in pointing out various inconsistencies between what NS has said on previous occasions concerning any beneficial interest in the trust fund and what she was saying in these proceedings.

38 I can understand why the TIB has made such an application. But the fact that I have ruled that NS should bear a substantial proportion of her own costs in order to reflect these matters (amongst others) does not mean that it follows that an adverse cost should also be made against her. On balance, I do not think that the TIB has made out a sufficient case for an adverse costs order to be made in category (1) proceedings and accordingly I reject the application.