In The Supreme Court of Bermuda

CIVIL JURISDICTION
2007: No. 136

BETWEEN:

DAVID LIONEL WINGATE

Plaintiff

-v-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

RULING ON COSTS

Date of Hearing: 6 February 2008
Date of Ruling: 11 February 2008

Mr. David Kessaram, Cox Hallett Wilkinson, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the Defendant

Introduction

1. In this matter I delivered judgment on 14 December 2007, in respect of an interlocutory application made on behalf of the plaintiff ("the Plaintiff") seeking relief against the defendant ("the Trustee") in its capacity as trustee of a trust which had been settled by the Plaintiff's father in March 1976. The judgment did

not deal with costs, and there was a subsequent hearing on 6 February 2008 at which detailed submissions on costs were made.

The Proceedings

2. The proceedings alleged breach of trust as against the Trustee in relation to three different aspects of its trusteeship; first, in relation to the failure of the Trustee to provide information and/or documentation in relation to the Trustee's fees and expenses, and in regard to certain trust assets; secondly, in regard to its failure to use reasonable care and skill or the prudence to be expected of a professional trustee in relation to a specific trust asset, and lastly, in regard to its fees and disbursements. However, the application which led to the judgment was an interlocutory application, for an order pursuant to Order 14 of the Rules of the Supreme Court 1985 ("RSC"), pursuant to which the Plaintiff sought extensive information and documentation, and for an order pursuant to Order 43 rule 1 RSC for an account on the basis of wilful default. The Plaintiff also sought an order pursuant to Order 43 rule 1 RSC for a common account, not based on wilful default, and in the event pursued that relief rather than an order for an account on the basis of wilful default. That concession was made only shortly before the hearing. One other matter which was dealt with by way of concession shortly before the hearing was that the Trustee's attorneys, Appleby, wrote a letter to the Plaintiff's attorneys, Cox Hallett Wilkinson, dated 2 November 2007, which provided the Trustee's published fee schedule, and agreed to make documents available for inspection and copying in relation to its fees.

The Applications for Costs

3. In broad terms, the judgment required the provision of substantial information and documentation, and declined to order an account in common form. The consequences of the judgment appear to be that each side regards itself as the successful party. The submissions for the Plaintiff start with the statement that:

> "The Plaintiff's summons has succeeded. The Plaintiff's summons was about obtaining information and

> documentation from the Defendant in relation to the Defendant's stewardship of a significant trust fund."

Yet the Trustee similarly sought an order for costs, saying in its submissions that:

> "The Defendant successfully defended the Plaintiff's application for an account in common form in respect of the thirty years that the Trust was in existence. A substantial amount of time and effort was put into preparing the Defendant's defence to the Plaintiff's claim for an account in common form. A substantial part of the hearing was devoted to this aspect of the Plaintiff's claim."

4. I commented in the judgment on the fact that during the course of argument, Mr. Kessaram for the Plaintiff had appeared at various times to equate the request for an account in common form with the provision of the information and documentation, which had originally been sought in a comprehensive letter sent by the Plaintiff's London solicitor to the Trustee on 25 November 2005. I pointed out that that letter sought information and documentation, as opposed to a common form account and commented that by the time the application came on for hearing, the application for the common form account appeared to come first, and the request for outstanding information followed.

5. No doubt it is the case that each side succeeded in part. But I do not think that it can be said that the respective successes cancel each other out, as Mr. Riihiluoma urged, if his primary submission was not accepted. In that case, he said, there should be no order as to costs, referring to the Trustee's success in resisting the obligation to produce an account in common form, and the Plaintiff's success in obtaining disclosure in respect of certain transactions. He carried on to say that, in sporting terms, one might call the result "a draw".

6. I do accept that the task of the Court is, as Lightman J said in *BCCI –v- Ali (#4)* [1999] NLJ 1734, to consider success not as a technical term, but as a result in

real life, with the question of which side has succeeded being a matter for the exercise of common sense. And looking at matters on that basis, I do not agree with Mr. Riihiluoma's contention (and this was of course his fall-back position) that the result represented a draw. The reality is that disclosure of information and documentation lay at the heart of these proceedings. The letter from the Plaintiff's London solicitor of 25 November 2005 was comprehensive, and although the Trustee had initially indicated a willingness to comply with the request, that position changed, and it was that change which led to the institution of these proceedings in late May 2007. And although I did not agree that the ordering of an account in common form would prove to be at all productive, and would no doubt be extremely expensive, a significant factor in terms of not making such an order was my view that such an order would be unlikely to provide the Plaintiff with anything more by way of assistance than an order for disclosure of the information and documentation, most of which the Plaintiff had sought since November 2005.

7. And so my view is, looking at matters on a common sense basis, that the Plaintiff has succeeded of his application, in broad terms. However, it does have to be recognised that his success has not been complete, and that because of the overly broad way in which the matter was pursued, the overall costs increased, and so far as the Trustee was concerned, unnecessarily incurred.

8. The position now in the United Kingdom, following the institution of the Civil Procedure Rules 1998 ("CPR") is that if the court is to reflect success or failure on individual issues, then it should do so, if at all possible, by expressing a success or failure in the form of a proportion of costs — see the judgment of Arden L J in *The Borough of Hackney –v- Campbell* [2005] EWCA Civ 613. It seems to me that that represents the modern and practical approach, which should be followed in this case. It is always difficult to seek to reconstruct how much of a hearing has been spent dealing with a particular matter, and of course the hearing represents only a part of the costs; preparation will also be a highly significant component of the complete costs picture.

9. I have reviewed the submissions prepared on each side for the November hearing, and it is obviously the case that, as I commented in the judgment, the Plaintiff ran the issue of an account very much as a part of the application for provision of information and documentation. On the other hand, the Trustee put the issue of an account first, even when referring to the Plaintiff's summons which had in fact dealt with the provision of information and documentation first. No doubt the Trustee attached more weight to the issue of an account in common form because of its appreciation as to how much work that would have involved, whereas the Plaintiff was primarily concerned with the provision of information and documentation. In the circumstances, and looking at matters as completely as I can, the view that I take is that the Plaintiff should be entitled to an order for two thirds of his costs in relation to the summons, and I so order. I will turn next to the question whether such costs should be ordered on the standard basis or on an indemnity basis, as sought by the Plaintiff.

Indemnity Costs

10. The Plaintiff sought an order of indemnity costs, on the basis that:

> "This is a bad case of default, with an insouciant trustee making no serious effort to disclose, let alone justify, its own dealings with and drawings from the trust property."

11. The Plaintiff referred to a number of different aspects of the Trustee's conduct in support of its application for costs to be on the indemnity basis. First was that the Trustee's initial response to the 25 November 2005 letter had been that the information would be provided, whereas with the passage of time, and despite a further promise, relatively little documentation or information was provided. Next, the Plaintiff complained of the pressure which he said the Trustee had sought to apply, most particularly in asking David Nash, an independent advisor both to the Trustee and to various members of the Wingate family, to include in his letter to the Plaintiff's London solicitor a paragraph designed to dissuade the Plaintiff from pursuing litigation. Having expressed the hope that the

Plaintiff would abandon any thought of litigation on the basis that this would inevitably delay any distribution to him, the letter carried on:

> "Your client should appreciate that given the history of distributions he will not receive an increased distribution in the event that litigation produces an unexpected windfall."

12. On any basis this was an improper attempt to bring pressure to bear on the Plaintiff, but in the event if was of course unsuccessful. Beyond those two matters mentioned above, the Plaintiff essentially relied upon passages in the judgment which supported his case and indeed were critical of the Trustee, and then carried on to refer to two authorities from the Royal Court of Jersey, where a trustee had been ordered to pay the costs of an application for information and documentation on the indemnity basis. These were the cases of *Re The Den Haag Trust* (1997/98) 1 OFLR 495 and *Bhander v Barclays Private Bank & Trust Co Ltd* (1997/98) 1 OFLR 497, but the problem with these two cases is that the case of *Re The Den Haag Trust* gives almost nothing in terms of reasoning, and the judgment in the case of *Bhander v Barclays* is very short. Nevertheless, I will set out the extract from that latter case, which is as follows:

> "The accounts were produced after what we consider to be an inordinate delay and after numerous requests had been made. Nothing, in our view, could have been simpler than to produce these accounts which deal only with the banking of funds in a designated account. Much confusion has been caused and some incorrect conclusions reached all of which would have been unnecessary had the trustees delivered a copy of the original Settlement when it was requested. In our view, the trustees' attitude has not been helpful in reaching a necessary stage before the beneficiary is able to consider his next cause of action.
>
> In consideration of this delay and the lack of precision on behalf of the trustees we will award the representor his costs of and incidental to this part of the representation and

> of today's hearing on an indemnity basis. The costs to be met by the trustees are not to be paid from the trust fund."

It does seem to me that that the case of *Bhander v Barclays* was concerned with a very much more straightforward request than arose in the case before me, and indeed with a relatively simple factual background, and I am reluctant to attach too much weight to the course of action followed in that case.

13. Mr. Kessaram relied upon two further cases in relation to the Plaintiff's pursuit of an order for costs on the indemnity basis. The first was the case of *Three Rivers District Council –v- Bank of England* [2006] EWHC 816 (Comm). The facts in that case were of course at the extreme end of the scale, but Mr. Kessaram sought to rely upon the principles set out by the trial judge governing the appropriate circumstances for an award of costs on the indemnity basis. The difficulty, as it seems to me, in attaching too much weight to these guidelines is their reliance upon the CPR, and the same cautionary note should be attached to the second case, *Reid Minty –v- Taylor* [2001] EWCA Civ 1723. In relation to that case, Mr. Kessaram referred to the headnote and a short passage which dealt with the fact that the CPR represented a new procedural code. However, it is of note that the trial judge had held that the court could only make an order for indemnity costs under the relevant part of the CPR if a party had been guilty of a moral lack of probity or conduct deserving of moral condemnation, and that there had been no such conduct on the claimant's part. On that basis the judge had dismissed the application. In explaining the true effect of the CPR, May L J referred (paragraph 26) to the submission of counsel that the trial judge had applied the correct test and that he had correctly extracted it from the notes to rule 44.4 in the White Book, which relied on pre-CPR cases. Counsel had submitted that there was no real difference between conduct deserving moral condemnation and unreasonable conduct of litigation in any manifestation. The respondent's written submissions had referred to numerous pre-CPR authorities and had submitted that their principles survived into the CPR. May L J dealt with that submission in this way (paragraph 27):

> "In my judgment, the judge here was wrong to constrain himself in the way that he did. He was, I think, implicitly guided by pre-CPR authorities, which are no longer apt for the new procedural code in this respect. Under the CPR, it is not, in my view, correct that costs are only awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving moral condemnation on the part of the paying party. The court has a wide discretion under r 44.3 which is not constrained, in my judgment, by authorities decided under rules which preceded the introduction of the CPR"

14. In my view there does remain a difference in the principles to govern an award of indemnity costs in this jurisdiction under the RSC, and those which are now applicable in the United Kingdom under the CPR. It is not clear to me what rules operate in Jersey, and for that reason, too, I am reluctant to place weight on the Jersey authorities relied upon by Mr. Kessaram. My conclusion in relation to this case is that there has been nothing exceptional in relational to the conduct of these proceedings which would call for an award of costs on the indemnity basis. I do regard the Trustee's letter referred to above as being worse than ill advised; it was quite improper to seek to exert pressure upon the Plaintiff in this way. But as I have noted, the threat did not deter the Plaintiff, and of course that conduct did occur before the issue of proceedings, and hence was not improper in relation to the conduct of the proceedings. My order as to costs is that costs should be taxed, if not agreed, on the standard basis.

The Trustee's Right to an Indemnity

15. The Plaintiff's submission on this issue was that the Trustee should be debarred from effecting any recovery of costs from the trust fund pursuant to the provisions of Order 62 rule 6 (2) RSC.

16. Mr. Kessaram relied upon the principle set out in *Underhill & Hayton* on *The Law on Trusts and Trustees.* The relevant section is based on a practice direction to the CPR and indicates:

> "The relevant practice direction provides that the trustee will be entitled to an indemnity out of the fund for costs 'properly incurred', which may include costs awarded against the trustee in favour of another party. Whether costs were properly incurred depends on all the circumstances of the case, but factors include (1) whether the trustee obtained the directions of the court; (2) whether the trustee acted in the interest of the fund or in another interest; and (3) whether the trustee acted unreasonably."

17. Mr. Kessaram contended that the Trustee failed on all counts. It is common ground that the Trustee did not obtain the directions of the court. In relation to the second and third aspect of matters, Mr. Kessaram contended that the Trustee had never acted in the interests of the other beneficiaries, but in its own interests, particularly in relation to its withholding information about its own fees and charges. And the general complaint that the Trustee had acted unreasonably was also made.

18. Before turning to Mr. Riihiluoma's response to this part of counsel's argument, I should refer to a reference which I made to counsel early on in the submissions, to part of the judgment of Lightman J in *Alsop Wilkinson -v- Neary* [1995] 1 All ER 431. In that judgment, Lightman J had described the kind of disputes in which trustees might become involved, and referred to 'a beneficiaries dispute' as 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. In relation to this type of dispute, Lightman J had said:

> "A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come

out of the trust estate (see Hoffman L J in *McDonald –v- Horn*).

19. The case of *McDonald –v- Horn* [1995] 1 All ER 961 concerned a pension scheme and the plaintiffs were seven members of the scheme. Hoffman L J referred to the provisions of Order 62 rule 6 (2) and then said this (page 970):

> "In the case of a fund held on trust, therefore, the trustee is entitled to his costs out of the fund on an indemnity basis, provided only that he has not acted unreasonably or in substance for his own benefit rather than that of the fund. Trustees are also able to protect themselves against the possibility that they may be held to have acted unreasonably or in their own interest by applying at an early stage for directions as to whether to bring or defend the proceedings. This procedure, sanctioned by the decision of the Court of Appeal in *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 at 557, requires the trustee to make full disclosure of the strengths and weaknesses of his case. Provided that such disclosure has been made, the trustee can have full assurance that he will not personally have to bear his own costs or pay those of anyone else."

20. Having said that Order 62 rule 6 (2) did not in itself help the plaintiffs because although the litigation concerned a trust fund, the plaintiffs were not trustees, Hoffman L J went on to consider the position of the plaintiffs on the basis that the Chancery Courts had been willing in certain circumstances to extend to other parties to trust litigation an entitlement to costs in any event by analogy with that accorded to trustees. In relation to what Lightman J called a beneficiaries dispute, Hoffman L J said (page 971):

> "Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary.

> This is treated in the same way as ordinary common law litigation and costs usually follow the event."

21. So it does seem to me that it would be highly unusually to allow the Trustee to recover its costs (whether its own or those it has been ordered to pay) in circumstances where the Trustee has not sought the direction of the court, and has ended up the losing party, in what may be described as ordinary hostile or common law litigation.

22. In this case, I am of the view that the Trustee acted unreasonably in its failure to provide information and/or documentation in response to the questions asked, and this was particularly so in relation to its own fees and expenses. Having failed to protect itself by means of an application to the court, it does not seem to me to be right that the Trustee should at the end of the day be entitled to be paid its costs from the trust fund, in litigation where I have held that the Plaintiff has succeeded. As Mr. Kessaram submitted, the reasons why the Trustee should pay the Plaintiff's costs are themselves reasons why the Trustee should bear them itself and not impose them on the beneficiaries - including the Plaintiff - who are not responsible for its failings, by taking them out of the trust fund.

23. I therefore rule that the Trustee is not entitled to an indemnity from the trust fund, either in respect of its own costs, or those which I have ordered that it should pay to the Plaintiff.

Dated the 11th day of February 2008.

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Hon. Geoffrey R. Bell
Puisne Judge