

A

SHEIKH ABDULLAH ALI M ALHAMRANI

v

B

1. RUSSA MANAGEMENT LTD
2. JPMORGAN TRUST COMPANY (JERSEY) LTD
3. SHEIKH MOHAMED ALI M ALHAMRANI
4. SHEIKH SIRAJ ALI M ALHAMRANI
5. SHEIKH KHALID ALI M ALHAMRANI
6. SHEIKH ABDULAZIZ ALI M ALHAMRANI
7. SHEIKH AHMED ALI M ALHAMRANI
8. SHEIKH FAHAD ALI M ALHAMRANI
9. LADY NOURA ALI M ALHAMRANI
10. LADY ADAWIAH ALI M ALHAMRANI

C

D

Jersey Royal Court (Samedi Division)
Sir Philip Bailhache, Bailiff

Neutral citation: [2006] JRC 081

E

Judgment: 25 May 2006

Trust litigation; interlocutory applications; trustees; costs; taxation; appropriate uplift; indemnity basis; reasonableness; proportionality; recourse to advisers; foreign lawyers

F

Sheikh Abdullah Alhamrani (AA) and his eight brothers and sisters are the beneficiaries under two Jersey trusts: the Internine Trust, trustee JPMorgan Trust Company (Jersey) Ltd (JPM); and the Intertraders Trust, trustee Russa Management Ltd. In September 2000, an agreement called the disengagement agreement was entered into, providing that five of the brothers ('the first party') should take the family assets in Saudi Arabia, while AA, his brother Fahad and their two sisters ('the second party') should take the assets elsewhere, including the assets of the two Jersey trusts, with an appropriate balancing payment.

G

The agreement broke down and was subsequently held by courts in Saudi Arabia to be of no effect. In 2003, proceedings were instituted in Jersey by both AA and the first party in relation to the trusts. There were a number of interlocutory applications, in relation to which numerous costs orders were made. JPM appealed against five orders on the basis that, even where costs were awarded on an indemnity basis, a substantial proportion of the costs incurred was disallowed on taxation. The orders were that the costs of JPM:

H

1. 'In relation to the Skyspan argument shall be paid from their respective trust funds on an indemnity basis, such costs to be taxed if not agreed.' The bill of costs submitted by JPM for £10,851.76 was taxed down to £3,801.44.

2. 'Of and incidental to [a strike-out application] shall be paid by the first party on the standard basis.' That bill of costs was for £10,113.45. It was taxed down to £2,559.87. A
3. 'Incurred as a result of the application to intervene [made by AA] shall be paid by the first party on the standard basis.' That bill of costs amounted to £1,714.67 and £1,071.52 was allowed on taxation. B
4. Relating to an application of the first party and Sheikh Fahad for specific disclosure 'be paid from the trust fund on an indemnity basis, to be taxed if not agreed'. That bill of costs amounted to £12,665.65 of which £2,326.30 was allowed on taxation.
5. Of an unsuccessful application by AA for a stay 'shall be paid by [AA] on an indemnity basis'. The bill of costs amounted to £24,914.78 of which £5,112.68 was allowed on taxation. C

Against the appeal, it was argued that JPM had assembled an excessive number of advisers given its neutral position, and that in fact serious allegations were being made against the trustee so that JPM had its own interests in mind and that was why such a large legal team was deployed. D

Held (allowing the appeal - para [41])

It was a misunderstanding to treat the matter as though all the issues arising for consideration were taxation issues. There were also issues of trust law, and it was the interplay of those issues with the procedural rules of taxation which gave rise to some difficulty (para [11]). E

Where a suggestion that a trustee has not acted appropriately or sensibly is made and a complaint of breach of fiduciary duty follows, it does not create a licence for a trustee to engage an army of advisers at the expense of the trust fund. The general principle, however, is that where a trustee is acting reasonably, it should be entitled to an indemnity for its costs and expenses out of the trust fund (para [19]). F

While this might place a trustee in a more advantageous position than other litigants in that it could procure a greater level of recovery of its costs, this was a consequence of the rule referred to above. The taxation process was not the only defence which the beneficiaries had against such conduct - the same remedies were available as for any alleged breach of trust. Where a trustee was acting reasonably, questions of taxation of costs should not arise, but a trustee might nevertheless want to know whether there was any objection from the beneficiaries to an account for legal fees or other expenses which had been submitted for payment. As a matter of good practice trustees, should forward such accounts in appropriate circumstances to the beneficiaries to ascertain whether there were any such objections so that consideration can be given to them (para [22]). G

A trustee has a continuing duty to act in the best interests of the beneficiaries of the trust. It was not generally in those best interests that a trustee should fall out with its legal advisers. Yet it did have a duty to be robust in contesting any charges made by its lawyers which it considered to be excessive or to relate to work which was unauthorised or H

A unnecessary. This duty embraced an obligation to consider whether a particular lawyer or firm of lawyers was appropriate to the matter on which advice was sought, and the scale of the trust assets. There were good reasons why, in complex trust litigation, it might be appropriate for Jersey trustees to seek advice and assistance from large firms of English solicitors and specialist Chancery counsel (para [26]).

B This case was hotly contested litigation involving substantial sums of money and an large amount of documentation. While some of the applications underlying the appeal might appear straightforward, they were nonetheless to be viewed against that background. There could be occasions when the court was assisted by, and indeed needed, the trustee actively to participate in order to give impartial and constructive advice on the opposing contentions of the different beneficiaries. It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs just because the court decided against the recommendation. JPM acted reasonably and properly during the course of the applications leading to these costs orders.

C In relation to taxation, the case involved a bitter dispute over the destiny of trust funds worth more than \$100m. It was the kind of case which, when it came to trial, might be expected to attract a 'Factor B' uplift in the region of 100% (see paras [34]-[39]). Even in terms of the interlocutory skirmishes, which were more narrowly based and arguably more straightforward, the correct range was between 60% and 75% (para [40]). The bills of costs were to be remitted to the Greffier Substitute for reconsideration.

D The fifth order did not contain a direction that the indemnity costs 'be taxed if not agreed'. Surprisingly, JPM had nonetheless submitted the bill for taxation but it could withdraw it. If it remained before the Greffier Substitute for taxation, it was to be dealt with in the same manner as the first and fourth orders, bearing in mind that a trustee acting reasonably is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred (paras [42]-[43]).

E

Cases referred to

Re Beddoe, Downes v Cottam [1893] 1 Ch 547

Brush v Bower Cotton & Bower [1993] 4 All ER 741, [1993] 1 WLR 1328

Re Carafe Trust, Guardian Trust Co Ltd v Louveaux [2006] WTLR 1329, 2005 JLR 159

G

Re Esteem Settlement 2000 JLR N-67

Re Esteem Settlement (unreported, 15 January 2001, JRC)

Re Grimthorpe [1958] Ch 615

Johnson v Reed Corrugated Cases Ltd [1992] 1 All ER 169

Lloyds Bank Private Banking (CI) Ltd v Cala Cristal SA 1996 JLR N-20

H

Murphy v Collins 2000 JLR 276

Parujan v Atlantic Western Trustees Ltd 2003 JLR N-11

Re Spurling's Will Trusts, Philpot v Philpot [1966] 1 All ER 745, [1966] 1 WLR 920

Statutes referred to

Civil Proceedings (Jersey) Law 1956, Art 29

Trusts (Jersey) Law 1984, Arts 21, 26, 53

Rules referred to

Royal Court Rules 2004 (Jersey), rr12/5, 12/7

JUDGMENT

THE BAILIFF:

Background

[1] The background to this appeal is a bitter family dispute involving the nine brothers and sisters of the Alhamrani family. Originally there were two sides to the dispute: the first party comprising Sheikhs Mohammed, Siraj, Khalid, Abdulaziz and Ahmed; and the second party comprising Sheikhs Abdullah and Fahad and the Ladies Noura and Adawiah. Subsequently Sheikh Fahad and the Ladies Noura and Adawiah have broken ranks with Sheikh Abdullah and have substantially allied themselves to the first party.

[2] All the nine brothers and sisters are listed as beneficiaries of two Jersey trusts, the Internine Trust and the Intertraders Trust. The trustee of the Internine Trust is JPMorgan Trust Company (Jersey) Ltd ('JPMorgan') and the trustee of the Intertraders Trust is Russa Management Ltd ('Russa'). In September 2000 an agreement called the disengagement agreement was entered into providing, in very broad terms, that the first party should take the family assets in Saudi Arabia while the second party should take the assets elsewhere, including the assets of the two Jersey trusts, with an appropriate balancing payment.

[3] Unfortunately that agreement broke down and has subsequently been held by courts in Saudi Arabia to be of no effect. In 2003 proceedings were instituted in Jersey both by Sheikh Abdullah and by the first party in relation to the trusts. The proceedings raise a number of issues, some of which are difficult. There have been a plethora of interlocutory applications some of which have gone on appeal to the Court of Appeal and even to the Privy Council. Numerous costs orders have been made in the context of those interlocutory applications.

[4] It is the decision of the Greffier Substitute taxing five bills of costs arising from certain of those orders in favour of JPMorgan with which this appeal is concerned. Certain matters are common ground between the parties. First, even though Mr Speck for JPMorgan is seeking to set aside the orders of the Greffier Substitute on issues of principle, both he and all other counsel agree that the taxing officer approached his task in a meticulous and most careful manner. I agree. Secondly, there is agreement between all the parties that on an appeal of this nature the Court is entitled to look at the matter afresh and to exercise its own discretion, while paying due regard, of course, to the decision of the Greffier Substitute. See *Murphy v Collins* 2000 JLR 276.

The costs orders

[5] The bills of costs submitted for taxation by JPMorgan related to five orders made by the Court between 13 February and 18 March 2004. Some costs were ordered to be paid by other parties to the litigation, and some costs were ordered to be paid out of the Internine trust fund. I will list them in the order in which they were referred to by counsel, although it is not the chronological order.

A [6] The first order was made on 13 February 2004 and related to the Skyspan application. The Court ordered 'that the costs of [JPMorgan and Russa] in relation to the Skyspan argument shall be paid from their respective trust funds on an indemnity basis, such costs to be taxed if not agreed'. The bill of costs submitted by JPMorgan was in the sum of £10,851.76. It was taxed down to £3,801.44.

B [7] The second order was made on 14 January 2004 in relation to a strike-out application by the first party. The Court ordered 'that the costs of [JPMorgan] of and incidental to today's hearing shall be paid by the first party on the standard basis'. That bill of costs amounted to £10,113.45. It was taxed down to £2,559.87.

C [8] The third order was made on 9 February 2004 in relation to an application of Sheikh Abdullah seeking leave to intervene. The Court ordered 'that the costs of... [JPMorgan] incurred as a result of the application to intervene shall be paid by the first party on the standard basis'. That bill of costs amounted to £1,714.67 and £1,071.52 was allowed on taxation.

D [9] The fourth order was also made on 9 February 2004 and related to an application of the first party and Sheikh Fahad for specific disclosure. The Court ordered 'that the costs of JPMorgan be paid from the trust fund on an indemnity basis, to be taxed if not agreed'. That bill of costs amounted to £12,665.65 of which £2,326.30 was allowed on taxation.

E [10] The fifth order was made on 18 March 2004 and related to an unsuccessful application by Sheikh Abdullah for a stay. The Court ordered 'that the costs of [JPMorgan] shall be paid by [Sheikh Abdullah] on an indemnity basis'. The bill of costs amounted to £24,914.78 of which £5,112.68 was allowed on taxation.

F [11] It is clear that, even where JPMorgan was awarded costs on an indemnity basis, a substantial proportion of the costs incurred was disallowed on taxation. JPMorgan has accordingly appealed against the decision of the Greffier Substitute. I was addressed during the hearing as if all the issues arising for consideration were taxation issues. That seems to me to be a misunderstanding of the position. There are also issues of trust law, and it is the interplay of those issues with the procedural rules of taxation which has given rise to difficulty and to some confusion. That confusion has been compounded (I regret to say) by the form of words employed by the Court to express the orders which it made. I refer to the phrase 'such costs to be taxed if not agreed' which was added to the order for indemnity costs (whether erroneously or not) in two of the three orders made in favour of JPMorgan.

The law

H [12] In turning to consider the relevant principles of law I must emphasise at the outset that I am here considering circumstances in which a trustee can be shown to be acting properly and reasonably in the interests of the beneficiaries of a trust. I am not concerned with circumstances where the trustee is defending himself in adversarial proceedings against allegations of breach of trust or breach of fiduciary duty, or some other misconduct - in such circumstances different considerations will apply. The first relevant principle of trust law (where the trustee is acting properly and reasonably) is that a trustee is entitled to be indemnified out of the trust fund for

all expenses and liabilities reasonably incurred. *Article 26(2) of the Trusts (Jersey) Law 1984* provides:

‘A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust.’

[13] *Lewin on Trusts* (17th ed) Sweet and Maxwell, 2000, at para 21-03, states that:

‘A trustee is, subject to the terms of the trust, entitled to be indemnified out of the trust property in respect of liabilities, costs and expenses properly incurred by him in connection with the performance of his duties and the exercise of his powers and discretions as trustee.’

[14] In *Re Grimthorpe* [1958] Ch 615 Danckwerts J (as he then was) stated at 623:

‘Persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred... The general rule is quite plain; they are entitled to be paid back all that they have paid out.’

[15] The court can of course deprive a trustee of costs incurred in relation to legal proceedings if the court considers that the trustee has acted unreasonably. The general rule remains however that in principle a trustee is entitled to an indemnity for costs reasonably incurred. In support of his submissions counsel for JPMorgan drew my attention to a passage from *Halsbury’s Laws of England*, 4th ed (original re-issue) approved by Hamon, Deputy Bailiff in *Lloyds Bank Private Banking (CI) Ltd v Cala Cristal SA* 1996 JLR N-20, which seems to me to express the position very aptly. At para 780 the learned editors state:

‘[W]here a person is or has been a party to any proceedings in the capacity of a trustee, he is, unless the court otherwise orders, entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the trust fund, and the court may otherwise order only on the ground that the trustee has acted unreasonably or has in substance acted for his own benefit rather than for the benefit of the fund.’

[16] At para 781 they continue:

‘*Entitlement of trustee to costs of proceedings.* The restrictions on the power to deprive a trustee of his costs out of the trust fund in effect embody the general principle that, as it is an implied term of the contract between a

A trustee and the author of the trust that the trustee should be indemnified in respect of all his costs and expenses properly incurred in the execution of the trust, a trustee is entitled to be paid out of the trust property his full costs of legal proceedings which he has properly instituted or defended on behalf of the trust.'

B Whether one uses the adverb 'reasonably' or 'properly' seems to me immaterial. The principle is clear.

C [17] The principle has been applied by this Court on a number of occasions. By way only of example, the Court stated in *Re Esteem Settlement* 2000 JLR N-67, that people should not be discouraged from becoming trustees by having costs inflicted upon them in circumstances where they have fulfilled their duties even if they have committed an innocent breach of trust. The Court stated:

D 'There is... no evidence of misconduct and I can see no reason why the Trustee's costs should not be paid from the trust fund. Although the Trustee's application has been adjourned *sine die*, it seems to me unlikely, unless the Court's decision is overruled by the Court of Appeal, that the application will be resumed for many months. To require the Trustee, which in my judgement has acted entirely reasonably in making the application, to pay its costs in the meantime out of its own pocket would be quite unfair.'

E [18] The power of the court to override the trustee's general right of indemnity finds statutory expression not only in Art 29 of the *Civil Proceedings (Jersey) Law 1956* but also more specifically in Art 53 of the *Trusts (Jersey) Law 1984* which provides:

F **'53. Payment of Costs**

The court may order the costs and expenses of and incidental to an application to the court under this Law to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit.'

G [19] The general principle therefore is this. A trustee, acting reasonably and in the exercise of his duties, powers and discretions, is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred. This right or entitlement may be removed, in whole or in part, by the Court, but only by specific order to that effect. The rationale is quite simple. Persons undertaking the heavy responsibilities of acting as a trustee are not expected to perform any of these functions at their own expense. As Lord Jessel MR was quoted in *Re Spurling's Will Trusts, Philpot v Philpot* [1966] 1 All ER 745 as stating:

H 'It is not the course of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust.'

In Jersey it is a particularly burdensome duty to act as a trustee. The legislature has seen fit to regulate the position by requiring that any person seeking to carry on a financial service business as a professional trustee should first be registered by the Jersey Financial Services Commission and approved to undertake such functions. The Commission is entitled to impose, and does impose, stringent conditions upon registered persons. These burdens are in addition to the usual responsibilities of a trustee under the general law. It is not in the public interest that an additional duty should be imposed upon trustees requiring them to pay out of their own pockets costs and expenses which have been reasonably incurred.

[20] Where a trustee is involved in a non-adversarial capacity in litigation of this kind, he is entitled to an indemnity from the trust fund for costs and expenses reasonably incurred. In some cases, including this one, a suggestion may be made that the trustee has not acted appropriately or sensibly and that a complaint of breach of fiduciary duty may follow. Such suggestions will, almost inevitably, mean that a trustee reacts to ensure that every action is fully and properly considered. Sometimes that may involve taking further or specialist advice. It does not lie in the mouth of a beneficiary who makes such suggestions then to complain that a trustee is necessarily acting unreasonably. One is reminded of the lines of an old French song:

'Cet animal est très méchant. Quand on l'attaque, il se défend.'

There is naturally a balance to be struck. Suggestions of this kind are not a licence for a trustee to engage an army of advisers at the expense of the trust fund. Much will depend upon the circumstances of a particular dispute. The usual order, however, where a trustee is acting reasonably should be for an indemnity for his costs and expenses out of the trust fund. Strictly such an order is not necessary in the context of proceedings where the trustee is not in any real sense an adversary. But if the order is made, questions of taxation should not arise. As Danckwerts J put it in *Re Grimthorpe*, 'They are entitled to be paid back all that they have paid out'.

[21] Mr James for Sheikh Abdullah submitted that such a conclusion would be to place a trustee in a more advantageous position than other litigants in that he could procure a greater level of recovery of his costs. That may well be so, but it is a consequence of the rule of trust law to which I have referred above. Mr Taylor for the first party and Sheikh Fahad submitted that it would open the door to a plundering of the trust fund by a trustee. The taxation process, Mr Taylor submitted, was the only defence which the beneficiaries had against such conduct. I reject that submission. There are other remedies available to the beneficiaries, and they are the same remedies which are available for any alleged breach of trust, breach of fiduciary duty, or other misconduct.

[22] I have reached the conclusion that, where a trustee is acting reasonably, questions of taxation of costs should not arise. Nonetheless a trustee may well want to know whether there is any objection from the beneficiaries to an account for legal fees or other expenses which has been submitted for payment. As a matter of good practice it seems to me that trustees should forward such accounts in appropriate

A circumstances to the beneficiaries to ascertain whether there are any such objections so that consideration can be given to them. This would be consistent with the guidance offered by the Jersey Financial Services Commission in its Codes of Practice for Trust Company Business, published in October 2001 as to transparency in business arrangements. Paragraph 4.2 provides:

B ‘A registered person shall be open and transparent about its charges, including the basis for determining all associated (including other group) fees and charges including commissions (both initial and recurring) and any payments to or from third parties (such as introductory fees or commission sharing arrangements), inform customers if the fees will be deducted directly from their assets without their approval - effectively a “no surprises” policy.’

D It would also be consistent with the views expressed by Birt, Deputy Bailiff, in *Re Carafe Trust, Guardian Trust Co Ltd v Louveaux* [2006] WTLR 1329 as to the desirability of timely and transparent processes in the matter of fees and disbursements. If any objections are received, they can be considered and then accepted or rejected.

E [23] A trustee has a continuing duty to act in the best interests of the beneficiaries of the trust. It is not generally in the best interests of the beneficiaries that a trustee should fall out with his legal advisers. Yet he does have a duty to be robust in contesting any charges made by his lawyers which he considers to be excessive or to relate to work which was unauthorised or unnecessary. This duty embraces an obligation to consider whether a particular lawyer or firm of lawyers is appropriate to the problem upon which advice is sought, and the scale of trust assets. Some firms may be more expensive than others. Trustees should be alert to the necessity of employing advisers whose skills and charges bear a proper relationship both to the nature of the problem and to the size of the trust fund. It is no longer appropriate, if it ever was, for a trustee to engage a particular lawyer or adviser without regard to the particular considerations set out above. A prudent trustee will be able to demonstrate, if any allegation of misconduct is subsequently made, that such issues were properly considered. The duty to act in the best interests of the beneficiaries is a high duty - it is a duty to observe the utmost good faith (see *Art 21(1)(b)* of the *Trusts (Jersey) Law 1984*) - and it persists even in the face of conduct by a beneficiary which the trustee may perceive to be offensive or unreasonable. Providing, however, that a trustee performs these functions in such a manner, a court will not lightly make a finding of misconduct if a trustee, having given proper consideration to any objections expressed by a beneficiary, does not accept them.

Employment of foreign lawyers

[24] Considerable argument was addressed to me on the extent to which it was proper for the costs of employing foreign lawyers, that is (in the context of this appeal) English solicitors and specialist Chancery counsel, to be met from the trust fund. This gives rise to the more fundamental question of when it is appropriate

for trustees, no doubt advised by their Jersey lawyers, to seek such advice and assistance from outside the island.

[25] I am conscious that, in the context of the taxation jurisdiction of the court, r12/7 of the *Royal Court Rules 2004* provides:

‘The cost of advice obtained from or work done by lawyers outside the jurisdiction shall be allowable on taxation to the extent that –

- (a) where that advice or work done could, in the context of those proceedings, reasonably have been obtained from or done by a Jersey lawyer, the costs allowable on taxation shall be no greater than those allowable on taxation in respect of a Jersey lawyer’s fees; and
- (b) where that advice or work done could not, in the context of those proceedings, reasonably have been obtained from or done by a Jersey lawyer, the costs allowable on taxation shall be no greater than those which are reasonable in all the circumstances of the case.’

That does not however bear upon the question of when it is appropriate for a trustee, acting reasonably, to authorise the taking of specialist advice and the obtaining of assistance from outside the jurisdiction.

[26] There seem to me to be at least three reasons why, in complex trust litigation, it may be appropriate for trustees to seek advice and assistance from large firms of English solicitors and specialist counsel at the Chancery Bar. First, the Jersey law of trusts, even though it is a discrete body of law, has much in common with the English law of trusts, drawing as it does upon equitable principles developed by the English courts. Secondly, Jersey is a small jurisdiction and the management of complicated trust litigation can often be better achieved by drawing upon the resources and experience of large English firms of solicitors. Thirdly, again primarily by reason of size, there are few specialist practitioners in Jersey working principally in the field of trusts. The Chancery Bar represents a valuable intellectual resource upon which it can be useful to draw in developing the jurisprudence of Jersey in the field of trusts. It is axiomatic that the quality of decision-making in this Court is likely to, or at any rate should, reflect the quality of submissions made to it. For all these reasons it seems to me desirable that in appropriate cases assistance from outside the island should be sought. Where English lawyers are employed by a trustee he is entitled to recover the reasonable costs of doing so from the trust fund.

[27] The qualification is of course that the seeking of such assistance should be considered, reasonable and proportionate. The cautionary words of Bowen LJ in *Re Beddoe, Downs v Cottam* [1893] 1 Ch 561 should be at the forefront of every trustee’s mind:

‘If the present appeal fails what, we are told, amounts to nearly a quarter of a tiny trust fund will be wasted with impunity in unsuccessful litigation and

A no profit whatever to the trust; and the legal profession will have devoured without any corresponding advantage to anybody, a considerable portion of a very small oyster.'

B [28] Trustees may often seek, and rely upon, the advice of their legal advisers in Jersey as to the desirability of seeking advice from outside the island. It may be worth underlining the fact that such legal advisers also have a continuing duty to apply their minds to the reasonableness and proportionality of the involvement of English solicitors and counsel. If an application were made to the Court which demonstrated any serious default in this respect, the Court would not hesitate to use its powers under *Art 53 of the Trusts (Jersey) Law 1984* to which I have already referred to make an appropriate order against such legal adviser personally. Indeed I wish to underline the heavy obligations upon trustees and their legal advisers to keep at the forefront of their minds the duty to protect the interests of the beneficiaries. Nothing which I have stated above should be taken as indicating a *carte blanche* to use the trust fund for the payment of legal or professional fees in an improper, immoderate or disproportionate way. A beneficiary or other interested party who wishes to complain of such misconduct has a right of recourse to the Court which would not hesitate to use its supervisory jurisdiction to impose appropriate orders or penalties, as for example in *Parujan v Atlantic Western Trustees Ltd* 2003 JLR N-11.

E **Application of those principles**

F [29] Having laid down a number of general principles I now turn to apply them to the facts of this appeal. I have emphasised throughout that the entitlement to an indemnity out of the trust fund is restricted to circumstances where the trustee is acting reasonably. Was JPMorgan acting in such a manner at the time when these costs and expenses were incurred? Mr James for Sheikh Abdullah made it clear that no allegation of misconduct was being made by his client against the trustee. He accepted that JPMorgan was acting as an impartial trustee. His contention was, however that JPMorgan had assembled an excessive cohort of advisers given its neutral position.

G [30] Mr Taylor for the first party and Sheikh Fahad concurred with Mr James that an excessive number of lawyers had been deployed. He contended however that serious allegations were being made against the trustee and that JPMorgan was not acting in a neutral capacity. JPMorgan had its own interests in mind, counsel submitted, and that was why such a large legal team was in action.

H [31] Before this appeal was transferred for hearing by me, it was initially considered by Commissioner Page who now has the conduct of the principal litigation. The Commissioner decided, for various reasons that are not here material, that it would be preferable for the appeal to be heard by the judge who had made the original orders. He did however prepare a note in which he gave some guidance to the taxing officer in relation to the taxation of costs incurred in a subsequent hearing. It is helpful to refer to part of that guidance which is set out below:

'It is easy to look at the very considerable array of legal representation and support on the Trustee's team and to wonder whether the same level of forces would have been deployed had there not been - in the background - the likelihood that the Trustee itself would sooner or later be an active respondent to at least some of the claims arising out of the events with which this litigation is concerned: that this is likely to be the case has been clear for a long time. And it is in the nature of things that it can be difficult for anyone in a similar position to maintain a rigorous distinction between the time spent *qua* neutral trustee (as was required of JPMorgan on Issues 1 and 2) and that spent *qua* prospective respondent in the defence of his own interests: inevitably anyone in that position is going to have one eye looking over his shoulder.

However, based on my own experience of the case and the material I have seen so far:

- (i) despite being alive to the potential dangers, I am not aware of anything that would suggest that the Internine Trustee has done anything other than do its best to maintain a properly neutral role in the proceedings since I first became involved (whether it is to be criticised for the stance adopted by it in the past is another matter and one that is likely to be an issue at the next stage of the litigation);
- (ii) during that time, the Trustee's description of its position as having been "caught in the cross-fire" in a complex and bitterly-fought litigation seems, to a large extent, a not unfair one;
- (iii) the Trustee, via its legal team, has made a considerable contribution to the orderly conduct of the proceedings; and
- (iv) its contribution to the resolution of Issue 1 and 2 was also of considerable value.'

[32] That guidance is entirely consistent with my own view as to the stance adopted by JPMorgan in relation to the matters underlying this appeal. While one might take the view that on occasion the attendance of some of the advisers might not have been strictly necessary, such an approach would be, looking at the matter in the round, to swallow the camel but to strain at gnats. The fact is that this is, as counsel for JPMorgan put it, 'very substantial and hotly contested litigation involving substantial sums of money and an extremely large amount of documentation'. While some of the applications underlying this appeal may appear on the face of it to be relatively straightforward, they were nonetheless applications to be viewed against that background, and against the observations made in para [20] above. Impartiality does not necessarily involve acting as a colourless cipher. There can be occasions when the Court is assisted by, and indeed needs, the trustee actively to participate in order to give impartial and constructive advice on the opposing contentions of the

A different beneficiaries or claimants to the trust fund. As Birt, Deputy Bailiff stated in *Re Esteem Settlement* (unreported, 15 January 2001) at para [14]:

B
C
D
E
F
G
H
‘Indeed I would not wish to discourage trustees from making recommendations when they seek the directions of the Court in administrative proceedings. It is not helpful to the Court for the trustee metaphorically to dump the problem in the Court’s lap saying “There you are, you sort it out”. The Court is entitled to expect the fullest assistance from a trustee who should ensure that all relevant law is before the Court and that all the arguments for and against the various possible courses of action are rehearsed. The Court will usually be assisted by the trustee recommending a particular course of action and explaining the reasons for its recommendation. It will of course then be for the Court to decide whether it agrees. It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs just because the Court decides against the recommendation.’

That was of course a case where the trustee was itself seeking the directions of the Court, but the principle remains valid even if the trustee has become involved in what is essentially a dispute between others. I am quite satisfied that JPMorgan acted reasonably and properly during the course of the applications leading to these costs orders.

The taxation jurisdiction

[33] I turn now to the orders for costs to be paid not out of the trust fund, but by one of the parties to the litigation. The second order directed that the costs of JPMorgan in relation to the strike-out application should be paid by the first party on the standard basis. The third order also directed that the costs of JPMorgan should be paid by the first party on the standard basis. Curiously the acts of the Court do not go on to add that as to the balance of any such costs JPMorgan should be entitled to an indemnity out of the trust fund. It seems to me that this was an unintentional omission but before correcting it I will allow counsel for the other parties to make any such submissions as they think fit.

[34] The second and third orders raise entirely different considerations which engage the Court’s taxation jurisdiction. Counsel for JPMorgan submitted that the Greffier Substitute had erred in allowing only a 60% mark-up for factor B instead of the 97% which was claimed. Counsel for the other parties contended that the Greffier Substitute had been correct although Mr James was prepared to concede that 60% might have been justifiable.

[35] Practice Direction 05/11 provides at para 2(2):

‘In exercising his discretion with regard to the total sum for Factor “A” and the Factor “B” uplift the Greffier shall have regard to all the relevant circumstances, and in particular to:

- (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved; A
- (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by the solicitor or advocate; B
- (c) the number and importance of the documents (however brief) prepared or perused; C
- (d) the place and circumstances in which the business involved is transacted; C
- (e) the importance of the cause or matter to the client;
- (f) where money or property is involved, its amount or value; and
- (g) any other fees and allowances payable to the solicitor or advocate in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.' D

[36] The application of these principles to particular cases has not yet been considered judicially in this jurisdiction. The same, or any rate similar, principles are applicable in England, and I was referred to two decisions of the English Courts. The first was *Brush v Bower Cotton & Bower* [1993] 4 All ER 741 where the applicant solicitor was employed by a client facing bankruptcy to conduct six separate sets of proceedings. In four of them, the client wished to defend actions by mortgagees claiming amounts totalling approximately £1m. The client was counter-claiming for damages of £2.75m. In the fifth action the client wished to sue his former solicitor for negligence. In the sixth action he wished to appeal against a bankruptcy order. He was unsuccessful in all six sets of proceedings. The client was legally aided and the applicant solicitor presented six bills for taxation claiming fees of about £184,000. About 75% was taxed off and he appealed. One of the issues on appeal was the appropriate Factor B uplift. Brooke J, who was sitting with Chief Master Hurst and Mr Girling as assessors stated: E

'Mr Farber then relied on a number of matters, particularly referring me to those seven principles, which have sometimes been called the "seven pillars", which are described in para 1(2) of Ord 62, App 2, Pt 1. [I interpose that these principles are identical to those set out in para 2(2) of Practice Direction 05/11.] He submitted that this litigation approached the exceptional and justified the Factor B uplift of 100%. F

My assessors have considered these submissions with great care and have given me their advice. I have, without the benefit of their great G

A experience of taxation, also formed my view of what the appropriate uplift should be and, for all practical purposes, I had independently reached the same views as my assessors. So far as BMT was concerned, there was a very large amount at stake in the claim and counter-claim, although the claim itself presented no particular difficulties. The counter-claim was for a very substantial amount. The litigation was of crucial importance to Mr Brush. It was a difficult case to argue and prepare and to plead. It was based on oral assurances, giving rise to allegations of estoppel or collateral contracts or the existence of a duty of care. It would be a difficult case to argue and prepare not only on issues of liability but also on issues of quantum. It involved, as I have indicated, the perusal of a very large number of documents and it needed intense application over periods of time and very considerable command of the relevant facts by the solicitor who was responsible not only for the tactics in individual aspects of the whole of the work that he was doing trying to stave off his client's personal bankruptcy and on tactics he would be acting on on the advice of counsel, but also in relation to the strategy which should be adopted. The view that I have formed and the judgement that I have formed with the assistance of my assessors is that the appropriate uplift in that case is not the 100% claimed, this case is not in that category, but it should be 90%.'

E So far as preparation was concerned, the Court found that 75% was the appropriate uplift.

[37] The second case was *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169. Evans J, who was also sitting with assessors, reviewed a whole range of taxation issues including the question of mark-up, or Factor B. The plaintiffs had claimed 150%, the defendants contended for 75%, and the registrar had allowed 90%. Evans J stated:

F
G
H 'I approach the assessment on the following basis. I am advised that the range for normal, ie non-exceptional, cases starts at 50%, which the registrar regarded, rightly in my view, as an appropriate figure for "run-of-the-mill" cases. The figure increases above 50% so as to reflect a number of possible factors - including the complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken towards the client, and others, depending on the circumstances - but only a small percentage of accident cases results in an allowance over 70%. To justify a figure of 100% or even one closely approaching 100% there must be some factor or combination of factors which mean that the case approaches the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of the particular kind, can properly be regarded as exceptional, and such cases will be rare. I am aware that the figures cannot be precise, but equally in my view the need for consistency and fairness means that some limits, however elastic, should be recognised.

On this basis, the claim for 150% is clearly inappropriate, and the registrar's allowance of 90% places this case in or close to the category of exceptional.

My conclusions are that 90% is certainly too high, and that the appropriate figure is 75%.'

[38] It is important to bear in mind that the taxation of costs is more of an art than a science. The Greffier Substitute will, by dint of examining the files and relating them to the bills of costs and to the submissions made, obtain a 'feel' for the case which will guide him towards his conclusion. Having said that, there are principles to be taken into account. Factor B, the allowance for care and conduct, is intended (if I may quote from para 1.4 of App A to Practice Direction 05/11):

'... to reflect all the relevant circumstances of the case and in particular the matters set out in Practice Direction 05/11 and 05/12. It is also intended to reflect those imponderable factors, for example general supervision of subordinate staff, for which no direct time charge can be substantiated, and the element of commercial profit. Accordingly the allowances to be made for different items may, in the discretion of the taxing officer, be allowed at different rates. In particular it is anticipated that, save in unusual circumstances, the rate appropriate to paragraphs 3(1), (2) and (5) for care and conduct will be less than the rate appropriate to paragraphs 3(3) and (4) for general care and conduct.'

[39] Factor B must also take account of the nature of the case as a whole. By that I mean not only its complexity and the other circumstances set out in para 2(2) cited above, but also the risk factor to the lawyer. Certain litigation, especially but not exclusively heavyweight commercial litigation, is inherently more risky to conduct. The stakes are higher, and the clients may be hyper-critical and more prone to blame their advisers when things go wrong. The element of risk is a consideration when assessing the appropriate Factor B uplift for care and control.

[40] This case involves a dispute, *inter alia*, over the destiny of trust funds worth more than \$100m. It raises difficult issues and it is bitterly contested, exhibiting a high degree of animosity between the different members of the family in dispute. It is the kind of case which, when it comes to trial, I would expect to attract a Factor B uplift in the region of 100%. Even in terms of the interlocutory skirmishes involved in this appeal, which are more narrowly based and arguably more straightforward, it seems to me that the correct range is between 60% and 75%.

Conclusions

[41] My conclusion is that the appeal should be allowed and that the taxation of the bills of costs should be remitted to the Greffier Substitute for reconsideration in the light of this judgment. I have already indicated that the usual order for an indemnity to a trustee out of a trust fund would not involve the Court's taxation jurisdiction.

A Nonetheless, without objection from counsel for the trustee, it has in this case been invoked. I offer the following observations as to the approach to be adopted by the taxing officer.

B [42] (i) The fifth order did not contain a direction that the indemnity costs 'be taxed if not agreed'. Surprisingly, the trustee has nonetheless submitted the bill for taxation. It is open to JPMorgan to withdraw it and to deal with it in the manner set out in para [21] above. If it remains before the Greffier Substitute for taxation, it should be dealt with in the same manner as the first and fourth orders.

C [43] (ii) As to the first and fourth orders the taxation jurisdiction should be exercised bearing in mind the rule of trust law to which I have referred, viz that a trustee acting reasonably is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred. *Rule 12/5 of the Royal Court Rules 2004* provides:

D 'On a taxation of costs on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.'

E In the context of costs incurred by a trustee in the circumstances described above it would *prima facie* be reasonable to allow the usual rates which the lawyer in question would charge for this type of work. It would be unreasonable to increase the rate merely because the client is a trustee, but if the taxing officer can be satisfied that the rate represents the usual charge-out rate for the fee-earner in question, it should *prima facie* be allowed. Similarly, in relation to the costs of foreign lawyers, the trustee may recover from the trust fund the costs reasonably incurred, as a stated in para [26] above. *Prima facie* that would involve payment to the fee-earner in question at his usual charge-out rate for that type of work.

F [44] Finally, I repeat that the taxing officer's jurisdiction should be exercised generally against the background of the general rule, viz that a trustee acting reasonably, as I have found that JPMorgan was acting in this case, is entitled to a full indemnity out of the trust fund. If costs or expenses are to be disallowed in relation to a specific item, it should be on the basis that the Greffier Substitute is satisfied that JPMorgan was acting unreasonably, and that is a high hurdle.

G [45] (iii) As to the second and third orders, which ordered that the costs of JPMorgan were to be paid on the standard basis by the first party, I direct the Greffier Substitute to reconsider its assessment in the light of my findings as to the appropriate Factor B rate of uplift. *Rule 12/7 of the Royal Court Rules* must of course be applied in relation to advice obtained from or work done by lawyers outside the jurisdiction.

H [46] In all other respects it seems to me the Greffier Substitute exercised his discretion in a careful and appropriate manner which is not open to any sustainable criticism. The appeal is accordingly allowed and I remit the bills of costs to the Greffier Substitute.

Representation

Advocate Damian James (Crill Canavan, 40 Don Street, St Helier, Jersey JE1 4XD, tel 01534 601 700, fax 01534 601 701, e-mail enquiries@crillcanavan.co.uk) for the representor.

Advocate Jonathan Speck (Mourant, PO Box 87, 22 Grenville Street, St Helier, Jersey JE4 8PX, tel 01534 609 000, fax 01534 609 333, e-mail enquiry@mourant.com) for the second respondent.

Advocate Mark Taylor (Bedell Group, PO Box 75, 26 New Street, St Helier, Jersey JE4 8PP, tel 01534 814 814, fax 01534 814 815, e-mail enquiries@bedellgroup.com) for the third to eighth respondents.

Advocate Simon Young (Bois & Bois, PO Box 429, 2 Bond Street, St Helier, Jersey JE4 5QR, tel 01534 480 480, fax 01534 480 490, e-mail lawyers@boisbois.com) for the ninth and tenth respondents.

A

B

C

D

E

F

G

H