

JERSEY / JUDGMENT

Trigwell -v- Clapp [2017]

JRC 185 (03 November 2017)

[2017] JRC 185

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[2017] JRC 185 [New search] [Help] Costs. [2017]JRC185 Royal Court (Samedi) 3 November 2017
Before : Sir Michael Birt, Commissioner, sitting alone. Between David John Trigwell
Representor And Gerald Clapp Respondent The Representor appeared on his own behalf.
Mrs Jane Clapp appeared on behalf of the Respondent. judgment on costs the
commissioner: 1. On 11 th September the Court issued a judgment, Trigwell-v-Clapp

[2017] JRC 145 ("the Judgment") dismissing the application of the Representor (Mr Trigwell) for a
declaration that he was the beneficial owner of a Jersey company called Astral Enterprises
Limited ("Astral"). 2. Prior to that date, a draft of the Judgment had been circulated for
comment in the usual way and it was envisaged that the question of costs would be dealt
with at the hearing on 11 th September when the Judgment was formally issued. Mr
Trigwell submitted various comments on the question of costs but indicated that he was
unable to attend the hearing on 11 th September because of a prior commitment
elsewhere which he could not change. In the circumstances, I considered that it would be
wrong to allow Mrs Clapp to address the Court in the absence of Mr Trigwell. I therefore
directed on 11 th September that Mrs Clapp should file submissions in relation to the
matter of costs and that Mr Trigwell should then be given an opportunity to respond in
writing. I would then determine the matter of costs on the papers. 3. That has duly
occurred and what follows constitutes my decision on costs having taken into account the
written submissions of Mr Trigwell and Mrs Clapp on behalf of her husband. The
principles 4. In Flynn v Reid

[2012] (2) JLR 226, the Court of Appeal approved the observations of Page, Commissioner in
Watkins v Egglshaw

[2002] JLR 1 where he set out the principles which, in his view, ought to guide the Court in the exercise of its discretion when considering the issue of costs. The relevant paragraphs are as follows:- "7. The principles that should guide the court in the exercise of its discretion in this area appear to me, therefore, to be as follows, stating them as shortly and simply as possible:

- (a) The court's overriding objective in considering costs is, as in everything else, to do justice between the parties.
- (b) In many cases, that objective will be fulfilled by making an award of costs in favour of the "winning" party, where a "winner" is readily apparent. In any event, the "follow the event" rule can still be a useful starting point.
- (c) It is a mistake, however, to strain overmuch to try to label one party as the "winner" and one as the "loser" when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms.
- (d) The discretion as laid down in art. 2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in *In re Elgindata (No.2)* and *A. E. I. v. Phonographic Performance* ...
- (e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice. ...
- (f) It is implicit in this that, even though a party would otherwise be regarded as having been "successful," justice may require that costs should not automatically follow the event. 8. 9. Secondly, it may also be appropriate for a court to have regard to the fact (if such be the case) that a defendant has to a greater or lesser extent brought the action on his own head. Authority for the proposition that this can be a legitimate factor to take into account is to be found in a clutch of decisions of the English Court of Appeal in the late nineteenth and early twentieth centuries which include, among others: *Angus v. Clifford* ..., *Bostock v. Ramsey Urban Council* ... and *Ritter v. Godfrey* In each of these cases the court recognized that, in exercising a discretion in relation to costs, a court was not confined to looking at the conduct of the parties during the course of the litigation itself but was entitled to have regard also to the earlier circumstances. Although it is now necessary to treat older authorities on costs with caution, the general point made in those cases is, in my view, still a perfectly valid one. ..." Discussion 5. There is undoubtedly one clear winner in this case, namely the Respondent Mr Clapp. The representation of Mr Trigwell has been dismissed in its entirety and there were no subsidiary arguments on separate points on which Mr Clapp failed even though succeeding overall (as discussed in para 14 of *Flynn v Reid*). Accordingly, on the face of it, the appropriate order would be one for standard costs against Mr Trigwell. 6. However, Mr Trigwell argues that Mr Clapp has to a greater or lesser extent brought this action on his own head. He refers to the fact that Mr Clapp allowed Astral to be struck off in 2008 despite

having been involved in correspondence with Nautilus during which Nautilus made it clear that their records showed the beneficial owner as being Mr Harrod. Mr Trigwell says he was in effect misled as to the strength of his case by the fact that there were declarations of trust by both Martello and Nautilus in favour of Mr Harrod. It was the fault of Mr Clapp that this position remained uncorrected because he had refused to have anything to do with Nautilus in 2007/8. Mr Trigwell submitted therefore that Mr Clapp should be ordered to pay all of Mr Trigwell's costs. 7. The Court accepted at paragraph 123(xiii) of the Judgment that Mr Clapp's conduct once Nautilus was involved was somewhat strange. Nevertheless, I do not think that this is a case where he has brought the case upon himself. That is because, as set out in the judgment, Dr Osment, who advised Mr Trigwell at all material times, was aware back in 2013 that Mr Clapp considered that his family was the beneficial owner of Astral through the OEEA Trust. Despite this, in 2014 Mr Trigwell, assisted by Dr Osment, procured Mr Harrod to concede the claim in the QBD proceedings on behalf of Astral and to authorise execution against the CMI Bond and the Blandford Property even though they were aware that Mr Harrod had not known what assets were in Astral. They did all this without informing Mr Clapp so as to give him an opportunity of contesting the matter. 8. Mr Trigwell was therefore aware from an early stage that there was an issue as to ownership. Certainly, by the time he instituted these proceedings in November 2015, he was well aware that Mr Clapp considered that his family was the beneficial owner. 9. Furthermore, examination of the corporate records of Astral showed that, until September 2005, there was nothing to suggest that Mr Harrod was the beneficial owner; on the contrary all the evidence pointed to the beneficial owner being the OEEA Trust. Mr Trigwell was aware of this evidence well before trial yet persisted in the allegation that Mr Harrod had been the beneficial owner at all times from the very start at 1998. 10. I do not think the mere fact that Mr Clapp - who did on 21 st August, 2007, contradict Nautilus' assertion in their letter of 15 th August, 2007, (mistakenly written as 15 th November, 2007, in para 58 of the judgment) that Mr Harrod was the beneficial owner - did no more after that and let Astral be struck off, is sufficient to disentitle him to his costs. 11. In my judgment, viewed in the round, Mr Clapp has been entirely successful and it was Mr Trigwell's choice to bring this litigation. Having lost, he must pay the costs on the standard basis. Authorities Trigwell-v-Clapp

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Prepared on 25 October 2026 · Esheria