

## Briefing Note March 2018

# Trustee's Costs: Loser Pays or User Pays?

This note is for information purposes only and is not intended to be legal advice.

**The Royal Court has today handed down its latest Judgment in *Re: the Tchenguiz Discretionary Trust* providing useful guidance on costs in the “largely unchartered area of law in Guernsey” of applications for collateral use of documents.**

Babbé LLP represented a trustee-respondent to the applications and was successful in obtaining an indemnity costs award against the applicant – despite the applicant obtaining the relief it was seeking.

This briefing note follows on from an earlier Babbé note (from July 2017) which explained the implications for trustees when a party to “in camera” (i.e. confidential) proceedings applies to the Court for permission to deploy confidential trust documents elsewhere.

### Background

In general terms, a party in court proceedings to whom a document has been disclosed, may only use that document for the purposes of those proceedings – unless the Court grants permission for its use elsewhere.

In May 2017, a liquidator of four BVI companies applied to the Royal Court for permission to disclose documents now in his possession (having been provided to the liquidator during the course of in

camera trust administration proceedings) in order to comply with disclosure obligations in unrelated English proceedings.

In June 2017, the Court granted its permission albeit not in the form originally sought. Babbé’s client (as the principal respondent to the applications) sought its costs of the applications on the indemnity basis.

The “usual order” in Royal Court proceedings is that the “loser pays the winner’s costs” on the recoverable basis. Whereas an indemnity costs award entitles the receiving party to a near full indemnity, a “recoverable” award usually means a far lower level of recovery.

By its costs application, Babbé’s client was therefore seeking something extraordinary: an order that the party who, in effect, “won” the application (having been granted the permission that it was seeking) should pay its costs - and on the indemnity basis instead of the usual recoverable basis.

### Indemnity Costs?

The Royal Court had considered substantially the same arguments in a similar but unrelated application involving the same parties in 2017. In its decision on that application the Royal Court (LB Marshall QC) awarded Babbé’s client – as the respondent to a

collateral use application – its costs on the indemnity basis: see *Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Rawlinson Hunter Trustees* (Judgment 39/2017).

Unsurprisingly, perhaps, the Royal Court did so again today. However, in doing so, the Court gave clear guidance on the factors to be taken into account, when deciding the costs of a collateral use application.

Following the Royal Court's Judgment in 2017, there appeared to be a presumption in collateral use applications that the applicant should always fully indemnify a trustee-respondent. In the Judgment handed down today, however, the Court (LB Talbot QC) clarified the position, saying that “...*The Court's discretion as to costs must be exercised without any such fetter...*”. The Court duly applied the guidance of Lord Justice Vos in the Court of Appeal in England in *Tchenguz v Director of the Serious Fraud Office* [2014] EWCA Civ 1471 which states that there should be no such general principle.

Despite this, having regard to the commendable way in which Babbé's client conducted itself throughout the application (and in the face of attempted criticism by the applicant, which the Court refused to accept), the Court was still satisfied that it would be appropriate for Babbé's trustee-client to be indemnified in full by the applicant.

Today's Judgment should offer trustees, joined to applications in which neither they nor the trust appear to derive any benefit, much comfort in that they will not be “*out of pocket*” when assisting an applicant and ultimately the Court, provided that they conduct themselves appropriately.



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