



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2024: No. 40

### IN THE MATTER OF THE W TRUST

#### RULING

*On Costs of the other parties to a trustee's blessing application*  
(In Chambers)

**Date of hearing:** 8 September 2025

**Date of Ruling:** 23 September 2025

**Appearances:** Elspeth Talbot-Rice KC and Keith Robinson of Carey Olsen  
Bermuda Limited for the Trustee  
Edward Cumming KC and Jonathan O'Mahony of Conyers Dill &  
Pearman Limited for the Third Defendant ("D3")  
Lilla Zuill of Cox Hallett Wilkinson Limited for the Second and  
Fourth Defendants ("D2" and "D4")  
The Fifth Defendant was unrepresented and did not participate  
("D5")

#### RULING OF MARTIN J

##### Introduction

1. This is the Court's decision in relation to the costs of the defendants to the Trustee's application for blessing given in the Ruling dated 11 April 2025.
2. The Court awarded the Trustee's costs of the application in the normal way but invited the parties to make submissions on the incidence of the costs of the other parties to the proceedings.

3. In cases in which the court is engaged to construe the trust deed for the guidance of the trustees or beneficiaries, or ascertain the interests of the beneficiaries, or have some other question determined which has arisen in relation to the administration of a trust, the costs of all parties necessarily incurred will normally be paid out of the trust fund on an indemnity basis. (See **Re Buckton**<sup>1</sup> (category 1)). It is common ground that this is the starting point on an application for the court's blessing of a decision of the Trustee.

### **The Trustee's position**

4. However, in this case, the Trustee submitted that the blessing application was necessitated as a result of D3's demand that the Trustee proceed to make a distribution for D3's benefit based on his particular wishes and his circumstances. Although it was a blessing application in form, the Trustee submitted that it was more akin to a contested application in ordinary litigation, and so did not fall squarely within the category 1 type of case described in **Re Buckton**.
5. The Trustee said that D3 asserted that he had an entitlement to a distribution of the equivalent of one quarter of the residue of the trust fund as a result of the earlier tax settlement which required equal treatment as between the beneficiaries, otherwise the tax settlement that had been received might be jeopardised.
6. The Trustee submitted that the Trustee had made its position clear to all the beneficiaries that it had decided not to make any further distribution until the tax situation had been clarified and that it would be inappropriate for the Trustee to make a further distribution for the time being. But D3 refused to accept the Trustee's decision.
7. The Trustee submitted that the application for the court's blessing not to make a distribution to D3 was made necessary only as a result of the continuous campaign of correspondence initiated by D3, supported by correspondence from D3's solicitors and attorneys. The Trustee considered it was necessary to contain the costs that the ongoing correspondence was incurring for the trust, and to reduce the friction that this campaign was causing between the Trustee and D3 and also between D3 and the other beneficiaries.
8. The Trustee takes the position that the application was therefore not one that was made for the benefit of the trust as a whole, or for determining an issue that had arisen as to the meaning or scope of the Trustee's powers, but was made as a result of the refusal of D3 to accept the Trustee's decision, which was plainly within its proper powers under the terms of the Trust Deed.
9. The Trustee submitted that D3 acted unreasonably in refusing to accept the Trustee's decision and consequently D3's costs should not be borne by the trust fund. In the

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<sup>1</sup> [1907] 2 Ch 406.

circumstances, the Trustee submitted that the proper and just order as to costs is for D3 to bear D3's own costs.

### **D2 and D4's position**

10. D2 and D4 agreed with the position advanced by the Trustee and accepted that they would bear their own costs of the proceedings. However, if the Court was minded to award D3's costs out of the Trust, D2 and D4 submitted that fairness would require that their costs should be met out of the Trust assets as well.

### **D3's position**

11. D3 says that the application was necessary and that it was made for the benefit of the trust as a whole and that D3's costs (as well as D2 and D4's costs) should be paid out of the assets of the trust on a full indemnity basis.
12. D3 says that to refuse to award D3's costs from the trust would send a chilling message to beneficiaries who wish to (and are entitled to) oppose or challenge the decisions of a trustee and that the court should be wary of discouraging beneficiaries from participating in proceedings because of a risk that they may have to pay the costs if their opposition or challenge is unsuccessful.
13. D3 submitted that D3 had participated in the proceedings properly and had made considered, measured and reasonable points in opposition to the Trustee's decision. D3 submitted that the Trustee's position had evolved over time and that it was perfectly understandable and proportionate for D3 to participate in the proceedings. D3 submitted that D5 supported D3's position, and therefore the application was for the benefit of the Trust.
14. D3 submitted that to refuse D3 recovery of costs from the trust fund would amount to a penalty which would be unjustified because D3 had acted reasonably throughout, and even though D3 had expressed strong objections, this should not operate to deprive D3 of the normal rule as to costs under a **Buckton** category 1 type of application. D3 submitted that D3 had not acted out of personal animosity or made allegations for no good or proper reason.

### **Court's assessment and decision**

15. This was an unusual application in that the Court was asked to bless the Trustee's decision not to make a distribution for the time being, which was a decision the Trustee was perfectly entitled to make without seeking blessing of the court. The Court accepts that what made the application necessary was (i) the ongoing and significant cost incurred by the Trustee in dealing with D3's ongoing correspondence and (ii) the friction that D3's

correspondence was causing between the Trustee and D3, and also between D3 and D2 and D4, which led to the application being made.

16. Without indicating any disapproval as to the vigour and determination with which D3 pressed the objections to the Trustee's decision, it is obvious that the application was contested by D3 on the same footing as any commercial litigation would have been. Points were taken which went well beyond mere objection or strong disagreement with the Trustee's decision.
17. In the Court's view, the whole purpose of D3's campaign of ongoing correspondence was to force the Trustee either to make a distribution to D3 on the terms D3 wanted or to put the Trustee in the position that either the Trustee would apply to the Court or D3 would do so. This is evident from the early correspondence<sup>2</sup>.
18. The premise of D3's submissions to the Court was that the Trustee was obliged to make the distribution to D3 based on the requirement of the terms of the tax settlement agreement for equal treatment between the beneficiaries. While this may be a practical view of the position the Trustee was likely to take (so far as possible), it does not reflect the strict legal obligation of the Trustee under the terms of the W Trust which is a discretionary settlement.
19. The Court agrees that a party to a category 1 case under the **Buckton** principles would not be deprived of costs simply because the submissions made in opposition to the Trustee's application were not accepted by the Court.
20. D3 is of course entitled to raise all the issues that are open to D3 in presenting the case in the most effective and persuasive way and to take whatever points are considered to best serve D3's interests. It is understandable that D3 may have very strong motivations which may be taken into account given D3's terminal condition.
21. However, this was not a case of a beneficiary being impolite or 'difficult', for which no adjustment to the category 1 award of costs would (normally and within reason) need to be made. In this case, the clear strategy of D3 was to attack the Trustee's exercise of its (undisputed) power not to make a distribution in order to achieve the result D3 wanted. This involved making serious allegations against the Trustee which were (as the Court found) unjustified by the facts.
22. D3 alleged that the Trustee had acted irrationally and unfairly. D3 also alleged that the Trustee had been guilty of breach of its duty to give full and frank disclosure to the Court. D3 alleged that the Trustee suffered from an alleged conflict of interest (and was therefore in breach of trust). D3 alleged that the Trustee had given undue weight to the views of the other beneficiaries (and was thereby in breach of trust).

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<sup>2</sup> See page 921 of the hearing bundle at paragraph 41.

23. Allegations involving breach of trust and conflict of interest on the part of the Trustee are the hallmarks of hostile trust litigation. This case does not properly fall within category 1 of the **Buckton** principles for the purposes of assessing the appropriate approach the Court should take in making an award of the costs of the proceedings.
24. If the Court were to be held to be wrong in this assessment, the Court would nevertheless consider that the strategy adopted by D3 was ‘unreasonable’ in the sense used in **Green v Astor**<sup>3</sup> given the absence of any facts justifying D3’s allegations of conduct amounting to a breach of trust on the part of the Trustee.
25. It was accepted by D3 that the decision whether to make a distribution was a matter that was within the Trustee’s discretionary powers. The Court agrees that the application ought not to have been necessary and the Trustee ought not to have been required to incur the costs of bringing these proceedings. Those costs are to be met out of the assets of the Trust, but the Court does not consider that it would be just or fair for the Trust to bear D3’s costs as well.
26. As a result, the Court is not minded to make any award of costs for any of the defendants. This does not mean that D3 is being penalised in costs by being required to bear the costs of the Trustee or the other parties. It simply means that D3 must bear D3’s own costs. The other parties are in the same position, although the Court recognises that the other defendants did not incur the same level of costs as D3.
27. The Court does not consider that this approach will send a ‘chilling’ message to beneficiaries who wish to oppose or challenge the decisions of the Trustee because (in the normal case) the questions that are to be resolved in a **Buckton** category 1 type of case do not involve making serious allegations of (or amounting to) breach of trust on the part of the Trustee.
28. The Trustee is to submit an Order to reflect the Court’s decision.

**DATED the 23<sup>rd</sup> day of September 2025**



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**HON. ANDREW MARTIN**  
**PUISNE JUDGE**

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<sup>3</sup> [2013] EWHC 1857 (Ch) per Roth J at paragraph 54.