



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No.: FSD 166 of 2019 (MRHJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)

AND IN THE MATTER OF ONETRADEX LTD. (IN PROVISIONAL LIQUIDATION)

BEFORE Hon Mrs Justice Margaret Ramsay-Hale

HEARD: On the Papers on 27 June 2022

Mr. Graeme Halkerston instructed by Mr. Rupert Bell and Mr. Niall Hanna of Walkers for the Provisional Liquidator

Mr. Hector Robinson QC and with him Mr. Christopher Harlowe and Mr. Laurence Aiolfi of Mourant for the Ad Hoc Committee of Clients and Creditors

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Headnote

Civil procedure - *Calderbank* Letter - Liquidator's application for remuneration opposed by Ad Hoc Committee - Whether *Calderbank* offers applicable where no risk of adverse costs orders - Whether reasonable to reject offer

DECISION ON COSTS

Introduction

1. OneTradex is a company incorporated in the Cayman Islands which was licensed by the Cayman Islands Monetary Authority ("CIMA") to conduct the activity of broker/dealer (the "Company"). Following the discovery of divers regulatory breaches by the Company in July 2019, CIMA, acting in its regulatory capacity, appointed Kenneth Kryss and Angela Barkhouse of Kryss Global to assume control of the affairs of the Company (the "Controllers" and the "Controllorship" as applicable). In September 2019, the Company was put into provisional liquidation by the Chief Justice and the Controllers were appointed Joint Provisional Liquidators ("JPLs"). The extent of the Company's regulatory breaches and the reasons for putting the Company into provisional liquidation are set out fully in the omnibus ruling of the Chief Justice dated 1 October 2020.



2. An Ad Hoc Committee (the "Committee") of creditors and persons for whom the Company held assets (the "Clients") was established, pursuant to the Order of the Chief Justice putting the Company into provisional liquidation (the "Provisional Liquidation"). The Committee was formed to assist the JPLs and to represent the views of the Clients.
3. As the assets of the Company were insufficient to meet the costs of identifying the trust assets and returning them to the Clients, the Chief Justice made a *Berkeley Applegate* order dated 27 November 2019 (and filed on 20 January 2020) permitting the JPL's to have recourse to the trust assets for their fees and expenses, provided such fees and expenses were reasonably incurred in returning the trust property to those beneficially entitled to it.
4. By summons dated 29 April 2020, Mr. Kryz, who was by then the sole Provisional Liquidator (the "PL"), made an application for orders regarding the quantum and apportionment of the remuneration, expenses and disbursements incurred during the Controllership and the Provisional Liquidation (initially to 31 March 2020, later extended to 30 June 2020). He applied for an order that such of his fees and expenses as fell within the *Berkeley Applegate* principle be paid out of the trust assets and an order that the costs of and occasioned in connection with the application were payable out of the trust assets.
5. The Committee opposed the PL's application in part. The application was finally resolved by this Court in a ruling handed down on 17 June 2022, which approved the PL's fees and expenses in the sum of US\$3,805,982.07, of which US \$2,944,289.33 was ordered to be paid out of the trust assets pursuant to the *Berkeley Applegate* order. The Court dismissed a submission by the Committee that the PL's costs of the remuneration application should be paid out of the Company's assets and held that the PL's costs were payable out of the trust assets.

Preliminaries

6. Subsequent to that Ruling, the Committee wrote to the Court seeking an opportunity to make further submissions on costs on the ground that the PL had not recovered from the trust assets a greater sum than that which had been offered to him by the Committee in a "*without prejudice save as to costs*" letter.
7. Such offers are commonly referred to as *Calderbank* offers, the eponymous decision being reported in *Calderbank v Calderbank* [1976] Fam 93, and have certain costs consequences if they are refused and not beaten at trial, as set out more fully below.
8. In response to the Committee's letter, the Court invited the Committee to file its skeleton and authorities within 21 days of the date of the judgment. Given the costs already incurred on this application, the Court also indicated its view that it could resolve the question without a further hearing based on the correspondence before the Court and that it would be desirable for the Court to do so.
9. The Committee responded as set out below:



“The Ad Hoc Committee has considered the matter and, whilst it would like to pursue the costs issue by way of an oral hearing in order to seek to achieve a more satisfactory outcome for the clients, the Ad Hoc Committee remains unfunded and is unable to do so. In contrast to the Provisional Liquidator, who is able to continue to charge the clients from their own trust funds in opposing a reduction to his entitlement to fees and expenses from their assets, the Ad Hoc Committee does not have access to the clients funds in order to advance the arguments on their behalf.

In the circumstances, we confirm that the Ad Hoc Committee is not in a position to seek a further hearing or to make any further written submissions. We therefore invite the Court to make such order as to the costs of the hearing as it considers appropriate bearing in mind the offer made in the without prejudice save as to costs letter dated 25 September 2020 and the result achieved.”

10. Before I move to consider the issue for resolution I feel obliged to note, in response to the Committee’s complaint that the Committee, unlike the PL, does not have access to the Clients’ funds to advance arguments on their behalf, that the terms of the **Client Ad Hoc Committee Membership Agreement** (the “Membership Agreement”) executed by the members of the Committee, allows for the Committee to enter into an agreement with the Clients to contribute towards its legal fees and expenses.
11. The Committee did not seek to make any such agreements with the Clients as envisaged by the Membership Agreement. Instead, it pursued an application to have its fees paid out of the Company’s assets as expenses in the liquidation. That application was futile given that the Membership Agreement expressly provides that the Committee’s costs could not be paid out of the Company’s assets.
12. The Committee sought, in the alternative, that it be allowed its costs on a *Berkeley Applegate* basis. That proposition was equally doomed as *Berkeley Applegate* orders are only available to secure the reasonable expenses of officeholders who assume responsibility for the administration of trust property as “agents of necessity”: see *In re Caledonian Securities Limited*, 2016 (1) CILR 309, not beneficiaries.
13. The Committee’s renewed application for its costs to be paid out of the trust assets, now put on the basis that it fell within that category of case identified by Kekewich J in *Re Buckton* [1907] 2 Ch 406 entitling them to be indemnified out of the fund, was not brought on for hearing until the 6 October 2021, too late for a pre-emptive costs order which might have assured the Committee of its costs for appearing in respect of the PL’s applications.
14. Against that background, the Committee’s complaint that it is not funded rings hollow.

15. I would also note here that attorneys for the PL expressed the wish to make written representations and supply the Court with authorities if it intended to consider the Committee's submission. Given the costs already incurred in this application, I intend to deal with the question of the PL's costs summarily, without further assistance from Counsel. It is perhaps not the wisest course, but I consider it the most expedient to ensure that further costs - and the further diminution of the trust assets - are avoided.

The Offer

16. The offer which was made on 25 September 2020 was as follows:

"In a final attempt to avoid the costs that will be incurred in the hearing of the Application the Ad Hoc Committee is prepared to agree, in full and final settlement, to a payment in the sum of US\$2,964,427.63, being 80% of the Provisional Liquidators' total claim for the period to 30 June 2020, as the total sum payable on the Application, provided that this offer of settlement is accepted before 5 pm on 30 September 2020."

17. The letter did not propose what the costs consequences would be if the Committee's offer was not accepted.
18. That was set out in a later correspondence to the PL's attorneys where the Committee asserted that:
- (i) the Court had approved a sum to be paid out of the trust assets which was lower than the amount offered to the PL by the Clients in their 25 September letter; and
 - (ii) in the circumstances where the PL had failed to beat the offer made to him and *"achieved nothing by his unsuccessful pursuit of greater deductions"* from the trust assets, his costs of the application should not be paid out of those assets.

Discussion and Decision

19. In its decision on the Committee's costs summons granting the Committee's application to be paid out of the trust assets,¹ the Court held that the PL's remuneration application fell within the first category of trust cases described by Kekewich J in *Re Buckton* [1907] 2 Ch. 406 at 415:

"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of

¹ Handed down on 30 June 2022

220706 *In the matter of OneTradex Ltd (IPL) – Decision on Costs made on the papers*



the estate, and direct them to be taxed as between solicitor and client and paid out of the estate ..."

20. The Court accordingly held that the Committee could recover its legal expenses for appearing in that application out of the trust assets on an indemnity basis (up to a specified amount) on the ground that their appearance was for the benefit of the beneficiaries as a whole.
21. The PL had already been granted a pre-emptive costs order by the Chief Justice which entitled him to be indemnified out of the trust assets for his reasonable expenses.
22. The learned authors of **Cook on Costs** note that:

*"Wherever there is a risk that costs **may be ordered between the parties** it is sensible to make offers to settle, if necessary using Calderbank terms, 'without prejudice save as to costs'."* [emphasis mine]
23. In the circumstances where there was no risk of an *inter partes* costs order being made, the cost consequences of the Committee's offer would not have been immediately apparent, given that the purpose of a *Calderbank* offer is to shift the allocation of litigation costs **between** litigants where costs would normally follow the event: if the offeree refuses an offer which he fails to exceed, he is usually ordered to pay the offeror's costs incurred after the date when the offeree ought reasonably to have accepted the offer: see *Cutts v Head* [1984] 2 WLR 349
24. Such cost shifting would be inconsistent with the basis on which the Committee sought and was granted its costs of appearing on the PL's application for remuneration which was that the proceedings were not adversarial, but 'friendly' proceedings to determine some issue arising in the administration of a trust in which the Committee's costs fell to be paid from the fund in any event.
25. In those circumstances, in order for the Committee's offer to be fairly considered by the PL, the Committee would have had to give some indication in its letter of the cost consequences for which it would contend, if the offer were rejected. The Committee's failure to do so was sufficient reason for the PL to disregard the offer. That, and the fact that he was given 5 days (in effect, the PL says, 3 business days) to consider it.
26. Further, in my view the Committee is not right to say that the PL did not do better on the remuneration application than the sum offered by the Clients.
27. The offer was said to be in "*full and final settlement*" of the PL's claim and made no allowance for the PL's costs incurred in the application to the date of the offer.
28. In his letter in response, the PL states that, by the date of the offer letter, he had already incurred a further US\$250,208.63 in costs in dealing with the Committee's evidence:



“By the time the Committee Offer was received, on 25 September 2020, further costs in connection with the Summons had been incurred that were not included in the figures provided in Krys 5 and Krys 8. The Ad Hoc Committee was well aware of this since it was involved throughout: they included the costs of dealing with, among other matters in connection with the Summons, the following evidence – all of which was either prepared by or served on the Ad Hoc Committee between 30 June 2020 and 25 September 2020:

- (a) the Eighth Affidavit of the Provisional Liquidator dated 7 July 2020;*
- (b) the Third Affidavit of Simon Ecclefield dated 18 August 2020;*
- (c) the Ninth Affidavit of the Provisional Liquidator dated 21 August 2020;*
- (d) the Tenth Affidavit of the Provisional Liquidator dated 25 August 2020;*
- (e) the Fifth Affidavit of Simon Ecclefield dated 7 September 2020;*
- (f) the First Affidavit of Andrew Bolton dated 7 September 2020;*
- (g) the Second Affidavit of Andrew Bolton dated 8 September 2020; and*
- (h) the Eleventh Affidavit of the Provisional Liquidator dated 17 September 2020.*

Having carried out a preliminary review of the costs attributable to these items alone, the Provisional Liquidator estimates that by the date of the Committee Offer (25 September 2020), at least another US\$250,208.63 had been incurred in connection with the Application.”

29. Had the PL accepted the offer, he would have been responsible for his own costs of the application from June to September 2020, costs which had been necessarily incurred. It was not unreasonable for him to refuse the offer in those circumstances.
30. The PL’s costs of the application are to be paid out of the Reserve.

DATED 6 JULY 2022

RAMSAY-HALE J