



**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)**

**IN CHAMBERS via videolink**

**Appearances:** 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

**Before** Hon Mrs Justice Margaret Ramsay-Hale

**Heard** 6 October 2021

**Draft decision circulated on** 24 June 2022

**Decision handed down** 30 June 2022

**Headnote**

**Winding Up - Ad Hoc Committee appointed in a provisional liquidation - Application for Ad Hoc Committee's costs and expenses to be paid out of trust assets - Equitable jurisdiction of Court to make provision for reasonable expenses of representative beneficiaries - *In Re Buckton* [1907] 2Ch 406**

**DECISION**

**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"). Its website, onetradex.com, stated that it was the Cayman Islands' only fully licensed broker/dealer offering online discount trading services to individual investors, traders, hedge fund managers and family offices.
2. The assets of the majority of the Company's clients (the "Clients") were kept in accounts at Interactive Brokers LLC. ("IB"), a company headquartered in Greenwich, Connecticut which is



regulated by a number of US regulatory agencies, including the U.S. Securities and Exchange Commission ("SEC") and other regulatory agencies around the world. IB, as part of its broker/dealer agency business, provided direct access trade execution and clearing services to the Clients via an online trading platform.

3. Others assets were held by the Company on behalf of the Clients through various other custodians, namely Fidelity Bank (Cayman) Ltd ("Fidelity"), a number of UK based firms including Beaufort Securities Limited (in Liquidation) ("Beaufort"), Jarvis Investment Management Limited ("Jarvis"), Linear Investments Limited ("Linear"), Dolfin Financial UK Limited ("Dolfin") and Maybank Kim Eng Securities Pte. Ltd. ("Maybank"), a company based in Singapore.
4. In July 2019, CIMA appointed Mr. Kenneth Krys and Ms. Angela Barkhouse to assume the control of the affairs of the Company as controllers (in that capacity, the "Controllers"). By a Petition filed on 29 August 2019, the Cayman Islands Monetary Authority ("CIMA" or the "Authority"), acting in its regulatory capacity, petitioned for the winding up of the Company and the appointment of the Controllers as the joint provisional liquidators of the Company.
5. On 27 September 2019, the Authority's Petition was, with the agreement of the Authority, stayed by Order of the Court in deference to an Ex Parte Summons filed on 30 August 2019 by the Controllers, which sought their immediate appointment as joint provisional liquidators of the Company ("JPLs"), under section 104(3) of the Companies Law. The regulatory failures of the Company and the reasons for putting the Company into provisional liquidation are fully set out in an omnibus Ruling issued by the Chief Justice on 1 October 2020.<sup>1</sup>
6. An ad hoc committee of clients and creditors was established on 10 September 2019. The Order made by the Chief Justice on 27 September 2019 authorised the JPLs to constitute an ad hoc committee of clients and creditors (the "Committee"). On 29 September 2019, the terms of the Committee were agreed with the JPLs.
7. As a condition for becoming a member of the Committee, each member was required by the JPLs to sign a **Client Ad Hoc Committee Membership Agreement** (the "Membership Agreement").
8. Clause 2 of the Membership Agreement provides:

***"2. No compensation or expense reimbursement; no indemnification***

*Neither the Committee, nor any of its members shall have any right to draw upon, or seek remuneration, reimbursement or indemnification from assets of the Company for any purpose, including, among others, engaging or compensating legal counsel or advisors.... Notwithstanding the foregoing, nothing set forth in this agreement shall prevent the committee from engaging legal counsel at their own cost or by separate*

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<sup>1</sup> Ruling dated 1 October 2020. Noted at [2020 (2) CILR ] at Note 20



*agreement, seeking contribution from other Clients towards their fees and expenses incurred in relation to such engagement ...”*

9. In sum, under the terms of Clause 2:
- (i) The Committee was permitted to engage legal representation at its own cost;
  - (ii) The Committee was permitted to enter into an agreement with Clients whereby those Clients would contribute towards the Committee’s legal fees and expenses; and
  - (iii) The Committee was expressly prohibited from seeking recourse to the assets of the Company to meet legal expenses.
10. A proposal for the inclusion of a provision in the Membership Agreement that would allow the Committee to seek recourse to the trust assets on a rateable basis without the agreement of a Client was rejected at the time the Committee was formed.

#### **Background to this application**

11. Despite the fact that the membership of the Committee comprised of a Cayman Islands litigation attorney with considerable experience in insolvency matters as well as an insolvency practitioner who had been appointed as a liquidator of Cayman Islands entities on numerous occasions, the Committee retained Mourant to advise it on divers issues which arose in the controllership and the subsequent provisional liquidation and almost immediately began incurring costs.
12. The Committee also appeared through Counsel at a number of hearings, including:
- a. The 27 and 28 November 2019 hearing of the JPL’s application for a *Berkeley Applegate* Order to permit payment of certain fees and costs from the Client’s assets held on trust by the Company, the JPL’s application for an *MF Global* Order and the Committee’s summons for payment out of the Client’s trust assets;
  - b. The 25 June 2020 application by the provisional liquidator (following the resignation of Ms Angela Barkhouse as JPL, the "PL") for interim payment of his costs;
  - c. The 28 August 2020 hearing of the Committee’s summons for directions on the Provisional Liquidator’s quantum and apportionment application and the Committee’s costs summons;
  - d. The hearing on 1 October 2020 on the PL’s summons seeking declaratory orders regarding the evidence of Theo Bullmore; and



- e. The hearing on 18, 19 and 20 November 2020 at which the Court considered the Provisional Liquidator's application for the assessment of the quantum of the Provisional Liquidator's costs pursuant to the ***Berkeley Applegate*** order.
13. Notwithstanding the provisions of the Membership Agreement, the Committee did not enter into an agreement with the Clients or any of them to contribute to the Committee's legal expenses as anticipated by the Membership Agreement, nor did they seek approval from the body of Clients, at inception, to incur legal expenses costs and recoup them out of the trust assets. As matters presently stand, the members of the Committee are personally responsible for the attorney's fees and fees of leading counsel who they have instructed.
14. The Committee now seeks to be indemnified out of the trust assets for the legal costs it has incurred on the basis that all legal costs were incurred in the pursuit and protection of the Clients' beneficial interest in the assets held on trust by the Company.

### **This Application**

15. The application which is brought pursuant to the Committee's summons dated 19 August 2020 (the "Committee's Costs Summons" or the "Summons") seeks an order that:

*"the legal costs and expenses reasonably incurred by the Committee shall be treated as an expense of the provisional liquidation and paid out of the assets of the Company and/or from the assets held by or for the Company on trust for any Client and/or creditor or otherwise, whether directly controlled by the Company or otherwise within the control of the Company..."*

16. It is clear from the terms of the Membership Agreement that the Committee was not entitled to be paid its costs and expenses out of the assets of the Company. The relief the Committee now seeks is set out in the Draft Order and is an order that their legal expenses and costs, reasonably incurred, be paid out of the trust assets on an indemnity basis and that the sums payable by recourse to the trust assets be apportioned between the Clients in proportion to the value of their trust assets as at 19 July 2019.

### **The Evidence**

17. The primary contention of the Committee is that it has played an integral role in the provisional liquidation as it has represented the interests of the Clients and served as a conduit between the Clients and the PL. In his submissions, Mr. Robinson QC, who appeared for the Committee, asked the Court to consider that had the matter proceeded to Official Liquidation, the Committee would have been replaced by a liquidation committee and, pursuant to CWR O9. r. 6 (3), its legal fees and expenses, reasonably and properly incurred, would have been paid out of the assets of the company as an expense of the liquidation. He surmised that in a case like this, where the assets of the Company were insufficient to meet the costs of the provisional liquidation, an official



liquidator might have had to add the costs of a liquidation committee to any *Berkeley Applegate* application.

18. He submitted that, in the circumstances where the Committee was performing precisely the same role for the stakeholders as a liquidation committee would, it would be fair and just for the costs of the Committee to be treated as if they were an expense of the liquidation.
19. In his evidence sworn on 19 August 2020 in support of this application, Committee member Mr Ecclefield stated that the Committee was seeking to recover out of the trust assets (i) legal costs already incurred up to August 2020, which were in the region of \$275,000; and (ii) legal costs to be incurred in the proposed challenge to the PL's remuneration application, which the Committee estimated at between \$250,000 - \$300,000.
20. Mr. Ecclefield stated that 79% of the Clients, by value, supported the Committee recovering its legal costs up to 19 August 2020 from the trust assets, to be paid from the trust assets of all Clients in proportion to the value of their accounts at 19 July 2019 and that 76%, by value, supported an order that the costs of challenging the PL's application for remuneration be paid from the trust assets.
21. The PL has taken a neutral stance with respect to the Committee's application. Nonetheless, he has made submissions intended to assist the Court with respect to the applicable legal principles as well as commented on factual matters relevant to the application on the basis that the relief sought by the Summons affects the trust assets of which he is, in effect, trustee, as well as the estate of the Company of which he is the PL. He has also conveyed the views of certain Clients who oppose the Committee's Costs Summons and wished their opposition to be brought to the attention of the Court.
22. The Committee objected to the PL appearing in the application but his appearance to assist the Court is supported by authority and no criticism can be made of it. The position is summarised in **Lewin on Trusts, 20<sup>th</sup> edn**:

*“Being neutral should not necessarily be equated with being passive, especially in cases falling within Buckton categories (1) and (2). Since the objective in cases within these categories is to obtain the guidance of the court, the court may well be assisted by submissions from the trustees as to the principles of law or construction involved. Further, there are cases where the argument presented on behalf of beneficiaries is one-sided, and the court is assisted by hearing the contrary argument from counsel for the trustee. For example, if unborn beneficiaries are in a position of their own, the trustees are under a duty to address the court on their behalf and likewise where there is a class of beneficiaries with an opposing interest of whom none is willing to participate in the proceedings. A trustee who assists the court in this way will not be deprived of costs.”*



23. In his evidence, the PL drew the Court's attention to the questions that were posed by the Committee as set out in Mr. Ecclefield's email:

*"10. On 1 August 2020, the Committee advised all clients of the Company of the above established Committee costs and asked the following questions (the first of which, for clarity, related to the 29 April Summons) requesting a 'Yes' or 'No' answer:*

*Question 1: Do you support BOTH challenging those elements of the fees that the committee and its advisers consider it reasonable to challenge, AND the making of an order that would spread the costs of doing so across all clients in proportion to the value of their accounts at 19 July 2019?*

*Question 2: Do you support the making an order in respect of the Committee's legal fees incurred to date being made payable by all clients in proportion to the value of their accounts at 19 July 2019?"*

24. The PL challenged the Committee's assertion that it had advised "all clients" of the proposal for the payment of their fees as several Clients had advised him they had not received any communication from the Committee.
25. He questioned whether the basis of the assertion that the Committee had procured "the full support of the majority of clients by way of percentage value of assets held in the company" in the circumstances where the majority of Clients approached by Mr. Ecclefield had already transferred out 85% of their assets.
26. He also said that he had received correspondence which suggested that four of the "DAS Account" Clients - Clients whose monies had been commingled in a single account and used to shore up positions in other accounts held by the Company - representing 43% of total securities in that account, did not agree to the Committee's proposal. They also expressed concern that the Committee had, to date, represented the interests of the "U Account" Clients only, that is to say those Clients whose assets were segregated and readily transferrable once their balances were confirmed.
27. Among the responses the PL received was the following acerbic assessment of the Committee's conduct:

*"Further to your email, I do wish to have my view on this provided to the court, and would be grateful if you would please do so, however, I would prefer not to be personally identifiable if at all possible. I also would not want to engage the ad hoc committee on this directly, in order to avoid the risk of appearing to provide even a semblance of legitimacy to their actions.*

*"Below are the points I would like to be reflected:*



*“The actions taken by the ad hoc committee would lead to potentially further costs to all clients, and as this is the case, I am quite concerned that I have not seen any of the ad hoc committee actions/proposed actions ever communicated (in advance) to or put before the entire body of clients to authorise any such actions that could have financial implications for all parties involved.*

*“As far as I am aware, there has been no communication by the ad hoc committee to clients on any of these matters, no requests for all clients to vote on, approve, authorize prior to or subsequently via an appropriately approved written resolution for any of the actions taken to have gone ahead*

*“Consequently, this ad hoc committee appears to be a group of individuals acting on their own, in their own interests and accountable to no one. As far as my understanding of the ad hoc committee’s role, there is no process in place which authorizes these individuals to act as they have, and now having incurred costs, seek to have them recovered from clients’ trust assets. I do not recall there having been any meetings appropriately convened at which all clients resolved to grant this ad hoc committee any such powers to act on behalf of all or even to act at all, as they have.*

*“If these ad hoc committee members who are also clients wish to contest issues as they have so far, they should be doing so at their own expense and in respect of their own assets alone.*

*“I strongly object to these actions taken by the ad hoc committee, acting on their own accord yet putting all clients financial interests at risk without proper consultation and agreement to act having been sought and obtained, and as such, they ought to have no recourse whatsoever to client trust assets in their pursuance of these unauthorized actions.*

*“Finally, should these ad hoc committee members wish to take the sorts of actions they have so far, and intend to continue, I reiterate the point that they should be acting in respect of their own assets/accounts alone, and at their own personal expense – should any other clients wish to join them, they also should do so at their own personal expense.”*

28. Importantly for the resolution of the application is the fact, as Mr. Halkerston pointed out, that Mr Ecclefield’s email did not bring the terms of the Membership Agreement to the attention of Clients nor ask the Clients to fund its costs and expenses generally, as contemplated by the Membership Agreement. The only thing the Clients were expressly asked was whether they would support the Committee incurring costs on its challenge to the PL’s remuneration application and its Summons.

29. It is relevant to this application that the Committee's costs now exceed the estimated costs for which the PL made provision in the trust assets remaining under this control (the "Reserve"). This was confirmed by Mr Ecclefield who, in his 14 May 2021 affidavit, stated that the Committee's actual costs to date were \$746,330.
30. The PL's evidence is that, through his attorneys, he invited the Committee on 20 August 2020, to either confirm that \$575,000 was the maximum amount that the Committee required him to make provision for or provide him with a final figure regarding the total quantum of the Committee's incurred and projected costs before his application to adjust the Reserve was heard. The Committee did not respond to that request. On 30 August 2020, in Mr Ecclefield in his 7th Affidavit appeared to confirm the Committee's estimate of \$575,000.
31. The PL's position is that there was a further payment out of the Reserve thereafter with the consequence that the opportunity to adjust the Reserve was lost if the Committee decided that its costs estimate needed to be updated.

#### **The Jurisdiction to allow the Ad Hoc Committee to recover its Legal Expenses**

32. There is no statutory basis on which to award the Committee's costs and the Grand Court Rules do not make any provision for a beneficiary to be awarded his costs out of the trust fund.
33. Despite the Committee's effort to bolster this application on the basis that "a majority" of the Clients supported paying their costs incurred up to the date of Mr. Ecclefield's email and paying the costs of challenging the PL's remuneration application, the Membership Agreement makes it clear that only the agreement of *all* the Clients would allow the Committee to have recourse to their assets to pay its costs.
34. Although the members of the Committee accepted their appointment on the terms that they would not be paid out of Clients' assets on a rateable basis, this does not deprive the Court of jurisdiction to make provision for their costs in the absence of such agreement.
35. The principles on which the court would award costs to beneficiaries were elucidated in *Re Buckton* [1907] 2 Ch 406 by Kekewich J in the following well known passages:

*"Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand, costs are so largely in the discretion of the judge that it is more difficult to secure uniformity in that department than in any other, and it is well-nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases. But when an opportunity occurs, it is well to enunciate rules for the guidance of the profession, and a question arising in this case affords an opportunity which I think it right not to neglect."*



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

*“There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by the trustees ..., but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or the other, a different course has been deemed convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.*

*“There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs...’*

36. These principles have been applied by the Grand Court in traditional trust disputes. In *Al-Ibraheem v Bank of Butterfield International (Cayman) Limited* [2000 CILR 88] Smellie CJ allowed a trust beneficiary who brought proceedings to determine the validity of an amendment to a trust deed to recover the costs incurred out of the trust fund on the indemnity basis.
37. In *re Cotorro Trust* [1997 CILR 1], the Grand Court found that an application by trust beneficiaries, which raised questions of construction of amendments made to a trust deed and the validity of the distributions made pursuant to the amendments, fell within *Buckton* category 1 and allowed the beneficiaries to be indemnified, with respect to their costs of the application, from the trust fund.
38. In *Re SPhinX* [2010 (2) CILR 1], the principle was applied by the Chief Justice in the context of a winding up. In that case, the liquidators applied for an order appointing representatives to be

heard on behalf of parties who shared a common interest in securing the same outcome. They further applied for the costs of the representative parties to be pre-emptively paid from the liquidation estate, submitting that all the parties were agreed that the resolution of the issues was in the interest of the administration of the liquidation estate as a whole and that the resolution of the issues would be facilitated by awarding pre-emptive costs to the representative parties.

39. The Chief Justice accepted that the practice of awarding of pre-emptive costs in trust cases could be adopted by analogy in the liquidation field where statute mandates the application of equitable principles to the treatment of a class or classes of persons who claim benefits under a single liquidation estate and that that the guidance to be found in the *In re Buckton* principles should be taken.
40. The Chief Justice declined to award costs on the “solicitor and own client” or full indemnity basis but instead capped the costs as to the amount chargeable to the beneficiaries by reference to certain maximum hourly rates, on the basis that this was necessary to contain costs in a liquidation in which millions had already been spent.
41. Mr. Robinson also referred the Court to the case of *Wallersteiner v Moir (No. 2)* [1975] 1 Q.B. 373 as instructive. In that case, the English Court of Appeal allowed the minority shareholder to be indemnified by the company for the costs of a derivative action against wrongdoers still in charge of the company, prospectively up to and including discovery in the proceedings. Buckley L.J. gave the following explanation of the basis of the Court's jurisdiction at 403:

*'But there are circumstances in which a party can embark on litigation with a confident expectation that he will be indemnified in some measure against costs. A trustee who properly and reasonably prosecutes or defends an action relating to his trust property or the execution of the trusts is entitled to be indemnified out of the trust property. An agent is entitled to be indemnified by his principal against costs incurred in consequence of carrying out the principal's instructions... The next friend of an infant is prima facie entitled to be indemnified against the costs out of the infant's estate... It seems to me that in a minority shareholder's action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff's costs so far as he does not recover them from any other party... [W]here a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs...'*

42. Mr. Robinson submitted that *Wallersteiner v Moir (No. 2)* is significant because these were hostile proceedings in which, applying the *Buckton* categories, costs would follow the event. The plaintiff



was, however, allowed his costs out of the company as the proceedings were brought for and on behalf of the company.

43. I note, however, that the jurisdiction to make *Wallersteiner v Moir* orders, as the Chief Justice pointed out in *Re SphinX*, developed separately to the jurisdiction exercised by the Court following *re Buckton* and there is no true analogy between the minority shareholder and the beneficiary in *Buckton* category 3 cases. In those cases, as noted by the Chief Justice at paragraph 44, costs would only be recoverable where the proceedings, though on their face hostile, are “to be truly regarded as being representative in nature ...- in other words, proceedings falling into *In re Buckton’s* first category by analogy, rather than into its third”.
44. As explained in **Lewin on Trusts**, since beneficiaries are awarded costs by analogy to the trustee’s right of indemnity, beneficiaries are subject to the same requirement of reasonableness as applies to the trustees and beneficiaries may be disallowed their costs when they choose to be represented in court though, on the trustee’s uncontradicted evidence, their claims are hopeless: see 21-73 17<sup>th</sup> ed.

#### **Discussion and Decision**

45. The authorities establish that, in principle, the Committee, as a representative acting on behalf of the Clients as a class, was entitled to be heard in the divers applications made by the PL to have questions determined which arose during the administration of the trust assets as those applications fall within *Buckton* category 1. Such applications would include the PL’s application for an *MF Global* Order and for a *Berkeley Applegate* order in respect of his costs.
46. The judgment of Kekewich J describes those costs as necessarily incurred for the benefit of the estate regarded as a whole. Provided that the Committee acted reasonably, it should have its costs on the same basis as the PL, that is to say, on the indemnity basis. Although Mr. Halkerston rightly submitted that costs may be directed to be assessed on either the standard or indemnity basis, there has been, as the author of **Lewin on Trusts** points out, a “strong trend” towards orders directing assessment in non-hostile proceedings on the indemnity basis: 17<sup>th</sup> ed. paragraphs 21-60
47. Although the jurisdiction to award costs out of the fund on an indemnity basis may be exercised retrospectively, it may be a counsel of perfection that beneficiaries make application for pre-emptive costs to ensure that they are indemnified out of the trust in respect of the costs incurred by them participating actively in such proceedings and that the costs do not fall to be paid by them personally. The Committee might have been well advised to take this approach with respect to its proposed opposition to PL’s application for an *MF Global* Order, a *Berkeley Applegate* Order and to be paid his costs on an interim basis, since it does not follow that, because proceedings come within *Buckton’s* category 1, an order for costs out of the trust fund will necessarily be made



in a beneficiary's favour. The benefit of a pre-emptive costs order is that the Committee would have been assured that it could recover its costs.

48. The point was not argued - perhaps reserved by the parties to a quantum and apportionment hearing consequent on the decision of this Court with respect to the Committee's entitlement to be indemnified out of the trust assets for its costs - but, in an effort to mitigate the costs consequences of such a hearing given the costs incurred to date by the Committee and the PL, I would offer my provisional view that the Committee should not be allowed its costs of opposing the PL's application for the divers orders for the reasons that:

(i) With respect to the *MF Global* Order, there was a clear risk of proprietary claims being brought as set out in the PL's evidence in support of the application for an *MF Global* Order. The Chief Justice's omnibus Ruling records at [22] that *it was accepted in principle* that the reserve could be available to meet the claims of clients who might have proprietary claims but who, unlike the confirmed clients, had not yet had their claims admitted.

The Committee's opposition was hopeless.

(ii) With respect to the *Berkeley Applegate* Order, the Committee's opposition was also hopeless in view of the fact that work had been done for the benefit of the Clients which had to be paid for and of the well-developed line of authority that liquidators are entitled to be paid by recourse to trust assets for doing work in the administration of those trusts where the Company's assets are insufficient.

That this was ultimately conceded by the Committee as the hearing in which the *Berkeley Applegate* is recorded in the Chief Justice's omnibus Ruling at [21] where he states that *"it came to be accepted between the parties that the JPLs could recover their reasonable costs and expenses out of the trust assets."*

(iii) With respect to the PL's application for payment of 80% of his costs on an interim basis, the Chief Justice declared himself at [26] to be unpersuaded by the sheer technicality of Committee's objection on jurisdictional grounds in the circumstances where:

(a) the Committee had not opposed the Order made on 27 November 2019, which allowed the PL to apply for approval of his costs on a *"final or interim basis"*;

(b) there was an established line of authority supporting the making of such an order which he reviewed at [28]-[30] ;

(c) the Committee was unable to challenge the correctness of the PL's evidence in support of the application [32]; and where



(d) “it was difficult to understand the basis upon which it could be just to deny the PL a reasonable amount of interim payment of his Costs” [32] to which he was entitled by analogy with the customary applications made pursuant to Regulation 10(2) of the **Insolvency Practitioners’ Regulations, 2018** [33].

49. As I say, these are my provisional views only and offered with a view to saving costs. The Committee remains entitled to make submissions as to why those costs should be allowed.
50. With respect to the PL’s application for remuneration, it was plainly appropriate to adopt a process which would afford the persons entitled to the trust assets an opportunity to either challenge the PL’s commercial or business decisions or to contest the details of the liquidator’s allocation of work done by him to categories relevant to the identification and return of the trust assets and/or the reasonableness of the remuneration claimed for performing those tasks.
51. Such opportunities are provided to creditors in a winding up by the Court when the official liquidator seeks approval of his remuneration and expenses.
52. The PL’s application for remuneration clearly falls into *Buckton* category 1 as a matter arising for resolution in the administration of the trust assets. It was an application on which the Committee was entitled to appear on behalf of the beneficiaries of the trust assets.
53. Although the Committee’s attitude towards the PL could fairly be described as hostile, and the language employed by the Committee in its Report in which it set out the grounds of the Committee’s challenge to the PL’s remuneration application as adversarial, the Committee’s opposition to the PL’s remuneration application did not change the character of the proceedings into ‘hostile’ litigation taking it out of *Buckton* category 1.
54. I consider it a proper exercise of the Court’s jurisdiction to order that the Committee’s costs of the PL’s remuneration application be paid out of the estate on an indemnity basis, consistent with the modern trend described in **Lewin on Trusts**.
55. That said, in exercising the jurisdiction to make *Buckton* category 1 costs orders, the Court has a residual discretion as to costs and can impose a limit on the quantum of costs recoverable, as held by the Chief Justice in *Re SpHinx* at [48].
56. I consider that the Committee’s costs in the remuneration application should be capped at \$575,000 in any event. The PL made provision for that sum in the Reserve based on the Committee’s own estimate of costs for the challenge to the remuneration application and what it had already spent on legal expenses. The Committee did not respond to the PL’s inquiry, made before the hearing to adjust the Reserve on 26 August 2020, whether a greater provision needed to be made for the Committee’s costs in the Reserve. I also consider that the cap is justified as the Committee did not advise the Clients that its costs had exceeded the original costs estimate.



57. The Committee's costs of the remuneration application and of its Costs Summons are to be paid on an indemnity basis out of the Reserve, subject to the cap of \$575,000.
58. The PL's costs of and occasioned by the Committee's Costs Summons are to be paid out of the Reserve.
59. I will hear Counsel on any orders consequential upon the judgment.

DATED THE 30 JUNE 2022

RAMSAY-HALE J