



HAVE YOU FOUND 'THE ONE'?

MARCH 2017

It's a question that potential claimants – including those thinking of making claims against trustees, or any company within a group structure – should ask themselves.

In a recent decision in *Popat v Popat and Ors*, the Royal Court determined that a claimant, who had mistakenly sued the incorrect trust group entity, should pay the wrongly-joined party's legal costs on an indemnity basis as a result.

In reaching its decision, the Court considered a number of significant points of procedure which are relevant to those contemplating bringing proceedings in Guernsey. Below are two of the most important of them.

Pre-Action Protocol

Unlike in England and Wales, there are no pre-action protocols in Guernsey and there are no requirements for parties to exchange information before proceedings are issued.

Whilst the Court acknowledged this, it confirmed that, nevertheless, a party initiating proceedings without taking steps to ascertain the proper parties will be at risk of an adverse costs order.

This is the case even if proceedings were initiated quickly or brought with an element of surprise for tactical reasons.

Importantly in this instance, it was clear that the mistake – suing an unconnected company - could have been avoided by the claimant had it made proper inquiries.

The claimant's argument that he should not be penalised for making an innocent mistake (suing a company in the same group with a similar name) was rejected by the Court, which noted that a company is a distinct legal entity and should be treated as such.

Indemnity Costs

Having determined that the original trust company had been sued incorrectly, the Court proceeded to decide the costs consequences of that error.

Eschewing the usual costs order when an action is discontinued (reasonable or "recoverable" costs), the Court considered that the original trust company had been joined "improperly or unnecessarily" pursuant to rule 37 of the Royal Court Civil Rules, 2007.

Because of this, it was determined that such conduct on the part of the claimant warranted an award of indemnity costs – the rarer and more substantial basis for costs to be ordered against a party.

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Practical Points

The order that the plaintiff pay the trustee's relevant costs on the indemnity basis is a blunt reminder of the importance of taking reasonable steps to research the position fully before initiating proceedings, particularly so when there are a number of connected or related parties involved.

The importance placed by the Court on claimants taking pre-action steps, even in absence of a standardised protocol in Guernsey, is also important.

A failure to do so by a claimant can ultimately mean satisfying not only their own costs burden, but that of the party they have mistakenly sued.

Trustees or fiduciary service providers who utilise a number of different companies to provide their trust and corporate services should bear the above in mind. Any letters before action or requests for information should be considered carefully to ascertain the rights and obligations (or duties) of the recipient party.

In such circumstances, Collas Crill can assist in determining how and by whom any response should be made.

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