COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/01134

IN THE MATTER of the trusts of the Deed of Settlement dated 30 June, 1992 and designated as the Glenfinnan Settlement

AND IN THE MATTER of an application by the Plaintiff as Beneficiary of the said Trust and made pursuant to Sections 48 and 50 of the Trustee Act 1998 and the inherent jurisdiction of the Court

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

(1) GRAMPIAN TRUST COMPANY LIMITED
(2) MARK RUSSELL COHEN
(3) MICHAEL MORRISON

Defendants

Before Hon. Ian R. Winder

Appearances: Richard Wilson QC with John Minns for the Plaintiff
Simon Taube, QC with Sean Moree and Vanessa Smith for the First Defendant
Krystal Rolle for the Second and Third Defendants

1 July 2019

RULING

WINDER J

This is the application of the first defendant, Grampian Trust Company Limited ("Grampian") to have the action brought by the plaintiff ("Ashley") by originating summons converted into an action begun by writ of summons.

1. Grampian is sole trustee of the Glenfinnan Settlement dated 30 June 1992. The Glenfinnan Settlement is a discretionary trust governed by the law of The Bahamas and arose following a restructuring of various trusts in The Bahamas, Australia and Hong Kong which were created for the benefit of the descendants of the late Viscount Carlow.

2. The beneficiaries of the Glenfinnan Settlement included the two sons the late Viscount Carlow, namely George (Lord Portarlington) and John Dawson-Damer, their legitimate non-adopted children and remoter issue, and their spouses. John died in June 2000. Ashley, John's widow, is a beneficiary but their adopted children are not.

3. There are presently 18 other living beneficiaries of the Glenfinnan Settlement, besides Ashley, who are descendants of Lord Portarlington or their spouses. The class of Lord Portarlington's descendants who are beneficiaries is likely to expand further during the trust period.

4. This claim is the companion action to action 2015/CLE/gen/00341 which was also brought by Ashley on 20 March 2015. In that pending action (2015/CLE/gen/00341), Ashley seeks to set aside two appointments that Grampian made in 2006 and 2009 which had the ultimate effect of transferring 98% of the corpus of the Glenfinnan Settlement to establish new settlements which did not benefit Ashley.

5. On 3 October 2018, Ashley brought this fresh Originating Summons asking the Court to remove Grampian as Trustee of the Glenfinnan Settlement. The Originating Summons is settled in the following terms:

> LET ALL PARTIES concerned attend before a Justice of the Supreme Court of the Commonwealth of The Bahamas in Chambers on the day of AD, 2018 at o'clock in the noon on the hearing of an application by the Plaintiff under sections 48 and 50 of the Trustee Act 1998 and the inherent jurisdiction of the Court for:
> (1) An Order that:
> a) Grampian Trust Company Limited be removed as Trustee of the Glenfinnan Settlement;
> b) Butterfield Trust (Bahamas) Limited by appointed as Trustee of the Glenfinnan Settlement and be authorised to charge remuneration according to the usual scales;
> c) all necessary vesting and other orders in respect of the Trust estate may be made; and
> d) such further and other relief as this Court deems appropriate be granted.
> (2) In and so far as necessary, an order for the administration of the Glenfinnan Settlement by this Court.
> (3) An Order making provisions for the costs of these proceedings.

6. The Originating Summons is supported by the Affirmation of Ziva Robertson also filed on 3 October 2018. The claim raises grounds of alleged conduct by Grampian which did not fall to be considered under the 2015 Action. Paragraphs 15-17 of the Affirmation of Ziva Robertson details these issues as follows:

> <u>The Application</u>
>
> 15. In this Application, Ashley seeks the removal of Grampian from the trusteeship of the Trust. She does so on the basis of a matrix of facts which is not, or should not be, open to any material dispute. I should also emphasise that whilst Ashley also seeks the removal of Grampian as trustee in the Reversal Proceedings, she bases this present application on entirely different grounds that have arisen more recently and which make the need for a change of trustee urgent.
> 16. This application does not form part of the Reversal Proceedings; rather, it is concerned with acts and omissions that have occurred after the events giving rise to the Reversal Proceedings. Ashley's concerns comprise four key grounds which are based on undisputed (or undisputable) facts.
> a. Grampian's decision to use Trust funds to pay for the costs of Taylor Wessing LLP, its English lawyers, in proceedings before the English courts, (the DPA Proceedings between Ashley and her

children (on the one hand) and Taylor Wessing (on the other) concerning Taylor Wessing's obligations under the English Data Protection Act 1998 (DPA). Grampian's lawyers have confirmed that Grampian has chosen to discharge Taylor Wessing's personal liability in costs out of funds derived from Glenfinnan, even though there was no obligation on Grampian to do so.

b. Grampian's failure to take steps to preserve trust documents which are (i) potentially relevant in legal proceedings, and (ii) constitute trust property which a trustee has a duty to protect from loss or destruction.
c. Grampian's failure in its duty to maintain adequate trust accounts reflecting Trust expenditure including its own fees and expenses charged to the Trust fund.
d. Grampian's decision, made under a conflict of interests, to assert privilege to the maximum possible extent in the DPA Proceedings, in respect of the personal data of Ashley and her children (rather than the personal data of other beneficiaries).

17. ... Ashley's position is that each of these problems has been caused wholly or partly by the fact that Grampian has made key decisions while facing a conflict of interests. A trustee not affected by conflict would plainly be alert to the possibility of a conflict arising between its own interests and the interests of its beneficiaries, and would take immediate steps to address it once it emerges. Refusal to recognise and address a conflict which has been brought to the attention of a trustee shows that the conflict is, in fact, having a real impact on the ability of the trustee to discharge its fiduciary duties. Grampian's refusal to recognise the conflicts of interest described below is, therefore, in itself a ground justifying it removal.

7. The claim is brought under Sections 48 and 50 of the Trustee Act and the inherent jurisdiction of the Court against Grampian as Trustee and the second and third defendants in their capacity as the Protectors of the Glenfinnan Settlement. The claim seeks the removal of Grampian and the appointment of Butterfiled Trust (Bahamas) Limited in its stead.

8. The second and third defendants have been joined into the action on the basis their refusal to exercise their power under the settlement to remove Grampian and appoint new trustees. These defendants have a pending application to be removed from the action, however the parties have agreed to stand that application down in an effort to arrive at a mutually accepted compromised position. In that application,

dated 14 December 2018, these defendants also sought relief, pursuant to O. 28 r. 8, for the conversion of this action to a writ action.

The Application

9. Grampian's application is made by Summons dated 11 April 2019 which is settled in the following terms:

> LET ALL PARTIES concerned attend before a Justice of the Supreme Court of the Commonwealth of the Bahamas in Chambers on the 1st day of July, A.D., 2019 at 10:30 o'clock in the fore-noon, on the hearing of an application by the First Defendant for case management directions and for the following orders and/or relief:
>
> 1. That pursuant to Order 28, Rule 8(1) of the Rules of the Supreme Court the Plaintiff's action issued by Originating Summons filed on 2 October 2018 be continued as if the same had been commenced by a Writ of Summons;
> 2. Such further or other directions for case management of the said action (and, in particular, for the filing and service of pleadings) as the Court deems appropriate;
> 3. That the Plaintiff provide security for the First Defendant's costs of and occasioned by the said action;
> 4. That the Plaintiff pay the First Defendant's costs of and occasioned by this application; and
> 5. Further and other relief/directions.

The application is supported by the Affirmations of Surinder Deal dated 23 May 2019 and 25 June 2019. In addition to the Affirmation of Ms Robertson dated 3 October 2018 Ashley also relies on the 2nd Affirmation of Ms Robertson dated 11 June 2019.

10. The substance of Grampian's complaint is found at paragraphs 10-13 of its written submissions, which state:

> 10. As a matter of procedural law, the general rule is that a contentious claim by a beneficiary for an order of the Court to remove a trustee, where there are likely to be allegations of breach of trust and disputes of fact, should be begun by writ and properly pleaded; and the originating summons procedure is not appropriate. ...
> 11. As a result of the factual matters ... Ashley and her advisers ought to be well aware that Ashley's claim to have Grampian removed as trustee is

highly contentious and there are many disputes of fact and law as between Ashley and Grampian concerning Ashley's complaints.

12. The Affirmation from Ashley's London solicitor, Robertson 1, contains generalised complaints against Grampian. But it fails properly to plead or particularise the basis upon which Ashley claims to be entitled to an order of the Court to remove Grampian as trustee. In particular, Ashley has failed to specify (i) the relevant duties of the trustee, (ii) the facts amounting to the breach of those duties, or (iii) the reasons why these matters jeopardise the due administration of the Glenfinnan Settlement.
13. Grampian submits Ashley's approach is not a proper way to mount such serious claims affecting the reputation of Grampian and its directors. Ashley's failure to plead her case, and her reliance instead on generalised complaints in an Affirmation from her London solicitor, makes it impossible fairly for the trustee to respond or for the Court to assess the merits of Ashley's claim to remove the trustee.

11. Ashley says that the conversion into a writ action is unnecessary, inappropriate and would result in significant prejudice to Ashley and the other beneficiaries of the trust.

Analysis and Disposition

12. The real issue for determination in this application is whether it was appropriate for Ashley to have commenced these proceedings by originating summons rather than by writ of summons. The starting point therefore is O. 5 of the RSC which demarks the criteria for originating summons applications. O. 5 r. 4 states as follows:-

> 4.(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.
> (2) Proceedings -
> (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or any instrument made under any written law, or any deed, will, or contract or other document, or some other question of law, or
> (b) <u>in which there is unlikely to be any substantial dispute of fact are appropriate to be begun by originating summons</u> unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 81 or for any other reason considers the proceedings more appropriate to be begun by writ." (emphasis added)

13. O. 28 r. 8(1) provides as follows:-

> 8.(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

14. The choice of the appropriate process is important because the route to a decision and the conduct of the hearing are considerably different. In the originating summons process, as there is only a dispute as to the law, the parties merely file evidence to form the evidential basis of the dispute and make legal submissions to the court. Ordinarily there is no discovery and no testing of the evidence by cross-examination as there is no witness testimony. By contrast the writ of summons process is reserved for matters which are contentious. The process is considerably adversarial as parties would exchange pleadings or statements of their respective cases outlining the material facts only and not evidence. Thereafter the matter would proceed to case management for a full suite of directions which would invariably involve discovery and witness testimony which may include expert testimony. Witness evidence is tested by cross-examination and the court called upon to assess the truthfulness of the witnesses in addition to deciding the legal questions. The originating summons process is concerned only with the legal questions as there is no material dispute as to the facts.

15. Germaine to this central issue for determination therefore is the question of whether any substantial disputes as to facts arise in the present action. Grampian argues that there are such disputes whilst Ashley contends that no such factual disputes exist only legal disputes and there is no need to convert the claim into a Writ action which would undoubtedly be lengthier and more costly.

16. Having considered all of the arguments advanced by the parties, I am satisfied that the appropriate order to be made is for the conversion of this action to a Writ action. The issues of:

    a) whether the payment of the costs of Taylor Wessing by Grampian in the DPA Proceedings before the English courts amounted to a breach of trust warranting its removal;
    b) whether Grampian failed to take steps to preserve certain trust documents in the custody of PWC Australia;
    c) whether Grampian failed to maintain adequate trust accounts reflecting trust expenditure including its own fees and expenses charged to the trust fund;
    d) whether Grampian was in a conflict of interest with respect to the DPA Proceedings;
    e) whether the conduct of the Protectors in refusing to change Grampian as the trustee was improper (if necessary); or
    f) whether the Protectors as fit persons to exercise the power of removal of Grampian such that their decision should be overridden by the Court (if necessary);

    among others, to be decided in this action, notwithstanding the assertions of Ashley to the contrary, in my view, are mixed questions of law and facts and are substantially disputed.

17. Whether: resolving the terms of Taylor Wessing's retainer; determining what Grampian knew or didn't know relative to the documents in the custody of PWC Australia; determining the adequacy of Grampian's maintenance of accounts having regard to the trust structure and Grampian minority holding in such structure; resolving the question of whether Taylor Wessing was acting in its own personal interest or that of the other beneficiaries against Ashley; assessing the fitness and independence of the Protectors; or, any of the other myriad of factual findings to be made in this action, there is considerable contention and disagreement as to these facts between these parties. I do not propose to treat in any further detail with the exercise of my discretion in this application, save to say

that it would be inappropriate, with such contention between these parties, to have to resolve factual disputes on the strength of affidavit evidence as would occur in the originating summons process.

18. I fully accept Grampian's submission that the claim of Ashley against Grampian, specifically its removal on the basis of some breach of trust, would ordinarily necessitate commencement by the writ of summons procedure. Grampian argues that the Court will not exercise its inherent jurisdiction to remove a trustee merely because the beneficiary claims there is friction or disagreement between herself and trustee. They say, and I agree, that ordinarily the beneficiary must plead and prove something more, namely there has been misconduct by the trustee in the administration of the trusts which jeopardises the due administration of the trust funds.

19. It would seem to me that for a claim which so fundamentally challenges a trustee such as breach of trust, Ashley ought to be required to properly plead the terms of Grampian's alleged legal duty which she says has been breached and the facts constituting such alleged breach of duty. This will in turn permit a fulsome response by way of defence and thereafter all of the case management features attendant on the writ of summons trial process will apply, inclusive of discovery, the giving of oral evidence and cross-examination. The case for the writ process is strengthened where the beneficiary contends that such breach warrants the nuclear remedy of removal of the trustee. Respectfully, therefore, I do not accept Ashley's contention that if there is any need for further detail of any aspect of Ashley's claim that can easily be accommodated within the originating summons procedure.

20. In ***Re Sir Lindsay Parkinson & Co Ltd Settlement Trusts*** **[1965] 1 WLR 372**, the English High Court stated that claims of a contentious nature by a beneficiary against a trustee charging breach of trust or default in the performance of their duties should normally be commenced by writ. In ***Re Sir Lindsay Parkinson &***

Co Ltd Settlement Trusts the plaintiffs, claiming to be beneficiaries under a trust deed, took out an originating summons asking for the removal of the trustees from their office and the appointment of two of the plaintiffs or other fit and proper persons, in their places, and, alternatively, for relief including relief against the trustees in respect of alleged breaches of trust. On the question whether the proceedings were properly commenced by originating summons under O.5 r.4 the court held that under O. 5 r. 4, it was open to the plaintiffs to institute the proceedings either by originating summons or by writ, so that the proceedings were properly instituted, but that as a general rule it was desirable that proceedings by beneficiaries against trustees of a contentious nature charging the trustees with breach of trust or default in the proper performance of their duties should be commenced by writ, so that the trustee should have available to them full machinery for discovering precisely what were the charges levelled against them.

21. According to ***Buckley J.*** at pp. 373-4:-

> Under rule 4 it was, I think, open to the plaintiffs to institute these proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs. But I desire to say that in my view clearly proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission ought normally to be commenced by writ and not by originating summons, for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them. The appropriate form of proceedings, therefore, in my view, is proceedings by writ in which the issues between the parties will be clearly defined in the pleadings; under which the parties can, if they wish, seek further and better particulars of the matters alleged by their opponents; and in which there is full discovery. For where allegations of this kind are made against trustees, I think it is right that the trustees should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, of discovering precisely what the charges are that are levelled against them. I say that because I do not want it to be thought that these proceedings constitute a precedent of the way in which, in normal circumstances, proceedings raising matters of the kind which the plaintiffs seek to raise in these proceedings should be instituted.

22. The leaned authors of ***Lewin on Trusts 19th edition*** paras 13-064 – 65, also provides a useful discussion on the general principles governing the court's inherent jurisdiction to remove a trustee and the proper process to be utilized. According to ***Lewin***:

> Principles guiding court in exercise of its inherent jurisdiction
> 13-064
> The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
> 13-065
> Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed. In assessing the significance of friction or hostility between original trustees or executors and a beneficiary, it is relevant to have regard to the fact that they were chosen by the settlor or testator and evidence as to his reasons for that choice.

23. Further, at paragraph 13-068 ***Lewin*** states:-

> "Proceedings for the removal of a trustee under the inherent jurisdiction should be commenced by claim form under Part 7 of the Civil Procedure Rules, unless there is unlikely to be a substantial dispute of fact, in which case the Part 8 procedure may be used."

A claim form under Part 7 of the English Civil Procedure Rules involves pleadings like a writ action, whilst the Part 8 procedure is akin to the originating summons procedure.

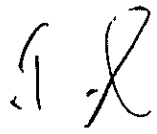
24. In the present case therefore, it is my respectful view that Grampian should have available to it the full machinery which exists in the case of proceedings instituted

by writ and conducted on pleadings, of discovering precisely what the charges are that are levelled against them.

25. Ashley complains that Grampian took five months before making this application and only as a response to her summons for directions. She says that Grampian is seeking to delay the final determination of this claim. Whilst Grampian did delay in making this application, such delay could not be said to have had any appreciable impact as the other defendants in this action had already applied since 14 December 2018 for the conversion of this action to a writ action. That application, although likely to be compromised, remains extant.

26. In all the circumstances therefore I am satisfied that the relief sought by Grampian ought to succeed and this action ought to proceed as if began by writ. I will hear the parties as to the appropriate directions.

Dated the 20th day of August 2019



Ian R. Winder
Justice