COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00777

IN THE MATTER of the Deed of Settlement dated the 26th May, 2005 and designated as the A.B. Insurance Trust Settlement

AND IN THE MATTER of Section 48 of the Trustee Act 1998 (Chapter 176 Revised Statute Laws of The Bahamas 2000)

BETWEEN

ANN MAXINE PATTON

Plaintiff

AND

ALVAREZ, JIMENEZ, DE PASS, S.A. A/K/A ALVAREZ AGUILAR ABOGADOS ASOCIADOS, S.A.
(in its capacity as the Trustee of the A.B. Insurance Trust Settlement)

First Defendant

AND

JAMES ALFRED WALKER JR.
(in his capacity as the Protector of the A.B. Insurance Trust Settlement)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sean Moree and Mrs. Vanessa L. Smith of McKinney, Bancroft & Hughes for the Plaintiff
Mr. Marco Turnquest and Ms. Chizelle Cargill of Lennox Paton for the Second Defendant

Hearing Dates: 3 June 2020, 12 June 2020 – heard on written submissions

Costs – Who should pay costs to the Plaintiff – Estate or protector – Protector's right to indemnity - Trust – Duty of trustee (protector) – Hostile litigation – Whether governing law needed clarification - Whether protector should personally pay adverse costs order

The Plaintiff, a beneficiary of the A.B. Trust, was successful on two Summonses brought by the Second Defendant, as Protector of the A.B. Trust, in which he sought (i) to set aside service of the Amended Originating Summons and all other pleadings on him on the grounds the Plaintiff's claim does not fall within section 79A of the Trustee Act and Order 11 rule 1(2) of the Rules of the Supreme Court; and (ii) the Court does not have jurisdiction to hear this matter. As the Plaintiff was successful in defending the said Summonses the Court ruled that she was entitled to costs. While the Second Defendant agreed that Mrs. Patton should be awarded costs in the amount of $25,000.00 he submitted that the costs should not be borne by him personally but rather the costs formed an expense which was payable out of the A.B. Trust.

HELD: The Second Defendant and not the A.B. Trust should pay the adverse costs order.

1. Absent misconduct, a trustee, protector or other persons exercising fiduciary powers should not generally be ordered to pay the other party's costs in applications concerning a trust's administration.

2. A protector's legal status in relation to costs and his right of indemnity in trust proceedings are analogous to that of a trustee if the protector has fiduciary functions. A trustee's (protector's) right of indemnity is restricted to liabilities reasonably or properly incurred. **Price v Saundry & Anor** [2019] EWCA Civ 2261 considered. However, a trustee (protector) may be deprived of his right of indemnity and further ordered to pay the costs of other parties, by reason of his unreasonable conduct in, among other things, bringing unnecessary trust proceedings or taking procedural steps which needlessly increase costs.

3. In dealing with costs in trust litigation the Court must consider the nature of the trust proceedings. Conventionally, trust proceedings are treated as being divisible into three categories: (i) Proceedings brought by the trustee seeking guidance from the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held; (ii) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee; and (iii) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund: **Re Buckton** [1907] 2 Ch. 406 at pages 413-415 by Kekewich J.

4. The dispute in the present case falls squarely within the second category of trust disputes set out in **Alsop Wilkinson (A Firm) v Neary and Others** [1996] 1 WLR 220 by Lightman J. at page 224B-C, regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate.

5. The present case does not fall within any of the Buckton categories and can be aptly categorised as "hostile litigation". Accordingly, since the Second Defendant was the unsuccessful party in the jurisdictional challenge and made the challenge unreasonably and for his own ultimate benefit, he ought to bear the adverse costs order.

RULING

Charles J:

Introduction

[1] On 13 May 2020, I ruled in favour of the Plaintiff ("Mrs. Patton") on two Summonses brought by the Second Defendant ("Mr. Walker") in which he sought (i) to set aside service of the Amended Originating Summons and all other pleadings on him on the grounds that Mrs. Patton's claim does not fall within section 79 A of the Trustee Act and Order 11 rule 1(2) of the Rules of the Supreme Court ("RSC") and (ii) the Court does not have jurisdiction to hear this matter. I also ruled that since Mrs. Patton was the successful party in the proceedings, she is entitled to costs. The Second Defendant ("Mr. Walker") agrees that Mrs. Patton should be awarded costs in the amount of $25,000.00 but that he should not be ordered to pay those costs. Instead, it should be an expense to be paid out of the A.B. Trust. Thus, the single issue before the Court is whether Mr. Walker as the protector of the A.B. Trust should personally pay the costs or whether it should be borne by the A.B. Trust.

[2] On 17 July 2020, I delivered an Oral Ruling. I found that Mr. Walker and not the A.B. Trust should pay the adverse costs order. I promised to deliver a Written Ruling. I do so now.

Factual matrix

[3] On 23 June 2017, Mrs. Patton filed an Originating Summons with supporting affidavits seeking, among other things, an Order of the Court that:

a. The First Defendant (**"**AJD") be removed as Trustee of the A.B. Insurance Trust Settlement **(**"A.B. Trust"**)** and that Mr. Peter James Delisi (**"**Mr. DeLisi") be appointed as successor Trustee of the A.B. Trust and;

b. That the Second Defendant, James Alfred Walker Jr. be removed as Protector of the A.B. Trust and that Mr. John Michael Koonmen be appointed as successor Protector of the trust.

[4] An Amended Originating Summons was filed on 27 June 2017 changing Mr. Walker's address from Costa Rica to Puerto Rico ("Amended Originating Summons").

[5] On 6 August 2017, Fernando Alonso Castro Esquivel, a Notary Public of San José, Costa Rica, served Juan De Dios Alvarez Aguillar personally as a representative of AJD with the Amended Originating Summons and the supporting affidavits of Mr. DeLisi and Mrs. Patton.

[6] The Amended Originating Summons and supporting affidavits were served on Mr. Walker on 25 October 2017 at 1837 Covey Rise Farm Road, Sparta Georgia, USA by Mr. Delisi.

[7] Mr. Walker filed two Summonses on 8 November 2017 and 3 October 2018 respectively (**"**the Applications") in which he sought the following Orders:

a. An Order pursuant to Order 12, rule 7 of the Rules of the Supreme Court 1978 **(**"RSC") setting aside service of the Amended Originating Summons and all other pleadings in the action purportedly served on Mr. Walker on the grounds that Mrs. Patton's claim does not fall within section 79A of the Trustee Act and/or under Order 11 rule 1(2) or any other basis upon which the Court may exercise jurisdiction over him ("the service challenge");

b. Alternatively, without prejudice to Mr. Walker's position that the Court does not have jurisdiction, an Order pursuant to Order 12 rule 7 that the purported

service on Mr. Walker be set aside on the basis that pursuant to Order 11(2) only service of a Notice of Amended Originating Summons is permissible and not service of the Amended Originating Summons itself ("the jurisdictional challenge").

[8] The Applications were heard on 13 June 2019 and the Court delivered its Ruling on 13 May 2020 ("the Ruling").

The Ruling

[9] The primary issue for determination was whether the Court had jurisdiction over the A.B. Trust pursuant to Section 79A of the Trustee (Amendment) Act, 2011 ("the Act").

[10] In the Ruling, the Court first addressed the jurisdictional challenge. The Court did not find Mr. Walker nor his witness David E. Richardson ("Mr. Richardson") to be credible and rejected their evidence: see paragraphs 41 and 58 of the Ruling.

[11] The Court accepted Mrs. Patton's submissions and her documentary evidence which consisted of the A.B. Trust itself and two letters; one from Mr. Sean McWeeney QC of Graham Thompson to AJD written on 28 July 2010 and the other from Adorno & Yoss dated 24 June 2010 to demonstrate that the governing law of the A.B. Trust was and has always been Bahamian law.

[12] The Court further addressed the issue of the service challenge. In the Ruling, the Court expressed that having found the governing law of the A.B. Trust to be the law of The Bahamas, leave is not required to serve out of the jurisdiction: paragraph 61 of the Ruling.

[13] The Court further relied on the express wording of Order 11, rule (1)(2) of the RSC, section 79A of the Act and the judgment of Winder J. in **RTL v ALD and others** [2014] 3 BHS J. No. 83 in finding that it has jurisdiction under section 79A of the Trustee Act to hear and determine the action brought by Mrs. Patton and also to

serve the Amended Originating Summons out of the jurisdiction without the leave of the Court: see paragraphs 61 to 70 of the Ruling.

[14] Additionally, the Court held that there were no procedural irregularities in service, but, even if there were, the Court was not interested in technical points and, if any procedural irregularities existed, they were not fatal and could be corrected.

[15] The Court dismissed the Applications and awarded costs in the amount of $25,000.00 to Mrs. Patton.

The issue

[16] The single issue is whether Mr. Walker should pay the costs of $25,000.00 or whether it should be paid out of the A.B. Trust.

Liability and indemnity of Protector under the A.B. Trust

[17] Pursuant to clause 6.15 of the A.B. Trust, Mr. Walker has a comprehensive indemnity which provides as follows:

> "**6.15 Liability and Indemnity of Protector. The Protector shall owe no fiduciary duty towards nor be accountable to any person with an interest in the Trust Property under this Settlement or to the Trustees. Except in the case of actual fraud or willful default, the Protector shall not be accountable or liable for any act of omission or commission regarding the powers granted to him under this Settlement. The Protector shall not be liable for relying absolutely on the opinions of counsel or other experts to this Settlement as to matters within their competence. The Protector shall be entitled to reimbursement of all proper expenses incurred by him in the performance of his duties, including any legal expenses incurred in connection with any question which may arise with reference to the Protector's duties or powers under this Settlement. The Protector shall also be entitled to be indemnified out of the Trust Property and the income thereof against all legal and other expenses incurred in any legal or other proceeding relating to the exercise or non-exercise of his power and duties under this Settlement."** [Emphasis added]

Costs in trust disputes

[18] It is well-established that the Court has an unfettered discretion in the making of costs orders in trust disputes. However, the discretion ought to be exercised judicially and in accordance with established principles.

[19] The starting point in applications on this nature must be section 30(1) of the Supreme Court Act which provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**" [Emphasis added]

[20] The discretion to order costs in civil proceedings is further bolstered by Order 59, rule 6(2) of the RSC which provides that:

> **"(2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund."** [Emphasis added].

[21] Mr. Turnquest, who appeared as Counsel for Mr. Walker, correctly stated that the above principles are to be applied to the present case because (i) this matter involves a trust and (ii) Mr. Walker, in his capacity as protector, is entitled to exercise certain fiduciary powers pursuant to the A.B.Trust.

[22] In addition, the Court operates on the assumption that, absent misconduct, a trustee, protector or other person exercising fiduciary powers should not generally be ordered to pay the other party's costs in applications concerning a trust's administration. He referred to the case of **Turner v Hancock** (1882) 20 Ch D 303. At page 305, Sir George Jessel, M.R. stated:

> **"It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty or even if they have committed an innocent breach of trust."**

[23] Further, in the Jersey case of **In Re Esteem Settlement** [2000] JLR Notes 67a, Bailache B noted that:

> **"A trustee's contractual right to costs, including the costs of litigation, is only lost by misconduct, and not if he has fulfilled his duties or if he has committed an innocent breach of trust. People should not be discouraged from becoming trustees by having costs inflicted upon them in such cases (Re Spurling's Will Trusts, [1966] 1 All E.R. 745, applied). <u>In the absence of evidence of misconduct, both the trustee and all parties convened to an application concerning a trust are entitled to have their costs paid out of the trust fund.</u>"**[Emphasis added]

Costs must be reasonably and properly incurred

[24] Section 36(2) of the Act states that a trustee is entitled to reimbursement out of the trust for all expenses and liabilities reasonably incurred in connection with the trust.

[25] It is a settled law that a protector's legal status in relation to costs and his right of indemnity in trust proceedings are analogous to that of a trustee **if** the protector has fiduciary functions. This principle was fortified in the Court of Appeal case of **Re JP Morgan 1988 Employee Trust** [2013] JCA 146. At paragraph 23, Nugee JA stated:

> **"Second, although JPM is not a trustee, it is a person with functions in relation to the Trust which are fiduciary. I agree with the Commissioner (at paragraph [17] of his judgment on costs) that such a person is entitled to an implied equitable indemnity in respect of costs reasonably incurred by it in the discharge of such functions: see Lewin on Trusts (18th edn, 2008) §21-31. Advocate Pearmain before us accepted that the Commissioner was right so to hold. The Commissioner said (at paragraph [20] of his judgment on costs):-**
>
> > **'The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets. The fiduciary's implied right of**

indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation…'"

[26] In accordance with Part 6.15 of the A.B. Trust, Mr. Walker occupies a fiduciary office which provides him with an express right of remuneration. The existence of an express right of remuneration is strongly indicative of an intention to subject the protector to fiduciary constraints. The learned author of **Trust Protectors** at paragraph 2.94 (3) stated:

> **"Right of remuneration. Where the trust instrument provides that the protector is to be paid out of trust assets in respect of its fees that indicates that the role of protector is fiduciary in nature. That is because remuneration is most naturally understood as compensation for the discharge of an obligation."**

[27] Since Mr. Walker is a fiduciary, the restrictions on his right of indemnity should be equivalent to that of a trustee. A trustee's (protector's) right of indemnity is restricted to **liabilities reasonably or properly incurred.** The learned authors of **Lewin on Trusts** elaborate on this restriction at paragraph 48-010:

> **"Terms of the trust entitling the trustee to indemnity in respect of costs incurred by him will be construed so as to cover only costs which are reasonably or properly incurred and so do not operate to enhance the trustee's rights of indemnity under the general law. The same applies to other persons owing fiduciary obligations, such as protectors."**

[28] In addition, the Bermudian case of **Re FA Trust** [2019] SC (Bda) 77 Civ cited with approval the above passage of **Lewin on Trusts.** At paragraph 19 of **Re FA Trust,** Hargun CJ stated:

> **"The above passage in Lewin supports the contention that an express clause in a trust deed providing for indemnity for legal costs incurred by a trustee are subject to the overriding requirement that <u>such costs are reasonably or properly incurred</u> both as a matter of entitlement and as a matter of quantum…"**[Emphasis added]

[29] Similarly, after reviewing several authorities relating to express indemnities contained in trusts, Hargun CJ, at paragraph 26, had this to say:

> "**These authorities in my judgment provide ample support for the proposition that an express provision in a trust deed providing for an indemnity in favour of a protector in respect of litigation costs must be construed as providing for an indemnity for litigation costs which are properly and reasonably incurred both in relation to entitlement under the clause and in relation to the quantum of such costs.**"

[30] Thus, on the basis of the above judicial authorities, I agree with learned Counsel Mr. Moree who appeared for Mrs. Patton, that the Indemnity should be construed in material part as follows:

> **"The Protector shall be entitled to reimbursement of all proper expenses *[reasonably or properly]* incurred by him in the performance of his duties, including any legal expenses *[reasonably or properly]* incurred by him connection with any question which may arise with reference to the Protector's duties or powers under this Settlement."** (Emphasis added.)

[31] Further, the test to determine whether a trustee's indemnity is available or whether it may be deprived was succinctly set out in **Price v Saundry & Anor** [2019] EWCA Civ 2261. In delivering the leading judgment of the court, Asplin LJ said, at paragraph 24, that the test to determine whether the indemnity is available is:

> **"… best expressed in the form of two questions: were the expenses properly incurred; and were the expenses incurred by the trustee when acting on behalf of the Trust? The answer to those questions is often far from straightforward. They are dependent upon all the circumstances of the case."**[Emphasis added]

Discussion and analysis

[32] Learned Counsel Mr. Turnquest submitted that, in dealing with costs in trust litigation, the Court will normally follow the guidance set out by Kekewich J in **Re Buckton** [1907] 2 Ch. 406 at pages 413-415, where the learned judge stated:

> **"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 or 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 ask 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. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.

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 trustees (who are respondents), 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 other, a different course has been deemed more 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 often 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. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."** [Emphasis added]

[33] Mr. Turnquest submitted that in determining whether a case falls into a specific **Buckton** category, the Court should look at the substance and not the form of the application as noted by Kekewich J at pages 416-417. Following **Re Buckton**, Mr. Turnquest submitted that Mr. Walker's jurisdiction challenge falls within the second category of **Buckton** for the following reasons:

1) Mr. Walker was sued in his capacity as protector, and it was in that capacity that he raised the issue of whether the governing law of the A.B. Trust was Bahamian or Costa Rican law and consequently whether the Court had jurisdiction over the A.B. Trust. In this regard, the Court should allow Mr. Walker to enjoy the benefit of his indemnity and not have to bear Mrs. Patton's costs.

2) Determining what is the governing law of the A.B.Trust is central to its administration and, as such, this application is administrative in nature despite, at first blush, it appears adversarial. Mr. Turnquest submitted that Mr. Walker, in his jurisdiction challenge, did not advance a claim for substantive relief specifically against Mrs. Paton (to the exclusion of the other parties to the A.B. Trust) which he could have obtained in separate proceedings or to receive a collateral benefit.

3) Clarifying the governing law of the A.B. Trust benefited all the parties to it, not only Mr. Walker.

4) Mr. Walker, in his capacity as protector, could have applied to the Court for directions of his own volition to determine what the governing law of the A.B. Trust.

5) The First Defendant, who is the trustee of the Settlement, failed to participate in this action to clarify what the governing law of the A.B. Trust was or to seek directions from the Court thus necessitating Mr. Walker's application.

[34] Mr. Turnquest contended that it can hardly be suggested that Mr. Walker acted unreasonably or to benefit himself to the detriment of the other parties to the A,B. Trust by bringing his jurisdiction challenge. This challenge brought to the fore the central issue of what is the governing law of the A.B. Trust, which is critical for its administration. Further, it was entirely proper for Mr. Walker to promptly raise the issue of the A.B. Trust's governing law given that:

1) He recollected that when the First Defendant was appointed as the trustee to the A.B. Trust, its governing law changed to Costa Rican law. Mr. Walker, as Protector, would have been involved in this process. While the Court did not accept Mr. Walker's evidence on this issue, given the lack of direct evidence on the change of trustee to the First Defendant, it can hardly be said that he acted unreasonably in raising the same. This is especially since, aside from the governing law, the A.B. Trust has no other connection to The Bahamas to ground the court's jurisdiction;

2) Mr. Walker advised Mrs. Patton's Bahamian Counsel by email immediately upon notified of the Bahamian action that, in his view, the Bahamian Court had no jurisdiction over the A.B. Trust and that he would challenge jurisdiction once served. Given this, Mrs. Patton could hardly claimed to be surprised when Mr. Walker challenged jurisdiction and service once served;

3) Mr. Walker has no personal interest in the litigation as he is not a beneficiary. Thus, he stands to gain nothing from this litigation aside from ensuring that the A.B. Trust is administered according to its proper governing law and;

4) While Mrs. Patton has sought to make certain allegations against Mr. Walker in this litigation, Mr. Walker denies the-m. In any event, there has been no finding against Mr. Walker on these allegations at this stage, and as such, this should not factor into the Court's determination of the costs of his jurisdiction challenge.

[35] In conclusion, Mr. Turnquest argued that the Court should not personally saddle Mr. Walker with the costs associated with his jurisdiction challenge as it was necessary to determine the proper law of the A.B. Trust. According to him, if the Court makes a costs order against Mr. Walker, it will run contrary to the established principles set out in O. 59 r 6(2) and **Re Buckton.** Such order would also essentially deprive Mr. Walker of his express indemnity when there has not been any finding of misconduct on his behalf or any suggestion that he acted improperly or personally benefitted in raising his jurisdiction challenge.

[36] On the other hand, Mr. Moree appearing as Counsel for Mrs. Patton argued that the legal expenses were not reasonably and properly incurred by Mr. Walker. According to him, the jurisdictional challenge was an unnecessary step in an already expensive and protracted litigious dispute between the parties. It was not until almost a year after the service challenge that Mr. Walker raised the jurisdictional challenge. It is also noteworthy that the jurisdictional challenge was made merely 5 days before the initial hearing of the service challenge set down on 5 November 2018.

[37] No other interested party with the requisite *locus standi*, specifically the beneficiaries or the Trustee, disputed that the governing law of the A.B. Trust was The Bahamas. The Trustee retained Adorno & Yoss and Graham Thompson after the purported date of the change in governing law to determine issues of Bahamian law.

[38] Additionally, Mr. Moree submitted that the expenses were not reasonably and properly incurred by Mr. Walker acting on behalf of the A.B. Trust. The jurisdictional

challenge was unnecessarily dilatory and was not in furtherance of the administration of the Trust but a calculated tactic to prolong and resist the application for his removal as Protector of the A.B. Trust. There has been no evidence before this Court as to who this application would benefit outside of the Protector personally.

[39] Mr. Moree next submitted that the Court must consider that after a long and protracted challenge to the service of the Amended Originating Summons and the governing law of the A.B. Trust, Mr. Walker has advised the Court that he will not be submitting to the Court's jurisdiction and does not intend to participate further in the extant action. According to Mr. Moree, this is evidence that these expenses could not have been reasonably and properly incurred by Mr. Walker as he could not have been acting on behalf of the Trust in making the application to the Court to determine the governing law when it appears on the uncontroverted affidavit evidence given by Mrs. Patton that the Trustee has accepted Bahamian law to govern the A.B.Trust.

[40] Mr. Moree also emphasised that a trustee (protector) may be deprived of his right of indemnity and further ordered to pay the costs of other parties, by reason of his unreasonable conduct in, among other things, bringing unnecessary trust proceedings or taking procedural steps which needlessly increase costs.

[41] The learned authors of **Lewin on Trusts** expound on these circumstances at paragraph 48-007:

> **"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all."**

[42] Mr. Moree submitted that based on the above exposition of the law, Mr. Walker should not be allowed to rely on the Indemnity as the costs associated with the jurisdictional challenge were not reasonably and properly incurred by him nor were they reasonably and properly incurred by him acting on behalf of the A.B. Trust.

Re Buckton and categorisation of disputes involving trustees

[43] Conventionally, trust proceedings are treated as being divisible into three categories following the classification in the seminal case of **Re Buckton** at pages 414-415, and conveniently summarised in **Lewin on Trusts** paragraph 48-033:

> **"(1) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be given credit if he does so on advice. In a case where any doubt is a slight one, consideration should be given to an application to the court under section 48 of the Administration of Justice Act 1985 as a convenient and inexpensive method of securing appropriate protection for the trustees ("Buckton Category 1")**
>
> **(2) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs ("Buckton Category 2").**
>
> **(3) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason. A case which falls clearly within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument, or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or rival view of the law. Here the general principles as to costs of**

> **hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation ("Buckton Category 3").**

[44] As indicated earlier, Mr. Turnquest submitted that Mr. Walker's application falls within the purview of Buckton Category 2. Mr. Moree acknowledged that it is the only category in which Mr. Walker can attempt to categorize the present matter as it did not fall within the scope of Buckton Category 1 (since he is not a trustee) or Buckton Category 3 (since he is not a beneficiary embroiled in a litigious dispute with another beneficiary).

[45] In this regard, Mr. Moree cited the case of **Singapore Airlines Ltd v Buck Consultants Ltd** [2011] EWCA Civ 1542 which involved a dispute over the construction of the terms of a pension scheme relative to a negligence action brought by Singapore Airlines, the scheme's employer, against the Defendant. The Defendant drafted the terms of the scheme and was appointed by the court to represent the members of the scheme in order to resolve, as a preliminary issue, the correct construction as to the drafting of the scheme. The Court held that the Defendant was acting in a dual capacity in the proceedings; ostensibly on behalf of members but with a second element of self-interest. Because the Defendant had a direct financial interest in the outcome, it took the matter outside the scope of **Buckton** Category 2. At paragraph 71, Arden LJ stated:

> **"In my judgment, in determining whether category (2) in Re Buckton applies, <u>regard has to be had to the substance as well as the form of the application</u>. This indeed was the basis on which the litigation initiated by the beneficiary against the trustee in Re Buckton was placed in category (2) although it appeared from its form to be within category (3). <u>In this case, when the question of substance is confronted, it immediately becomes apparent that BC had a direct financial benefit in the outcome of the preliminary issue. In my judgment, contrary to the conclusion of the judge, that factor takes this case outside category (2)</u>."**[Emphasis added]

[46] In **Singapore Airlines**, the Defendant was therefore ordered to bear their own costs.

[47] Mr. Moree next submitted that when the question of substance is confronted in the instant case, it does not have any of the characteristics of an administrative application. He maintained that Mr. Walker acted in his own self-interest as opposed to the benefit of the A.B. Trust.

[48] Mr. Moree also submitted that Mr. Walker's application for Mrs. Patton's costs to be paid out of the A.B. Trust is inconsistent with the Buckton's categorisation as he did not seek an order for his costs to be paid out of the A.B. Trust.

[49] I agree with Mr. Moree's submissions. Further, in my opinion, the dispute in the present case falls squarely within the second category of trust disputes set out in **Alsop Wilkinson (A Firm) v Neary and Others** [1996] 1 WLR 220 by Lightman J. at page 224B-C:

> **"The second (which I shall call "a beneficiaries dispute") is a "dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and /or damages for breach of trust."**

[50] Such a dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate. This proposition was affirmed by Lightman J. in **Alsop Wilkinson** at page 1224G, where he stated:

> **"A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see per Hoffmann L.J. in McDonald v. Horn [1995] I.C.R. 685, 696."**

[51] In addition, Mr. Moree correctly submitted that the mere fact that this hostile claim was brought by way of Originating Summons does not deprive the proceedings of their hostile character and turn them into an ordinary administration action. If a trustee (protector) succeeds in defending a hostile claim, he may be awarded all of his costs to be paid by the plaintiff. However, when he is unsuccessful he may deprived of his ability to recoup his costs out of the trust fund and be ordered to

pay an adverse costs order. To that effect, in **Armitage v Nurse** [1998] Ch 241, Millet LJ at page 262D-E opined:

> **"The respondents cross-appeal from the judge's ruling, which, they claim, deprives them of their legal rights. They submit that trustees are entitled to a lien over the trust fund for their costs, and that this lien extends to the costs of litigation, including the costs of defending themselves against a charge of breach of trust: see Turner v. Hancock (1882) 20 Ch.D. 303 and In re Spurling's Will Trusts; Philpot v. Philpot [1966] 1 W.L.R. 920. The lien is only lost by misconduct.**
>
> **But the principle is in my opinion overstated. Trustees are entitled to a lien on the trust fund for the costs of successfully defending themselves against an action for breach of trust. That was the position in In re Spurling's Will Trusts as it was in Walters v. Woodbridge (1878) 7 Ch.D. E 504, which it followed. But on what principle can one justify their right to recoup themselves out of the trust fund for the costs of unsuccessfully defending themselves against such an action? It offends all sense of justice."**

[52] The Court of Appeal in **Price v Sundry** [2019] EWCA Civ 2261 considered when a trustee may be deprived of its indemnity in respect of its own costs in hostile litigation. Asplin LJ, who gave the leading judgment, said:

> **"As Millett LJ pointed out in Armitage v Nurse, it offends all sense of justice to allow a trustee to recoup themselves of the trust fund the costs of unsuccessfully defending themselves in relation breaches of trust and, I would add, for doing so in relation to serious misconduct…. Although an adverse costs order made inter partes does not necessarily lead to the loss of the trustee's indemnity, it is a strong indicator that the requirements of section 31 [Trustee Act 2000] have not been met."**

[53] Against the wealth of judicial authorities referred to above, **Re Buckton** has minimal relevance in respect of a trustee's right of indemnity or about the costs of trustees at all. Similarly, it is irrelevant whether the claim is in form or substance administrative or hostile. The most important consideration is whether misconduct is established against the trustee. In **Re JP Morgan 1988 Employee Trust** Nugee JA came to this conclusion at paragraphs 31 and 33:

> **"31. In my judgment there is nothing in Buckton which affects the principle by which trustees are entitled (by statute, contract and**

> **under the inherent jurisdiction of the Court) to an indemnity for costs reasonably incurred, which can only be lost by misconduct being established. Since I have accepted above that persons exercising fiduciary functions are entitled to a similar indemnity in equity for costs reasonably incurred in relation to their fiduciary functions, it follows that there is nothing in Buckton which affects their right to an indemnity either…**
>
> **33. But for the reasons I have given, I do not think that is the question that needs to be answered. It is not necessary, at any rate for resolving the question of JPM's entitlement to costs out of the fund, to attempt to decide how hostile the claim is, with a view to shoehorning the case into either category (2) or category (3); and I do not think category (3) is in any event really an appropriate characterisation of a case where a beneficiary is making a claim not against another beneficiary or rival claimant but against the trustee or other person alleged to be liable in respect of fiduciary functions. In such a case it does not matter whether the claim is, in form or substance, administrative or hostile: the trustee or fiduciary is prima facie entitled to his indemnity, and can only lose it by misconduct."**

[54] Misconduct was described by Asplin LJ in **Price v Sundry** Asplin LJ at paragraph 31 in the following manner:

> **"Misconduct in this context would be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances.**"

[55] Ultimately, I agree with Mr. Moree that the present case does not fall within any of the Buckton categories and can be aptly categorised as "hostile litigation". Accordingly, since Mr. Walker was the unsuccessful party in the jurisdictional challenge and made the challenge unreasonably and for his own ultimate benefit, he ought to bear the adverse costs order.

Conclusion

[56] In my opinion, Mr. Walker ought not to have made the jurisdiction challenge. No other interested party specifically the beneficiaries disputed that the governing law of the A.B. Trust was Bahamian law. The trustee had already retained Adorno & Yoss and Graham Thompson after the purported date of the change in governing law to determine issues of Bahamian law.

[57] In addition, the jurisdiction challenge was made only five days before the initial hearing of the service challenge which was previously fixed for 5 November 2018. Mr. Turnquest submitted that what the jurisdiction challenge did was to clarify the governing law of the A.B. Trust. In my view, there was nothing to clarify.

[58] To my mind, Mr. Walker has consciously adopted an adverse position, seeking some benefit from the proceedings rather than just proceeding to have the Court proceed with Mrs. Patton's application. By filing his applications, it placed a temporary yet protracted halt to her application which also seeks to remove him as the protector of the A.B. Trust. Whether or not she will be successful is another issue but had it not been for the challenges by Mr. Walker, her application may have already been heard and determined.

[59] For all of the reasons stated above, to which I owe a great depth of gratitude to both Counsel, I will order that Mr. Walker, and not the A.B. Trust, pays the adverse costs order of $25,000.00.

Postscript

[60] A trustee and/or a protector has a duty to remain neutral when the trust faces hostile litigation. Therefore, if a trust dispute arises, the trustee (protector) ought not to be embroiled in it but, if he chooses to, he may end up paying legal costs from his own resources, as the present case demonstrates.

Dated this 17th day of August, A.D. 2020

Indra H. Charles
Justice