COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00341

IN THE MATTER of the trusts of the Deed of Settlement dated the 30 June 1992 and designated as the Glenfinnan Settlement AND the trusts of the Deed of Settlement dated 23 March 2009 and designated the Moray Settlement AND the trusts of the Deeds of Settlement dated 20 December 2006 and designated the Emo Settlement, the Hewish Settlement and the Came Settlement

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

(1) GRAMPIAN TRUST COMPANY LIMITED

(2) LYNDHURST LIMITED

Defendants

Before Hon. Chief Justice Ian R. Winder

Appearances: **Richard Wilson KC with John Minns (Instructed by Graham Thompson) on behalf of the Plaintiff**

Eason Rajah KC with Sean Moree and Vanessa Smith (Instructed by McKinney Bancroft & Hughes) for the First Defendant

1 March 2022

DECISION ON COSTS

WINDER, CJ

This is my decision on several outstanding costs applications made by the parties over the course of this trust dispute between the Plaintiff (Ashley) and the First Defendant (Grampian), her Trustee.

[1.] The outstanding costs applications are the following:

(1) Costs associated with cross applications relative to the evidence of Simon Taube KC (the Taube Applications);

(2) Costs associated with the application of Ashley for an adjournment of the original February 2020 trial date (the Adjournment Application); and

(3) Costs following the Court's decision on 17 January 2022 with respect to the main dispute in the action (the Trial costs).

The Taube Application

[2.] Grampian had applied, by Summons dated 10 December 2019, for an order that their then lead counsel, Simon Taube KC ought not to be called or compelled to give evidence at trial. Ashley subsequently applied, by Summons dated 24 December 2019, for leave to cross-examine Taube KC on the contents of an affidavit dated 9 December 2019 and generally on his involvement in Grampian's decision to make the 2006 Appointment. Ashley sought, alternatively, for letters of request to the English High Court to examine Taube KC.

[3.] The cross applications were determined in a written ruling dated 3 April 2020 where Grampian's Summons was dismissed. The Court permitted the examination of Taube KC. The parties subsequently agreed that Taube KC would attend the trial and be examined along with Grampian's other witnesses.

[4.] The parties were invited to make representations as to why costs ought not to follow the event in the usual course. Submissions were made by all parties, each seeking for costs to be made in their favor.

[5.] Since the completion of the trial, parties have now both accepted that the usual order, that costs follow the event, ought to prevail and Ashley be entitled to the costs of the applications. The Court therefore orders that Ashley shall be entitled to the reasonable costs of and occasioned by both Summonses, in any event.

The Adjournment Application

[6.] The trial of the action had been set to begin on 24 February 2020. On 13 January 2020 Ashley filed a summons seeking an adjournment of the trial fixture. The parties ultimately agreed the terms of a consent order which the Court approved on 27 January 2020. The consent order did not agree the issue of costs which was reserved to be determined by the Court.

[7.] Grampian says that the costs should be theirs as Ashley required time to pursue her renewed application to the Court of Appeal for permission to appeal a discovery order made by the Court. Ashley's renewed application for permission to appeal was ultimately unsuccessful. Grampian says that:

> "[w]hile Grampian was (because of the Taube Applications) facing the possibility of having to instruct new leading counsel at short notice, Grampian did not seek an adjournment on that basis and only reluctantly consented to the adjournment following the Court's informal indication that the trial could not proceed.

[8.] Grampian says that alternatively, the costs of the adjournment application should be costs in the case.

[9.] Ashley says, at paragraphs 40-42 of her submissions:

40. Similarly, Grampian should also be ordered to pay Ashley's costs of the Adjournment Application.

41. The Adjournment Application was made because it became apparent on 19 December 2019 / the first week of January 2020 that because of a number of outstanding matters, the trial could not sensibly be expected to go ahead as then listed (to commence on 24 February 2020). Those matters were inter-alia:

a. The summons issued by Ashley on 7 November 2019 that she have leave to appeal against the learned Judge's decision on 24 October 2019 not to order specific discovery of certain documents in the possession of Messrs Michael Morrison and James Burns, was not due to be heard until 11 February 2020.

b. The summonses relating to the Taube Applications were not due to be heard until 13 February 2020.

c. The time estimate for trial was not agreed given the amount of disclosure belatedly disclosed by Grampian in October 2019 following its voluntary waiver of privilege and its decision to no longer resist production of documents on the basis of s.83(8) of the Trustee Act.

d. Witness attendance at trial and the question of the admission of such evidence and permissibility via a pre-trial disposition, in particular in relation to Grampian's belated indication that two if (sic) its witnesses would not be able to attend trial to give evidence.

42. Despite it being obvious that an adjournment of the trial would be required (indeed, the Court having previously suggested as much) Grampian steadfastly resisted an adjournment until after Ashley had been forced to issue her summons. The writing had been on the wall long before that, and Grampian should have read it. Accordingly, it should now bear the costs of the Adjournment Application.

[10.] There is some merit in Ashley's submissions. It was indeed clear that the trial could not fairly proceed as scheduled in February 2020 and resisting the adjournment of the trial by Grampian was unhelpful. Had the consent been entered into timeously Ashley

would not have had to incur the expense of issuing her Summons on 13 January 2020 and preparing for a contested application in order to formally adjourn the trial.

[11.] In the circumstances, I will order that Ashley be paid her costs incurred with respect to the Adjournment Application up to the time of agreeing the consent position, in any event.

The Trial Costs

[12.] On 17 January 2021, following the trial, the final decision was rendered in this action, dismissing Ashley's claim. At paragraph 118 of the decision, the Court stated:

> "I will hear the parties as to costs, in the event something other than the usual order for costs following the event is being advanced."

[13.] Ashley immediately indicated her intent to seek an order other than the usual order. Written and oral submissions were made to the Court on the issues. Ashley takes two positions on the issue of the Trial Costs:

(1) Ashley's primary position is that the determination of an appropriate costs order ought to be deferred to abide the outcome of Common Law & Equity Action 1134 of 2018 (the Removal Action). Ashley also says that the Removal Action ought to be stayed pending the determination of her appeal of this action to the Court of Appeal.

(2) Ashley's secondary position is that Grampian should be ordered to pay a portion of Ashley's costs as notwithstanding the claim was dismissed, she was successful on the main issues of whether Grampian gave adequate consideration to Ashley in making the 2006 and 2009 appointments.

[14.] Grampian's position on the Trial costs is simply that Ashley's claim has failed and as such, having won, costs should follow the event. Grampian says that Ashley challenged the 2006 and 2009 appointments claiming that they were invalid. Grampian, having successfully defended their validity, ought to be permitted to recover their costs and expenses.

[15.] Ashley argues that unless and until the Removal Action has been determined the court cannot form any proper view as to the extent to which either side has been successful in this litigation.

[16.] The Removal Action was originally commenced by Originating Summons (prior to being converted to a Writ action) on 3 October 2018. It was supported by the Affirmation of Ziva Robertson also filed on 3 October 2018. The Affirmation of Ziva Robertson provided at paragraphs 15, 16 and 17 as follows:

> 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 undisputabie) 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.
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> (emphasis added)

[17.] The Removal Action was brought by Ashley, subsequent to these proceedings, seeking the removal of Grampian as Trustee. The two actions have always been pursued separately and distinctly. They have never been consolidated. As the affirmation of Ziva Robertson reflects, Ashley had gone to great lengths to demonstrate how different the claim in the Removal Action was from this action, where Grampian's removal was being sought only in relation to the 2006 and 2009 Appointments.

[18.] In the circumstances, I am not persuaded that the entitlement of any party to their costs in this action ought to be affected by the Removal Action, whatever the outcome. It would seem unfair for a party, having succeeded in dismissing a claim against them, to have to await the outcome of another action, even a related action. I therefore could not accept Ashley's submission that these costs ought to abide the outcome of the Removal Action.

[19.] In respect of Ashley's intent to seek a stay of the Removal Action; that application ought properly to be made in the Removal Action, not in these proceedings, as these actions are not consolidated.

[20.] Order 59 r. 3(2) of the Rules of the Supreme Court provides:

> "If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[21.] Grampian says, at paragraph 13 of their submissions, that:

> The usual rule reflects the principle that the broad justice of a case lies in costs following the event. A defendant sued by a plaintiff who in fact has no valid claim is obliged to defend himself, and thereby incur costs, to see off the invalid claim. The plaintiff should therefore pay the costs which he has made the defendant incur. The rule provides desirable certainty for litigants contemplating or involved in litigation. It should not be lightly departed from.

[22.] I accept this submission. The recent decision of the Court of Appeal in ***Sterling Asset Management Ltd. v Sunset Equities Ltd. SCCivApp 152/2021***, provides helpful guidance on the Court's approach to the determination of costs. ***Sir Michael Barnett P.***, stated as follows:

> 5. The general principle is that whilst costs are in the discretion of the court, that discretion must be judicially exercised. The jurisprudence in this matter can be found in the judgment of Buckley, LJ in Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529:
>
> > "...we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the Court or given another party cause to have recourse to the Court to obtain his rights is required to recompense that other party in costs. But, (2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the Court's discretion. (4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with

the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the Court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of discretion, as in Dutton v Spink & Beeching (Sales) Ltd and Ottway v Jones, the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs. Indeed, in Ottway v Jones [1955] 2 All ER 585 at 591, [1955] 1 WLR 706 at 715 Parker LJ said that such an order would be judicially impossible, and Evershed MR said that such an order would not be a proper judicial exercise of the discretion, although later he expressed himself in more qualified language (see [1955] 2 All ER 585 at 587, 588-589, [1955] 1 WLR 706 at 708, 711)..."

6. This statement has been approved by this Court in a number of cases: see Amber Murphy v Hot Pancakes et al SCCivApp. Nos. 95 of 2020 and 52 of 2021 and Polymers International Ltd. v Philip Hepburn SCCivApp. No. 8 of 2021.

[23.] Similarly, in the English Court of Appeal decision in ***Re Elgindata Ltd [1992] 1 WLR 1207 at 1213,*** the applicable principles, in deciding an appropriate order for costs, were stated as follows:

"The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations

on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."

[24.] Ashley says that Grampian is responsible for the litigation and that the Court's finding, at paragraph [94] of the judgment, justifies Ashley's complaint that Grampian failed to give her proper consideration when exercising its discretionary powers to make the 2006 and 2009 Appointments. Paragraph [94] of the judgment provided:

> [94] The evidence, which I accepted, reflected a very cursory/curt assessment of Ashley's circumstances and fell short of what a prudent and diligent trustee ought to have conducted. In particular Grampian failed to give any proper consideration of whether provision ought to be made for Ashley from Glenfinnan in the context of a resettlement of assets onto new discretionary trusts. The appointments, which resulted in the resettlement was said to have been facilitated principally for tax advantages to Australian residents. Grampian gave no thought as to whether Ashley ought to have her position preserved as a beneficiary of the resettled trust considering that the evidence at trial was that the exclusion of Ashley from the new trusts was not necessary to achieve the advantages that was to justify the 2006 and 2009 Appointments. There was no consideration as to the real value of the fund remaining (after tax considerations) which was said to have been retained particularly on account of Ashley.

Ashley says that the bulk of the costs of the litigation and most of the time at trial, has been spent dealing with the question of whether Grampian acted as a prudent and diligent trustee.

[25.] Respectfully, I could not accept Ashley's submission. The issue of whether Grampian failed to give Ashley proper consideration, when exercising its discretionary powers to make the 2006 and 2009 Appointments, arose on Ashley's pleading and

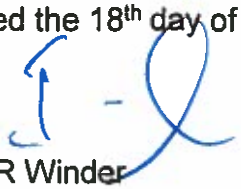
required her to prove the same in order to succeed at trial. Whilst it was indeed true that Ashley succeeded on this limb of the case, it was but one of several ingredients necessary to establish the multifaceted claim brought by her. This is aptly reflected in paragraph 24 of Grampian's submissions, where it states:

> 24. In any event, it is simply not true that the investigation into the adequacy of Grampian's consideration of Ashley's circumstances (the factual extent of which was not in dispute) substantially increased the length or costs of the trial. As the Court recognised, at the heart of this trial was the question of Spey's intentions, and whether Glenfinnan was intended by Spey to be a fund for the younger generations. A huge amount of the trial was devoted to the 1992 restructuring and distilling the evidence about Spey's intentions. Grampian succeeded on that issue and it was ultimately determinative of the validity of the Appointments. Much time was also spent in cross-examination of Grampian's witnesses to establish whether their alleged hostility to Ashley had tainted Grampian's decisions (another issue on which Grampian succeeded). Furthermore, even if Grampian had conceded at the outset that its deliberations about Ashley had been inadequate, that concession (on the characterisation of undisputed facts) would not have shortened or simplified the trial. Ashley would still have cross-examined all of Grampian's witnesses in order to show that the inadequacies in Grampian's deliberative process were sufficiently serious to amount to a breach of trust and sufficiently material to its decisions to warrant setting aside the Appointments.

[26.] Regrettably, Ashley was unable to establish all of the necessary ingredients to succeed on her claim. As such, proposition No. 8 in ***Scherer and another v Counting Instruments Ltd and another*** militates against Grampian paying any of Ashley's costs. Additionally, as per ***Re Elgindata Ltd,*** it cannot fairly be said that Grampian raised issues or made allegations on which it failed or that any issue raised by them has caused a significant increase in the length or cost of the proceedings so as to be deprived of the whole or a part of its costs.

[27.] In all the circumstances therefore, I make the usual order, that costs follow the event in respect of the Trial Costs, such costs to be taxed if not agreed.

Dated the 18th day of October 2022



Ian R Winder

Chief Justice