

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/00621

BETWEEN

IN THE MATTER of the Estate of the late Emmanuel Pantelis Tsakkos
AND IN THE MATTER of Section 77 of the Trustee Act 1998, Chap.
176 of Statute Law of the Bahamas, 2000

AND IN THE MATTER of an application by Pantelis John Tsakkos in
his capacity as Executor of the Estate of Emmanuel Pantelis Tsakkos

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Sophia Rolle-Kapousouzoglou with Mr. Valdere Murphy of
Lennox Paton for the Executor, Pantelis John Tsakkos
Mr. Michael R. Scott KC with him Ms. Marnique Knowles for Nomiki
Tsakkos and Peter Tsakkos (the Plaintiffs in the Main Action)

Hearing Date: 6 September 2022

Trust – Application under section of the 77 of the Trustee Act, 1998 - Opinion, advice and direction of the Court sought– Whether Executor should continue to defend the Main Action and engage accountant and surveyor –Indemnity costs – Whether Executor should be indemnified for costs incurred as a result of defending the Main Action which asserts fraud and breach of duty claims against the Estate he represents – Whether Executor should be removed because of alleged fraud, dishonesty and breach of duty personally against him – Plaintiffs’ failure to bring application to carry on – Whether costs incurred in bringing section 77 Application should be paid out of estate

The Plaintiffs in the Main Action are the sole beneficiaries of their father’s Will. Their father died in 1997 leaving their uncle, Emmanuel Pantelis Tsakkos, now deceased (“EPT”) as the executor and trustee of his Will since the Plaintiffs were minors. EPT died in 2020. Under his Will, he appointed the Executor as sole executor. The beneficiaries under EPT’s Will are his widow, his nephew Peter (one of the Plaintiffs) and the Executor.

In their Amended Statement of Claim, the Plaintiffs alleged that EPT, his wife and the Executor dishonestly put to their own personal and beneficial use, money and property belonging to their deceased father.

The Plaintiffs further alleged that EPT and the Executor owe them, among other things, a fiduciary duty to exercise reasonable care and skill in administering their father's estate and they breached that duty by failing to administer the estate in accordance with his Will and failing to invest the funds of their father's estate for their benefit.

Since EPT, who was the original executor died, by virtue of section 48 of the Probate and Administration of Estates Act, 2011, the Executor of EPT's estate is also the executor of their father's estate.

The Executor brought this application, pursuant to section 77 of the Trustees Act, for the Court's opinion, advice and/or directions in respect of certain questions including: (i) whether he should continue to defend the Main Action having regard to the conflict caused by the chain of representation under section 48; (ii) whether he should engage a forensic accountant and a surveyor to defend the Main Action; (iii) whether he should be relieved and wholly excused from any liability and be fully indemnified for any acts or things done by him for defending the Main Action and (iv) whether his costs shall be borne pre-emptively by the Estate.

HELD: finding that the Executor should continue to defend the Main Action on behalf of the estate of EPT with a co-executor, be it a family member or a professional accountant, to be nominated by the Plaintiffs; that the issue of whether to appoint a surveyor and an accountant should be left to the trial judge in the Main Action and the Executor ought to be indemnified for the costs incurred thus far in the Main Action and reasonable costs of this Section 77 Application from the Estate. Thereafter the two executors acting jointly will be indemnified from EPT's Estate for future costs of defending the Main Action.

1. The appointment of neither of the Plaintiffs as executor of EPT's Estate would, in my judgment, resolve the issue of conflict. A different conflict would arise: persons suing the estate that they represent. The Second Defendant is also conflicted. As there are allegations of fraud, dishonesty and breach of duty now levelled against the Executor and since it was the wish of EPT for the current executor to be the Executor of his Will, I will not remove him as the Executor but he will carry on with the executorship of the Estate alongside a co-executor to be nominated by the Plaintiffs.
2. The question of whether an accountant and/or a surveyor are necessary for disposing of the issues between the parties in the Main Action should be left to the trial judge.
3. It will only be in exceptional circumstances that a trustee will be granted an indemnity by the court if he has not obtained the sanction of the court. Obtaining the court's sanction also removes the risk that an allegation will be made by a beneficiary that the trustee had acted in breach of duty, imprudently or improperly

in engaging in litigation: **In the Matter of the Stingray Trust** Cause No. FSD 0085 of 2017 & FSD0248 of 2017 applied.

4. Although it is prudent for a trustee to make a *Beddoe* application before defending the Main Action, an application can be made later and, if so made, the trustee (in this case the Executor) will be allowed to retain his costs out of the trust property if, had the application been made at the outset it would have been granted: **In the Matter of the Stingray Trust** (supra) and **Lewin on Trusts (19th Edn)** relied upon.
5. The Court has an exceptional jurisdiction, which is analogous to that exercisable on an application for a pre-emptive cost order in hostile litigation, where a trustee has become involved in a trust dispute which amounts to an attack on the validity of the settlement. The court will look carefully at the merits of the case and the relative costs to the overall value of the trust assets: **Alsop Wilkinson v Neary** [1996] 1 WLR 1220 at 1224 and **In the Matter of the Stingray Trust** applied.
6. A trustee/executor is entitled to be paid his costs out of the estate as he is defending the suit for the benefit of the estate; though he is at the same time defending his own character: **Walters v Woodbridge** (1878) 7 Ch D 504 at 510 applied.
7. The instant case is one of an exceptional circumstance. What is special about this case is that the Executor is not only defending allegations of fraud and breach of duty made against him but made against the person whose estate he represents. I think this has a big effect. The fact that he did not bring the application until after he filed a defence does not have that great of an effect. It is difficult to conceive that he should pay the expenses personally. Further, he is acting in the best interest of EPT's estate by defending the action because the assets alleged to be misappropriated from DT's estate are traced as being now part of EPT's estate so any damages would come from EPT's estate.
8. Considerations that should guide the court's exercise of the discretion to make pre-emptive costs orders include: (1) the strength of the party's case; (2) the likely order as to costs at the trial; (3) the justice of the application; and (4) any special circumstances: **Alsop Wilkinson (a firm) v Neary** [1995] 1 All ER 431 applied.
9. This is a Section 77 Application whereby the Executor seeks the opinion, advice and direction of the Court. The law is that, in such an application, the normal rule is that, *absent misconduct*, the costs of the trustee (or in this case an executor) will be paid out of the trust fund: **Davies v Watkins** [2012] EWCA Civ 1570 at para 26. See also: **section 36(2) of the Trustee Act** which provides that, "*a trustee may*

reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of the trusts or powers.” The allegations of fraud, dishonesty and breach of duty levelled against the Executor only surfaced after the section 77 Application was filed in the Plaintiffs’ Amended Statement of Claim.

10. The failure of the Plaintiffs to make an application for an order appointing a person to represent the estate is not fatal. The Main Action is still in its infancy as the Executor himself acknowledged. In any event, given the outcome of this Section 77 application, it is unnecessary for the Plaintiffs to make such an application.

RULING

Charles Snr. J:

Introduction

[1] Pursuant to section 77 of the Trustee Act, 1998, Pantelis John Tsakkos (“the Executor”), in his capacity as the Executor of the Estate of Emmanuel Pantelis Tsakkos (“EPT”) seeks the opinion, advice and/or direction of the Court with respect to the following matters:

- (1) Whether he (the Executor) should defend the Main Action on behalf of EPT’s Estate including, but not limited to the engagement of (i) a forensic accountant to consider and opine on the claims in the Main Action from a quantum perspective and (ii) a surveyor to confirm whether the location of the commercial property in the name of Trebert Holdings Limited as per the Satisfactions of Mortgage dated 28 January 2010 and 7 July 2011 conforms with the legal description of the property which is the subject matter of the Main Action;
- (2) (In the event of an affirmative answer to the questions in paragraph [1] (1) above), a declaration that the Executor is presently under no duty to renounce his executorship vis-à-vis EPT’s Estate;
- (3) (In the event of a negative answer to the question in paragraph 1 above), directions as to whether the Executor may continue to serve as the executor of EPT’s Estate;

- (4) Whether the Executor should be granted leave to respond to and/or refute the claims in the Joint Tsakkos Affidavit and the First Peter Tsakkos (“PT”) Affidavit, filed in Supreme Court Action No. 2021/CLE/gen/00621 on 20 May 2022 but made in response to the Statement of Sebastian Masnyk (“the Masnyk Statement”) lodged with the Court relative to these proceedings and dated 24th March 2022 and/or make an application to strike out the Affidavits which were filed in the Main Action but made in response to the Masnyk Statement on the grounds that a portion of paragraphs 5, 6, 7, and 10 of the Joint Tsakkos Affidavit is scandalous, irrelevant or otherwise oppressive, and paragraphs 4 and 13 of the First PT Affidavit is scandalous, irrelevant or otherwise oppressive and refer to without prejudice communications;
- (5) Whether the Executor should it be deemed fit, make an application to strike out the Plaintiffs’ Statement of Claim as disclosing no cause of action;
- (6) An Order that the Executor shall be relieved and excused wholly from any liability and be fully indemnified (pursuant to Section 77 (3) and 98 of the Trustee Act) for any acts or things done by him in accordance with or further to any Order or advice or directions of this Court, including but not limited to, defending the Main Action if so directed by this Court;
- (7) To the extent that this Statement has to be disclosed to Peter Tsakkos or Adita Boy, an Order that all communications, evidence or otherwise which are subject to legal professional or other privilege be redacted in advance of any such disclosure to Peter Tsakkos, Adita Boy or their respective legal representatives;
- (8) An Order that the Executor’s costs of this application shall be borne by the Estate of EPT; and

(9) Whether the Executor would be authorized to be paid its costs of both steps in any event out of EPT's Estate.

[2] These questions could adequately be subsumed under these broad heads namely:

1. Whether the Executor should defend the Main Action and engage a forensic accountant and a surveyor?
2. Whether the Executor should be granted leave to respond and/or refute the claims in the Joint Affidavit of the Plaintiffs and/or apply to strike out the Plaintiffs' Statement of Claim as disclosing no cause of action;
3. Whether the Executor should be excused from liability and have full indemnity in respect of acts done by him pursuant to the Court's order/advice/direction in defending the Main Action; and
4. Whether the Executor's costs shall be borne pre-emptively by the Estate of EPT and any other order that the Court deems fit?

Background facts

[3] The First Plaintiff, Nomiki Tsakkos ("Nomiki") and the Second Plaintiff, Peter Drosos Tsakkos ("Peter") (together "the Plaintiffs") are the Plaintiffs in Action No. 2021/ CLE/gen/00621 ("the Main Action"). They are the children of the late Drosos Tsakkos ("DT") and the sole beneficiaries under his Will. DT died in 1997 at the age of 52. At the time of his death, Nomiki was 8 years old and Peter was 12 years old.

[4] The late Emmanuel Pantelis Tsakkos ("EPT") was the brother, executor and trustee of the Last Will and Testament of DT. EPT died on 5 August 2020 at Doctors Hospital. By his Will dated 23 June 2020, the Executor was appointed sole executor. The beneficiaries of EPT's estate are his widow, Adita Boy, his nephew, Peter (one of the Plaintiffs) and the Executor.

- [5] By virtue of chain of representation provided for in section 48 of the Probate and Administration of Estates Act, 2011, the Executor is also the executor of DT's estate.
- [6] On 15 January 2021, the Plaintiffs filed a Caveat against the issue of a Grant of Probate. However, notwithstanding the filing of the Caveat, Grant or Probate was issued in relation to EPT's estate on 8 April 2021.
- [7] On 17 May 2021, Mr. Scott KC, the Attorneys for the Plaintiffs, wrote the then Chief Justice requesting that the Grant of Probate be recalled on the basis that the Plaintiffs alleged fraud and breach of duty against EPT.
- [8] On 18 May 2021, the Grant was recalled on the basis of the Caveat.
- [9] On 9 June 2021, the Plaintiffs commenced the Main Action against the Executor (now the First Defendant) alleging fraud, breach of trust and/or duty and/or devastavit by EPT.
- [10] On 19 August 2022, the Plaintiffs amended their Statement of Claim to include EPT's widow, Adita Boy as the Second Defendant ("Adita Boy") and the Executor as the First Defendant.
- [11] Under DT's Will, EPT was appointed the sole executor and trustee of the Will for the beneficiaries, the Plaintiffs. The Plaintiffs contend that the residue of DT's estate is said to include shares in Trebert Holdings Limited ("THL"), which they allege, owns the said commercial property.

Main Action: the pleadings

- [12] In the Main Action, the Plaintiffs sued the Executor (as executor of the Will of EPT) and Adita Boy for fraud, breach of trust and/or duty and/or devastavit. A summary of the Plaintiffs' claim is set out in paragraph 4 of the Amended Statement of Claim as:

“EPT and the First and Second Defendants dishonestly put to their own personal and beneficial use, money and property (both real and personal) which formed part of the estate of the late Drosos Tsakkos at the time of his death to the value of between \$3,000,000 - \$5,000,000. Such property came into the hands of and under the control of EPT as the executor and trustee of the late Drosos Tsakkos’ estate. The said assets of the estate of the late Drosos Tsakkos are now within or traceably within the estate of EPT, in respect of which the Defendant is the executor and trustee. In any event, the First Defendant as executor stands in the shoes of EPT and he has himself perpetuated fraud against the estate of the late Drosos Tsakkos.”

[13] With respect to fraud, the Plaintiffs alleged that, as the executor and trustee of the Will of the late DT, EPT failed to comply with his duty to act honestly, responsibly and reasonably in ensuring that the assets of DT’s estate were collected, preserved and distributed to the Plaintiffs.

[14] The particulars of fraud which is alleged against EPT are as follows:

1. Between August 1997 and August 2020, EPT deposited cash and cheques totaling approximately \$1,174,835.50 into his personal bank account from tenants of properties in the estate of DT including Playtech Systems Limited and Infincol (Bahamas) Limited, which should have deposited into THL’s account;
2. Between August 1997 and August 2020, on a regular basis, EPT stole money from THL’s bank account with the Royal Bank of Canada;
3. EPT dishonestly spent or converted the assets of the estate of DT for his own use when he was not so entitled and;
4. EPT makes (sic) provision in his Will dated 23 June 2020 for assets forming part of the estate of DT to be distributed in the way he saw fit, rather than to give effect to the provisions of the Last Will and Testament of DT which should have been distributed upon the majority of Nomiki on 28 August 2007 to the Plaintiffs.

[15] The allegations made against the Executor and Adita Boy are that they have fraudulently misappropriated money and property (real and personal effect) from the estate of the late DT.

[16] The particulars of the fraud alleged against Adita Boy are as follows:

1. She stole funds from THL after the death of EPT;
2. She stole a generator and automatic transfer switch from a building belonging to THL; and
3. She misappropriated rental income from the estate of DT which was deposited into a joint bank account which she shared with EPT.

[17] The particulars of the fraud alleged against the Executor are as follows:

1. The Executor fraudulently misappropriated that the rental income from EPT's Estate was going into an escrow account in the name of EPT when in fact, it was going into his personal account and;
2. The Executor dishonestly accepted from Adita Boy and installed into his own property a generator belonging to THL, which Adita Boy had stolen.

[18] With respect to the allegation of breach of trust, the Plaintiffs asserted that EPT and the Executor owe the Plaintiffs a fiduciary duty to exercise reasonable care and skill in administering the estate of DT and they breached that duty by failing to administer DT's estate in accordance with his Will; failing to invest the funds of DT's Estate for the benefit of the Plaintiffs; failing to act in accordance with their duty and in the best interests of the Plaintiffs by failing to (a) maintain properties forming part of DT's Estate; (b) pay government and corporate fees for companies in DT's Estate; and (c) stop leakage of funds from DT's Estate due to tenants leaving THL's properties that were in disrepair. There are also other allegations including but not limited to EPT and the Executor spending or converting the assets of DT's Estate for their own use and failing to keep proper record and produce

them to the Plaintiffs when requested. Unquestionably, these are serious allegations against EPT, Adita Boy and the Executor.

[19] In its Defence, the Executor denied using money or property of DT's Estate for his personal benefit and not complying with his fiduciary duty as executor and trustee of DT's estate. He asserted that the rental income from the THL properties was insufficient to cover their expenses of the estate such as the maintenance, education and benefit of the Plaintiffs. EPT deposited \$20,000.00 of his personal money to THL's account for the estate. DT faced serious financial difficulties before his death, including difficulty paying the monthly mortgage payments of a property owned by THL, which remained unsatisfied at the time of DT's death but was satisfied by EPT in or about 2011.

[20] Throughout the Defence, the Executor puts the Plaintiffs to strict proof of their assertions.

[21] A Reply to the Defence was filed on 10 August 2021. The Plaintiffs denied some of the allegations contained in the Defence and put the Executor to strict proof thereof.

Matters for which the Court's directions are sought

Whether the Executor should defend the Main Action and engage a forensic accountant and a surveyor?

[22] Mrs. Rolle-Kapousouzoglou, appearing as Counsel for the Executor, contended that, as a consequence of the Executor having been appointed Executor to EPT's Estate, he also automatically became Executor of DT's Estate upon EPT's death and due to the allegations in the Main Action, he cannot continue to act for both estates. According to learned Counsel, the Executor's preference is to act for EPT's Estate as that was the Estate over which he was appointed to act in accordance with EPT's wishes.

[23] Mrs. Rolle-Kapousouzoglou further contended that the thrust of the position adopted by the Plaintiffs in the Main Action is that the Executor should renounce

his executorship vis-à-vis both EPT's Estate and DT's Estate. According to her, the Executor has no issue in renouncing his executorship relative to DT's Estate since the Plaintiffs have both attained the age of majority and they are the sole beneficiaries of their father's estate. However, the Executor is unclear on what basis in law or otherwise the request is made on behalf of the Plaintiffs that he renounces his executorship in EPT's Estate. Mrs. Rolle-Kapousouzoglou submitted that the renunciation of executorship vis-à-vis EPT's Estate and the claims in the Main Action appear to be unrelated and such renunciation would not assist or solve the claims in the Main Action.

- [24] Further, Mrs. Rolle-Kapousouzoglou submitted that if the Executor were to renounce his executorship of EPT's Estate and Peter were to make an application for a grant of probate by clearing off those with a prior right to make such an application in accordance with Rule 5 of the Probate Rules, Peter will find himself in a tricky conflict. Specifically, in the Main Action, there are allegations of fraud as against EPT's Estate made on behalf of Peter, who is also a beneficiary of EPT's Estate. Obviously, he would be conflicted since he would be acting as a personal representative on behalf of EPT's Estate and, at the same time, suing the Estate.
- [25] Mrs. Rolle-Kapousouzoglou also stated that the suggestion by the Plaintiffs to the Main Action that Nomiki ought to be appointed to represent EPT's Estate is untenable given that she is a Plaintiff in the Main Action.
- [26] Learned Counsel Mr. Scott KC stated that the Statement of Sebastian Masnyk ("the Masnyk Statement") dated 24 March 2022 suggests that Adita Boy is a possible substitute executor for the current Executor. He argued that her position is the same as that of the current Executor and her appointment would not solve the issue. They are both beneficiaries under EPT's Will and they are both also alleged to have committed fraud and breached their duties. Instead, submitted Mr. Scott KC, Nomiki is a better option, as she is not conflicted and has expressed her willingness to be appointed executor of both estates.

- [27] The allegations against the Executor are grave both as Executor and in his personal capacity. On a *prima facie* view, the Executor seems to be in a conflicting position by acting as the executor of DT's Estate while also acting as executor for EPT's Estate thereby defending EPT's Estate in the face of allegations of fraud and breach of duty. Specifically, the conflict arises from the fact that he now stands in the shoes of EPT as executor for DT's estate while also being executor of DT's estate in circumstances where EPT's conduct (as executor of DT's estate) is directly in issue. The fact that he has no issue to renounce the executorship of DT's Estate is neither here nor there.
- [28] It is a fact that EPT appointed the Executor as the executor of his estate. That was his wish which should be a factor taken into account albeit not the dominant factor specifically as he is allegedly mixed up in the dishonesty and breach of duty claims made against EPT's Estate and himself personally.
- [29] Pursuant to section 48 of the Probate and Administration of Estates Act, 2011, the Executor stands in both shoes with respect to the Estates of EPT and DT and it is not a case, as Mr. Scott KC asserted, of simply removing him. Both estates are inextricably linked and whoever represents EPT's Estate must also represent DT's Estate. The distrust by the Plaintiffs that the Executor could adequately represent the interests of the two estates is palpable.
- [30] That said, the appointment of either of the Plaintiffs as executor of EPT's Estate would, in my judgment, not resolve the issue of conflict. A different conflict would arise: persons suing the estate that they represent.
- [31] I also agree with Mr. Scott KC that Adita Boy would be conflicted by being appointed executor of EPT's Estate as her position and that of the Executor are the same. Both are beneficiaries under EPT's Will and, on the basis of the pleadings, they are both implicated in the fraud, dishonesty and breach of duty alleged.

[32] Each case must turn on its own facts and circumstances. In my judgment, the most judicious direction that the Court could give is for the Executor to continue to represent both estates alongside a family member or a professional to be nominated by the Plaintiffs to be a co-executor. The Court is cognizant of the fact that such appointment may be a burden to the estate but I do not believe that the current Executor should continue to act alone given the serious allegations of dishonesty and breach of duty made against him.

Surveyor and accountant

[33] The Masnyk Statement seeks directions as to whether the estate of EPT should hire a surveyor to verify that the commercial property that the Plaintiffs say is owned by THL is actually the commercial property in question. According to the Masnyk Statement, it cannot be ascertained whether the Mortgage Satisfaction which is stated to be owned by THL, is the subject property, based on the legal description alone. As such, the Masnyk Statement says that the Executor would need to hire a surveyor to verify the location of the commercial property to determine whether it corresponds with the Mortgage documents.

[34] The Masnyk Statement further contended that a forensic accountant is required by the Executor.

[35] Mr. Scott KC vigorously challenged the engagement of both a surveyor and an accountant. His reasons are clear: that a forensic accounting report has already been obtained and the property title documents comprise of descriptions and diagrams that adequately describe the location.

[36] In my considered opinion, this issue should be left to the trial judge who has carriage of the Main Action. This Court should not usurp the powers of the trial judge.

Indemnity costs

[37] Learned Counsel Mrs. Rolle-Kapousouzoglou urged the Court to find that as this is a section 77 application or a Beddoe application derived from **Re Beddoe**,

Downes v Cottan [1893] 1 Ch 547, the costs incurred by the litigation and to be incurred in the future by the litigation ought to be paid from EPT's Estate. The Executor seeks an Order that he be indemnified for the costs incurred to date and for any costs which may be incurred in the event that this Court accepts that the Executor should remain the executor of EPT's Estate.

[38] Mrs. Rolle-Kapousouzoglou correctly stated that these applications are brought to ensure that the Trustee, in accordance with its duty to protect and preserve the trust estate and are not merely for the purpose of unjustifiably spending expending trust money. Mrs. Rolle-Kapousouzoglou also correctly stated that Trustees are only granted indemnity by the Court in exceptional circumstances. The position with respect to costs of applications for directions was succinctly stated by Parker J in **In the Matter of the Stingray Trust Cause** No. FSD 0085 of 2017 & FSD0248 of 2017, a decision of the Grand Court of the Cayman Islands, at paras 54 to 57:

"54. The court has an inherent statutory jurisdiction to give directions to supervise trustees and to give directions binding on the trustees and all beneficiaries of the trust see XvY (unreported) 15 March 2017 per Smellie CJ at paragraph 17. The statutory jurisdiction arises out of section 48 of the Trusts Law (2017 Revision).

55. By virtue of that section the court may give directions as a matter of discretion and if the trustee acts in accordance with them it is deemed to have discharged its duty so far as its own responsibility is concerned, unless of course there has been fraud, willful concealment or misrepresentation. The trustee must give full disclosure of the strength and weaknesses of the case and of all other relevant information.

56. As is well known the wisdom of applying to the court for directions specifically on the question of engagement in litigation follows from The decision of the Court of Appeal in Re Beddoe [1893] 1 Ch 547. It has been clear from that case (for well over a century now) that a trustee without the sanction of the court commences or defends an action unsuccessfully does so at his own risk as regards costs, even if he acts on counsel's opinion.

57. It will only be in exceptional circumstances that he will be granted an indemnity by the court if he has not obtained the sanction of the court. Obtaining the court's sanction also removes the risk that an allegation will be made by a beneficiary that the trustee had acted in breach of duty, imprudently or improperly in engaging in litigation."

- [39] Mrs. Rolle-Kapousouzoglou argued that this is a *Beddoe* application because it is not only for the purpose of spending money. On the other hand, Mr. Scott KC, argued to the contrary.
- [40] The rule in *Beddoe* that a Trustee can be indemnified is limited to expenses **reasonably** incurred by him in the course of carrying out his duty. According to Mr. Scott KC, this does not fall within that circumstance because the rule in *Beddoe* is predicated on a disinterested trustee, which the Executor is not. He also submitted that the rule could not apply to the instant case because it concerns dishonesty. Further, Mr. Scott KC argued that valid *Beddoe* applications are made before expenses are incurred. Otherwise, the litigation is conducted at the Trustee's personal risk with respect to costs.
- [41] In response, Mrs. Rolle-Kapousouzoglou correctly submitted that the failure to bring the application for directions before commencing proceedings does not preclude the Trustee being indemnified for costs although it is prudent to do so. This was stated at paras 58 and 59 of **The Stingray Trust**:

58. As recognised by the authors of Lewin on Trusts (19th Edn) at paragraph 27-257 although it is prudent for a trustee to make a *Beddoe* application before proceedings are engaged in, an application can be made later and if so made the trustee will be allowed to retain his costs out of the trust property if, had the application been made at the outset it would have been granted.

59. The court also has an exceptional jurisdiction, which is analogous to that exercisable on an application for a pre-emptive cost order in hostile litigation, where a trustee has become involved in a trust dispute which amounts to an attack on the validity of the settlement – see *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1224 D Lightman J. The court will look carefully at the merits of the case and the relative costs to the overall value of the trust assets.” [Emphasis added]

- [42] Mrs. Rolle-Kapousouzoglou further relied on paras 71 and 72 of **The Stingray Trust** which stated that the usual rule is that the costs of the parties to a *Beddoe* application is like the costs of other applications by trustees, and will normally be

paid from the trust fund so long as there is no improper conduct. Paras 71 and 72 provide:

“71. The Trustee is under a duty to protect the Trust fund for the benefit of the beneficiaries. There is no alternative funding available to the Trustee to fight the claims apart from the disputed trust property or its own personal resources.

72. The usual rule is set out at paragraph 27-260 of Lewin on Trusts (19th Edition) which provides that:

‘The costs of the parties to a Beddoe application, like the costs of other applications by trustees to the court for directions, will normally, in the absence of improper conduct, be paid from the trust fund.’ [Emphasis added]

[43] Mrs. Rolle-Kapousouzoglou urged the Court to find that the instant case is considered an exceptional circumstance which justifies a *Beddoe* Order. In relying on **STG Valmet Trustees Ltd. V Brennan and others** 4 ITELR 337, she stated that the mere fact that a fiduciary claim is made against the Trustee personally does not prevent the Court from making a provision for the Trustee’s costs that the interests of justice would have otherwise required. This was stated at page 351:

“Although in general terms it is not easy to visualise cases in which the court would regard it as appropriate to allow a trustee against whom charges of negligence or breach of trust are made to conduct his defence with the benefit of an advance indemnity for his costs, there may be instances where it would be appropriate to allow a trustee facing such charges to take steps at the expense of the fund to test the bona fides of the claim or its sustainability in law by issuing, for example, a striking out application. It is certainly not the case that the mere fact that a claimant against the trust estate chooses to add to the claim against the trustee as a fiduciary a further claim against him personally operates in any way to inhibit the court from making any provision for the trustee’s costs that the interests of justice would otherwise require—*Walters v Woodbridge* (1878) 7 Ch D 504.”

[44] In **Walters v Woodbridge** (1878) 7 Ch D 504, the Court recognized that trustee/executor is entitled to be paid his costs out of the estate as he is defending

the suit for the benefit of the estate; though he is at the same time defending his own character. At page 510, James LJ stated:

“It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have *honestly* incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.”[Emphasis mine]

[45] Although I accept Mr. Scott KC’s emphasis on the law that, subject to exceptional circumstances, the general rule is that in hostile litigation, costs should follow the event, in my judgment, the interests of justice require that the Executor be indemnified for costs incurred. The instant case is one of an exceptional circumstance. What is exceptional about this situation is that the Executor, when he filed the Defence, was not defending allegations of fraud and breach of duty made against him but made against the estate of EPT which he represents as Executor. The fact that he did not bring the application until after he filed a defence does not have that great of an effect. As the Masnyk Statement stated at paras 74 to 81, “*there were Relevant Discussions between the parties vis-à-vis attempts to settle the Main Action*”. ...It was not until it became palpable that a speedy compromise would not be achieved and the litigation was becoming more complex and/or protracted that the Section 77 Application became necessary.”

[46] I accept Mr. Scott’s emphasis that indemnity costs is a pre-emptive costs order. He urged the Court to find that such an order would cast a long shadow over the Main Action to the benefit of the Executor. Further, he submitted, prejudging the outcome of the matter without hearing the evidence in the substantive proceedings should not be permitted in hostile litigation save for exceptional circumstances. Mr.

Scott KC then urged the Court to have regard to the considerations that should guide the court's exercise of the discretion to make pre-emptive costs orders. Those considerations were succinctly set out by Lightman J in **Alsop Wilkinson (a firm) v Neary** [1995] 1 All ER 431:

“The court has an exceptional jurisdiction in hostile litigation to make an order at an early stage in the proceedings regarding the ultimate incidence of costs. For the purpose of this application, all parties are agreed that the relevant principles are sufficiently set out in the judgment of Mary Arden QC (sitting as a deputy judge of the High Court in the Chancery Division) in *Re Biddencare Ltd* [1994] 2 BCLC 160 and that the four relevant considerations for this purpose are: (1) the strength of the party's case; (2) the likely order as to costs at the trial; (3) the justice of the application; and (4) any special circumstances. I would only add that since the decision of the Court of Appeal in *McDonald v Horn*, the second requirement has been tightened up and (save in cases of the presently recognised exceptions, namely derivative actions and actions relating to pension funds) it must appear that the judge at the trial could properly exercise his discretion only by ordering that the applicants' costs be paid out of the trust estate.”

- [47] The proceedings in the Main Action are in their infancy given the fact that an Amended Statement of Claim was filed on 19 August 2022; some three weeks before the hearing of this Summons for Directions. It is difficult to conceive how he should pay the expenses personally when he was defending the Estate of EPT.
- [48] It is almost impossible at this stage to assess the strength of the Executor's case and therefore the likely order as to costs at trial. However, the allegations made by the Plaintiffs are very serious and onerous. In my judgment, the Executor is fairly justified in seeking the indemnity cost order and, as I stated, special circumstances include the Executor defending the action on behalf of EPT whose estate he represents and that defending the claims of the Plaintiffs are for the benefit of EPT's estate. Accordingly, the Executor ought to be indemnified for the costs incurred thus far by the litigation of the Main Action namely: (i) engagement of Counsel to act on his behalf and (ii) filing a Defence.
- [49] By the Amended Statement of Claim, the Executor is now implicated in the dishonesty and breach of trust allegations. That is another issue for which he ought

to personally bear the costs which is involved. If he is successful in the Main Action, no doubt, he will be adequately compensated but that is for the trial judge.

[50] As the Executor will now act conjunctively with a co-executor nominated by the Plaintiffs, be it a family member or a professional, the two executors ought to be indemnified for future costs incurred by the litigation of the Main Action; such costs to be borne by the Estate of EPT.

[51] At para 2.1(5) of the Masnyk Statement, the Executor seeks an Order that all communications, evidence or otherwise which are subject to legal professional or other privilege be redacted in advance of any such disclosure to Peter, Adita Boy or their legal representatives to the extent that such disclosure is required or ordered by the Court. In my opinion, this should be left to the trial judge.

Costs of section 77 Application

[52] The law is that, as regards the costs of the application for directions, the normal rule is that, *absent misconduct*, the costs of the trustee (or in this case an executor) will be paid out of the trust fund: **Davies v Watkins** [2012] EWCA Civ 1570 at para 26.

[53] As Mrs. Rolle-Kapousouzoglou correctly contended, this rule is in keeping with the section 36(2) of the Trustee Act which provides that, "*a trustee may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of the trusts or powers.*"

[54] In **STG Valmet Trustees Ltd** [supra], Sir John Waite at page 349 stated that:

"Trusteeship is often a burdensome status, and the Court of Chancery has traditionally encouraged trustees to seek the directions of the court in cases of doubt, embarrassment or difficulty. It is a door open to all trustees, of whatever kind and calibre. Of the numerous authorities cited in this appeal, there is not one in which the court has gone to the lengths of penalising in costs any trustee who has turned to the court for directions in the Beddoe jurisdiction, and it is not suggested that the trustee in the present case should be deprived of those very limited costs." [Emphasis added]

[55] The allegations of dishonesty and breach of duty against the Executor only surfaced when the Amended Statement of Claim was filed but, prior to that, there had been no such allegations of improper conduct on behalf of the Executor. The Section 77 Application was filed prior to any allegation of fraud, dishonesty and breach of duty was levelled against him. He should not, as Executor of the two estates, be penalized for turning to the court for directions. It is therefore proper that he should be paid from the estate with respect to the costs incurred by bringing this application.

Plaintiffs failure to bring an application for leave to carry on proceedings

[56] Mrs. Rolle-Kapousouzoglou argued that the Plaintiffs have not made any application for an order appointing a person to represent the Estate of EPT as required by RSC O. 15, r. 7. That rule provides:

7. **(1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.**

(2) Without prejudice to the generality of paragraph (1), an action brought against “the personal representatives of A.B. deceased” shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a defendant who has died shall, if the cause of action survives and no grant of probate or administration has been made, be treated as having been brought against his estate in accordance with paragraph (1).

(4) In any such action as is referred to in paragraph (1) or (3) -

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased’s estate for the purpose of the proceedings or, if a grant of probate or administration has been made since the commencement of the action, for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person so appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in subparagraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

[57] Mrs. Rolle-Kapousouzoglou referred to **The Supreme Court Practice 1999** at 15/6A/3 where the learned editors state that such proceedings where no grant has been issued may amount to a nullity if no application has been made to appoint a party to represent the deceased estate. She submitted that, in the circumstances, it would appear that an application ought to have been made in the context of the Main Action on behalf of the Plaintiffs for an order appointing a person to represent the Estate to carry on the proceedings.

[58] Mrs. Rolle-Kapousouzoglou had previously intimated that the Main Action is in its infancy. By his Section 77 Application, the Executor seeks directions. The Masnyk Statement suggests that Adita Boy is a possible substitute as Executor. Mr. Scott KC vehemently challenge that suggestion asserting that Adita Boy and the Executor are in reality the same: they are both beneficiaries under EPT's Will and on the basis of the pleadings, they are both implicated in the fraud and breach of duty alleged. In that regard, the Plaintiffs suggested Nomiki who they say is not in a conflicted position and, in her Affidavit in Response, she has expressed a willingness to carry on with the Executorship of both estates.

[59] In those circumstances, there is really no reason to make a formal application to carry on the proceedings. In any event, given my findings, the need to make such an application would be useless.

Conclusion

[60] For all of the reasons stated above, the Order of the Court is as follows:

1. The Executor shall continue to act as the Executor of both estates but alongside a co-executor to be nominated by the Plaintiffs;

2. The issue of whether an accountant and a surveyor should be appointed is reserved for the trial judge who has carriage of the Main Action.
3. The costs incurred by the Executor thus far in defending the action ought to be paid for out of the Estate of EPT. Going forward, the two executors ought to be indemnified for future costs incurred by the litigation of the Main Action; such costs to be borne out of the Estate of EPT.
4. The Executor shall be paid his costs of this Section 77 Application to be taxed if not agreed.

Dated this 13th day of December 2022

**Indra H. Charles
Senior Justice**