Neutral Citation Number: [2022] CA (Bda) 18 Civ

Case No: Civ/2020/8

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2018: No. 376

Sessions House
Hamilton, Bermuda HM 12

Date: 02/11/2022

Before:

THE ACTING PRESIDENT, SIR ANTHONY SMELLIE
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER
and
JUSTICE OF APPEAL CHARLES-ETTA SIMMONS (Ag)

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Between:

ST JOHN'S TRUST COMPANY (PVT) LIMITED

Applicant

- v -

(1) MEDLANDS (PTC) LIMITED
(2) THE ATTORNEY GENERAL
(3) ROBERT THERON BROCKMAN
(4) BERMUDA TRUST COMPANY LIMITED
(5) HSBC PRIVATE BANK (C.I.) LIMITED
(6) MARTIN LANG
(7) GROSVENOR TRUST COMPANY LIMITED
(8) EVATT ANTHONY TAMINE
(9) DOROTHY BROCKMAN

Respondents

Edward Cumming KC, instructed by Mark Diel and Katie Tornari of Marshall Diel & Myers for the Appellant

Robert Ham KC instructed by David Kessaram of CHW Ltd for the First Respondent.

Shakira Dill-Francois, Deputy Solicitor General and Lauren Sadler-Best, Crown Counsel for the Second Respondent.

Keith Robinson of Conyers Olsen (Bermuda) Limited for the Fourth and Seventh Respondents

Steven James White and Sam Riihiluoma of Appleby (Bermuda) Limited for the Fifth Respondent

John Machell KC, instructed by Lewis Preston of Kennedy Chudleigh for the Sixth Respondent.

David Brownbill KC, instructed by Paul Harshaw of Canterbury Law Limited, for the Intervening Respondent.

Francis Tregear KC, instructed by Sarah-Jane Hurrion of Hurrion and Associates Ltd, for the Ninth Respondent.

Hearing dates: (On the papers)

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APPROVED RULING (on costs)

SMELLIE JA:

Introduction

1. Following our judgment handed down on 22 December 2021 ("the Judgment"), by formal order dated 2 February 2022, we dismissed the appeal of the Appellant ("SJTC") against the orders of Subair Williams J. dated 1 November 2019 and 19 December 2019 ("the Orders"). We also ordered that the First Respondent ("Medlands") be discharged as trustee of the Brockman Trust to which these proceedings relate and replaced as trustee by BCT Limited ("BCT"), on such terms as Subair Williams J directed upon hearing from such of the First to Third, Sixth and Ninth Respondents and BCT, as wished to appear and make representations to her in that regard.

2. In light of the conclusions reached in the Judgment, we also directed that no other party to this appeal had standing to appear or present evidence or submissions before Subair Williams J, in relation to the matter of Medlands' discharge or BCT's appointment.

3. By paragraph 74 of the Judgment we directed that submissions on the costs of the appeal be filed within 14 days of delivery of the Judgment but that deadline was subsequently extended to 14 March 2022, to allow for written submissions and those in reply from all parties, to be filed.

4. The submissions having been received, this is our judgment on costs, regrettably but unavoidably delayed until now.

The parties' submissions in relation to costs

5. While the other respondents were also successful, the main antagonists on the issue of costs became SJTC and Mr Tamine on the one hand, with Medlands, the Sixth Respondent and Trust Protector, Mr Lang, and the Ninth Respondent, Mrs Brockman, on the other. Their respective submissions have had to be considered and are set out in some detail in this judgment.

6. As successful parties on the appeal, Medlands, Mr Lang and Mrs Brockman argue that SJTC and Mr Tamine as the unsuccessful parties - the latter, due to his intervention in the appeal and this Court's finding in the Judgment that the appeal was brought "*at (his) directions or behest*" - should be liable for all the Respondents' costs. Moreover, they further contend that, having regard to the complete lack of merit of SJTC and Mr Tamine's arguments (as also found by the Judgment), and the manner of their conduct of the appeal, SJTC and Mr Tamine should be held jointly and severally liable and ordered to pay the successful parties' costs on the indemnity basis. They further contend that, having regard specifically to the email sent by the Court to the parties on 22 January 2021 presaging the futility of the appeal[1], at the very least SJTC and Mr Tamine (alternatively SJTC alone) should pay the Respondents' costs of the appeal to be taxed (in default of agreement)

[1] In the following terms: *"The Court is concerned to be clear about what it is that the Appellant really seeks to achieve by the appeal, given that even if it succeeds in setting aside the November and December Orders, it has been resolved by the human beneficiaries of the Trust [charity also being a beneficiary] that another trustee shall be appointed in any event. Accordingly, at the start of the hearing, the Court intends to consider whether (the Court) should not simply proceed to make an order of the kind proposed by Mrs Brockman (the 9th Respondent) in the New Proceedings [(those filed by her on 3 December 2020 in Cause 2020: No.476)] in keeping with section 8 of the Court of Appeal Act and as proposed in the 6th Respondent's (Mr Lang's, the Trust Protector's) Notice and Submissions."*

on the standard basis up to 22 January 2021 and on the indemnity basis thereafter. The successful parties also seek an order for payment on account of costs pending final taxation.

7. As an unsuccessful party, SJTC does not deny its liability for costs which would ordinarily follow the outcome of the appeal. Instead, counsel on SJTC's behalf submitted that the extent to which it should be ordered to pay the costs of the Respondents should be limited, particularly in light of the way in which, according to SJTC, "*the appeal was transformed following Mrs Brockman's decision to seek, initially by separate proceedings commenced in the Supreme Court on 3 December 2021 in Cause 2020: No. 476 (the "New Proceedings"), an order replacing Medlands with BCT as trustee of the Brockman Trust*". SJTC submits that, as a consequence of this development, described by it as "*a very late change of position*", there were essentially two different phases of the appeal and that each should be addressed separately when considering the appropriate order in respect of costs.

8. The first phase is said to have run from the date when SJTC first filed its notice of appeal on 24 September 2020 seeking the vindication of its putative position as trustee until 11 January 2021 when, says SJTC, just 14 days before the hearing of the appeal, it was first indicated that the appointment of BCT in place of Medlands would be sought by Mrs Brockman on the hearing of the appeal. For this phase SJTC contends, for reasons to be examined below, that it would be unreasonable for it to have to bear the costs of the other parties.

9. The second phase is said to have been the period which followed after 11 January 2021 until the conclusion of the appeal hearing on 2 February 2022. In relation to this period, its appeal having been dismissed, SJTC accepts that it must bear, not all the costs of the successful parties but " *a proportion of the reasonable costs (to be taxed if not agreed) incurred in respect of the period following 11 January 2021 by (i) the Respondents who successfully argued for the dismissal of the appeal (namely Mrs Brockman, Mr Lang and Medlands), and (ii) the other Respondents who adopted a neutral stance but appeared on the appeal to assist the court (subject to whether their costs were proportionate and reasonable in amount)*."

10. For his part, Mr Tamine's primary response is to resist any adverse order for costs. His first contention is that as a non-party initially to the appeal, he was given leave by Simmons JA (Acting) to intervene because allegations "*of the utmost seriousness*" had been made against him and it was only appropriate for him to be able to set out his position to the Court in respect of those allegations. If the other parties to the appeal had wished to disagree with him being afforded that opportunity to participate, then the appropriate route would have been to seek to appeal the order of Simmons JA (Acting), not to argue that he should be condemned in costs for having participated pursuant to that order. He maintains that at most any costs order made against him in respect of Medlands', Mr Lang's or Mrs Brockman's costs, should be restricted to (a) no more than 10% of the costs incurred by those parties; and (b) for the same reasons of a late change of tact by Mrs Brockman as argued on behalf of SJTC, restricted to costs incurred after 11 January 2021, prior to which there should be no order as to costs.

11. At all events, says Mr Tamine, as he did not bring this appeal but only sought to intervene having been permitted by Simmons JA (Acting) to do so, such participation cannot on any view be

regarded to have been so outside the norm as to warrant an adverse costs order on the indemnity basis.

The Background

12. The factual context for the examination of the competing arguments on costs is of course, set out fully in the Judgment. A brief summary of the background leading to the Administration Proceedings before Subair Williams J and the making of the Orders will therefore suffice for present purposes.

13. The parting of ways between Mr Tamine, who ultimately controlled SJTC through his ownership and control of its sole-shareholder Cabarita Limited and Mr James Gilbert, at one time SJTC's sole director, had led to a bitter contest of their disputes before the Supreme Court.

14. In Cause 2019: No. 447, the action was between, arrayed on one side, SJTC itself, Mr Tamine, Mr Glen Ferguson and Mr James Watlington (the latter two having been appointed as directors of SJTC by Mr Tamine) and on the other side, Medlands (which is owned and controlled by Mr James Gilbert) and Mr Gilbert himself ("*the Corporate Proceedings*").

15. In the Corporate Proceedings, the dispute was over control of SJTC and its disputed role then as Trustee of the Brockman Trust[2] and so ultimately over control of the Brockman Trust itself.

16. However, the dispute in the Corporate Proceedings became significant in the appeal, only in so far as it involved the question of the authority of Mr Gilbert to have acted on behalf of SJTC by instituting the Administration Proceedings which came before Subair Williams J and which led to the making of the Orders. As mentioned above, the Orders resulted, among other important outcomes, in the removal of SJTC as trustee of the Brockman Trust and its replacement by Medlands.

17. On the appeal, both SJTC and Mr Tamine unsuccessfully contended that a specific consequence of a judgment rendered in the Corporate Proceedings in relation to the Administration Proceedings was that SJTC was not properly a party to those proceedings as Mr Gilbert was not authorized to take those proceedings on its behalf and so SJTC should not be regarded as bound by the orders which were made in them.

18. That contention having been firmly rejected by the Judgment, the other two essential objections against the Orders raised by the appellants, were destined to fail as well. These were: first, the submission that SJTC, as trustee (whether *de jure* or *de son tort,* the latter in light of doubt raised by the historical issues affecting the Brockman Trust), was entitled to seek to set aside orders

[2] As explained at Footnote 2 of the Judgment, the question about SJTC's true status as trustee arose in the context of historical issues in the administration of the Brockman Trust which were also raised for resolution before Subair Williams J in the Administration Proceedings and addressed by her in the Orders. The appointment of Medlands to replace SJTC as Trustee was in part deemed necessary in order to resolve those issues, some of which were constitutional in nature going to the question of the validity of the Trust itself and actions taken by its various trustees at different times.

otherwise validly made in the context of trust administration proceedings in exercise of the longstanding supervisory jurisdiction and discretionary powers of the Court (and intended to protect and affect not SJTC's interests but rather those of the beneficiaries), on the basis that in those proceedings, its own rights as trustee (whether *de jure* or *de son tort*) to proper representation and a fair hearing were allegedly breached; and second, the submission that, even if SJTC could not properly (and did not propose on the appeal that it should) be reappointed as trustee, there was nonetheless a worthwhile purpose to be served in allowing it to prosecute the appeal, potentially at the expense, and to the detriment, of the proper ongoing administration of the Brockman Trust.

19. As had been highlighted in the email of 22 January 2021 from the Court to the parties, even if SJTC could establish that it had a right to be heard in the Administration Proceedings which had been breached, the real question nonetheless for the Court, on an appeal from those Proceedings, was whether it would be in the paramount interests of the beneficiaries of the Brockman Trust, rather than those of SJTC itself, for the Orders to be set aside as SJTC proposed. The Judgment resolved this issue resoundingly in the negative.

The Legal Principles

20. Before turning to assess the competing arguments, we can state the applicable legal principles briefly. There was, despite the familiar nature of the subject of an award of indemnity costs, surprising disagreement between Counsel.

21. The starting point is the Rules of the Supreme Court ("RSC"). Pursuant to Order 62, rule 3(4), where a party is entitled to an order for costs, the amount of costs which the party would be entitled to recover is the amount allowed after taxation on the standard basis unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis. The well-known definitions of "*standard basis*" and '*indemnity basis*" are set out in RSC Order 62 rule 12[3].

22. The case law demonstrates the circumstances in which it may be appropriate for the Court to order costs to be taxed on the indemnity basis. Mr Machell KC, relied upon the following dictum of this Court from *Crisson v Marshall Diel & Myers* [2021] CA (Bda) 13 Civ, (Case No: Civ/2020/9):

> "*In order for indemnity costs to be ordered it is necessary that there is something significantly out of the ordinary in respect of the manner in which the case has been conducted, or its nature, which justifies the making of such an order*".

23. In *Crisson*, a case which involved the claimant, by reliance on misleading evidence, obtaining from the Supreme Court a freezing injunction which had *"catastrophic effect on the life of Mr Crisson*", the Court of Appeal concluded at [5] that the nature and conduct of the case constituted such exceptional circumstances that the making of an indemnity costs order was warranted. The Court cited no authority for the formulation of principle which it declared, no doubt considering it

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[3] "*Basis of taxation*

12(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Registrar may have as to whether the costs were reasonable in amount shall be resolved in favour of the paying party; ..

(2) On taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubt which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party;.."

unnecessary to do so: the test as formulated reflects the well-established position to be gleaned from the English case law, where the Court of Appeal has repeatedly stated that indemnity costs may be ordered when the circumstances are "*out of the norm*."

24. As Waller LJ explained in *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [25], the formulation "*out of the norm*" reflects "*something outside the ordinary and reasonable conduct of proceedings."*

25. It is now clear also from the English case law that there is no scope for the application of some other more stringent "*exceptionality*" test such as proposed on behalf of SJTC in its submissions relying on specific Bermudian cases. Thus, in *Whaleys (Bradford) Limited v Bennett* [2017] 6 Costs LR 1241; [2017] EWCA Civ 2143, David Richards LJ (as he then was) said, in agreement with Newey LJ who gave the lead judgment (at [28]):

> "*In my view it was unfortunate that the judge [below] used the word "exceptional" to describe the circumstances that may justify an order for indemnity costs. The formulation repeatedly used by this court is "out of the norm", reflecting, as Waller LJ said in Esures Services Ltd v Quarcoo (above) at [25] , "something outside the ordinary and reasonable conduct of proceedings". Whatever the precise linguistic analysis, "exceptional" is apt as a matter of ordinary usage to suggest a stricter test and is best avoided. Its use in this case gave rise to an arguable ground of appeal and while I am satisfied, particularly in light of the submissions made to him, that the judge was not applying a stricter test, for the future it would be preferable if judges expressly used the test of "out of the norm" established by this court*."

26. However, by reference to decisions of the Supreme Court, SJTC and Mr Tamine submit that, as a matter of principle, a different approach applies in relation to the ordering of indemnity costs in Bermuda. They seek primarily to rely upon the recent decision of the Chief Justice in *Ivanishvili v Credit Suisse Life (Bermuda) Limited* [2021] SC (Bda) 14 Civ (1 March 2021) where he articulated a two-pronged exceptionality test, the first relating to an award of costs at an interlocutory stage and the second, relating to the final conclusion of a case. The Chief Justice relied upon the earlier decisions of the Supreme Court in *De Groote v Macmillan and others* Cause Civ. 1991 No.148 (delivered 17 December 1993) (per Ground J as he then was); *Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd* [2009] Bda L.R. 70 and *SCAL Limited v Beach Capital Management Limited* [2006] Bda L.R. 93 (both per Bell J as he then was) in declaring at [25] the following statement of principle:

> "*I accept, as submitted by Mr Smouha, that in DeGroote v MacMillan, Phoenix Global v Citigroup Fund Services; and SCAL Limited v Beach Capital Management Limited, the Court was considering whether indemnity costs* ***in relation to the entire action*** *should be awarded against a party to the proceedings. Ground J's articulation of the test that* ***indemnity costs are to be reserved for exceptional circumstances*** "***involving grave propriety going to the heart of the action and affecting its whole conduct"*** *was made in the context of an application for indemnity costs at the conclusion of the action and that is clearly the appropriate test in that context. It may not always be an appropriate test in the context of an application for indemnity costs in respect of a distinct interlocutory application prior to the trial and conclusion of the action. In the*

context of an interlocutory application the Court retains its jurisdiction to award indemnity costs in appropriate cases. In such applications indemnity costs against a party should be reserved for exceptional circumstances involving great impropriety in relation to the conduct of the application under consideration."

27. The view that the Court retains its jurisdiction to award indemnity costs in the context of an interlocutory application is unobjectionable, if only because many actions are resolved finally as the result of interlocutory applications and the ultimate liability for costs must then be determined. There is however, obvious tension between the pronouncements of this Court in *Crisson* and the test of exceptionality articulated by the learned Chief Justice in *Ivanishilli* by reliance on the earlier cases. The former is less restrictive than the latter, recognizing and endorsing, consistent with English authorities, the discretion of the Court to consider both the nature (or merits) of the case and the manner in which it has been conducted, in determining whether or not indemnity costs should be awarded.

28. It is significant that the earlier decision of this Court in *American Patriot Insurance v Mutual Holdings* [2012] Bda L.R. 23 appears not to have been considered in *Ivanishvilli.* In *Mutual Holdings,* having referred at [26] to the requirement for "*exceptional circumstances*" applied in both *Phoenix Global v Citigroup* and *De Groote,* Evans LA in delivering the judgment of the Court said*:*

"In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim" (per Kawaley J in Lisa SA v Leamington and Avicola ([2008] Bda L.R. 61) at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just." [emphases added]

29. Thus, while not expressly disapproving of the stricter exceptionality test, this Court did not adopt it, instead preferring an approach which would allow for a discretionary assessment on the case by case basis, as to whether an order for indemnity costs is justified. And while not itself purporting to set a test by which the discretion should be exercised, the approach of the Court there was, in my view, more consistent with an enquiry as to whether litigation has been conducted *"out of the norm"* than with the stricter test.

30. It follows, in my view, that we should now confirm that the latter test- that firmly approved in the English case law - is the test to be applied.

31. That said, I should not pass from this point without recognizing the discussion in the Bermudian case law about the appropriateness of adopting the English position, there described as having emerged post–Woolf Reforms and so based upon the current English Civil Procedure Rules (CPR) rule 44.3, rather than upon the former Rules of the Supreme Court (RSC) upon which the Bermudian RSC O.62 r.3 is still based.

32. The task of assimilation was undertaken by Bell J (as he then was) in *Phoenix Global v Citigroup.* There, at [9] to [12] the judge discussed the different tests which had been articulated by Ground J in *De Groote* and by Kawaley J in *Lisa v Leamington*, the latter being that which later found favour with this Court in *Mutual Holdings,* as well as his own earlier judgment in *Wingate v Butterfield Trust (Bermuda) Limited [2008] LR 55* where he had opined*:*

> *"In my view there does remain a difference in the principles to govern an award of indemnity costs in this jurisdiction under the RSC, and those which are now applicable in the United Kingdom under the CPR."*

33. However, reflecting on that pronouncement, he went on to say in *Phoenix Global v Citigroup (ibid)* that:

> *"Those words followed a reference to the judgment of May LJ in Reid Minty v Taylor [2001] EWCA Civ 1723, where he had referred to the fact that the first instance judge had been wrong to constrain himself by reference to the pre-CPR authorities. Conversely, I was reluctant to place reliance upon post-CPR authorities* [as Kawaley J had done in *Lisa v Leamington*] *when considering the applicable regime in Bermuda."*

34. Bell J then concluded in the same judgment at [10], in my view correctly, that there should no longer be any concern about assimilating the modern English case law as the test for an order for indemnity costs:

> "*So, as (the defendant) Citigroup noted, Kawaley J (in Lisa v Leamington) did emphasise the relevance of the conduct of the litigation, such that in practical terms there may be little between us in terms of approach*."

35. If needed, fortification for this approach is to be found both in Cayman Islands law, based as it still is in this regard upon the RSC pre-CPR position (as well as distinctly in Equity) and from further pronouncements in the English cases.

36. In *Woods Furniture and Design v Gary James* CICA (Civ) Appeal No1 of 2020 (Judgment delivered on 30 July 2020), the Cayman Court of Appeal (per Sir Richard Field JA at [78]-[79]) approved of the following dicta from the Grand Court in *AHAB v SAAD* [2012] (2) CILR 1:

> "9. *There is guidance to be found in the case law as to the approach to be taken to an application for an award of costs on the indemnity basis in party and party litigation. In Bonotto v Boccaletti 2001 CILR 292 [a breach of trust case] the Court of Appeal held that this Court has a discretionary jurisdiction (said to be founded in Equity) to grant costs on the indemnity basis, but the discretion is to be exercised only in the most exceptional cases (otherwise than where the costs are to be paid under contract or out of a fund).*
>
> *10. It is nonetheless recognized that the jurisdiction is wide and flexible, allowing the court to exercise its discretion as the circumstances of the case may require.*

11. In Simms v Law Society, Carnwath LJ, in delivering the lead judgment on behalf of the English Court of Appeal, summarized the principle (by reference to the [current] English equivalent of GCR , O. 62. r. 4) in the following terms ([2006] 2 Costs L.R. 245, at para 16), which I think are suitable to be adopted by this court:

"The courts have declined to lay down any general guidance on the principles which should lead to an award of costs on the indemnity basis. However, the cases noted in the White Book (Vol. 1 p. 1085 jj) show that costs will normally be awarded on the standard basis '…unless there is some element of a party's conduct of the case which deserves some mark of disapproval. It is not just to penalize a party for running litigation which it has lost. Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for the award of costs on the indemnity basis …' (p. 1087-8)

Similarly, in Kiam v MGN (No. 2) [2002] 2 All E. R 242, 246 Simon Brown LJ, while agreeing that '… conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs…' added – 'to my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided in hindsight …'

12. In Excelsior Comm. & Indus. Holdings Ltd v Salisbury Hammer Aspden & Johnson (2), Waller LJ. had earlier expressed the view 9[2002]] C.P. Rep. 67 , at para. 39) that the issue whether indemnity costs should be ordered depends on whether there is "*something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs*." [emphasis added].

37. The words in emphasis immediately above from Waller LJ had presaged his own later pronouncements in *Esure Services v Quarcoo* (above), as well as those implicitly approved and adopted by this Court in *Crisson* (also above). It is therefore only fitting to note the following further pronouncement from Waller LJ from *Esure Services v Quarcoo,* by way of completing the process of assimilation of principles, (at [24]):

"24. *In my view the Recorder [in the court below] here misdirected himself in failing to place the words "out of the norm" in* ***Excelsior*** *in their proper context. It was well established prior to the CPR and prior to* ***Excelsior*** *that a court might mark its disapproval of dishonest conduct by making orders for indemnity costs, and [rule] 44.3 with its reference to the conduct of the parties was on any view preserving that position. Thus, it was to misconstrue the words "out of the norm" to place on them a construction which somehow might constrain the ability of the court to mark that disapproval."* [emphasis added].

38. Thus, it is explained that even before the advent of CPR r. 44.3, it had been established that an indemnity costs award could be made by having regard to whether the nature of the action or the manner of its conduct was out of the norm.

Discussion

39. Accordingly, I must now proceed to consider the appeal in light of that test. In my view, for the following reasons, an order for indemnity costs is justified.

40. As to the nature of the appeal, the arguments for treating the appeal as having two separate phases for the purposes of the incidence of costs are, in my view, misconceived.

41. The first phase is said to be the period in which SJTC and Mr Tamine simply sought respectively to vindicate their rights or reputation and so, it is contended, should not be in anyway regarded as being out of the norm or unreasonably conducted. However, as the starting point, as both Mr Machell and Mr Tregear submitted having regard to the findings reached on the appeal, it is unrealistic to seek a distinction between SJTC and Mr Tamine. As the Court observed at [1] of the Judgment, in bringing the appeal against the Orders, SJTC was "*acting at the directions or behest of the Intervening Respondent Mr Evatt Tamine*." Indeed, the appeal would not and could not have been pursued but for the financial support of Mr Tamine through his company Cabarita[4]. His control of SJTC through Cabarita created a state of conflict of interest which meant that in no sense could SJTC truly contend, as it purported, that the appeal was brought by it in its putative capacity as trustee to rescue the Brockman Trust from the clutches of Medlands and in the interest of the beneficiaries.

42. While Medlands' suitability as trustee was itself plainly in doubt because of its sole control by Mr Gilbert, and his own conflicted position, it was known by the time of the filing of the notice of appeal that all the parties wanted Medlands to be replaced and Medlands had itself given notice of its intention to retire as trustee. Moreover, at all times all parties (other than SJTC and Mr Tamine) were unanimous that SJTC should not resume the trusteeship. This especially included Mrs Brockman, who represented the interests of the human beneficiaries and hence her institution of the New Proceedings in which she sought the appointment of BCT.

43. It must therefore be accepted that SJTC started and pursued the appeal entirely in its own interests and in total disregard for the interests of the beneficiaries. It had been removed as trustee at a properly constituted hearing, despite its futile refrain that it had been "*kept in the dark*" and that there had been some "*miscarriage of justice*" because no notice of the Administration Proceedings had been given by Mr Gilbert to its latterly appointed other directors, Messrs Ferguson and Watlington. SJTC had no personal interest in the appeal and, throughout, asserted none. The proceedings before Subair Williams J were instituted by SJTC itself, acting by Mr Gilbert, as trust administration proceedings to examine the affairs of the Brockman Trust in the interests of its beneficiaries. By their very nature those proceedings were not such as to have admitted of a personal interest in SJTC adverse to those of the beneficiaries or the Trust itself. It follows that there was simply no prospect of this Court setting aside Medland's appointment in favour of SJTC without having primary regard to the views and interests of the beneficiaries.

44. It follows also that the appeal was and should always have been recognized by SJTC, to be an exercise in futility. As the Judgment observes at [8], the real objective behind the contest over

[4] See transcript Day 2/180/line 11 to 181/line 6 where it was admitted that Mr Tamine loaned the money through Cabarita for the funding of the Appeal.

SJTC's role, was a quest to regain ultimate control of the very valuable Brockman Trust itself. That was the objective for which both SJTC and Mr Tamine must be regarded as having acted in concert and, as the successful parties in my view properly submit, indistinguishably for the purposes of the incidence of the costs of the appeal.

45. Further as regards the findings of the Judgment in relation to Mr Tamine in this respect, at [31], I comment that, while the concerns over his conflicted position had been raised (including the pending lawsuit against him for recovery of Trust assets), Subair Williams J in fact expressed no conclusions as to any impropriety on his part. This also, in my view, falsifies his contention that his participation in this appeal was simply for the purpose of protecting his reputation.

46. As to the manner of conduct of the appeal, a number of further compelling points are raised by the successful parties.

47. They contend, justifiably in my view, that SJTC's and Mr Tamine's conduct in relation to the appeal was highly unreasonable, at times bordering on the unrestrained.

48. While not venturing to propose that SJTC should be reappointed to replace Medlands, both SJTC and Mr Tamine nonetheless opposed the appointment of BCT. And this was notwithstanding the earlier submission made on behalf of SJTC before the Chief Justice in the Corporate Proceedings [and as noted in the Judgment at [23], page 9] that "*It may well be that the best outcome is a properly regulated independent professional trust company to come in*".

49. Nor, as Mr Machell submits, does it appear that SJTC - as it should have done, had it considered itself as acting in the interests of the Trust or its beneficiaries – applied to the court for *Beddoe* relief[5], in relation to the commencement or prosecution of the appeal. And so, just as it disregarded the interests of the beneficiaries, it appeared to have ignored the supervisory jurisdiction of the Court[6]; given that it was represented by very experienced lawyers, the inference might well be drawn that the failure to apply for *Beddoe* relief was deliberate. Given the lack of merit of the appeal, it is also to be inferred that, had it made a *Beddoe* application (as it should have done), the Court would inevitably have directed it not to appeal and, heeding that direction from the Court as it would have been obliged to do, the resultant costs would have been avoided.

50. As Mr Machell also submits, these failures were compounded by a letter from MDM (SJTC's attorneys) dated 23 December 2020[7], in which it was suggested that if Mrs Brockman's application for the appointment of a professional and independent trustee were to succeed in the New Proceedings in advance of the hearing of the appeal, SJTC would nevertheless continue to prosecute the appeal and then seek to have the new appointment (that which this Court ultimately effected by the appointment of BCT) set aside.

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[5] In keeping with the now settled principles first declared in *Re Beddoe* [1893] 1 Ch 547 that in the event a trustee acts unreasonably in bringing or defending proceedings, he may be held personally liable for the costs of the litigation if ultimately unsuccessful. Thus, the purpose of *Beddoe* relief is to protect against this risk.

[6] Even where a former trustee has a real and reasonable concern as to the propriety of his removal, he should not run an active case challenging the validity of his removal unless so directed by the Court: *Lewin on Trusts* (20th Edition) at 48-088

[7] Seen at **9/K/74/5596** of the Record of Appeal

51. Given the highly charged and contentious situation surrounding the Trust, SJTC's failure to seek *Beddoe* relief and its unreasonable escalation of its challenge to the appointment of an independent trustee (including going so far as joining with Mr Tamine in seeking to impugn the *bona fides* of a commitment letter written by BCT's appointee Mr Peter Goddard, the head of Maples FS[8]), are factors which also justify the making of an indemnity costs order.

52. For all the foregoing reasons, there is no proper basis for dividing the appeal into two phases as SJTC proposes. Its proposal is completely undermined by its staunch prosecution of the appeal even after Mrs Brockman instituted the New Proceedings and even after the proposal was raised on behalf of Mr Lang that a new trustee be appointed. Nor did SJTC desist even after this Court gave its clear indication that it was attracted by the obvious good sense of the proposal. Thus, it is clear that the proposal made on behalf of Mr Lang in advance of the appeal that the Court of Appeal should make an order replacing Medlands with BCT simply made no difference to SJTC's (nor Mr Tamine's) conduct of the appeal.

53. So far as its proposed second phase is concerned, SJTC suggests that it should bear only a portion of the costs, which it suggests should be no more than 50%, on the basis that part of the costs related to the application to replace Medlands with BCT and such costs would otherwise have been incurred in the New Proceedings had that issue not been resolved on the appeal. But here too I find myself in agreement with the successful parties that this is misconceived: the question of Medland's replacement by BCT need not have come before the courts at all and only came before this Court because of the appeal and SJTC's (and Mr Tamine's) determined pursuit of it, notwithstanding the desire of the Trust Protector, Mr Lang, and Mrs Brockman, to appoint BCT. SJTC pursued its appeal to the bitter end notwithstanding that the outcome it sought by the setting aside of the Orders, would have been, as found in the Judgment (at [29]), to *"(plunge) the Trust back into its former state of uncertainty*" including as to the validity of any actions taken by its trustees over the many years of its existence.

54. Further as regards Mr Tamine: as an admitted stranger to the Trust, he had no legitimate interest in the Trust or its administration. Nor therefore, did he have any proper basis for making submissions as to how the Trust should be administered. Mr Tamine sought and obtained an order joining him to the appeal solely for the purpose of protecting his personal interests, which interests he asserted (incorrectly as mentioned above), had been affected by "*seriously adverse findings apparently made against [him]*" (see paragraph 4 of his affidavit sworn on 4 July 2020).

55. Thus, in conclusion, the appeal was hopeless from beginning to end. As this Court held, SJTC, acting through its then sole director Mr Gilbert- had effectively instituted the Administration Proceedings and was therefore bound by their outcome, which included the Orders which were the subject of the appeal (a conclusion which the Judgment made clear was "*sufficient to dispose of SJTC's appeal*") (the Judgment at [40] to [44]). The appeal was only about SJTC's and Mr Tamine's personal interests, rather than anything required for the welfare of the Trust's beneficiaries. On the contrary, its intended outcome would have been inimical to those interests.

[8] See letter disclosed to the Court at **9/K/89/5922**

56. In its wholly unreasonable pursuit of its appeal, SJTC was not only joined but also funded and enabled by Mr Tamine making their respective positions as to the incidence of the costs, in my view indistinguishable.

Disposition

57. Accordingly, on a proper analysis of the facts, the extraordinary conduct of both SJTC and Mr Tamine, and the reasons given in the Judgment for dismissing the appeal, the appropriate order is that SJTC and Mr Tamine are jointly and severally liable and must pay the costs of the appeal of the successful parties, on the indemnity basis.

58. The only qualification I would make to this order is that upon taxation, if the matter reaches that stage, it would, of course be nonetheless appropriate for the taxing officer to examine the extent and reasonableness of the costs, especially as to whether there may have been avoidable duplication, and particularly as to those incurred by other successful parties who essentially took part simply as observers to the proceedings.

GLOSTER JA:

59. I agree.

SIMMONS JA (Ag):

60. I, also, agree.