In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 447

BETWEEN:

ST. JOHN'S TRUST COMPANY (PVT) LIMITED

-and- **Plaintiff**

(1) JAMES WATLINGTON
(2) GLENN FERGUSON
(3) CABRITA (PTC) LIMITED
(Sued in its personal capacity and its capacity as trustee of the Waterford Charitable Trust)
(4) THE ATTORNEY GENERAL
(5) JAMES GEOFFREY STEPHEN GILBERT

Defendants

(6) MEDLANDS (PTC) LIMITED
(7) CONYERS DILL & PEARMAN LIMITED

Non-Parties

Before: **Hon. Chief Justice Hargun**

Appearances: **Mark Diel and Katie Tornari of Marshall Diel & Myers Limited for the Plaintiff and the First and Second Defendants**

David Brownbill QC and Paul Harshaw of Canterbury Law Limited for the Third Defendant

Graham Chapman QC and John Wasty of Appleby for Conyers Dill & Pearman, a Non-Party

Date of Hearing **2 February 2021**

Date of Judgment **24 February 2021**

RULING

(Leave to Appeal)

HARGUN CJ

Introduction

1. This is an application by Conyers Dill & Pearman Limited ("**Conyers**"), a Non-Party, pursuant to section 12(2) of the Court of Appeal Act 1964 for leave to appeal to the Court of Appeal against the Order of the Court in its judgment of 14 December 2020 ("**Judgment**") that Conyers pay 30% of the costs of these proceedings incurred by Mr. James Watlington, Mr. Glenn Ferguson and Cabarita (PTC) Limited, the First, Second and Third Defendants during the period 3 December 2019 to 26 March 2020 on the indemnity basis ("**Costs Order**"). The background facts underlying these proceedings are set out in the Judgment.

2. The Court directed that the application be heard on an *inter partes* basis pursuant to Order 2 Rule 3(c) of the Rules of the Court of Appeal for Bermuda.

The relevant test for leave to appeal

3. Mr. Chapman for Conyers submits that the relevant test in assessing whether to grant leave to appeal is that the Court must determine whether the grounds of appeal are arguable

relying upon the Court of Appeal decision in *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd* [2007] Bda LR 81, which in turn cited the case of *The Iran Nabuvat* [1990] 1 WLR 1115, in which Lord Donaldson stated "*no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal*" (p.1117).

4. Mr. Brownbill for Cabarita (PTC) Limited ("**Cabarita**"), the Third Defendant, submits that the test is accurately stated at paragraph 263 of the Judgment, as recorded in the English Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027 and in the decision of Subair Williams J in *Apex Fund Services Ltd v Clingerman* [2020] SC (Bda) 12 Com (18 February 2020). Leave will not be given if the appeal has no real prospect of success.

5. In the end Mr. Chapman was content, for purposes of this application, that the Court should apply the test set out in the English Practice Direction.

First Ground: finding of negligence

6. The First Ground of Appeal states that: *"The Chief Justice was wrong to find that Conyers had acted negligently and negligently to a serious degree. There is no express consideration in the Judgment as to whether a failure to appreciate that Mr. Gilbert was under a duty to return to Court pursuant to the duty of full and frank disclosure and to advise him of this or the failure to appreciate that Conyers were subject to a "personal" duty to correct the position was a failure that no reasonably competent barrister and attorney could have made in all the circumstances of the case and, then, whether that failure, if negligent, was sufficiently serious or gross to justify the costs order made."*

7. In this regard Mr. Chapman refers to paragraphs 240 and 245 of the Judgment where the Court held that it was Mr. Gilbert's legal duty to provide full and frank disclosure to the Court and it was Conyers' obligation to advise him of that duty. He also refers to

paragraphs 234 and 235 of the Judgment where the Court found that Conyers was subject to a "personal" duty to ensure that the duty of full and frank disclosure was discharged. However, Mr. Chapman contends, the Court failed to consider whether a failure to appreciate that this was the legal position or to discharge the duty was a failure that no reasonably competent barrister and attorney could have made in all the circumstances of the case and, then, whether that failure, if negligent, was sufficiently serious or gross to justify the costs order made.

8. In my view, a fair reading of the Judgment, makes it clear that the Court did indeed consider that the failure to appreciate the legal position or to discharge the duty was a failure that no reasonably competent barrister and attorney could have made in the circumstances and that it was sufficiently serious to justify the costs order.

9. The starting point is to note the representations made by Conyers at the *ex parte* hearing for the purposes of obtaining the *ex parte* injunction. As set out at paragraphs 59 and 60 of the Judgment, the application for an injunction was justified on the basis that unless the Court granted the injunction there was a risk that the assets of the Brockman Trust, a charitable trust, may be dissipated by Mr. Tamine and secondly, the concern that Mr. Tamine will seek to use the new directors to slow down or prevent the litigation which SJTC had commenced against him. For present purposes, it was emphasised by counsel that the injunction was required "*to hold the ring*" pending the determination of the *inter partes* hearing and, secondly, that there was no prejudice to Mr. Watlington and Mr. Ferguson if they were prevented from holding board meetings while their authority was scrutinised. It was emphasised that the sole purpose of the injunction was to preserve the *status quo* pending the *inter partes* hearing. As noted at paragraph 62, had the Court been advised by SJTC that it intended to use the *ex parte* injunction to launch an application to replace SJTC with Medlands (PTC) Limited ("**Medlands**") as the trustee of the Brockman Trust, the Court would have refused the application for the *ex parte* injunction.

10. In breach of the representations made at the *ex parte* hearing, which led to the grant of the *ex parte* injunction, as noted at paragraph 46 of the Judgment, Mr. Gilbert and Conyers applied for and obtained the Order of the 19 December 2019 in the trust administration proceedings ("**Trust Proceedings**"), without any reference to Mr. Watlington and Mr. Ferguson, the majority directors of SJTC, or the Court which had restrained Mr. Watlington and Mr. Ferguson from acting as directors of SJTC, which had the overall effect that:

    (a) SJTC was removed as trustee of the Brockman Trust.
    (b) A company of which Mr. Gilbert was the sole shareholder and sole director, Medlands, was appointed as successor trustee.
    (c) All legal professional advisors continued to provide their services as before to the successor trustee, Medlands.
    (d) The injunction proceedings and the proceedings challenging the appointment of Mr. Watlington and Mr. Ferguson as directors were rendered an academic exercise.

11. As noted at paragraph 67 of the Judgment, it does not appear that Mr. Gilbert or Conyers deny that the application to appoint Medlands as successor trustee in the Trust Proceedings was a material development and would ordinarily require disclosure to the Court and the other parties to the proceedings. The sole justification advanced by Mr. Gilbert and Conyers for not advising the Court or other parties of the momentous development is the legal contention that Mr. Gilbert had no duty to disclose because these proceedings were by that stage *inter partes* and reliance was placed on a single decision in *JSC BTA Bank Albyazov* [2012] EWHC 648 (Comm). For reasons set out in paragraphs 68 to 73 of the Judgment this position was entirely untenable bearing in mind that Mr. Watlington, Mr. Ferguson and Cabarita had no means of finding out that such an application to change the trustee was contemplated by SJTC, and as a result Mr. Gilbert and Conyers were under a duty to advise the Court in relation to this momentous development. Further, as noted at paragraph 239 of the Judgment, a review of the authorities shows that this has been the legal position since at least 2004 and is reflected in standard practitioner texts. The clear implication of the last sentence of paragraph 239 of the Judgment is that the failure to

appreciate that this was the legal position was a failure that no reasonably competent barrister and attorney could have made in all the circumstances of the case.

12. Furthermore, as noted in paragraphs 46 and 246 of the Judgment, this was not a technical breach of the duty of full and frank disclosure without any significant consequences in the pending proceedings. As noted at paragraph 246 of the Judgment, the application to change the trustee prior to the *inter partes* hearing, was in clear breach of the representations made to the Court that the sole purpose of the *ex parte* order was to preserve the *status quo* and that the grant of the *ex parte* injunction would not disadvantage Mr. Watlington and Mr. Ferguson in any material way. As noted in paragraph 46, the effect of the Order of the 19 December 2019 was, contrary to the representations made to the Court at the *ex parte* injunction hearing, to fundamentally change the position of SJTC and indeed to render it an empty vessel. Conyers must have appreciated that the application in the Trust Proceedings and the resulting Order of the 19 December 2019 could not possibly be consistent with the representations made by Conyers at the *ex parte* injunction hearing. In the circumstances, the Court made a finding in paragraph 246 that the conduct set out at paragraphs 21 to 50 and paragraphs 237 to 246 of the Judgment does reach the threshold of serious negligence.

13. The finding of negligence in paragraph 246 of the Judgment is based upon the test that no reasonably competent barrister and attorney in the position of Conyers could have (i) failed to advise Mr. Gilbert of the need to disclose the application to appoint Medlands as the trustee to the Court; and (ii) if Mr. Gilbert refused to do so, a reasonably competent barrister and attorney in the position of Conyers would not have continued to act in these proceedings. This finding is supported by the following facts and circumstances set out in the Judgment:[1]

[1] To the extent necessary, the Court relies upon the guidance provided by Lord Phillips MR in *English v Emery Reinbold* [2002] 1 WLR 2409 at [24]-[25]:

> *"24. We are not greatly attracted by the suggestion that a Judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the Judge who has heard the evidence has based a*

(a) The *ex parte* injunction was granted on the basis of the clear representations made by Conyers that the injunction was required "*to hold the ring*" pending the determination of the *inter partes* hearing; and that there was no prejudice to Mr. Watlington and Mr. Ferguson if they were prevented from holding board meetings while their authority was scrutinised.

(b) The fact that it would have been "*obvious*" to Conyers that "*the proposed application in the Trust Proceedings to appoint Medlands as the successor trustee was highly material to the proceedings in which SJTC had obtained the ex parte injunction on 6 November 2019*" (paragraph 64 of the Judgment).

(c) The fact that Conyers was fully aware that Mr. Gilbert had decided to seek the appointment of Medlands by the time of the 12 December 2019 directions hearing in these proceedings, but no attempt was made to draw the Court's attention to it at that time (paragraph 66 of the Judgment).

(d) The fact that Conyers must have appreciated that the proposed application to appoint Medlands in place of SJTC as the trustee of the Brockman Trust was in breach of the clear representations made to this Court at the *ex parte* hearing to obtain the injunction and as set out in sub-paragraph (a) above.

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rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the Judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a re-hearing will involve a hideous waste of costs.

25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent."

(e) The clear legal position that when Conyers became aware of Mr. Gilbert's intention to apply for the appointment of Medlands, Conyers was under a duty to advise Mr. Gilbert that these matters must be drawn to the attention of the Court in these proceedings, and, in the event that Mr. Gilbert refused to inform the Court, Conyers was obliged to cease acting for Mr. Gilbert. This has been the legal position since at least 2004 (*Network Telecom (Europe) Ltd v Telephone Systems International Inc.* [2004] 1 All ER (Comm) 418 (paragraph 17 of the Judgment); and *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm) (paragraph 72 of the Judgment). This legal position is reflected in standard practitioner texts such as *Gee on Commercial Injunctions* at 9-028 (paragraph 71 of the Judgment).

(f) The legal position referred to in sub-paragraph (e) above is reinforced by the professional obligation of Conyers under Rule 39 of the Barristers' Code of Professional Conduct 1981, made under the authority of the Bermuda Bar Act 1974, to "*inform the court of any developments which affect the information already provided*" (paragraph 80 and 235 of the Judgment).

(g) The fact that the obligations referred to in subparagraphs (e) and (f) above are non-delegable obligations of all barristers and attorneys appearing in the Bermuda courts.

(h) The fact that as at 3 December 2019 the only legal representatives appearing for SJTC in these proceedings was Conyers.

14. For the same reasons, Conyers could not become party to the "*conclusion*" reached by the wider legal team in London on 3 December 2019 that Mr. Watlington and Mr. Ferguson (and by extension this Court) "*could not be informed*" of the proposed application in the Trust Proceedings to replace SJTC with Medlands as the trustee of the Brockman Trust. Having regard to the matters outlined at paragraph 13 above no reasonably competent barrister and attorney, in the position of Conyers, could have agreed not to "*inform*" the Court of the impending application to change the trustee of the Brockman Trust.

15. The negligence referred to in paragraph 246 of the Judgment was indeed "*serious*" having regard to the following facts and circumstances set out in the Judgment:

(a) The proposed action to replace SJTC as trustee of the Brockman Trust, in respect of which there was a negligent failure to advise the Court, was in direct breach of the clear representations made to the Court at the *ex parte* hearing for the injunction and referred to in paragraph 13(a) above.

(b) The negligent failure to advise the Court in relation to the impending replacement of SJTC as trustee of the Brockman Trust was in breach of the clearly established duty, established under case law, and also in breach of the obligation imposed on Conyers by Rule 39 of the Barristers' Code of Professional Conduct.

(c) Conyers must have appreciated that the momentous decision to make the application to change the trustee from SJTC to Medlands was directly related to, and highly material to, the injunction proceedings pending in this Court.

(d) The fact that Conyers was fully aware that Mr. Gilbert had decided to seek the appointment of Medlands by the time of 12 December 2019 directions hearing in these proceedings, but no attempt was made to draw the Court's attention to it at that time (paragraph 66 of the Judgment).

(e) The direct consequences of the proposed application in the Trust Proceedings to change the trustee of the Brockman Trust, in breach of the representations made to this Court, were (i) to render academic the proceedings pending in this Court; and (ii) to deny Mr. Watlington and Ferguson, as majority directors of SJTC, any opportunity to make any representations in the intended application to replace SJTC with Medlands as the trustee of the Brockman Trust.

16. For the reasons given above, I would have refused leave if this was the sole ground of appeal on the basis that it has no real prospect of success.

Second Ground: inhibitions on the part of Conyers due to LPP and confidentiality

17. Secondly, Conyers contends that the Court failed to "*pay any or any sufficient regard to the inhibitions to which Conyers was subject in explaining and defending itself fully by reason of questions of privilege*". In addition to the usual obligations of confidentiality and privilege that arise in the course of conducting litigation, it is said, here there were further and complicating factors arising from the confidential nature of the Trust Proceedings and the existing orders made in those proceedings.

18. As the Judgment noted at paragraph 240, the Court paid close attention to the observations by Lord Bingham in *Medcalf v Mardell* [2003] 1 AC 120 in relation to the need for caution given that a barrister and attorney owes a duty of confidentiality and privilege to the client and as such may not be in a position to give a complete explanation to the Court. However, as explained in paragraph 79 and 240 of the Judgment, the significance of this consideration is diminished in the circumstances of this case due to the mandatory nature of the duty of full and frank disclosure. Here, Mr. Gilbert had no choice but to comply with his legal obligation to provide full and frank disclosure to the Court. As set out in paragraph 240, this was his legal duty and it was Conyers' obligation to advise him accordingly. In the event that Mr. Gilbert chose not to follow the advice and discharge his duty to the Court, it was the duty of Conyers to cease acting for Mr. Gilbert and SJTC. As Mr. Brownbill correctly submits, no matters covered by Conyers' duty of confidentiality and privilege could provide any justification for the fact that they had neither ensured the Court was informed nor ceased to act, and accordingly Conyers had been seriously negligent.

19. Furthermore, here, Conyers have in fact provided an explanation as to why Mr. Gilbert and Conyers decided not to provide the information relating to the application in the Trust Proceedings, namely, the legal contention that the obligation to give full and frank disclosure to the Court ceased when the proceedings became fully *inter partes*. This legal submission was first deployed by Mr. Hagen, representing SJTC at the February 2020

hearing to set aside the *ex parte* injunction, in response to the claim by Mr. Watlington, Mr. Ferguson and Cabarita that Mr. Gilbert and SJTC had not complied with their duty of full and frank disclosure to the Court by failing to advise the Court of the decision to change the trustee of the Brockman Trust. This has been the sole justification advanced by Mr. Gilbert and Conyers for failing to advise the Court of the decision to change the trustee during the entirety of these proceedings.

20. Mr. Chapman argues that in principle, privileged material relating to the advice provided by either legal team and, in particular, Leading Counsel (upon whom, he argues, Conyers was entitled to rely) was of potential relevance to the breach of the duty to provide full and frank disclosure. The Court is now informed by the letter from Conyers to Medlands dated 8 December 2020 that in fact "*The duty to return to the Chief Justice was not identified. Conyers believes that the Leading Counsel did not think it necessary. This is based on subsequent discussions with Leading Counsel: his view was that the matter had become inter partes. His submissions (written and oral) to the Court on the return date in February 2020 reflected his opinion on the matter."*

21. However, it does not appear from Conyers' letter of 8 December 2020, that Leading Counsel (or any other member of the wider legal team), was ever asked whether it was necessary for Mr. Gilbert to return to the Court or (if, Mr. Gilbert refused to follow that advice) for Conyers to cease acting. In the circumstances it is difficult to see how Conyers may have relied on the advice from Leading Counsel in relation to this issue.

22. The letter from Conyers provides no further relevant information than already noted in paragraphs 79 and 240 of the Judgment, namely, the decision not to provide the material information in relation to the application to change the trustees of the Brockman Trust was justified upon the legal contention that there was no such obligation once the proceedings became fully *inter partes.*

23. Further, as noted in in paragraphs 80 and 241 of the Judgment, Rule 39 of the Barristers' Code of Professional Conduct 1981 requires a barrister and attorney in Bermuda to *"inform the court of any developments which affect the information already provided*" and provides a statutory base for the obligation of full and frank disclosure in the circumstances contemplated by Rule 39. There is no suggestion that the wider legal team, including Leading Counsel, was asked to give any legal advice, or indeed had the expertise, in relation to Conyers obligations of full and frank disclosure arising under Rule 39.

24. Finally, in relation to the relevance of the wider legal team, it has to be kept firmly in mind, as set out in paragraph 241 of the Judgment, that only Conyers, as attorneys of record in the proceedings before this Court, had the responsibility for ensuring that the duty of full and frank disclosure to the Court was discharged by the client and Conyers. Likewise, only Conyers had the personal responsibility of ensuring compliance with Rule 39 of the Barristers' Code of Professional Conduct 1981. Conyers could not possibly accept advice or instructions from other professional advisors in the team that it did not have to comply with its obligations of full and frank disclosure either under the general law or under Rule 39.

25. In the circumstances, I would have refused leave to appeal if this was the sole ground of appeal on the basis that it has no real prospect of success.

Third Ground: failure to reconsider the finding of negligence

26. Third, Conyers contends that the Court was wrong to refuse to reconsider the findings set out in the draft Judgment in light of the new material presented to the Court by Conyers which Conyers had not been able to deploy prior to the Judgment being provided in draft.

27. In my view the effect of what is said in the Conyers letter of 8 December 2020 appears to be overstated.

28. Firstly, Conyers letter of 8 December 2020 does not state that English Leading Counsel in fact addressed the issue of disclosure to the Bermuda Court or at all. There appears to be no discussion at all as to whether, in light of the express representations made by Conyers to the Court that the purpose of the *ex parte* injunction was to preserve the *status quo* and not to disadvantage Mr. Watlington and Mr. Ferguson, it was necessary to advise the Court of the proposed application in the Trust Proceedings to change the trustee from SJTC to Medlands. It appears that the issue simply was not raised with Leading Counsel or at all during the two-day meeting in London.

29. This is confirmed, as noted earlier, by the Conyers letter which notes that: *"The duty to return to the Chief Justice was not identified. Conyers <u>believes</u> that Leading Counsel did not think it was necessary."* This *belief* is based upon, it appears, the fact that Leading Counsel did not positively advise that Mr. Gilbert and Conyers should return to the Court and advise the Court of the impending application to change the trustees. As Mr. Brownbill noted correctly, Conyers' argument is not that it was positively advised incorrectly, but that English counsel had omitted to answer a question that had never been asked by Conyers. In the circumstances, it cannot reasonably be argued by Conyers that it was relying on advice of English counsel in engaging in conduct which clearly breached its duties to the Court.

30. Secondly, barristers and attorneys practicing before the Bermuda Courts owe duties to the Court including the duty of full and frank disclosure in relation to *ex parte* applications. Those duties are in principle personal duties owed by a barrister and attorney to the Court and are not delegable. In the discharge of those duties, the Court of course accepts that Bermuda barristers and attorneys can, in appropriate circumstances, seek and rely upon overseas Leading Counsel possessing legal expertise not readily available in Bermuda. In that context it is relevant to keep in mind that Bermuda has been a leading jurisdiction for commercial and trust disputes for at least the last 30 years and Conyers has been a leading firm in Bermuda for commercial litigation for the same period.

31. The applications for *ex parte* injunctions and disputes relating to the attendant duty of full and frank disclosure are common applications before the Bermuda courts and do not ordinarily require specialist advice of overseas Leading Counsel. It is to be noted that in this case the failure to return to the Court to advise of the impending application to change the trustee was not justified on the basis of any arcane rule of trust law or procedure but by reference to the ordinary rules relating to the duty of full and frank disclosure in the context of *ex parte* injunctions. It was argued by Mr. Hagen, at the February 2020 hearing, that the duty of full and frank disclosure ceased because the proceedings became fully *inter partes*. As noted earlier, this was a *submission* made by Mr. Hagen in response to the claim that Mr. Gilbert has not complied with his duty of full and frank disclosure to the Court. This *submission* may or may not represent Mr. Hagen's view of the legal position. For reasons set out earlier this was plainly a wrong view of the law in circumstances where Mr. Watlington and Mr. Ferguson did not know and had no means of finding out about the application to appoint Medlands in the Trust Proceedings. As set out earlier, this has been the established position since at least 2004 and is reflected in standard practitioner texts.

32. Thirdly, as noted earlier, Conyers was obliged under Rule 39 of the Barristers' Code of Professional Conduct 1981 to advise the Court of any developments which affected the information already provided to the Court. Conyers had already represented to the Court that the sole purpose of the *ex parte* injunction was to preserve the *status quo* and that Mr. Watlington and Mr. Ferguson would not be disadvantaged by the granting of the *ex parte* junction. The proposed application to change the trustee was clearly contrary to these representations made to the Court. It is not suggested that Conyers sought any advice in relation to its obligations to the Court under Rule 39 or that Leading Counsel had any particular expertise to advise in relation to this particular provision of Bermuda law.

33. In the circumstances, if this was the sole ground of appeal I would have refused on the basis that it has no real prospect of success.

Fourth Ground: failure to particularise the basis of the finding of negligence

34. Fourth, Conyers contends that the Court was wrong not to clarify the basis or bases upon which it found against Conyers. In particular, it is contended that the Judgment does not identify whether Conyers' breach of duty lay in (a) failing to advise Mr. Gilbert of the need to disclose the application to appoint Medlands as trustee in these proceedings, or (b) continuing to act in these proceedings having given such advice and the advice being rejected by Mr. Gilbert.

35. In relation to Conyers duty of full and frank disclosure arising under the general law, the position is set out at paragraph 77 of the Judgment. Conyers was under a duty as soon as the firm became aware of Mr. Gilbert's intention to apply for the appointment of Medlands to inform Mr. Gilbert that these matters must be drawn to the attention of the Court in these proceedings. In the event that Mr. Gilbert refused to follow the advice of Conyers to advise this Court of his intention to apply to appoint Medlands as the successor trustee, Conyers was obliged to cease acting for Mr. Gilbert. At the time of the Judgment, the Court was unaware whether Conyers had advised Mr. Gilbert of his obligation to provide full and frank disclosure to the Court or whether Mr. Gilbert had refused to follow the advice given by Conyers. Accordingly, Conyers duty of full and frank disclosure was expressed on the alternative basis.

36. I accept Cabarita's submission that logically, one of these things must have happened since it is common ground that Mr. Gilbert did not return to the Court before the application to appoint Medlands was heard and neither did Conyers cease to act. It follows that Conyers' conduct was seriously negligent and it was not necessary for the Court to make any determination between the binary alternative forms of negligent conduct in the circumstances.

37. It now appears from the Conyers letter of 8 December 2020 that a decision was taken by the legal team not to advise Mr. Watlington and Mr. Ferguson or the Court of the impending application to change the trustee:*"After debate, it was concluded that SJTC should seek the transfer of the Trust to Medlands. Given the perceived risk to the Trust posed by the new directors, whose motives were unknown, it was clear to the team (including Leading Counsel) that they could not be informed."* On the basis of the letter from Conyers it would appear that Conyers' breach lay in the failure to advise Mr. Gilbert to make the appropriate disclosure to the Court in these proceedings. As noted earlier this position was subsequently justified on the basis of the legal contention that the obligation to give full and frank disclosure to the Court and the other parties ceased once the proceedings became fully *inter partes*. For reasons set out earlier, this was plainly a wrong view of the law in circumstances where Mr. Watlington and Mr. Ferguson did not know and had no means of finding out about the application to appoint Medlands in the Trust Proceedings. Again, as set out earlier, this has been the established position since at least 2004 and is reflected in standard practitioner texts.

38. In the circumstances, if this was the sole ground of appeal I would have refused leave on the basis that there was no real prospect of success.

Fifth Ground: issue of causation

39. Fifthly, Conyers contends that the Court was wrong to find that any breach of duty to the Court by Conyers had caused the First, Second and Third Defendants to incur costs which would otherwise have been avoided. Conyers contends that even if the Court had been advised of the impending application to change the trustee in the Trust Proceedings that Mr. Watlington and Mr. Ferguson would not have been in a position to discontinue these proceedings until the issue of their authority had been determined by this Court. Accordingly, it is contended, that an *inter partes* determination of the validity of the appointment of Mr. Watlington and Mr. Ferguson was always required in any event and as

a result the necessary element of causation for an order to be made against Conyers cannot be established.

40. In paragraph 244 of the Judgment the Court accepted Mr. Brownbill's submission that the likely effect of the discharge of the injunction would have been that Mr. Watlington and Mr. Ferguson, as the majority directors of SJTC, would have disavowed these proceedings and the proceedings would have been discontinued. On that basis the *inter partes* hearing in February 2020 would have been entirely unnecessary and would not have taken place. I consider that to be the likely outcome in those circumstances (see paragraphs 43-44 below).

41. Even assuming that Mr. Gilbert would continue with these proceedings after the discharge of the injunction there would still be considerable savings in the costs incurred in these proceedings. In those circumstances it would have been unnecessary to spend any further time or resources in pursuing the application to set aside or vary the injunction because the injunction would already have been discharged by the Court. The application to discharge/vary the injunction occupied a substantial proportion of the parties' preparation and submissions at the hearing. A considerable amount of time was spent exploring the issues as to full and frank disclosure, the jurisdictional basis for granting such an injunction and the proper scope of the injunction. In the circumstances, to apportion 30% of the costs incurred during the period 3 December 2019 and 26 March 2020 is a reasonable estimate of the costs incurred in relation to the issue of discharge of the injunction.

42. Mr. Chapman points to the earlier passage in paragraph 75 of the Judgment where the Court stated that had the Court been advised of the pending application by SJTC to change the trustee prior to the *inter partes* hearing it is likely that the Court would have required SJTC to either agree to postpone the successor trustee application after the *inter partes* injunction or to accept that the *ex parte* injunction be discharged immediately. He argues that if the application to change the trustee had been adjourned, these proceedings would have been conducted in exactly the same way with same costs. In the circumstances, he submits, if

there is any doubt as to whether any additional costs would have been incurred that weighs heavily against an order being made against Conyers.

43. In considering the issue of causation the Court takes a practical and realistic view of these injunction proceedings and related application to remove SJTC as the trustee of the Brockman Trust and appoint Medlands as the successor trustee. The purpose of both proceedings was to achieve the same object, namely, to ensure that Mr. Watlington and Mr. Ferguson (and Mr. Tamine) had no role to play in the administration of the Brockman Trust, as representatives of its trustee. In the injunction proceedings this was sought to be achieved by seeking a declaration that Mr. Watlington and Mr. Ferguson were not properly appointed as directors of SJTC and in the Trust Proceedings the same object was sought to be achieved by removing SJTC as the trustee. Had the Court been advised of the application to remove SJTC in the Trust Proceedings on 3 December 2019, the Court would not have considered it appropriate that Mr. Watlington and Mr. Ferguson should be restrained from participating in that application and would have discharged the injunction. As noted above, such an application would clearly be in breach of the representation made by Conyers that the purpose of the *ex parte* injunction was to preserve the *status quo*.

44. The practical effect of the discharge of the injunction would have been that any continued participation of SJTC (and by extension Mr. Watlington and Mr. Ferguson) would be determined in the Trust Proceedings with all relevant parties before Subair Williams J. On the basis that Subair Williams J made the same Order as 19 December 2019, which was reconfirmed in the Judgment of Subair Williams J dated 23 July 2020, the continuation of the injunction proceedings would have served no practical purpose and would have been entirely academic, as far as the interests of the Brockman Trust are concerned. No doubt the majority directors of SJTC, Mr. Watlington and Mr. Ferguson, would have taken the opportunity to disavow the injunction proceedings in those circumstances. In the circumstances the likely result of the Court being informed on 3 December 2019 that Mr. Gilbert, in the name of SJTC, intended to make an application in the Trust Proceedings to

change the trustee, would have been that the February 2020 strike out hearing would have been avoided.[2]

45. However, for the purposes of this application, I accept that it cannot be said that this ground of appeal has no real prospect of success, particularly in relation to the estimation of 30% of the costs incurred in relation to the discharge of the injunction. In the circumstances, I would give leave to appeal in relation to this ground of appeal.

Conclusion

46. In the overall consideration of this application, there is one additional consideration which militates in favour of granting leave to appeal. An appeal in respect of an order for costs requires leave of the Court even if the order is made against a non-party including wasted costs orders against barristers and attorneys. Such orders are capable of imposing substantial financial burdens on non-parties including attorneys. Wasted costs orders against attorneys may also reflect adversely on the professional reputation and standing of the attorneys concerned.

47. The former English Order 59/1B (1)(b) provided that orders "*relating only to costs which are by law left to the discretion of the court or tribunal"* require leave to appeal. However, it seems that this requirement for leave has never applied to non-party costs orders or to "*wasted costs*" orders. In the *1999 White Book* the position is summarised at volume 1, 59/1B/11:

> *"Rule 1B(1)(b) does not apply to an appeal against a "wasted costs" orders (Thompson v Fraser [1986] 1 WLR 17 CA), nor to a costs order made against a non-party (Re Land and Property Trust Co plc [1991] 1 WLR 601 CA). Accordingly leave*

[2] It seems that the February 2020 hearing relating to the validity of appointment of Mr. Watlington and Mr. Ferguson proceeded due to potential challenge to the Order of 19 December 2019 in the Trust Proceedings based upon, *inter alia*, Mr. Gilbert's and Conyers' lack of authority to represent SJTC in the Trust Proceedings.

to appeal would not be required under r 1B(1)(b) in respect of an appeal against an order for costs made against a non-party by virtue of the decision in Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965. It is submitted that a person is a non-party for these proceedings only if he is not a party to the action or other proceedings and has not made any application to the court below in the proceedings or any relevant part of the proceedings."

48. In *Thompson v Fraser* [1986] 1 WLR 17, the Court of Appeal (Sir John Donaldson MR, Parker LJ and Croom-Johnson LJ), dealing with an appeal in relation to a wasted costs order stated: *"We are unanimously of the view that an appeal in such circumstances does not relate only to costs or, indeed, primarily to costs; it relates to the conduct of the solicitor. In those circumstances, section 18(1)(f) has no application."*

49. Having regard to the potential adverse effect of a wasted costs orders on the professional reputation and standing of the barristers and attorneys concerned, the Court should, as a matter of practice, lean in favour of allowing a wasted costs order to be reviewed by the Court of Appeal unless the appeal is obviously hopeless. This is on the basis that such an appeal is not only concerned with costs but inevitably with the conduct of the barrister and attorney concerned.

50. I have already held that the ground of appeal relating to causation is an arguable ground of appeal, in the sense that it cannot be said that it has no real prospect of success, and would give leave to appeal on that ground. Given that the Court of Appeal will be asked to look at an aspect of the Order made against Conyers, I do not consider it appropriate to restrain Conyers from arguing the other grounds of appeal, despite my own view that those other grounds have no real prospect of success and I have sought to explain my reasons for taking that view. The end result is that I am content to give leave to Conyers to appeal against my decision in relation to wasted costs as set out in the draft Notice of Appeal.

51. Following the circulation of the draft Ruling to Counsel for the parties, the Court received a letter from Counsel for Cabarita advising that Cabarita will shortly issue a summons seeking a declaration that Medlands has waived privilege in relation to the breach of duty issue and an order for discovery by Conyers in relation to that issue. Cabarita anticipates that this issue is likely to be raised by Conyers in its appeal before the Court of Appeal. In order to ensure that the appeal progresses in an orderly manner, Cabarita invites the Court to determine Cabarita's summons before any order granting Conyers' leave to appeal takes effect so that Cabarita can rely on any material that Conyers may be ordered to provide for the purposes of any Respondent's Notice and in its submissions to the Court of Appeal.

52. Having considered this issue, I consider it unnecessary to defer the handing down of the Judgment until Cabarita's summons has been determined or by making an order delaying the granting of leave from taking effect until Cabarita's summons has been determined. The hearing of the appeal in this matter is unlikely to take place before the June 2021 Court of Appeal session. Any application by Cabarita in relation to this issue can be determined on an expeditious basis prior to the June 2021 session. In this regard I note that the application will be opposed by Conyers including on the basis that the Court no longer has the jurisdiction to entertain this application.

Dated this 24th day of February 2021

NARINDER K HARGUN

CHIEF JUSTICE