IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD ___

IN THE MATTER OF THE TRUSTS DEED DATED 21ST NOVEMBER 1985
AND MADE BY A.B. Snr.
AND
IN THE MATTER OF THE TRUST LAW (2001 REVISION)

BETWEEN	1.	A.B. Jnr.	
	2.	Mme B.	PLAINTIFFS
AND	1.	M.B.	
	2.	Ab.B.	
	3.	J.de.R.	
	4.	K.B.	
	5.	J.R.	DEFENDANTS

IN CHAMBERS
THE 15TH FEBRUARY 2013 AND 14TH JUNE 2013
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. John Machell QC instructed by Mrs. Linda DaCosta of Conyers Dill and Pearman for the Plaintiffs.

Mr. Christopher Nugee QC instructed by Ms. Lindsay Luttermann of Walkers and Ms. Ziva Robertson of Withers London for the 1st-3rd and 5th Defendants

Mr. Christopher Tidmarsh QC instructed by Ms. Lindsay Luttermann of Walkers and Ms. Ziva Robertson of Withers London for the 4th Defendant

RULING AS TO COSTS

1. The trial of the claim and counterclaim it this action spanned some nine weeks from April to June of 2012 resulting in a lengthy judgment delivered, with mixed outcomes, on 13th August, 2012.

2. The issue now before the Court is what, if any, order should be made for the costs of the action.

3. All sides agree that in keeping with Grand Court Rules Order 62, the award of costs is a matter to be decided in the discretion of the Court.

4. All sides agree that for the purposes of the exercise at hand, the action may be compartmentalized under three main heads or groups of issues; all as more fully identified and explained in the judgment of 13th August 2012:

   (1) The Plaintiffs' joint claim for breach of trust against the first three Defendants who at all material times were the Trustees; the claim itself involving four sub-issues:

      (i) what was the nature of the duty alleged to have been breached by the Trustees;

      (ii) was there in fact a breach of duty;

      (iii) the nature of the defence to the alleged breach;

      (iv) whether the Trustees were entitled by virtue of provisions of the Trust Deed, to be relieved from liability for the alleged breach

   (2) The 4th Defendant's (KB's) counterclaim alleging that Mme B (the 2nd Defendant) had forfeited her interests under the Trust and so had no standing

to bring a claim for breach of trust - all the consequence of her having allegedly acted in breach of the so-called "No Contest" provisions of the Trust Deed - in the manner of her earlier challenge to the proprietary rights of the Trust and the actions taken by the Trustees to protect those rights.

(3) The Equitable Defence raised by the Defendants to the Plaintiffs' claim (and entirely abandoned as against the First Plaintiff A.B. Jnr. only as late as after commencement of the trial):

(i) Affirmation or Election;

(ii) Estoppel

(iii) Laches/Acquiescence

5. Those being the three main groups of issues, it is also agreed between the parties that the costs of the action, however they are to be awarded, may be apportioned expressed as percentages as follows:

Breach of Trust	-	80%
Forfeiture	-	15%
Equitable Defences	-	5%

6. I adopt these apportionments as being a fair representation of the incidence of the costs incurred on all sides in the action.

7. While it was the subject of argument whether the costs jurisdiction here is as yet as wide or as specifically defined as it now is n England and Wales under the Civil Procedure Rules there, all sides are agreed that the jurisdiction under GCR Order 62 is wide enough to allow for different approaches to be taken to the award of costs; allowing for either or a combination of the following:

(i) an order for costs to follow the event;

(ii) a proportionate order having regard to the eventual outcomes of each of the three main groups of issues;

(iii) an order based even more specifically upon the outcome of each issue.

8. Mr. Machell proposed that the order I make should be one that the defendants pay the Plaintiffs' costs but Mme B pays the costs of the Defendants on the Equitable Defence issue – the only issue on which either of the Plaintiffs (viz: Mme B herself) lost. He proposed further that if I should decide to discount the costs awarded to the Plaintiffs, then the discount should be no more than necessary to reflect the costs incurred by the Defendants in their successful presentation of the Equitable Defences as against Mme B's claim.

9. Thus as the apportioned costs of the Equitable Defences is 5% of the total, she would bear 2.5% of those costs and actually pay the other 2.5% to the Defendants Trustee. In that event, A.B. Jnr. would pay no costs. As he was entirely successful the entirety or a large proportion of his costs should be awarded to him. At all events, there should be a significant net payment of costs in favour of the Plaintiffs.

10. Mr. Nugee QC for the Defendant Trustee and Mr. Tidmarsh for the 4th Defendant both argued for an order that costs follow the event of the outcome of the trial.

11. This would mean that as on the breach of trust claim Mme B was entirely unsuccessful (she was barred by the Equitable Defences successfully raised by the Defendants) the Defendants should get their costs of defending her claim; they should get all the costs of raising their defences.

12. As to A.B. Jnr.'s claim, though it was successful in establishing a breach of trust that was only the narrowest of bases as explained in the judgment of 13th August, 2012 – not justified by the allegations of deliberate or dishonest breaches which he alleged.

13. Moreover, as to quantum he succeeded for only 17.5% of his claim – USD6.5 million as against a claim for USD43 million (USD64 million when combined with Mme B's unsuccessful claim).

14. A great deal of time and costs were spent in preparation for trial and at the trial itself on the issue of the Trustees' liability which need not have been spent and on quantum so as to enable the court to arrive at the correct amount. This latter point on quantum having regard in particular to the unsuccessful raising by the Plaintiffs of the so-called "alternative transaction" basis for the computation of their claim.

15. So, says, Mr. Nugee, I should regard one plaintiff as being wholly unsuccessful and one plaintiff, although successful in recovering compensation, as having succeeded in doing so as to less than one-fifth of his claim.

16. He submitted that the court should take the principled approach, in the words of Order 62 rule 4(5) – the Court shall order costs to follow the event. This is "the primary rule" not to be departed from in the absence of a particular set of circumstances justifying another form of order. This is not such a case he said: the event is readily discerned and understood – A.B. Jnr. was only partially successful in his claim both as to liability and quantum, with the Defendant Trustees being more than 80% successful in defending against them. His mother, Mme B was totally unsuccessful. Those are the events to be followed in the award of costs.

17. Given that GCR O.62 r.4(5) still reflects virtually word for word the old Rules of the Supreme Court Order 62 r.3.3 (despite changes to other aspects of the Cayman rules); Mr. Nugee, supported by Mr. Tidmarsh, submitted that the law as it applied pre-CPR in England, should guide the exercise of my discretion now. The CPR were intended to be a "fresh start" in England and allow for a less stringent and different approach than the GCR O 62 r 4 (5) and the old RSC – both of which in identical terms state that the Court shall order costs to follow the event except *"when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

18. Elaborating upon these submissions on behalf of the 4th Defendant who brought the counterclaim to Mme B's claim (and so being responsible for raising the specific issue of forfeiture (which failed) and the Equitable Defences (which succeeded as against her), Mr. Tidmarsh says that the counterclaim should in reality be regarded as a defence to Mme B's claim. As she failed entirely in her claim, she should pay not only the costs of defending against her claim but the entire costs of the counterclaim as well. The issues based approach would not be appropriate as Mme B won no discrete issue.

19. He argued that there were at least two good reasons why the counterclaim was brought by the defendant K.B. and not by the Trustees themselves:

    (1) The Trustees did not want to take the forfeiture point. The Trustees must maintain an even hand as between all beneficiaries and it was not their view that they should seek to deny an apparent beneficial entitlement. By contrast K.B. as a beneficiary himself and appointed in a representative capacity to

represent the interests of all beneficiaries who could not represent themselves, was bound by no such conflict of interest or general duty.

(2) Moreover, K.B. was not a party to the 1999 Settlement Agreement between the Trustees and the Plaintiffs by which it had been intended that their interests be bought out from the Trust, nor a party to the still earlier 1994 Protocol by which it had been intended that the challenges then raised by Mme B against the Trust and Trustees be resolved. Not having been a party to either of those arrangements his counterclaim, especially that aspect by which he raised the argument that Mme B had forfeited her beneficial interests under the Trust, was thought not to have been precluded by them.

While the counterclaim for forfeiture was not successful, the counterclaim for the Equitable Defences was. Mme B lost – she should therefore pay K.B's cost of the claim and counterclaim.

20. Mr. Tidmarsh relied upon the following passage from ***Baylis Baxter Ltd. v Sabath [1958] 1 W.L.R. 529 at 538*** (per Parker LJ) where that learned judge was delivering judgment from an appeal against a judgment in which the judge found for the plaintiffs on both the claim and counterclaim:

> *"Finally, Mr. McDonnell counsel [for the plaintiffs] pointed out, with some force, that in regard to the counterclaim at any rate Poppers's evidence [the plaintiff's main witness] was wholly accepted, whereas the defendant's evidence was wholly rejected; and in the circumstances he says that there could be no material upon which the judge could deprive the plaintiffs of the costs of the counterclaim.*

I think that...in a case such as this, where the counterclaim amounts to an equitable set-off, it is only right that the judge should deal with the claim and cross-claim as one, and looked at in that way it seems to me that no valid distinction can be drawn between the way in which he should exercise his discretion in regard to the claim and in regard to the counterclaim."

21. Mr. Tidmarsh argued that that principle applies equally where, as here, a counterclaim amounts to a defence as it does where a counterclaim amounts to a set-off.

22. I agree with this proposition as a matter of principle and proceed on the basis that any costs award to which Mme B may be entitled could be set-off as against any costs she could be ordered to pay on the counterclaim.

23. I note here as well, that I was informed at the conclusion of this cost hearing that the Plaintiffs gave instructions to Mr. Machell that any costs found in favour of the Defendants (or any of them) may be set off as an accounting exercise as against Mme B and A.B. Jnr. together, should the court order a set-off.

24. It has also been explained that any order for costs made against the Defendants or any of them will be met from the Trust Fund.

25. As to the specific question of the nature of the costs jurisdiction, I recognise its wide discretionary nature given in the GCR notwithstanding the mandate of rule 4(5) that costs shall follow the event. The real task for the court here is to identify what the real event or outcome was and to reflect that in terms of a fair award of costs and it is in that regard that the rules are meant to be flexible, allowing for a wide discretion.

26. It is in this light that it should be observed that notwithstanding the retention of the old wording in rule 4 (5), GCR Order 62 was amended to bring them more expressly, if not exactly, in line with the modern English rules by inter alia the following sub-rules 4(2) and (7):

> *"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court....*
>
> *(7) The orders which the court may make under this rule include any order that a party must pay –*
>
> *(a) a proportion of another party's costs;*
>
> *(b) a stated amount in respect of another party's costs;*
>
> *(c) costs from or until a certain date only;*
>
> *(d) costs incurred before proceedings have begun;*
>
> *(e) costs relating to particular steps taken in the proceedings;*
>
> *(f) costs relating only to a distinct part of the proceedings; and*
>
> *(g) interest on costs (at the prescribed rate for Cayman (Islands dollars) from or until a certain date, including a date before judgment."*

27. It seems plain enough to me from paragraphs (a) and (f) in particular, that either a costs order that is proportionate or one based on the issues may be made.

28. To summarize the foregoing, I accept Mr. Machell's submission that the objective is (of course) to make an order that is just given the outcome of the proceedings and the conduct of the parties. Whilst the starting point is that costs follow the event, the Court will make a different order where justice requires. In particular, the Court will consider whether it is appropriate to make an order by reference to the outcome of the various issues within a case, either by making an issues based order or by ordering that a party pay a proportion of another party's overall costs ("a proportionate order").

29. I believe there is ample and authoritative support for the application of the foregoing summary of principle in this case, to be found in the pre-CPR case law, assuming, which I doubt, that the GCR O. 62 jurisdiction for the award of costs is more restricted than that under the CPR in England and Wales on account of the primary rule under the GCR that costs should follow the event.

30. I need do no more to illustrate this belief than to refer to the decision of the English Court of Appeal in ***Re Elgindata Ltd. (No. 2) [1993] 1 All. E.R. 232*** as taken from the head note:

> *"The principles on which costs were to be awarded were*
>
> *(i) that costs were in the discretion of the court;*
>
> *(ii) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made;*

(iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and

(v) that where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs. The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs...."

31. Further recognition of the power to award costs on the basis of a proportionate order is found in the decision of this Court given in ***R v Immigration Board, ex. p. , Kirk Freeport Plc Ltd. and Island Cos. Ltd. 1996 CILR Note 1.***

Disposition

32. As noted above, the award of costs in this case should reflect the real nature and outcome of the case and the conduct of the parties.

33. A.B. Jnr. was the only party who obtained success but only to the much narrower extent than he claimed.

34. His claim was far more ambitiously presented – both as to liability and quantum – than was justified.

35. Much more time and expense was spent by the Trustees in defence of his claim than would otherwise have been spent had his allegations of breach of duty and damages been presented on the more reasonable bases they should have been.

36. As a successful plaintiff, A.B. Jnr. is entitled to a net payment of costs in his favour from the Trustees but one that fairly reflects the time and expense that should properly have been taken for its successful presentation to the Court.

37. Mr Machell argued without demurrer from the Defendants that the costs of presenting the breach of trusts claim was incurred by the Plaintiffs in common. I accept that this must have been so, given the commonality of the issues raised and of the evidence and arguments presented on their case. Thus the costs incurred would have been the same whether or not Mme B's claim was successful, which in the event it was not. The vice of the claim having been too widely casted is not to be ascribed simply to her involvement.

38. I conclude, having regard to all the foregoing, that A.B. Jnr. should receive from the Trustees forty percent of the costs incurred in the prosecution of the breach of trust claim, such costs to be taxed if not agreed and paid from the Trust Fund.

39. Mme B's entirely unsuccessful participation further contributed significantly to the complexity and expense of the litigation, but only insofar as it was necessary to raise the Equitable Defences against her. The discount to A.B. Jnr.'s costs necessarily reflects any discount to be applied because of the over-complexity of the breach of trust claim for which Mme B may have been responsible.

40. With all such considerations in mind, I conclude that she has no entitlement to an award of costs but should contribute to the Defendant's costs of defending against her claim which was entirely unjustified.

41. Significant costs were however incurred in the unsuccessful raising of the forfeiture claim against her. It is only fair that her costs in that regard should be at least off-set in part against costs she must pay to the Defendants.

42. The order is that she (but not A.B. Jnr.) should pay the Defendant's costs of the Equitable Defence issues raised in the Counterclaim. Given the percentage apportionments identified above, those costs should be no more than 5% of the Defendants whole costs of the action. As she won on the forfeiture issue, in my view a fair order is that she should pay 2.5% of the Defendants' cost.

43. While she and A.B. Jnr. would have each contributed to (and on the Plaintiffs' side incurred) one-half of those costs in the presentation of their claims in common, the net effect is that she alone should pay them , to be taxed if not agreed.

Indemnity Costs

44. It is common ground that I should make an award of indemnity costs in favour of the Plaintiffs in connection with the late disclosure given by the Trustees during the trial.

45. The dispute is whether the order should apply to:

(a) the period from Wednesday 17 May to Wednesday 23 May 2012 (inclusive) all of which, as the Plaintiffs argue, was taken up as additional time for the disclosure issue; or

(b) three days in court, namely Wednesday 16th May, Friday 18th May and Tuesday 21st May 2012, as the Defendants argue was all that was necessary.

46. While I accept that the late disclosure would have caused the Plaintiffs to undertake significant additional work during the period of the trial outside Court hours, as the trial judge my assessment is that less than the additional four days out of Court was necessary. I consider that an additional two days out of court would have been reasonably necessary.

47. I therefore award the Plaintiffs indemnity costs for five days in respect of the late disclosure issue.

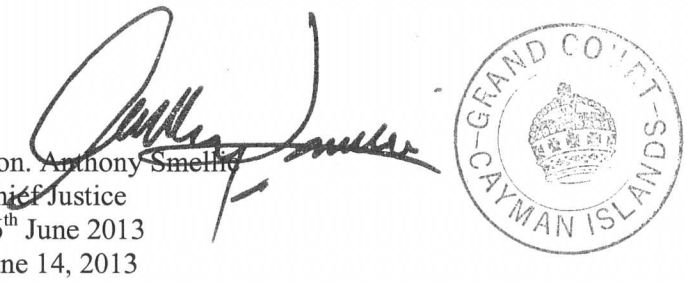
Security for Costs

48. A total sum of USD5 million was ordered to be provided by the Plaintiffs as security for costs. That sum has been held in escrow by a local bank as required by the order.

49. As there will be a net payment of costs by the Trustees to A.B. Jnr. and as it is obvious that the payment to be made by Mme B to the Defendants will be less than that to be paid to A.B. Jnr. who agreed that an award against his mother may be offset

as against an award to which he may be entitled, it follows that the security paid in may now be released.

50. It is so ordered.



Hon. Anthony Smellie
Chief Justice
16th June 2013
June 14, 2013