COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2015/CLE/gen/00341

BETWEEN

ASHLEY DAWSON-DAMER

Plaintiff

AND

GRAMPIAN TRUST COMPANY LIMITED

First Defendant

AND

LYNHURST LIMITED

Second Defendant

Before Hon. Mr Justice Ian Winder

Appearances: Sean McWeeney QC with John Minns for the Plaintiff

Brian Moree QC with Sean Moree for the Defendant

8 February 2019

RULING

WINDER, J

This is an application by the plaintiff (Ashley) for the defendant (Grampian) to account for its administration of certain trust assets.

[1.] The background to this dispute is carefully set out in my 3 December 2017 decision concerning other aspects of this action. In summary, the plaintiff was a beneficiary of a discretionary family trust of which Grampian was the trustee. The plaintiff was excluded from distribution of the trust funds and took action against Grampian alleging breach of duty in failing to give her interests reasonable consideration and in adopting a policy that she would not benefit under the settlement. Grampian denies the allegations.

[2.] The pleadings are now effectively closed. Ashley has applied for Grampian to provide accounts in a Summons dated 19 July 2018. The Summons seeks an Order:

> *"pursuant to the inherent jurisdiction of the Court that the defendant produce an Account of the property subject to the trust of the Glenfinnan Settlement possessed and received by the Defendant as the trustee of the settlement or by any other person or persons by the order or for the use of the Defendant and of the dealings of the Defendant therewith, such Account to fully particularise all assets, liabilities, income, expenditure directly or indirectly held, received or incurred by and on behalf of the Settlement."*

[3.] The application is supported by the several affirmations of Ziva Robertson filed on behalf of Ashley. Ashley says that on 16 February 2018, her attorneys wrote to Grampian and put them on notice that the paucity of information contained in the Glenfinnan annual accounts amounted to a breach of the trustee's duty to account to the beneficiaries for its dealings with the trust assets. In its initial response to Ashley's letter, Grampian acknowledged an obligation to account for trust expenses and indicated that it would seek to obtain from the company's accountant

a schedule of Glenfinnan's trust expenses charged to the company since 1992 and would provide it in approximately 2 weeks.

[4.] The promised material was not produced up to the time of the making of the application. Subsequently some material was provided to Ashley. Ashley continued to be dissatisfied with the level of accounting provided and says that she "seeks this information in sufficiently clear, precise and granular detail to determine whether these fees and expenses were reasonably and properly incurred and attributed or charged to the Glenfinnan Trust in correct proportions." Grampian says that the time estimate originally given by its attorneys was a gross underestimation of the sheer magnitude and breath of Ashley's request and their promise did not include the level on detail now demanded by Ashley. Grampian says that the accounting request involves 26 years of financial records in respect of a complex trust structure involving numerous levels and multiple companies. Grampian says that it tried to, ex post facto, break out these expenses in a way which they thought would be helpful to Ashley even though they did not have to do so.

[5.] Grampian says that it has now provided Ashley with annual trust accounts with respect to the Glenfinnan Settlement for the annual accounting periods from 1993 to 2017. Additionally, she was provided with financial statements for the entire duration of trust beginning in 1992.

[6.] Grampian denies any breach of its obligation to account to Ashley but says that as trustee of the Glenfinnan Settlement it has fully discharged its duty to account to Ashley and indeed on an entirely voluntary basis has gone beyond what she was entitled to as a discretionary beneficiary. Among its arguments in response, Grampian says that as the expenses that are being queried were paid by underlying companies and not by the trust itself, there is no duty to account for those expenses which they described as "companies expenditure". In particular Grampian says at paragraphs 17, 19 and 20 of its submissions:

17. Ashley's present Account Summons is misconceived because it proceeds on the premise that Grampian, as trustee of Glenfinnan, has a duty to account for expenditure incurred by companies, not by Grampian itself, even though Grampian is no more than an indirect minority shareholder in the company that has incurred the expenditure. That premise is incorrect in principle.

...

19. Ashley seeks an account of expenditure for trustee and protector fees, legal fees, directors' fees, accountancy fees, family adviser fees and family adviser travel expenses. These expenses were paid by subsidiary companies, not by Grampian. The fees and expenses of the family advisers (on which Ashley's complaints appear to fasten) were chargeable to and paid directly by subsidiary companies in respect of services provided to the structure.

20. As trustee of Glenfinnan, Grampian owns only a 2% shareholding in the structure.

[7.] Grampian also takes the preliminary objection that there is no foundation for an application for an account as the Summons is being pursued by way of an interlocutory application in a larger writ action to which questions of accounting are wholly irrelevant. It argues that the 2015 Writ Action only seeks orders to set aside certain appointments made by Grampian in 2006 and 2009 and to remove Grampian as trustee of Glenfinnan. They also say that Ashley's case is fully set out in her pleadings, from which it is abundantly clear that Grampian's removal is sought *only* on the basis that the 2006 and 2009 Appointments were made invalidly and in breach of trust.

[8.] Grampian points to Ashley's new action commenced on 3 October 2018, by Originating Summons against Grampian and the two protectors of Glenfinnan, in which she seeks the removal of Grampian as trustee. In that new action Ashley says that "*whilst she also seeks the removal of Grampian as trustee in the* 2015 Writ Action, *she bases the new claim on entirely different grounds that have arisen more recently*..." She asserts that one of the four new grounds for removal is

"Grampian's failure in its duty to maintain adequate trust accounts reflecting Trust expenditure including its own fees and expenses charged to the Trust fund".

[9.] Ashley, relies on the case of ***A-G v Cocke at al*** **[1986 A. No. 6085] - [1988] Ch. 414,** and ***Wingate v Butterfield Trust (Bermuda) Ltd***. In ***AG v Cocke et al*** (as reflected in the headnote) the second defendant, Albert Kantor, appealed against the order of Master Dyson made on 13 August 1987 whereby he dismissed an application by the second defendant to vary or discharge the order made by the master on 16 July 1987 which, pursuant to an action brought by Her Majesty's Attorney General seeking injunctions to restrain the first defendant, Marjory Cocke, and the second defendant, from dealing with the property held by them as trustees on charitable trusts set out in the will of Henry Scipio Reitlinger ordered, inter alia, certain accounts and inquiries to be taken in relation to the testator's estate and reserved to the second defendant the right to apply to have the order varied or discharged on the ground that he was entitled to rely on the provisions of the Limitation Act 1980. On 5 November Harman J adjourned the hearing, which had been commenced in chambers, into open court. According to **Harman J**, at page 420 of the decision:

> "It has always been the law that persons in a fiduciary position are bound to account to those for whom they are fiduciary...and who have been held liable to account and liable to a summary account under RSC Order 43, a procedure which is often resorted to."

[10.] Ashley says that the application may be made under the inherent jurisdiction of the Court. She relies on the case of ***Wingate v Butterfield Trust (Bermuda) Ltd***. In **Wingate**, at paragraph 20 of the decision, **Bell J** stated:

> 20. It does seem to me that the basis for a court to order an account in common form at the behest of a discretionary beneficiary must be undertaken on the basis of the court's discretion, on a consideration of all the relevant facts, where the court comes to the view that such is necessary in a context of the court's jurisdiction to supervise the administration of a trust.

Further, at paragraph 28.

> 28. It does seem to me that the plaintiff may have taken on a greater burden than necessary in making his application in the context of a summary judgment application, but it also seems to me to be right that he should not be prevented from securing relief to which he might otherwise be entitled by reason of the particular procedure followed, on the basis of an argument that the issue should be approached with the strict principles of Order 14 RSC in mind. Clearly, the court does have the jurisdiction to make orders for disclosure in the exercise of its supervisory jurisdiction in the administration of a trust, and to do so on an interlocutory basis. In those circumstances, it seems to me to be right to deal with matters on such basis, and not to penalize the plaintiff for any procedural error which he might have made (and I see no reason to decide whether he has in fact done so). I would propose to treat the application as if regularly made on an interlocutory basis, inviting the court to exercise the supervisory jurisdiction which it clearly has.

[11.] Further, Ashley says, "Grampian suffers no prejudice whatsoever from the account summons being disposed of in the context of this action as opposed to the context of the 2018 action. The evidence, points of law, the submissions available to the trustees are all identical. It is notable, that Grampian has not sought to suggest that there would be any such prejudice.... no injustice has been caused and any procedural irregularity can and should be cured under the court's jurisdiction. In this regard the court has an inherent jurisdiction to cure procedural irregularities. And this is reinforced by Order 2 Rule 2."

[12.] Ashley also complains that the objections were never made timely and that the point was only taken the day before the scheduled hearing in January. Ashley also comments that it is unbecoming that any trustee that would even raise such a purely formal point in the first place.

[13.] Order 43 of the RSC provides:

> 1. (1) Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.
>
> (2) An application under this rule must be made by summons and, if the Court so directs, must be supported by affidavit or other evidence.

(3) On the hearing of the application, the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order than an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

2. (1) The Court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.

(2) Every direction for the taking of an account or the making of an inquiry shall be numbered in the judgment or order so that, as far as may be, each distinct account and inquiry may be designated by a number.

...

(emphasis added)

[14.] Paragraphs 48 and 49 of the (Amended) Statement of Claim provides:

The Defendant's duties

48. As trustee of the Settlement, when considering the exercise of its dispositive powers under the Settlement, and when exercising them the Defendant owed *inter alia* the following duties to the Plaintiff:
    a) to exercise its powers only for a proper purpose;
    b) a duty to give genuine and responsible consideration to the exercise of its powers;
    c) a duty to inform itself as to matters material to the decision to be made;
    d) a duty not to take into account any irrelevant matters when making its decision;
    e) a duty to act even-handedly and fairly as between the competing beneficiaries and not to discriminate unfairly or improperly against one in favour of another;
    f) a duty to exercise their powers by reference to the facts and circumstances pertaining at the time of exercise and not to decide to exercise those powers (or not exercise those powers) in any particular way in advance; and
    g) a duty to act reasonably.

Breaches of Duty

49. In the premises, when exercising the 2006 Appointments and/or the 2009 Appointment the Defendant failed to exercise its discretion fairly, properly, reasonably or even-handedly and in particular it has breached its aforesaid duties in that it wrongfully:
    a) unfairly discriminated against the Plaintiff by adopting a policy that she would not benefit under the Settlement and took that policy into account when considering how to exercise its fiduciary discretionary powers under the Settlement;

b) failed to give any or any proper consideration whether provision ought to be made for the Plaintiff from the Settlement whether at that time or in the future;
c) failed to make any enquiries of the Plaintiff as to her financial needs and wishes (or obtain such information elsewhere) before making a decision;
d) failed to take into account the Plaintiff's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the Appointments were made and in particular George's children and remoter issue for whom ample provision (greatly exceeding any provision that had previously made for the Plaintiff) had already been made;
e) failed to take into account that by the time of the 2009 Appointment that the result of the 2006 Appointments was that George's children and remoter issue were the beneficiaries under the 2006 Settlements which already had substantial value and that there was therefore no need to make the 2009 Appointment in their favour;
f) took into account the personal views of its directors and the Trust Advisers (sic) towards the Plaintiff (which were hostile) and allowed itself to be influenced thereby;
g) failed to take into account the legitimate and reasonable expectation of the Plaintiff that the Defendant would not appoint almost the entirety of the trust fund of the Settlement to her exclusion without giving her the opportunity to make representations to it concerning her current and future financial needs;
h) applied a requirement that the Plaintiff should be required to demonstrate serious financial hardship before being able to benefit, a standard that was not applied to the other beneficiaries (and in particular George's children) who by the time of the 2009 Appointment were already beneficiaries of settlements with a far greater value than the funds remaining comprised in the Settlement;
i) failed to take account of the need for the Plaintiff to make proper provision for her children;
j) inappropriately and deliberately preferred the interests of one class of beneficiaries over another from an early stage, and overlooked the fact that the apparent "*equality*" between George and the Plaintiff was illusory as a result of the exclusion of the Plaintiff's children from the class of beneficiaries under the Settlement;
k) made appointments in favour of settlements governed by the law of Bermuda the effect of which was to confer benefits on *inter alia* George's adopted issue whilst failing and/or refusing to consider whether to make provision for John's adopted issue in a similar way;
l) purportedly decided by 2004 that the Plaintiff would not benefit from the Settlement (despite her remaining a beneficiary) and thereby wrongfully closed its mind to the interests of the Plaintiff and the question of whether she should benefit from any exercise of

discretion under the Settlement thereby effectively (and improperly) limiting the scope of the powers conferred on it;

m) alternatively, exercised its powers for the ulterior and improper purpose of excluding the Plaintiff from benefiting from the vast bulk of the trust fund, having determined not to exercise its power to exclude the Plaintiff from the class of beneficiaries on the grounds that it would be provocative to do so.'

Clearly when this case commenced it had nothing to do with accounting or the breach of any duty to account. The claims for breach of trust were specific relative to the 2006 Appointment and the 2009 Appointments.

[15.] Paragraph 48 sets out the seven duties which concerns this claim and does not include a duty to account. Such a duty, to account, appears not to have been a concern to Ashley at the time of the commencement of the action and until the 2018 action had not been raised. Such a concern appears to have arisen subsequent to the commencement of the action and was the basis for the commencement of the fresh action by Ashley. Therefore, as the duty to render an account is not identified in paragraph 48, there is no allegation of a breach of a duty to render account. Further, the action relates only to the 2006 and 2009 appointments, yet the accounts, for which Ashley seeks to compel Grampian to produce, date back to 1992 and the commencement of the Glenfinnan Settlement. In my view, it would be improper for the Court to make such an Order for account which have nothing to do with the claim in the action.

[16.] The prayers for relief in this action seek:

(1) declarations that the 2006 appointment and the 2009 appointment as void or alternatively voidable;

(2) an order to set aside the 2006 appointment and the 2009 appointments;

(3) an order requiring the re-vesting of the assets subject to the 2006 appointment and the 2009 appointments;

(4) a declaration that the second defendant holds the asset subject to the 2006 appointments and the traceable proceeds thereof to the trust of the settlement;

(5) an order that the second defendant take all reasonable steps to return the assets subject to the 2006 appointments to the trustee for the time being of the Settlement;

(6) all necessary *accounts* and inquiries;

(7) an order removing the First Defendant as trustee of the Settlement and replacing it with such person or persons as the Court shall decide; ....

Subparagraph 6 is the only reference to accounts. In its proper context this is clearly consequential to any possible order which may be made for the return of the assets and the setting aside of the 2006 and 2009 appointments. This is an accounting of a different nature than what is sought in the summons. The Amended Statement of Claim do not refer to a failure to account or a breach of duty to account or any complaint about the failure to provide information. I am satisfied therefore that there is no cause of action speaking to an account.

[17.] Ashley's Summons of 19 July 2018 is an interlocutory process, it is not an originating process. The Amended Statement of Claim demarks the four corners of the case and any relief sought must be fall to be considered within those parameters. A claim for an account is a cause of action and notwithstanding it may be pursued on an interlocutory basis, Order 43 rule 1 is clear, that there must be an underlying claim for an account. For an account to be necessary, as Order 43 rule 2 requires, it must relate to the allegations being made in the action.

[18.] Grampian says that if Ashley wanted to pursue an accounting cause of action, she should have amended her writ, pleaded the cause of action for an account and then she can make the interlocutory application. There is considerable merit in this submission as, my reading of Order 43 demands that there be a claim for an account or its necessity must flow from the complaints in the action.

[19.] Whilst Grampian's objection is technical, it is indeed a legitimate objection. The fact that the Court has the inherent jurisdiction, which I entirely accept, to order an account (in appropriate circumstances) in relationships such as in the present

case, cannot be divorced from what Ashley is seeking in the action. Notwithstanding the Court's supervisory jurisdiction this cannot be the proper forum for Ashley's application. The claim in this action is framed specifically as breach of trust arising from the challenged distributions and nothing more. In ***Wingate*** the procedural error was that the applicant proceeded to secure relief in the context of a summary judgment application under the provisions of Order 14 rather than under Order 43 of the Rules which provided for an interlocutory account. In ***Wingate***, unlike this case, the underlying claim in the Statement of Claim was for breach of trust in respect of inter alia, Butterfield Trust (Bermuda) Ltd's failure to provide any or any reasonably sufficient information and, or documentation. There was a substantive cause of action contained in the statement of claim for an accounting that does not exist in this action. Similarly, in ***A-G v Cocke***, which was an appeal from the Master, the underlying proceedings by the Attorney-General was for, inter alia, certain accounts and inquiries to be taken in relation to the estate and for the appointment of new trustees.

[20.] In all the circumstances therefore, I must dismiss Ashley's' Summons. I will resist the urge to comment on the merits of Ashley's central complaint as this will likely require my determination in the near future. I order that Ashley do pay Grampian's costs of the application save for those costs associated with the 23 January 2019 application which was adjourned. In my view, those costs were incurred as a result of the late submission of the Deal Affirmation and Ashley ought to be entitled to the costs of and occasioned by the adjournment.

Dated this 23rd day of May AD 2019

Ian Winder
Justice