

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

**2021/CLE/gen/00621**

**NOMIKI DROSOS TSAKKOS**

**First Claimant**

**AND**

**PETER DROSOS TSAKKOS**

**Second Claimant**

**AND**

**PANTELIS TSAKKOS**

**(As Executor of the Will of the late Emmanuel Pantelis Tsakkos)**

**First Defendant**

**AND**

**ADITA BOY**

**Second Defendant**

**Before The Hon Mr. Justice Neil Brathwaite**

Appearances: Attorneys Michael Scott K.C and Marnique Knowles for the Claimant  
Attorneys Valdere Murphy and Tonesa Munnings for the First Defendant  
Attorney Kelli Ingraham for the Second Defendant

Date of Hearing: 19 June 2023, 20 June 2023

**DECISION**

**FACTUAL SUMMARY**

1. The Claimants are the sole beneficiaries of their late father Drosos Tsakkos, who died in 1997. By his will, Drosos Tsakkos appointed his brother, Emmanuel Pantelis Tsakkos (“EPT”) as the executor and trustee of his estate. As the Claimants were minor children at the time of Drosos Tsakkos’ death, clause 5 directed that EPT hold the property of the estate on trust for the benefit of the Claimants and to apply such part thereof that EPT thought fit toward the maintenance, education and benefit of the Claimants. EPT was further directed to transfer the residue of the estate to the Claimants on obtaining the age of majority.
2. EPT died testate in 2020, naming his son Pantelis Tsakkos the First Defendant the sole executor of the estate. In this vein, Pantelis Tsakkos inherited the executorship of his late father to Drosos Tsakkos’ will. The beneficiaries of EPT’s estate are his widow Adita Boy the Second Defendant in this matter, Pantelis Tsakkos, and Peter Tsakkos.
3. The Claimants filed an Amended Statement of Claim alleging fraud and a breach of trust against EPT, Pantelis Tsakkos and Adita Boy between July 1997 and August 2020 claiming that they misappropriated the assets forming part of Drosos Tsakkos’ estate by dishonestly utilizing it for their personal use and benefit. The Claimants posit that the value of the estate was about \$3,000,000.00 to \$5,000,000.00. The Claimants also claim that EPT breached his fiduciary duty to act reasonably and skillfully in administering the estate of Drosos Tsakkos.
4. In his defence, the First Defendant refutes the Claimants’ claim by asserting that EPT complied with his duty to act honestly, responsibly and reasonably as executor and trustee of Drosos’ will by applying the property of Drosos and his own personal property for the maintenance, education and ultimate benefit of the Claimants. The First Defendant further asserted that EPT sought to convey the residue of the estate to the Claimants in 2007, but were advised by them that they preferred for the status quo to remain.
5. By virtue of section 77 of the Trustees Act, the First Defendant brought an application heard by Charles Snr. J. (as she then was) seeking the opinion, advice, or direction of the Court on (i) whether he should continue to defend the Main Action having regard to the conflict caused by the chain of representation under section 48 of the Probate and Administration of Estates Act, 2011; (ii) whether he should engage a forensic accountant and a surveyor to defend the Main action; (iii) whether he should be relieved and wholly excused from any liability and be fully indemnified for any acts or things done by him for defending the Main Action and (iv) whether his costs shall be borne pre-emptively by the Estate (“the Section 77 application”). The First Defendant also applied for a stay of the main proceedings pending the determination of the application.
6. Charles J’s ruling was reduced to an Order that directed the appointment of a co-executor and that the executor be indemnified for costs incurred in the main action and the section 77 application. Thereafter the two executors acting jointly would be indemnified from EPT’s estate for defending the main action. Charles J. reserved the question of the appointment of a surveyor and accountant to the trial judge.

7. On 25 April 2023, in the Main Action before me, the Claimants filed an Application for an order of consolidation of the section 77 proceedings and the main action pursuant to Part 26.1 (2)(b) of the Supreme Court Civil Procedure Rules, 2022 (“CPR”). By letter dated 4 May 2023, the Claimants state that the section 77 application is functionally spent and should be consolidated to save costs and time. The Claimants also stated that in accordance with Charles J’s ruling, they have selected their mother Myong Tsakkos to be co-executor alongside Pantelis Tsakkos of the estates of EPT and Drosos Tsakkos.
8. The First Defendant filed a Notice of Application on 15 June 2023 pursuant to Part 26.1 (1)(q) and (v) CPR for an order or direction that the Court refer the determination of the proposed appointment of a co-executor and the consolidation application for hearing by another judge. The First Defendant further seeks to have the proceedings in the Main Action stayed until the determination of the Consolidation application and the co-executor issue. The parties were heard on their applications and my decision was reserved in the matter.

### **THE CLAIMANTS’ CASE**

9. The Claimants filed a Notice for an order for consolidation on 25 April 2023 pursuant to Part 26.1(2)(b) of the CPR to have the following claims consolidated and heard as one:
  - a. Claim No. 2021/CLE/gen/00621 BETWEEN Nomiki Drosos Tsakkos and Peter Drosos Tsakkos as the First and Second Claimants and Pantelis Tsakkos and Adita Boy as the First and Second Defendants (“The Main Action”); and
  - b. IN THE MATTER of the Estate of the late Emmanuel Pantelis Tsakkos  
  
AND IN THE MATTER of Section 77 of the Trustee Act 1998, Chapter 176 of Statute Law of The Bahamas, 2000  
  
AND IN THE MATTER of an application by Pantelis John Tsakkos, in his capacity as Executor of the Estate of Emmanuel Pantelis Tsakkos (“The Section 77 Application”).
10. The Claimants attached to the Notice a Witness Statement of Peter Tsakkos which supported the Claimants’ application for consolidation. It is the Claimants’ position that the First Defendant is attempting to delay the progress of the Main Action by advancing applications under section 77 of the Trustee Act. The Claimants contend that any further section 77 applications that the First Defendant may seek to make are to be made in the Main Action to mitigate any further potential for delay. The Claimants posit that it is unfair and unconscionable that the First Defendant be allowed to further delay the progress of the Main Action and dissipate the assets of the Estate with excessive costs of litigating under section 77.

11. The Claimants laid over brief arguments stating that the reasons for their application to consolidate are that it would save costs, time and the court's resources in accordance with the overriding objective of the CPR Parts 1.1(2)(b) and 25.1(1), as opposed to litigating each matter separately.
12. The Claimants take the view that the Section 77 Application wasted costs and time. The Claimants lamented that there was no need for the confidentiality of the Section 77 proceedings as Charles J's ruling on the application was a matter of public record. Additionally, the Claimants stated that consolidating the matters would save considerable costs and time. In the alternative, the Claimants ask the Court to grant a stay of the Section 77 Application pending the outcome of the consolidation application which they say would limit conflicting decisions.

### **THE FIRST DEFENDANT'S CASE**

13. The First Defendant filed a Notice of Application on 15 June 2023 pursuant to Part 26.1 (1)(q) and (v) for the following orders and directions:
  - a. That the determination of the appointment of a co-executor alongside Pantelis Tsakkos as Executor in the Estates of EPT and Drosos Tsakkos be referred to the Listing Office to be listed for hearing by another Judge and/or Registrar.
  - b. That the Notice for Consolidation Application on behalf of the Claimants be referred to the Listing Office to be listed for hearing by another Judge and/or Registrar.
  - c. That these proceedings be stayed pending the determination of the Consolidation Application and Co-Executor Issue.
  - d. That the Claimants pay the Executor's costs occasioned by this application and the Consolidation Application to be taxed if not agreed.
14. The grounds for the First Defendant's application are that (i) Charles J. had directed in the Section 77 Application on 13 January 2022 that the Claimants were to make a formal application to the Listing Office for the Co-Executor Issue to be heard by a Judge, and (ii) that the Consolidation Application is procedurally misplaced as a Judge hearing a Section 77 application should not hear the main action.
15. The First Defendant also filed an Affidavit of Pantelis Tsakkos on 15 June 2023 in support of the Notice of Application. The First Defendant avers that the Section 77 Application was heard by Charles J. on the basis that the Judge who hears the application pursuant to Section 77 should not hear the main action. The First Defendant contends that the Co-Executor Issue directly arises from the Judgment of Charles J. who directed that a co-executor be appointed in these proceedings. Through a series of emails between Counsel for the Claimants and Counsel for the First Defendant, the Claimants' nomination of Myong Tsakkos as the co-executor of the estate was challenged. Counsel for the parties emailed

Charles J. for clarification on the nomination of Myong Tsakkos as co-executor and the challenge thereto. The First Defendant exhibited Charles J.'s email to Counsel for the Claimants of 13 January 2023 which stated that:

“I made an Order to the effect that the Plaintiffs are to appoint a family member or a professional to act as a co-executor alongside the Defendant. That is my order and that is the order that I will approve. I never identified the name of the person when I made the Order.

Since the Defendant is challenging the person that you wish to be appointed, the Plaintiffs should make a formal application to the Listing Office for the matter to be heard by a judge who will have to hear the application. This is not a part-heard matter before me. It is the First Defendant’s position that an independent co-executor be appointed such as a professional accountant or a neutral family member.”

16. As it relates to the Consolidation Application, the First Defendant avers that the section 77 application and these instant proceedings should be heard by two separate judges. Hence, the proceedings cannot be consolidated. In a letter dated 3 May 2023 to the Court, Counsel for the First Defendant stated that the consolidation of both actions can prejudice the Judge who will be privy to the weakness and strengths of the Executor’s case that will be exposed in the section 77 application. The First Defendant relies on *Lewin on Trusts 19<sup>th</sup> edn. At para 27-289* and the holding of Lightman J in *Alsop Wilkinson v Neary* at 1225H.
17. The First Defendant further seeks an order for a stay of these proceedings pending the determination of the Consolidation Application and the Co-Executor Issue by virtue of Part 26.1 (q) and (v) CPR. The First Defendant contends that it would be inappropriate to take substantive steps in the proceedings such as filing an Amended Defence before the appointment of the co-executor. Ultimately, it is the First Defendant’s position that the delay in the progression of the proceedings arises due to the Claimants’ failure to comply with the directions of Charles J.

## LAW

18. Section 77 of the Trustee Act provide:

“77. (1) A trustee or personal representative may without commencing an action apply upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate.

(2) Such application shall be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.

(3) A trustee or personal representative acting upon the opinion, advice or direction given by the Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee or personal representative in the subject matter of the said application.

(4) Subsection (3) shall not extend to indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction if he is guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

(5) The costs of such application shall be in the discretion of the Judge.”

19. It is clear from the statute that the trustee or personal representative may bring a section 77 application without commencing an action, seeking the advice or the opinion of the court. If it is that an action is commenced in the matter before the section 77 application is made, it is correct that the judge hearing the application would not be the judge hearing the main action. The same is true for a “Beddoe Application” which the First Defendant sought under section 77 and which was heard by Charles J.

20. The Beddoe application is one in which a trustee seeks the direction of the Court as it relates to litigation costs in pursuing or defending legal proceedings, and any administrative costs of the trust. It stems from the case *Re Beddoe, Downes v Cottam [1893] 1 Ch. 547* in which the court stated that “But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs...”. This application is made in separate proceedings from the main matter. In *Dagnell and another v JL Freedman & Co (a firm) and others [1993] 2 All ER 161*, Lord Browne-Wilkinson at page 165 stated:

“In *Re Beddoe, Downes v Cottam [1893] 1 Ch 547* the Court of Appeal held that the fact that the trustees had acted on the advice of counsel did not necessarily demonstrate that they had acted reasonably. The only absolutely certain protection is for trustees to obtain an order from the court in separate proceedings, the Beddoe application, authorising the bringing or defending of proceedings before the costs of such proceedings are incurred.”

21. In *Alsop Wilkinson v Neary*, the Beddoe application is seen in operation. There, the trustees had via a Beddoe Application filed a summons to obtain directions on whether or not to defend the action. It was held by the court at page 1225 that:

“The attempted Beddoe application is, I think, fundamentally flawed on at least two grounds. The first is that the application must be made in separate proceedings. This is for good reason. The purpose of the application is to inform the judge as to the strengths and weaknesses of the trustees' case and

the course to be taken e.g. in respect of a possible compromise. It would be quite inappropriate for all this to be revealed to the court which has to try the case or the other parties to the litigation.”

22. The Learned authors of Hill and Redman’s Law of Landlord and Tenant provide a simplified understanding of Beddoe Applications from the Chancery Guide 2022 under the UK CPR. It is stated at Chapters 25.17 to 25.23 that:

“25.17 Trustees or personal representatives should consider whether they may need to apply, under CPR 64.2(a), for directions as to whether or not to bring or defend proceedings. This is known as a Beddoe application (*Re Beddoe, Downes v Cottam* [1893] 1 Ch. 547).

25.18 If costs or expenses are incurred in bringing or defending the proceedings without the approval of the court or the consent of all the beneficiaries, it may not be possible to recover them from the trust fund or estate.

...

25.23 The Beddoe application must be made by separate Part 8 claim form with a request that it be assigned to a Master other than the Master assigned to the main proceedings which are the subject matter of the Beddoe application.”

23. By way of an example, recently in *Airways Pension Scheme Trustee v Fielder and another* [2019] EWHC 29 (Ch) which examined a few authorities on the Beddoe application, the application was made by way of separate proceedings. In this case, the trustees applied for Beddoe relief to ascertain whether the main action should be defended and whether they would be indemnified out of the assets of the fund as it relates to their costs. In the authorities examined by the Court, the Beddoe applications were all determined by judges alienated from the main action.

## DISCUSSION

24. The Court has the discretion under Part 26.1(b) of the Supreme Court CPR, 2022 to consolidate proceedings. However, to my mind, this is not a case that warrants consolidation as the intent of section 77 applications and Beddoe applications is to be heard by a separate judge for the purposes of gaining advice on the administration of the trust, initiating or defending proceedings and costs. Proceedings commenced in the main action and section 77 applications cannot be heard by the trial judge as it is the trustee's right to seek directions and clarification from the court and in doing so, possibly expose the merits and weaknesses of its case. There is an intention by Parliament, although not plainly expressed, to keep the section 77 applications distinct from the main action.
25. In any event, the application before Charles J. and the proceedings in the main action before myself were separate. Charles J. heard the section 77 application brought by the First Defendant and

formally handed down her ruling on 13 December 2022. Charles J. provided clarification to the parties for the further management of issues relating to the estates of EPT and Drosos Tsakkos and ordered that:

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

As it stands, this order was determinative of the issues raised on that section 77 application. Anything outstanding or any further application to be made must be dealt with by a judge not concerned with the main action. I find that the section 77 application and the main proceedings are not matters that can be consolidated. Any issues which may form the basis of a section 77 application or a Beddoe application, and compliance with the Order made by Charles J. is within the ambit of a separate judge. The First Defendant is always at liberty to apply to the Court for directions or advice on a matter regarding the administration of the trust that may arise, which is not within the purview of the judge in the main action. I, therefore, refuse the application of the Plaintiffs to consolidate the section 77 application or any future applications which may be made under this section and the main proceedings.

26. As it relates to the co-executor issue, this too is rooted in the section 77 application and must be heard by another judge who will have carriage of the matter given the ascension of Charles Snr. J to the Court of Appeal. I understand the importance of this issue to the furtherance of the case at hand. However, while the order of Charles J does not indicate a need for concurrence on the identity of the co-executor, the person nominated by the Claimant is opposed. The issue must therefore be referred to the Listing Office for further assignment to a judge or Registrar for determination.
27. On the question of a stay of the main proceedings pending the determination of the co-executor issue, in my view there is a distinct possibility that successive applications pursuant to section 77 could result in unconscionable delays in the trial of the main action, which would be contrary to the overriding objective pursuant to the CPR. The intention of Charles J in ordering the appointment of a co-executor was to protect the interests of the Claimants. It would simply be wrong to permit a disagreement over the identity of the protector to result in delay to the



determination of the main issue, particularly where such serious allegations are being made. I therefore decline to stay the main proceedings.

### CONCLUSION

28. Having heard the parties on their respective applications, I hereby dismiss the application to consolidate, and decline to stay the main proceedings. The costs of these applications are awarded to the defendants, to be taxed if not agreed.

Dated this 24th day of November, A.D. 2023

A handwritten signature in black ink, appearing to read "Neil Brathwaite". The signature is fluid and cursive, with a long horizontal stroke at the end.

Neil Brathwaite

Justice