COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/01043

IN THE MATTER of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Coral Ridge Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Hightree Trust

AND IN THE MATTER OF an application under Section 3 of the Judicial Trustees Act and/or under the inherent jurisdiction of the Court

BETWEEN:

CHERYL HAMERSMITH-STEWART

Plaintiff

AND

CROMWELL TRUST COMPANY LIMITED

First Defendant

ADAM STEWART

(acting in his capacity as the Enforcer, a member of the Advisory Board and personal capacity)

Second Defendant

JAIME STEWART-McCONNELL

(acting in her capacity as a member of the Advisory Board and personal capacity)

Third Defendant

BRIAN JARDIM

Fourth Defendant

GORDON STEWART

Fifth Defendant

KELLY STEWART

Sixth Defendant

SABRINA STEWART

Seventh Defendant

ASTON JONATHAN STEWART, SLOANE SARAH STEWART, CAMDEN JAIME STEWART, PENELOPE SKY McCONNELL, ISLA JAMES McCONNELL, FINLEY COLLINS McCONNELL, STELLAN JONATHAN McCONNELL AND THE UNBORN ISSUE OF ADAM STEWART AND JAIME McCONNELL

(acting by JOHANN GORDON EPSTEIN as their Guardian ad litem)

Eighth Defendant

ROBERT STEWART

Ninth Defendant

Before Hon. Chief Justice Ian R. Winder

Appearances:

Simon Taube KC with John Wilson KC and Vanessa Smith for the Plaintiffs

Brian Simms KC with Wilfred Ferguson for the First Defendant

Richard Wilson KC with Sean McWeeney KC and John Minns for the Second, Third and Fourth Defendants

Nicholas Le Poidevin KC with Terry North and Wynsome Carey for the Fifth, Sixth and Seventh Defendants

Lena Bonaby for the Eighth Defendant

Allan Steinfeld KC with Ilsa McPhee for the Ninth Defendant

6 October 2023

DECISION ON COSTS

WINDER, CJ

This is my decision on the costs arising from my 22 June 2023 written decision on a preliminary issue raised in this action.

[1.] I will not repeat the background to the action which was extensively set out in my written decision. I also adopt the references utilized in that judgment.

[2.] It should suffice to describe the action as a tiered one brought by the Plaintiff (Cheryl). Firstly, Cheryl sought a declaration that her claim does not engage the no-contest clause at clause 6 of the Coral Ridge and Hightree Trusts. Secondly, but only if the declaration was granted, Cheryl sought the replacement of the First Defendant (Cromwell) as Trustee and other consequential relief, on the basis that Cromwell was conflicted in favoring certain of the beneficiaries. Cromwell successfully applied for the first tier of Cheryl's claim to be heard as a preliminary issue. It is the decision on the preliminary issue which resulted in the written decision of 22 June 2023.

[3.] Paragraphs 58 and 59 of the written decision stated as follows:

> 58. In the circumstances therefore, on the preliminary issue, I declare that the claim brought by Cheryl against Cromwell in Action Number 2021/CLE/gen/01043 may not properly be determined to be, "a Claim" for the purposes of:
>
> a. Clause 6.2 of the Declaration of Trust of the Coral Ridge Trust, as amended by the Deed of Amendment dated 16th August 2018;
>
> b. Clause 6.2 of the Declaration of Trust of the Hightree Trust, as amended by the Deed of Amendment dated 16th August 2018;
>
> 59. I will hear the parties as to the proper order for costs.

On 6 October 2023, after laying over written submission, the parties argued as to what should be the proper order for costs.

The position of the parties as to costs

[4.] Cheryl seeks the following orders as to costs:

(1) Adam, the Second through Fourth Defendants and the Eighth Defendants do pay Cheryl's and the Fifth through Seventh Defendants' costs of the preliminary issue application, such costs to be taxed on the standard basis if not agreed, and certified as fit for two counsel;

(2) Cromwell be indemnified out of the assets of the Coral Ridge Trust and Hightree Trust in respect of its costs of the application, such costs to be paid

equally from those trusts, with Cromwell's costs certified as fit for one counsel only (Cromwell having asserted that it was adopting a neutral position at the hearing).

[5.] Cromwell seeks an order that it be indemnified out of the assets of the Trusts in respect of its costs of the preliminary issue application with its costs certified as fit for two counsel (in so far as such costs are not paid by another party).

[6.] Adam, Jaime and Brian seek an order that all parties' costs in relation to Cromwell's directions be paid out of the trust funds of the Coral Ridge and the Hightree Trusts on the indemnity basis. Alternatively, the Court is invited to order that costs be in the cause.

[7.] Gordon, Kelly and Sabrina (the Fifth through Seventh Defendants) seek an order that:

(1) Adam, Jaimie, Brian and the Guardian ad litem (Epstein) should pay the costs of the application incurred by Cheryl, Cromwell and Robert on the standard basis to be taxed if not agreed.

(2) Cromwell should be indemnified out of the assets of the Trusts (to be paid equally from the two trusts) for its costs of the application on the indemnity basis, to be taxed if not agreed, to the extent that it does not recover them from the Jamaican Family and the Guardian.

[8.] Epstein seeks an order as follows:

(1) All parties' costs should be paid out of the trust funds on the trustee/indemnity basis in circumstances where the preliminary issue is properly to be characterised as falling within Buckton category 1, alternatively category 2, and it cannot be said that any party conducted themselves unreasonably in relation to the preliminary issue;

(2) If the preliminary issue is not to be characterized as falling within Buckton categories 1 or 2 (albeit they submit this would be an error of law), the proper

order is costs in the cause, there being no proper basis for the Plaintiff to recover her costs of the preliminary issue from other parties should she be unsuccessful in her claim.

Law, analysis and discussion

[9.] Rule 71.6 of the Supreme Court (Civil Procedure) Rules 2022 (as amended) (CPR) provides as follows:

> **71.6 Successful party generally entitled to costs.**
>
> (1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

[10.] CPR Rule 71.6 merely codifies and reintroduces the well-known rule that costs ordinarily follows the event. This issue was recently discussed in the Court of Appeal decision in ***Attorney General of The Commonwealth of The Bahamas v Westmor Ltd.* SCCivApp No 134 of 2021. *Evans JA,*** giving the decision of the Court, stated at paragraphs [11] to [15] as follows:

> 11. It is generally accepted, and the authorities confirm, that this discretion although wide is not to be exercised arbitrarily but must be exercised judicially. This requires the Court to act in accordance with established principles applied to the relevant facts of the case. The general rule, as I understand it, is that at the conclusion of a hearing, costs follows the event with the result being that a successful party is awarded his costs of the proceedings, unless there are special circumstances which may militate against the usual order being made. ***Bernard Schulte Shipmangement (Cyprus) Ltd. v. Ritchie and another [2015] 3 BHS J. No. 152.***
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> 12. In considering the established principles it is noted that in the case of ***Swart et al v Appollon Metaxides et al SCCivApp.*** No.78 of 2012 (delivered on 22 October 2018), Isaacs JA said as follows:
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> > "7. In the Supreme Court the issue of who should bear the costs of an action and/or application falls to be considered in light of Order 59 of the Rules of the Supreme Court. Moreover, section 30(1) of the Supreme Court Act provides:

'30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.'

8. We generally have regard to the practice that obtains in the Supreme Court. In my view this makes estimably good sense".

13. Prior to the introduction of the Civil Procedure Rules (CPR), Order 59 rule 2 of the Rules of the Supreme Court (RSC) provided that:

"2. (2) The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order."

14. Notwithstanding the introduction of the CPR, as outlined below, the principle remains the same:

"71.6 Successful party generally entitled to costs.

(1) Where the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party."

15. It is clear then that whereas a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party he has no right to such an order, for it depends on the exercise of the court's discretion. That discretion is an unlimited discretion to make what order as to costs the court considers that the justice of the case requires. It is well accepted that this means that this discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case.

[11.] CPR Rule 71.19 also provides some guidance to the Court and states as follows:

71.19 Costs payable to a party out of a fund.
(1) Save as is provided in paragraph (2), where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be.

(2) Where paragraph (1) of this rule would otherwise apply but the Court is of the opinion that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, such person has in substance acted for his own benefit rather than for the benefit of the fund, the Court may make such other order as it thinks fit.

[12.] In the context of trust actions seeking to ascertain the true construction of a trust deed, the leading authority for the determination of the proper order for the payment of the costs of the parties is the English High Court decision of ***Re Buckton [1907] 2 Ch 406.*** At pages 414 in ***Re Buckton,*** Kekewich J identified three classes of proceedings which fall to be examined, stating as follows:-

> "Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand, costs are so largely in the discretion of the judge that it is more difficult to secure uniformity in that department than in any other, and it is well-nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases. But when an opportunity occurs, it is well to enunciate rules for the guidance of the profession, and a question arising in this case affords an opportunity which I think it right not to neglect.
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> In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.
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> There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some

> difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
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> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.
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> [Emphasis added]

Whilst the learning in ***Re Buckton*** is of some vintage, it continues to be followed in England and Wales (see ***Singapore Airlines v Buck Consultants Ltd [2012] Pens LR 1***) and was recently approved in this jurisdiction in the case of ***Ann Maxine Patton v Alvarez Jimenez, de Pass, S.A. a/k/a Alvarez Aguilar Abogados Asociados, S.A. and another, [2020] 1 BHS J. No. 22*** and ***In the matter of the trusts of the Deed of Settlement establishing the X Foundation Trust, [2021] 1 BHS J. No. 49***.

[13.] The three classes of case which were identified in ***Re Buckton*** are succinctly described by the learned authors of ***Lewin on Trusts*** at paragraph 48-033 as follows:

1) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he. Commences a construction claim unnecessarily, though will be given credit if he does so on advice.

2) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs. Where the application is made by someone other than the trustee, however, it may be less easy to show than in the case of a trustee that the applicant was acting reasonably in making the application and doing so for the benefit of the fund.
3) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason.

[14.] Cheryl, and those who support her claim, say that they were victorious in hostile litigation and the ordinary rule is that cost ordinarily follow the event and the loser must pay. They contend that this was hostile litigation and that Adam, Jamie and Brian went as far as to say that the no-contest clause had already been engaged and Cromwell was entitled to exclude her from benefit. According to Mr. Taube KC, ***Re Buckton*** speaks of *"the determination of a question which needs to be resolved for the benefit of the trust fund. The key phrase is for the benefit of the trust fund. If so, then it may well be appropriate for all costs of all party to be paid out of the fund. By contrast, if the claim is made for the benefit of [Cheryl] and resisted by [Adam and his supporters] for their own benefit, not for the benefit of the trust fund, that's the other side of the line. It's hostile litigation where the ordinary rule in civil litigation where the loser pays the victor's cost should apply."*

[15.] Cheryl argues that the question had to be resolved for her benefit because if her removal claim was a claim within clause 6.2 to the trust deeds, then it would have disastrous consequence for her, leading from her being excluded from the benefit of the Trusts. As to the bringing of the application by Cromwell, Cheryl asserts that this is pure "happenstance" as it would have been Cheryl who issued a summons for the preliminary issue to be heard, and she had raised the question fairly and squarely in her Statement

of Claim. The simple question, Cheryl says, is whether the claims were being made by Cheryl for her benefit and resisted by Adam and his supporters for their benefit, and that it is absolutely clear that that was what was happening.

[16.] Adam and those who support his position, including Epstein, say that this is a ***Buckton*** category 1 case and that this application was not hostile litigation as Cheryl, in framing her claim in a conditional way, was expressly holding back a hostile claim until this issue was resolved. They say that a beneficiary is allowed to argue forcefully and in a self-interested way. They say that the question for the Court is whether they acted unreasonably in doing so, and the fact that they were unsuccessful does not make conduct unreasonable. Epstein adds, at paragraph 10 of his submissions:

10.1 All of the beneficiaries were entitled to express their views on the proper interpretation of the trust instruments under which they are beneficiaries. It was an issue, the resolution of which will affect all of the beneficiaries not just in the content of the Plaintiff's proceedings but also, importantly, going forward in the administration of the Trusts.

10.2 Indeed, in circumstances where the trustee (having brought on the issue) adopted a neutral position (see [17] of the Judgment[9]), it was necessary (and right) for other parties positively to advocate the contrary arguments before the Court. This is particularly the case where, as recorded at [34] of the Judgment, "There is very limited authority on the law relating to the nature and effect of no contest clauses".

10.3 The fact that the Court has granted the declaration sought by the Plaintiff (supported by her children and D9) does not alter the position.

10.4 There was nothing in the Guardian's conduct which can possibly be characterized as unreasonable so as to justify his being deprived of his cost from the fund (let alone ordered to pay any parties' costs). To the contrary:

a) The Court has expressly recorded in the Judgment at [59] its "indebtedness to counsel for their invaluable assistance to the Court in the presentation of this application";
b) Both sides of the argument had a measure of success, e.g. the Court rejected the Plaintiff's argument that there is an ouster of the Court's jurisdiction (see [40] of the Judgment) and accepted the argument that the action is an "indirect attack" on the power placed in Adam as Enforcer of the Star Trust (see [49] of the Judgment); and

c) The Guardian adopted a measured approach, filing a single set of focused written submissions and no evidence.

[17.] The general rule is accepted to be that the successful party is entitled to their costs unless it can be shown that there exists some exceptional basis to depart from the general rule. The Buckton principles offer parties who can fall within a favorable Buckton category such an exception.

[18.] Having heard and considered the contending arguments by the parties I am satisfied that this case falls to be considered as akin to the cases to which category 1 of Buckton relates.

[19.] Cheryl contends that, had she been unsuccessful in the application, it could hardly be argued that she should not pay those costs incurred. I am not satisfied that this would have been a fair comparison having regard to the nature of the claim brought by Cheryl in the action. Had the Court determined that Cheryl's Claim would engage the no-contest clause the action would have been at an end, as the claim was run on a conditional basis. The Defendants, having already been called to defend the substantive claim in the action, different costs considerations must necessarily apply in assessing the responsibility for the costs incurred. In any event, such considerations would not automatically mean that Cheryl would have to pay those costs, as costs remain a matter of the Court's discretion having regard to all the circumstances.

[20.] ***Lewin***, relying on the dicta in ***Singapore Airlines v Buck Consultants Ltd*** asserts that the categories are not closed and have identified additional categories of cases which fall to be considered. At paragraph 48-039:

> The categories of proceedings enumerated in Re Buckton are not closed. A fourth category has been recognized where proceedings are commenced by a trustee but have the characteristics of category (3). For not all proceedings commenced by a trustee for the determination of some question affecting entitlement to the trust fund are within Buckton category (1), particularly in a case which does not involve the construction of the trust instrument but rather a dispute over the beneficial ownership of the trust fund.... We consider that the appropriate order for

> costs in a fourth category case is normally for the losing party to be ordered to pay the costs of the wining party and the trustee, the trustee being entitled to indemnity in respect of his costs so far as not recovered from the losing party, unless he is deprived of costs on the basis that he has acted unreasonably.

Mr. Le Poidevin KC, on behalf of his clients argued that this case fell outside of the conventional Buckton categories and into this fourth category of case.

[21.] I did not accept Mr. Le Poidevin KC's submission that this case falls to be considered in that fourth category. Notwithstanding the application on the preliminary issue mirrored Cheryl's conditional claim, Cromwell approached the Court, for assistance, to answer the questions it posed so that it knew what powers it had in order to discharge its fiduciary duties. Further, it did so because Cheryl had delayed in moving such an application and the determination was necessary for the continued administration of the Trust by Cromwell. In fact, the parties had already advanced substantial defenses in response to the substantive claim prior to the hearing of the preliminary issue.

[22.] Cromwell was compelled to move the Summons on the basis that it needed to know whether Cheryl's Claim falls within the no-contest clause and whether it called for the exercise of its fiduciary discretion to consider whether the beneficiary ought to be removed. As Mr. Wilson KC puts it, "the trustee needed to know whether it was under a fiduciary obligation to consider the exercise of that power". The determination of this issue would obviously affect the administration of the Trusts. Admittedly, the determination was considerably more important to Cheryl, who pursued the substantive claim conditionally, dependent upon the answer as to the efficacy of the no-contest clause. This however, does not derogate from the fact that it had tremendous importance to the continued administration of the Trusts by Cromwell.

[23.] I do readily accept that, notwithstanding the familial relationships, this was an adversarial contest. However, the fact that beneficiaries were pitted against each other, with opposite views, ought not of itself, to take the claim outside of ***Buckton*** Category 1 consideration. In ***Buckton,*** Kekewich J acknowledged that the hostile posture of the

combatants made him disposed to think that the case fell within the third category but ultimately found that the case fell within category 2. He stated at page 415 as follows:

> This looks much like hostile litigation, and scarcely less so because the summons asks that the costs "may be provided for," instead of asking, as would have been the better form if that had been intended, that the adverse litigants might be ordered to pay the costs. The applicant could not have brought ejectment, and the analogy to an action for ejectment is not perhaps a close one; but the applicant claims the property as his, and contends that the respondents have no interest therein. ... It is in form adverse litigation, but in substance it is amicable procedure for determining speedily and inexpensively a question the solution of which must sooner or later be found for the benefit of all concerned, including the trustees.

[24.] I therefore accepted the submission of Mr. Wilson KC, that *"the fact of adversarial arguments does not change the nature of it, and one saw that there were adversarial arguments in Re Buckton and that adversarial argument was for the purpose of each side looking to further its own interest. The fact that [Adam] would have benefitted from the success of the arguments, does not change the nature of the case from a Re Buckton perspective."* This is also supported by the learned authors of ***Lewin*** in paragraph 48-041 (as extracted by Adam) as follows:

> 48-041 In cases within Buckton categories (1) and (2), beneficiaries' costs will, as indicated above, normally be ordered to be paid out of the trust fund, whatever the outcome, and such cost are often, perhaps usually, assessed on the indemnity basis... Since beneficiaries are awarded costs by analogy to the trustees' right of indemnity, beneficiaries are subject to the same requirement of reasonableness as applies to trustees. The requirement of reasonableness may, however, apply differently to a claim for costs by a beneficiary, who is not a fiduciary or in a neutral position, and different considerations may also apply to the question whether a beneficiary has behaved reasonably both in bringing proceedings and in the conduct of proceedings once they have started"

[25.] It can scarcely be said that the outcome of the application and the answers obtained, were not of benefit to Cromwell as Trustee and by extension to the Trusts. Cromwell, who was necessarily required to take a neutral position, required Adam and his supporters to give the view opposite to that of Cheryl. I also bear in mind, as I noted in my 22 January 2023 written decision, this was a case where there was no local

authority and the only other limited authorities existed in a different legislative environment, making this essentially a case of first impression.

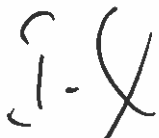
[26.] Although largely successful in the application, Cheryl did not succeed on every point she advanced. This was due, in no small part, to the benefit the Court had from a robust counter-view. The Court was greatly assisted by the arguments of both sides of the divide to enable it to come to its determination. In all the circumstances I did not find that the conduct of Adam, and those that supported his position, was unreasonable.

[27.] There is no objection to Cromwell being indemnified out of the assets of the respective Trusts, save that Cheryl asserts that it ought to be limited to costs for one (1) counsel. In all the circumstances, I am not satisfied that it would be fair, having regard to the work put in by Cromwell, that it ought to be limited to a single counsel. Notwithstanding their neutrality, great assistance was provided to the Court by Cromwell in considering the preliminary issue. This was not a case where they merely sat and watched the proceedings unfold.

Conclusion

[28.] I order that the costs of all parties be borne equally between the Trusts and those costs are certified as fit for 2 counsel.

Dated this 8th day of November 2023



Sir Ian R. Winder

Chief Justice