COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER OF an application by **A** as Trustee, for advice or direction pursuant to Section 77 of the Trustee Act, 1998 Chapter 176 of the Statute Laws of The Bahamas

AND

IN THE MATTER OF A Bare Trust arising from assets previously held on bank account in the name of N SA (the "Trust")

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: John Wilson KC with Michelle Deveaux for the Applicant Trustee

Sophia Rolle-Kapousouzoglou with Vonisha Rolle for the liquidator of N SA and the legal heirs

Hearing date(s): On the papers

RULING

WINDER, CJ

[1.] This is my decision regarding (i) A's entitlement to its costs incurred up to 3 November 2023 in taking legal advice and preparing to move a directions application pursuant to **section 77(1)** of the **Trustee Act** that I dismissed on 3 April 2024 and (ii) whether A should be required to pay the costs of (a) the liquidator of N SA and (b) the legal heirs of the late beneficial owner of N SA (the "legal heirs") in these proceedings.

Background

[2.] The factual background to this matter is summarised at paragraphs 3 to 26 of the Court's Ruling in this matter dated 3 April 2024 (the "3 April 2024 Ruling").

[3.] At paragraph 58 of the 3 April 2024 Ruling, this Court (among other things):

(i) dismissed A 's application for directions;

(ii) determined that A must bear its own costs of and incidental to its application for directions which were incurred after 3 November 2023; and

(iii) gave directions for (a) The Liquidator and the legal heirs and (b) A to lodge submissions on the issue of whether A should have its pre-3 November 2023 legal costs out of N SA 's funds held at A .

[4.] On 15 April 2024, Counsel for A communicated to the Court that A had determined that it would bear its own costs. However, Counsel for The Liquidator and the legal heirs indicated that they had already incurred costs in this matter and would therefore be seeking "wasted costs". Counsel for The Liquidator and the legal heirs lodged written submissions on the issue of costs dated 16 April 2024 contending that A should "bare [sic] its own costs in relation to all actions which were beyond its duty as a 'putative bare trustee' and pay LXPs costs arising from their conduct in relation to the proceedings including the withdrawal".

[5.] Faced with the robust position taken by The Liquidator and the legal heirs, Counsel for A lodged written submissions on the issue of costs dated 24 April 2024. Counsel for A maintained that A 's withdrawal of its claim to costs up to 3 November 2023 was provisionally advanced with a view to amicably resolving the matter and did not constitute an admission. A now seeks an order that (i) A as bare trustee is entitled to its costs up to 3 November 2023, to be paid out of N SA 's account held with A and (ii) The Liquidator and the legal heirs are not entitled to the costs of resisting the award of A 's costs up to 3 November 2023.

Chronology of Key Events

[6.] I gratefully adopt with minor modification the undisputed "chronology of key events" set out at paragraph 9 of Counsel for The Liquidator and the legal heirs' written submissions dated 16 April 2024:

(i) By correspondence dated 26 April 2022, French legal counsel for the legal heirs requested A to close N SA 's account and transfer to the heirs the remaining balance on the account.

(ii) On or about 3 July 2023, Lennox Paton were instructed to act on behalf of the legal heirs.

(iii) A sought the opinion of McKinney, Bancroft & Hughes on or about 28 July 2023 in order to ensure the appropriate party was paid the remaining balance on N SA 's account.

(iv) On 25 September 2023, Lennox Paton wrote to A advising that they were instructed by the legal heirs and requested that N SA 's account be closed and the funds in the account be transferred to the legal heirs.

(v) By letter dated 10 October 2023, A advised Lennox Paton that they were unable to accede to the request of the legal heirs due to N SA having been dissolved and The Liquidator 's office having come to an end, and that they required the Court's directions in exercise of its inherent and statutory supervisory jurisdiction over trusts to address the issue of ownership and the disposition of N SA 's assets.

(vi) By letter dated 13 October 2023 sent after conferences with McKinney, Bancroft & Hughes, A formally instructed McKinney, Bancroft & Hughes to prepare and move an application pursuant to **section 77** of the **Trustee Act** regarding transfer of N SA 's assets to the legal heirs.

(vii) By letter dated 27 October 2023, McKinney Bancroft & Hughes advised Lennox Paton that they would be acting on behalf of A and were finalising an application to the Supreme Court for directions.

(viii) On 3 November 2023, Lennox Paton notified McKinney, Bancroft & Hughes of their instructions to make an application for N SA to be restored to the Register of International Business Companies which might alleviate the need for McKinney, Bancroft & Hughes' directions application.

(ix) McKinney, Bancroft & Hughes responded on 3 November 2023 stating that Lennox Paton's restoration application "would not be the best approach".

(x) Lennox Paton replied that they did not agree to McKinney, Bancroft & Hughes' approach but would take instructions.

(xi) On 12 December 2023, an Originating Application was filed on behalf of The Liquidator and N SA for N SA to be restored to the Register of International Business Companies.

(xii) On or about 15 December 2023, McKinney, Bancroft & Hughes, on behalf of A , lodged A 's application for directions with the Court.

A's submissions

[7.] Mr. Wilson KC on behalf of A submitted that A's costs prior to 3 November 2023 were incurred by it in its position as bare trustee of N SA 's assets and hence are costs to which A is entitled. Mr. Wilson KC submitted that it is common ground that, until the 6 February 2024 restoration of N SA, A was bare trustee of the assets in N SA's account and, pursuant to **section 36(2)** of the **Trustee Act**, a trustee is entitled to be paid on an indemnity basis for taking advice in relation to its administration of trust assets as a bare trustee.

[8.] Counsel for A submitted that the cumulative effect of **CPR 71.19(1)** and **(2)** is to create a presumption that the Court will exercise its discretion in favour of a trustee being awarded its costs out of the trust fund. **CPR 71.19(1)** stipulates that a trustee "shall…be entitled" to the costs of the proceedings unless the Court otherwise orders. **CPR 71.19(2)** provides for the Court to depart from the usual order provided for in **CPR 71.19(1)** only if it is of the opinion that the trustee either acted unreasonably or acted for its own benefit.

[9.] Mr. Wilson KC highlighted to the Court that the 3 April 2024 Ruling found that A did not act reasonably in pursuing its directions application after 3 November 2023 but did not find that A acted unreasonably or for its own benefit prior to 3 November 2023. Mr. Wilson invited the Court to find that A did act reasonably and did act for the benefit of the trust in taking the steps that it did prior to 3 November 2023. Mr. Wilson KC developed this submission by making the following additional points:

(i) A's application was predicated on N SA 's dissolution because it was a bare trustee and remained so after N SA 's dissolution. A 's position as bare trustee only changed after N SA was restored to the Register of International Business Companies.

(ii) between 26 April 2022, when the legal heirs first requested that A transfer N SA 's account balance to them, and 3 November 2023, when Counsel for The Liquidator and the legal heirs indicated that the legal heirs intended to restore N SA, A maintained its capacity as a bare trustee of the assets formerly held for N SA.

(iii) A was unable to accede to the 26 April 2022 request from the legal heirs to transfer N SA 's account balance to them because (a) A did not have authority to do so (inasmuch as N SA had been dissolved on 18 December 2020 and, by 26 April 2022, the 1-year period had expired for which the liquidator holds and can instruct payment of the assets pursuant to **section 250(1)** of the **Companies Act**) and (b) A had not yet been provided with adequate evidence verifying the legal heirs.

(iv) save for any breach of trust and a trustee's own acts of neglect or default, the implied indemnity under **section 36(2)** of the **Trustee Act** entitles A to recover its costs (including administrative costs and the costs of taking advice) prior to 3 November 2023 out of the assets in N SA 's account. There has been no finding that A as a bare trustee up to 3 November 2023 acted unreasonably such that it would not be entitled to claim the statutory implied indemnity prior to 3 November 2023.

(v) A acted reasonably in seeking Counsel's advice on the manner in which it could deal with the assets being held by it as a bare trustee. This was a necessary pre-requisite to making a **section 77** application. A **section 77** application was the only application A could competently make in the circumstances that faced it. Locus standi to restore a creditor is limited to the company, creditors, members or the company's liquidator: **section 166** of the **International Business Companies Act** and **Baron's Court Holdings Ltd v The Registrar General** [2022] 1 BHS J. No. 112 at paragraphs 43 and 88.

(vi) It took Counsel for The Liquidator and the legal heirs 4 months between 3 July 2023 and 3 November 2023 to indicate to A that the legal heirs intended to make an application to restore N SA. A cannot be penalised by being denied its costs out of "the fund" because it took the legal heirs months to cause the liquidator to move the application to restore. Furthermore, up to 3 November 2023, the legal heirs themselves had no *locus standi* to make an application to restore N SA , as they did not present any grant of representation which justified them moving an application. Thus, A could not force them to make a restoration application.

(vii) The Liquidator in the first instance failed to fully complete the winding up of N SA , as it was open to N SA to instruct A 's predecessors to pay the monies in N SA 's account to The Liquidator pursuant to his duty under **section 250** of the **Companies Act** to distribute the assets, but The Liquidator failed to do this. The default on the part of The Liquidator and the dilatory conduct on the part of the legal heirs are factors that can be taken into account among the factors to be considered in the Court's exercise of its discretion as to costs pursuant to **CPR 71.9(4)**.

[10.] Counsel for A submitted that A acted reasonably in taking advice and preparing for the only application A could competently make in the circumstances in the interest of "the fund". In view of this, Counsel submitted, A should be entitled to its costs reasonably incurred up to 3 November 2023, to be paid out of N SA's accounts, and there should be no order as to the costs of Counsel for The Liquidator and the legal heirs.

The Liquidator's and the legal heirs' submissions

[11.] Mrs. Rolle-Kapousouzoglou for The Liquidator and the legal heirs submitted that A ought to bear its own costs incurred prior to 3 November 2023 as its own internal administrative costs because it was unnecessary for A 's in-house counsel to engage external King's Counsel for the "simple point" of whether the funds which A admitted to holding as bare trustee should be released to the beneficiaries. Counsel argued that A incurred the expenses for its own benefit and not for the benefit of "the fund" or trust.

[12.] Counsel for The Liquidator and the legal heirs referred the Court to **section 30(1)** of the **Supreme Court Act** and **CPR 71.3**, **71.5**, **71.6**, **71.9** and **7.19** on the issue of costs. In relation to **CPR 7.19(1)**, Counsel drew the Court's attention to the fact that subsection (1) provides that the Court has the discretion to order costs out of the fund insofar the person has been "a party to proceedings" and the costs are not recovered from or paid by "another person". In support of this submission, Counsel relied on the decision of the Court of Appeal in **Belgravia International Bank & Trust Company Limited v Experta Trust Company (Bahamas) Limited and CIBC Trust Company Bahamas Limited** SCCivApp No. 189 of 2011.

[13.] Mrs. Rolle-Kapousouzoglou submitted that A 's costs prior to 3 November 2023 were not costs incurred in relation to proceedings as they were administrative costs incurred by A , in which A was seeking to ascertain whether to release funds which on their own admission were held by them as a bank. Mrs. Rolle-Kapousouzoglou called attention to the fact that A acknowledged that the legal heirs were the legal heirs of the former beneficial owner of N SA and had asserted that it was not a custodian of N SA's assets. Mrs. Rolle-Kapousouzoglou also highlighted that a bare trustee is a trustee that holds property for the absolute benefit and at the absolute disposal of other persons and has no duties to perform except to transfer it.

[14.] Counsel for The Liquidator and the legal heirs submitted (as I understood her) that, insofar as A was asserting that the undistributed sum in N SA 's account was the trust fund of a bare trust of which A was trustee, **section 66** combined with **section 77(5)** of the **Trustee Act** empowers the Court to order the costs of A 's directions application and the costs and expenses incidental to the directions application to be raised and paid out of the assets (the "trust fund") or to be borne and paid in such manner and by such persons as to the Court may seem just.

[15.] Mrs. Rolle-Kapousouzoglou submitted that A 's conduct was unreasonable and for its own benefit. Mrs. Rolle-Kapousouzoglou developed this submission by making the following additional points:

(i) A did not communicate with the parties interested in N SA 's assets. From as early as July 2023 when McKinney, Bancroft & Hughes provided legal advice to A , they were aware of the legal heirs and acknowledged that the legal heirs had interests in N SA 's assets. A acted unreasonably by not engaging with the legal heirs in relation to the steps being considered to facilitate the transfer of N SA 's funds. Once A became aware on 25 September 2023 of Lennox Paton being instructed to act on behalf of the legal heirs, A ought to have engaged with Lennox Paton to facilitate the transfer or to request the further information it required.

(ii) A acted unreasonably and for its own benefit by not serving the **section 77** application on the legal heirs or The Liquidator as required and A did not raise the issue of whether the legal heirs or The Liquidator should be served or permitted to attend the hearing of the A 's application. The Court found in the 3 April 2024 Ruling that, in the events that have transpired, A 's application did not benefit the legal heirs.

(iii) A acted unreasonably and for its own benefit by taking the position that N SA could not be restored in order for N SA 's assets in its bank account at A to be realised and distributed.

(iv) A acted unreasonably by incurring expenses and legal costs without informing the legal heirs of such expenses, although A knew of their interest in N SA 's assets. A engaged McKinney, Bancroft & Hughes, sought advice and made its **section 77** application solely of its own discretion, without coordinating with or ascertaining the positions of the legal heirs who had an interest in N SA 's assets.

(v) the Court has not been informed of what A 's charges and expenses are or their respective amounts and A has not identified the specific basis on which it claims a right to those charges and expenses.

(vi) the costs of A 's external counsel, McKinney, Bancroft & Hughes were unnecessarily incurred for the period prior to 3 November 2023 on administrative matters regarding N SA and its ultimate beneficial owner and it would be unjust to the parties interested in N SA 's assets for its funds to be depleted further by A 's legal costs.

(vii) A failed to act prudently. Although A admitted that it had no ownership interest in the undistributed assets, A neglected the position of those who did have an interest in N SA's assets, which could have avoided or minimized any legal costs being incurred. Its in-house counsel and/or compliance team ought to have been able to assist in relation

to the issues which allegedly arose on the opinion it sought, and A should have acted prudently by confirming the position of the legal heirs.

(viii) A was not prudent in taking the position that a restoration application was "not the best approach" as orders were made in several cases and none of those decisions has been overruled to date. It would not be just for any of A 's costs in relation to the directions application, including the cost of any advice obtained in relation to that application, to be paid from N SA 's assets as a result of engaging and instructing McKinney, Bancroft & Hughes.

(ix) Even if A was acting in the capacity as a bare trustee as it suggests, A acted in a manner inconsistent with the duties of a bare trustee. On one view at least, a bare is a mere passive repository for the beneficial owner, having no duties other than a duty to transfer the property to the beneficial owner or as he directs: **Lewin on Trusts** (19th edn). If A was a bare trustee as it purports, it had no discretion over the trust assets and was a mere nominee. A exceeded the scope of its power as a bare trustee by acting as its own independent discretion and making a **section 77** application.

[16.] In concluding her submissions, Counsel for The Liquidator and the legal heirs echoed the observation made by the Court at paragraph 51 of the 3 April 2024 Ruling that the result of the declarations and orders contained in Fitzcharles J's 6 Feb 2024 Order is that, on one analysis at least, A was never a trustee of the assets in N SA's account on the basis that it identified. Counsel for The Liquidator and the legal heirs submitted that, as a result of this statement, A is not entitled to recover any costs resulting from them acting in the capacity of a trustee and they ought to pay "Lennox Paton's costs".

Discussion and analysis

[17.] **Section 30** 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.
> (2) Nothing in this section shall alter the practice in any criminal cause or matter or in bankruptcy.

[18.] **Section 66** of the **Trustee Act** provides:

> The Court may order the costs and expenses of and incidental to any application for an order under this Act or for any order or declaration in respect of any property subject to a trust, or of and incidental to any such order or declaration, or any document executed or act performed in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made and performed, or out of the income thereof, or to be borne and paid in such manner by such persons as to the Court may seem just.

[19.] In **Belgravia International Bank & Trust Company Limited v Experta Trust Company (Bahamas) Limited and CIBC Trust Company Bahamas Limited** SCCivApp No. 189 of 2011, *Conteh JA* speaking of **section 30** of the **Supreme Court Act** and **section 66** of the **Trustee Act** stated at paragraph 44:

> 44 These are in our view, clear statutory provisions regarding the award of costs involving trusts. They both put the matter in the discretion of the Court. The Trustee Act affirms that trustees may be entitled to costs for seeking any order or declaration in respect of any property subject to trust and those costs may be ordered by the Court to be paid out of the trust property itself or be borne and paid in such manner by such persons as the court may seem just.

[20.] **CPR 71.19** provides:

> (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.

[21.] In the **Experta Trust Company** case, *Conteh JA* said with respect to **Order 59, rule 6(2)** of the **RSC** (the predecessor to **CPR 71.19**) at paragraphs 62 and 63:

> 62 To be sure, there is under Order 59 r. 6(2) a *prima facie* entitlement to costs of a person who has acted in any one of the capacities specified in the sub-rule, in this case, as a trustee, (such as Belgravia), *unless* the Court orders otherwise. But this entitlement is however *prima facie*, and qualified: the costs of the proceedings are awardable to the trustee only to the extent that they are not recovered from any other person, in which case, they shall be met from out of the fund held by the trustee.
> 63 The Court, may, however otherwise only order i.e. not grant the trustee the costs of the proceedings, "on the ground that the trustee... acted unreasonably or ...has in substance acted for his own benefit rather than for the benefit of the fund."

[22.] It is unclear to what extent this Court's jurisdiction to order that A should have its costs incurred up to 3 November 2023 out of N SA 's assets is in dispute between the parties. Unsurprisingly, A proceeded on the footing that such jurisdiction exists, on the basis that A was a bare trustee of N SA's assets. No clear stance to the contrary was taken by The Liquidator and the legal heirs, though it is right that I record that they queried whether A's costs are properly to be regarded as costs in these proceedings instead of administration costs and whether A was truly a bare trustee of N SA 's assets pending N SA 's restoration.

[23.] The consent of the parties cannot confer jurisdiction on the Court where none exists. Nonetheless, I am content to proceed on the footing that this Court has jurisdiction to deal with A's costs. **Section 66** of the **Trustee Act** empowers the Court to *inter alia* order the "costs and

expenses of and incidental to" (i) any application for an order under the **Trustee Act** or (ii) any application for any order or declaration in respect of any property subject to a trust be (a) raised and paid out of the property in respect whereof the same is made or said property's income, or (b) borne and paid in such manner by such persons as to the Court may seem just. An application for an order pursuant to **sections 77** and **79** of the **Trustee Act** can fairly be said to be an application for an order under the **Trustee Act**. Additionally, **section 2** of the **Trustee Act** provides that the word "trust" extends to implied, constructive and resulting trusts and, therefore, would include a constructive trust of the institutional kind such as A contended for.

[24.] Granting A the status of "trustee" for the sake of argument, having given The Liquidator and the legal heirs an opportunity to be heard on the issue, I am not satisfied that A should have its costs of taking legal advice and preparing to move its directions application incurred up to 3 November 2023. Despite the attractive way in which Counsel for A put A 's case, I am unpersuaded that it is correct to say that A acted reasonably as a trustee for the benefit of the fund. On balance, I find the submissions lodged by Counsel for The Liquidator and the legal heirs, to be more persuasive than those lodged on behalf of A , although there are material aspects of the former's submissions that I am unable to accept.

[25.] Fundamentally, I do not consider that A acted reasonably or prudently in the circumstances of this case. While trustees are to be encouraged to seek the protection of the Court in cases of genuine difficulty, A did not need to proactively engage McKinney, Bancroft & Hughes or advance a directions application without the concurrence of The Liquidator or the legal heirs. There was no overriding situation of emergency to which A was responding. In acting as it did, A acted beyond the proper scope of its role, though I would not characterise A as having acted for its own benefit. In my view, A should have taken a passive approach and, in the absence of an active contest between two or more claimants to the assets, required the legal heirs[1] (or The Liquidator) to restore N SA or required an order directing payment of N SA 's assets to the legal heirs.

Conclusion

[26.] In the circumstances, it is my order that A must bear its own costs of taking advice and preparing to move its directions application incurred up to 3 November 2023. A must also pay The Liquidator's and the legal heirs' reasonable costs of these proceedings, to be summarily assessed if not agreed. There seems to me to be no good reason why they should have to bear their own

[1] It is at the very least arguable that the legal heirs had standing to apply to restore N SA under the inherent jurisdiction. In **Ivanishvili**, *Charles J* (as she then was) held at paragraph [68] that any person with an interest an apply under the inherent jurisdiction to restore an International Business Company to the Register. In that case, the sole beneficiaries of a trust were held to have sufficient standing to apply to restore a holding company owned by the trust.

costs. A's "concession" of the issue of its pre-3 November 2023 costs was made too late in the day to significantly influence the exercise of the Court's discretion.

Dated the 27th January 2025

Sir Ian R. Winder
Chief Justice