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

Claimants

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 Sir Ian R. Winder

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

Mr. Brian Simms, KC with Wilfred Ferguson for the First Defendant

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

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

John Delaney, KC with Lena Bonaby for the Eight Defendant

Hearing Date(s) On the Papers

DECISION ON COSTS OF THE SEALING (Etc.) APPLICATIONS

WINDER, CJ

This is an application in relation to the costs of the application to seal the Courts file in these proceedings.

[1.] On 20 May 2022, Charles Snr. J (as she then was) dismissed the application of the First Defendant Trustee (Cromwell) and the Second through Fourth Defendants to seal the file and extend the time by which Cromwell and the Second through Fourth Defendants could file and serve their respective defences.

[2.] On 26 July 2022, Charles Snr. J. refused the application of the Second through Fourth Defendants for leave to appeal the Ruling and for a stay pending appeal. In that ruling, the Learned Judge dealt with costs arising from the applications before her.

[3.] This decision relates to an application to re-open the question of costs.

Background

[4.] I adopt the succinct facts as outlined in the Learned Judge's headnote to her 30 May 2022 Ruling on the sealing application. A wealthy and well-known entrepreneur (the Founder) created two trusts governed by Bahamian law. The Plaintiff (Cheryl), who is the common law widow of the Founder, commenced an action against the Trustee, Cromwell, to which the Founder's children as beneficiaries of the trusts were joined. Cromwell applied for the file to be sealed (the sealing application). Some of the Defendants support the application. The Plaintiff initially did not oppose the sealing application but subsequently opposed it along with the Fifth through Seventh Defendants who are her adult children. They say that the circumstances are not sufficiently compelling to warrant the sealing of the file, effectively the disposal of the open justice principle.

Submissions of the Parties

[5.] Cromwell's submissions on costs are stated in part in its submission as follows:

"2. To the extent that the US Family seeks an order for their costs to be paid out of the Trust fund, Cromwell does not object to such an order being made.

...

7. Cromwell's entitlement to reimburse itself in relation to all expenses reasonably incurred by it in connection with the Trusts is also an express term of both Trusts: clause 9.3 in the Hightree Trust Deed and 11.3 in the Coral Ridge Trust Deed.

> "The Trustees shall be entitled to be reimbursed all expenses reasonably incurred by them in connection with this Trust."

...

9. In the context of hostile litigation, the Court has discretion to allow the Trustee its costs out of the trust fund even if it did not succeed, especially where the application was brought to preserve the trust's confidentiality and where there is no suggestion of impropriety or self-interest."

[6.] Adam's submissions on the issue of costs are, in part, as follows:

"8. In Summary, D2-D4's position is that: (i) the established legal principles as regards to the costs of applications relating to trusts such as the Sealing Application, where (as here) all parties have conducted themselves properly, is that the parties' costs should be paid out of the trust fund; and (ii) they ought to be awarded their costs of the Extension Application in circumstances where that application was opposed by the US Family and D2-D4 were substantially successful.

...

13. As Hoffman LJ held in McDonald v Horn, while the general principle is that costs follow the event, there are two special principles relevant to the proceedings relating to trusts.

(a) First, a trustee is usually entitled to its costs out of the trust fund.
"In the case of a funs held on trust, therefore, the trustee is entitled to his costs out of the fund on an indemnity basis, provided only that he has not acted unreasonable or "in substance for his own benefit rather than" that of the fund." (694C-D)

(b) Second, in respect of certain applications relating to the administration of trusts beneficiaries are also entitled to their costs from the fund.
The Chancery courts have however been willing in certain circumstances to extend to other parties to trust litigation and entitlement to costs in an event by analogy

with that accorded to trusts... The classic statement of the principles upon which the court acts is... In Re Buckton *[1907] 2 Ch. 406. 413-415."* (695D-E)

...

18. It is essential to distinguish the substantive claim in these proceedings from the Sealing Application.

(a) The substantive claim is hostile proceedings in which a beneficiary (the Plaintiff) is making a hostile claim against a trustee. It falls within the third Buckton category: costs will follow the event.

(b) However, the Sealing Application is in substance a proceeding brought by the trustee to have the guidance of the court as to a question arising in the administration of the trust, falling within the first Buckton category.

In the present case, as in Buckton, the Sealing Application was a 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"*. That question was whether or not the court file should be sealed. Whilst the Sealing Application arose as a result of the substantive proceedings, on any analysis, it was a free-standing application.

19. Moreover, the Sealing application was pursued for the benefit of all beneficiaries (as it would be in the interest of all for confidential information to remain confidential) and it cannot sensibly be suggested that the Sealing Application was brought other than reasonably. As such, all parties' costs should be paid out of the Trusts.

20. Given the principles authoritatively stated in Buckton and McDonalnd v Horn, no difference to the position on costs is made by the Judge's ruling at paragraph 69 of the Second Ruling that *"although* [D2-D4] *had not made the sealing application, they vehemently oppose* [sc. Support] *it. In fact, they are/were the most vocal."* The most that could be said in this regard is that D2-D4's vocal support of the Sealing Application puts them in the same position as if they had made the Sealing Application. But even if that is correct, D2-D4 would still be entitled to their costs out of the Trusts. That is because even if the Applicants have made the Sealing Application, this would have placed the Sealing Application in the second Buckton category (just like the facts of Buckton itself, where the application was made by one beneficiary and opposed by another). Such, all parties would still be entitled to have their costs paid out of the Trusts.

21. In respect of the Extension Application, D2-D4's primary position is that, as the substantially successful parties, they should be paid their costs by the Plaintiff (who opposed the application). In the alternative, D2-D4 submit that the appropriate order is for costs of the Extension Application to be costs in the case."

[7.] The Eighth Defendant (Epstein) is the Guardian ad Litem of the minor and unborn beneficiaries of the Trusts. Epstein's submissions on the issue of costs are, in part, as follows:

"15. The Guardian submits that there is no proper or principled basis for an order that he be liable for any of the US Family's costs, let alone the entirety of their costs, of the Sealing Application:

15.1 The Guardian did not make the Sealing Application.

15.2 The Guardian only became *guardian ad litem* for the minors on 13 April 2022, when he entered a memorandum of appearance, a notice of appearance and consent to act. …

15.3 Thus, the majority of the costs of and occasioned by the Sealing Application were incurred before the Guardian even became involved in the proceedings. There can be no basis in principle for making him liable for those costs. …

15.6 The extent of the Guardian's participation in the Sealing Application was thus extremely limited, namely limited oral submissions at the hearing itself. …

15.7 Those limited oral submissions generated no additional costs on the part of the US Family. The US Family would have been represented at the hearing (and thus incurred the costs of the hearing) in any event."

Epstein, in reply submissions, contend that the law permits exercise of the Re: Barrell jurisdiction, notwithstanding the reconsideration takes place by another judge.

[8.] Cheryl's submissions on the issue of costs are, in part, as follows:

"C. Submissions

(1) Charles Snr. J.'s Ruling should not be set aside or varied now

18. Charles J has already made a costs decision in her May 2022 Ruling. The order as drawn up by the Registrar ought therefore to follow that Ruling unless the Court is now persuaded that it should intervene to set aside or vary the learned Judge's decision. There are therefore two questions that arise: a. Can the Court intervene to set aside Charles J's Ruling? b. If it can, should it?

19. It is respectfully submitted that the answer to each of these questions is 'no'. vii (a) Jurisdiction to intervene

20. The preliminary issue for this Court is whether the Applicants can now properly invoke the jurisdiction of the Court to revisit its decision before a formal order is perfected. The jurisdiction was identified by the Court in Re Barrell Enterprises and others [1973] 1 WLR 19 and is therefore frequently called the "Barrell jurisdiction". …

25. Even if a jurisdiction to intervene theoretically exists, it should not be exercised in this case.

…

29. In all of the circumstances, it is humbly submitted that the Applicants request for a reconsideration of the July 2022 Ruling ought to be dismissed.

(2) Alternative submissions on the Costs Order that should be made

30. In the event the Court does decide to set aside Charles J's costs Ruling at this juncture, we set out below our submissions as to the costs order that ought to be made in respect of the Sealing and Extension Applications.

31. The Sealing Application before the Supreme Court was contentious. Although the Sealing Application was made by D1, it was supported, and largely moved, by D2-D4. Furthermore, while D8 did not lodge written submissions he made oral submissions in support of the Sealing Application.

32. It is a trite principle that in an ordinary situation the costs of an application for an extension of time are borne by the applicants, and it is novel for the D2-D4 and D8 to suggest that Cheryl ought to pay the costs of the Extension Applications or bear her own costs.

...

38. If the Court accepts the submissions set out above, the Court is also asked to order that the D2-D4 and D8 pay the costs of the application to set aside or vary Charles J's Ruling on the standard basis, to be taxed if not agreed."

[9.] The submissions of Cheryl's Children are, in part, as follows:

"II. SUMMARY OF CASE OF US CHILDREN

9. The US Children contend, in summary, that:

> (1) Charles J. has already decided in 2022 that the costs of the Sealing Application incurred by the US Children (and the Plaintiff) should be borne by the Jamaican Family and the Guardian personally and it is not now open to the latter, nearly three years later, to challenge that decision by seeking an order for payment out of the trust assets; or alternatively
>
> (2) Even if that is incorrect, the right order now as a matter of discretion is that those costs should be borne by the Jamaican Family and the Guardian without recourse to the trust assets.

10. The US Children also contend that the Trustee's costs of the Sealing Application should also be borne by the Jamaican Family and the Guardian; but in so far as the Trustee is not indemnified in that way they do not object to an order that the Trustee should take its costs from the trust assets. The Trustee's costs are not addressed further in this skeleton argument."

Law, Analysis and Disposition

[10.] Charles Snr. J stated in her ruling as follows:

> Ground 6: Whether the Judge's ruling on costs was wrong
> [62] The Applicants are also dissatisfied with the costs ruling. The costs ruling in the unredacted Ruling was as follows:
>
> > "Costs
> > [70] As the (REDACTED) are the successful parties in these proceedings, they are entitled to their costs, to be taxed if not agreed. The taxation will be done by the Court."
>
> [63] Counsel for the Applicants submitted that as the parties were not given the opportunity to make submissions on costs before the Court made the Ruling, the Applicants' constitutional right to a fair hearing under Article 20(8) was breached. He said that this was a serious procedural irregularity and breach of natural justice.
> [64] Counsel for the Applicants further contended that the Applicants should not be made to bear the costs of the Plaintiff and the Fifth through Seventh Defendants because they did not make the sealing application. He submitted that the single sentence ruling was imprecise and that the Ruling failed to explain the meaning of "successful parties" or "these proceedings" and failed to specify whether the costs of the Plaintiff and the Fifth through Seventh Defendants were to be paid from the trusts or to be borne personally. In the event that the Court intended to order the latter, the Court misdirected itself on the law and fact
> ...
> [65] The Applicants further submitted that the costs order was wrong because the Plaintiff was not the successful party.
> ...
> [69] The Court made a usual cost order – costs follow the event. Although the Plaintiff and the Fifth through Seventh Defendants did not made the sealing application.
> [70] In any event, nothing precludes the Applicants from challenging the costs order in this Court as they said they would do: see Transcript on 30 May 2022 at pages 52- 56. In addition, an order to that effect has not been perfected. Further, one of the purposes of circulating a draft Ruling before the final Ruling is to give the parties an early opportunity to consider and agree questions of costs. To my mind, this is another occasion where the Applicants are clutching at straws.
> ...

[11.] I accept the submission that the Learned Judge had made a determination on the sealing application as to costs but nonetheless invited the parties to approach her for a reconsideration of the decision under the rule established in **Re Barrell Enterprises**.

[12.] I also accept Cheryl's statement of the principles developed under the **Re Barrell** jurisdiction. At paragraphs 21-23 of her submission, Cheryl, states:

> "21. Russell LJ in Re Barrell Enterprises commented at page 23: "Now that the matter has been looked into, we are of the opinion that there were in this case no grounds on which the argument on the appeal could properly be reopened. When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought to save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present." (Emphasis added).
>
> 22. The Barrell jurisdiction has been developed by the UK Supreme Court specifically by Re L and B (children) (care proceedings: power to revise judgment) [2013] 2 All ER 294: see in particular the judgment of Lady Hale at paragraph 27, in which her Ladyship indicated that the Barrell jurisdiction is not limited to being exercised in 'exceptional circumstances': "This court is not bound by Re Barrell Enterprises or by any of the previous cases to hold that there is any such limitation [that is, the requirement to show 'exceptional circumstances'] upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 3 All ER 518 at 531, [2000] 1 WLR 2268 at 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in Re Blenheim Leisure (Restaurants Ltd (No 3), Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are viii only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

[13.] In the case of **RTL v ALD and others** [2015] 1 BHS J. No. 82 this Court discussed the issue of revisiting a decision made by the Court:

> "34 The Respondents argue that the judge retains an inherent jurisdiction to review a decision made and which has not been perfected. The Plaintiff cites several cases in support of this contention: Re St. Nazaire Co., 12 Ch. D. 88, Re Suffield and Watts, 20 Q.B.D., Millensted v. Grosvenor House, Ltd., [1937] 1 K.B. 717, C.A., Re Harrison's Settlements, [1955] Ch. 260CA, Charlesworth v Relay Roads Ltd. (in liquidation) et al. [1999] 4 All ER 397 and Paulin v Paulin et al. [2009] EWCA Civ 221. They say that the law has advanced

to the point where a simple change of mind would be sufficient to warrant a judge's review and subsequent reversal.

35 The Plaintiff and the Sixth Defendant ("the Applicants") assert that my jurisdiction has ended and that I cannot review the decision of 27 August 2014 notwithstanding the Order made thereon has not been perfected. They cite my reducing the decision to writing and the Respondents' filing of a notice of motion to appeal in support of their argument.

36 In Robinson v Fernsby [2003] All ED (D) 414, May LJ, after citing the authority of Stewart v. Engel [2000] 3 All ER 518 stated as follows:

> Sir Christopher Slade then said at page 525b that, since there must be some finality in litigation and litigants cannot be allowed unlimited bites at the cherry, it is not surprising that, according to the authorities, there are stringent limits to the exercise of the discretion conferred on the court by the Barrell jurisdiction. Russell LJ had said at page 23 in that case:
>
> > "When oral judgments had been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one."

This principle must have greater application where the judgment is a formal written judgment in final form, handed down after the parties have been given the opportunity to consider it in draft and make representations on the draft. At least until the coming into force of the CPR, the Barrell decision would have been clear authority binding on this court for the proposition that only in exceptional circumstances could it be proper for a judge to exercise his discretion under the relevant jurisdiction to vary a previous order once such order had been made. It may no longer be strictly binding after the introduction of the CPR. Nevertheless, all the considerations which led the court to decide as it did in that case still applied. The court therefore had to see whether there were exceptional circumstances sufficient to justify the judge in exercising the Barrell jurisdiction.

37 The authority advanced by the Respondents does suggest that the rule is no so rigid as to require the exceptional circumstance. Having considered these authorities it appears to me that they are all largely based upon environments, which have undergone CPR reforms. The Bahamas however, has not as yet introduced any CPR changes and therefore I find that the Barrell jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of Re: Petition of Henry Ambrister 2007/CLE/qui/01438 & 2008/CLE/qui/845. I accept therefore that it is only in the most exceptional circumstances that I ought to revisit a decision made by me. Further, that having reduced it to writing I ought to even raise the threshold to which I consider most exceptional.

38 In the Eastern Caribbean Court of Appeal decision of Saint Christopher Club Ltd v Saint Christopher Club Condominiums and others - (2008) 74 WIR 254, Rawlins JA held that a judge might review or vary a judgment or order before it was perfected or before an appeal was filed. It was held that appeal terminated the jurisdiction of the court whose order or judgment was appealed even if the judgment or order had not been perfected. The Respondents argue that they have not appealed but merely taken steps preliminary to an appeal as there has been no appeal lodged in the Court of Appeal.

39 The Respondents argue that the exceptional circumstance is the failure of the Plaintiff to bring to my attention the decision of the High Court of Bermuda in Re: Hanover Trust Dressage Trust and The Volcano Trust 2013 SC (Bda) 38 Civ (3 May 2013). They say that

this case had been in the bundle of authorities presented at the 27 August 2014 hearing but was not brought specifically to my attention. In response to the issue of a failure to disclose the Plaintiff says that they always held the view that there was no need for leave under Order 11, rule 1 but nonetheless sought and obtained leave out of an abundance of caution. They argue that they never contemplated this argument, which, they say, is a very bad argument and which was never raised at the 27 August 2014 hearing. It was never thought necessary to bring this aspect of Re: Hanover Trust to the courts attention.

40 I have no hesitation in holding that this failure of the Plaintiff (assuming for the moment that there was such a failure) ought not to be considered a most exceptional circumstance, having regard to my delivery of a considered ruling and the preparatory steps taken by the Respondents to appeal it.

41 I am not moved by Re Hanover, not only because the case is not binding on me or that it was a decision made upon an uncontested matter, but also because this argument, which the Respondent says is disclosed in the Re Hanover Trust case, was not put before me and was not the focus of the hearing on the 27 August 2014. The focus at the 27 August 2014 hearing was the issue of service and whether the affidavit provided to the Registrar and upon which leave was granted was deficient in that it did not show a good case on the merits as required under Order 11(4). The Respondents never made the argument they now make, that there is no in personam jurisdiction in the Court over the Respondents on the basis that there is no power to grant leave to serve out of the jurisdiction. …

42 As the circumstances which the Respondents say warrant a review are not the most exceptional, I find that my jurisdiction is at an end. I take the view of Sir Christopher Slade in the case of Stewart v. Engel that there has to be some finality in litigation and litigants not permitted repeated bites at the cherry. There has to be a point where the parties move to the next stage and challenge the decision if they desire. Whilst the Order has not been perfected I have put my reasons in writing and in fact the Respondents have file a motion for leave to appeal."

[14.] The decision to reopen is discretionary and the Court's jurisdiction should be exercised sparingly, only in exceptional circumstances.

[15.] While I accept that the failure to be given an opportunity to make representations is a good reason (See ***Blue Planet v Downie*** SCCivApp No. 80 of 2018) to review the issue of costs, I am satisfied that there are more compelling reasons not to exercise my discretion to re-open the Learned Judge's decision on costs. These include, but are not limited to, the following:

(1) The application for leave to appeal the decision, which included the costs order, was refused and considered at the appellate level and has been finally adjudicated.

(2) The May 2022 and July 2022 decisions are not simply oral decisions in advance of reasons but ones that were written and considered by the Learned Judge.

(3) The Applicants delayed almost 2 years and this application only moved earlier this year. At no time prior to January of this year did the Applicants make any attempt to seek a reconsideration of the May 2022 or the July 2022 rulings.

(4) While I accept the submission that a subsequent Court could engage in a reconsideration, the delay has deprived Charles Snr. J, who joined the Court of Appeal in January 2024, from engaging in the reconsideration of her own order.
(5) Cheryl has issued her bills of costs and filed the Taxation Application which was listed for a hearing on 6 February, 2025. It was not until 29 January, 2025 (almost 3 years after the May 2022 and July 2022 rulings) when the objection to the taxation was made on the basis that they wished to challenge the award of costs.

[16.] In my view, the question of who is responsible for the costs has been determined by Charles Snr. J, but the question of whether Cromwell could be indemnified for its costs, remains open and is a decision which may still be made.

[17.] Section 30(1) of the **Supreme Court Act** empowers the Court with discretion to determine questions of costs, and provides:

> 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.

[18.] **Price v Saundry & Anor** [2019] EWCA Civ 2261, identifies the proper test to be used to determine whether a trustee's indemnity is available. There, the English Court of Appeal determined that the question to be asked was, were the expenses properly incurred; and were the expenses incurred by the trustee when acting on behalf of the Trust? In the context of this case, I am satisfied that the appropriate answer is yes.

[19.] Cromwell's stated reason for making the application was for the protection of both the assets of the Trust and the confidentiality of sensitive trust-related information, the disclosure of which could risk harm to the Trust or its beneficiaries. Its affidavit evidence relied upon:

(1) the express confidentiality provisions in the Trust Deeds;
(2) the negative impact of publicity on the assets of the Trusts; and
(3) the negative impact on the Trusts' beneficiaries.

Cromwell, reminds the Court that Cheryl originally supported the application.

[20.] It is indeed worth noting that Cromwell's efforts in pursuing the sealing application appears to now accord with the public policy of The Bahamas. Since the decisions by this Court and the Court of Appeal on the sealing applications, the Parliament of The Bahamas has amended the law

to legislate provisions to enable the Court to make privacy orders. By the **Trustee Amendment Act, 2025**, section 77 of the **Trustee Act** has been amended to provide as follows:

> "(1) A trustee, personal representative or power holder may apply to the Court sitting in private (with or without commencing an action) for the opinion, advice or direction of the Court, on any question respecting the — (a) management or administration of the trust property; or (b) assets of any testator or intestate."

[21.] In all the circumstances, I am satisfied that it is appropriate that Cromwell be indemnified from the trust fund with respect to its expenses.

Dated this 9th day of September, 2025

Sir Ian. Winder
Chief Justice