BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2011/0102

BETWEEN:

MURAD ISSAC ELEINI

Claimant

and

~~(1) ISAAC MURAD ELEINI~~
~~(2) MONICA GOODWIN~~
~~(3) MARLENE ELEINI~~
~~(4) AMANDA JENNIFER DWEK~~
(5) INTERMANAGEMENT SERVICES LTD
(6) ALAIN KÖSTENBAUM
~~(7) GESTRUST SA~~
~~(8) SIRIUS TRUSTEES LTD~~

Defendants

[1] I have to decide (1) who should pay the costs of an application for a freezing order obtained *ex parte* from Hariprashad-Charles J on 17 August 2011 by the Claimant against the fifth Defendant ('ISL') and continued by me on 12 September 2011 and (2) whether ISL should pay the Claimant his costs of an application made by him for the removal of ISL as trustee of two settlements – which I am going to refer to as 'Belina I' and 'Belina II.'

The background

[2] The Belina I and Belina II trusts were established on 18 January 2000. There is a dispute as to the source of some of the trust property, but there is no doubt that the Settlor was the (former) first Defendant.[1] Both trusts are BVI settlements, in the sense that their proper law is BVI law and that they are subject to the exclusive jurisdiction of the BVI Court, which is their forum for administration (although the trusts contain provisions enabling that to be changed). The present trustee of each

[1] the proceedings were discontinued against all but ISL on 18 October 2011, but it is convenient to refer to the former parties as if they remained as such. Mr Köstenbaum, the intended sixth defendant, was never served

trust is ISL, which is a BVI registered company. ISL is owned or controlled by one Alain Köstenbaum ('Mr Köstenbaum'), a Swiss lawyer, who is or was the protector under both trusts. The so called primary beneficiary of each trust is, or was, the Claimant. The Claimant is the first Defendant's son. Sometime in late 2010 the first Defendant appears to have conceived the idea of varying the Claimant's entitlement as primary beneficiary so as to benefit the Claimant's daughters, or certain of them. Mr Köstenbaum refused to co-operate and the first Defendant took matters into his own hands by appointing, or purporting to appoint, an entity called Gestrust SA ('Gestrust'), on 11 November 2010, as protector in place of Mr Köstenbaum with a view to persuading Gestrust to appoint new trustees (a Belize registered company called Sirius Trustees Limited ('Sirius')) and, ultimately, to vary the beneficial entitlements under the two trusts. The Claimant challenges the validity of these dispositions.

[3] The Claimant got wind of these manoeuvres and he correctly divined the first Defendant's general intentions. What he did not discover until later was that by a document dated 15 February 2011 the Claimant was purportedly removed as a beneficiary under Belina I and the first Defendant was appointed in his place. By a further document dated 4 April 2011 the assets of the Belina II trust were purportedly 'divided' between the Claimant as to 60% and two of his sisters and their children and remoter issue as to 40%. I shall have to refer to these purported changes in a little more detail later. They, too, are challenged by the Claimant. On 5 August 2011 his BVI lawyers, Conyers Dill & Pearman ('CDP'), wrote to Mr Köstenbaum intimating that they intended to apply to the Court on behalf of the Claimant for a determination as to the validity of the steps as then known to them and inviting Mr Köstenbaum and ISL to adopt a neutral stance. They also asked for assurances that ISL would not dispose of trust assets, in particular that it would not transfer assets to Sirius. On 9 August 2011 Mr Köstenbaum told CDP that ISL had retired as trustee in July 2011. CDP challenged the validity of this alleged retirement and asked for an assurance that no trust assets had been disposed of. Mr Köstenbaum replied on 11 August 2011 saying that no assets had been disposed of to date but that unless stopped by an injunction, 'the files' would be transferred 'to a new Trustee properly appointed.'

[4] CDP interpreted this as a threat to transfer the trust assets to a new trustee (presumably Sirius). These proceedings were accordingly commenced, with the Claimant's father, his three sisters, ISL, Mr Köstenbaum, Gestrust and Sirius as Defendants (or intended Defendants) and on 17 August

2011 the Claimant obtained *ex parte* from Hariprashad-Charles J an injunction over 12 September 2011 preventing ISL from disposing of trust assets and ordering it to give disclosure as to the identity of those assets. She must also have given permission for the proceedings to be served out of the jurisdiction, although I do not think I have seen a copy of that order. She reserved the question of costs to the judge hearing the *inter partes* application. On 5 September 2011 the Claimant issued an application for the 'interim' appointment of a new Trustee. On 7 September 2011 Walkers, for ISL, informed CDP that they would be taking a neutral stance on the application for the continuation of freezing relief and on 9 September 2011 they said that ISL would not (subject to certain conditions being satisfied) object to an order of the Court replacing it as a trustee provided that an application for summary judgment was taken out for that purpose. On 12 September 2011 I continued the freezing relief until further order and gave directions in a summary judgment application for the removal of ISL as trustee of the Belina Trusts. I reserved the costs of the *ex parte* application and of the application of 12 September 2011 to the Judge hearing the Claimant's application of 5 September 2011 for the removal of ISL as trustee.

[5] It appears, although there is no evidence formally before the Court, that on 13 October 2011 the Claimant, the first Defendant, and two of the Claimant's three sisters met and appear to have thought that they had reached a settlement of their disputes, the settlement 'to be implemented by lawyers'. I shall have to consider that in a little more detail later. As I understand it, the intended outcome of the agreement was that the Claimant should be left (once the agreement had been implemented by the lawyers) beneficially entitled to the assets of the Belina II trust, subject to a 25% life interest for the first Defendant, and that the first Defendant would appoint a trustee of his choice over the Belina I trust and make such dispositions as he thought fit in relation to it, but to the exclusion of the Claimant and his family. It was a term of the settlement that the Claimant discontinue against the other parties with the exception of ISL and I made an order to that effect on 18 October 2011, providing for the Claimant to pay the costs of the parties against whom the Claimant had discontinued. The freezing relief granted against ISL remained in place. The only remaining parties to the proceedings are therefore the Claimant and ISL.

The costs of the freezing orders

[6] Mr Raymond Davern, for the Claimant, says that he was obliged, as a result of the terms of Mr Köstenbaum's letter of 11 August 2011, to seek injunctive relief and that ISL should pay his costs

accordingly. Mr Oliver Clifton, for ISL says that since there has been no determination of the rights and wrongs of the grant of freezing relief and since reservation of costs normally indicates that the judge reserving them intends that their ultimate incidence should turn on the eventual outcome, it is impossible for the Court to say now whether the Claimant's application for freezing relief was justified. He therefore submits that there should be no order as to costs, since it is not possible to say whether the Claimant has succeeded on that issue.

[7] I have no doubt that Mr Davern's submissions are correct. Even under the disputed appointments of February and April 2011, the Claimant retained a significant beneficial interest in one of the two trusts and on his case he remained currently the sole beneficiary under both. He was kept in the dark by Mr Köstenbaum, who for this purpose is to be treated as speaking for ISL,[2] and who declined, in his letter of 11 August 2011, to give him the assurance he sought. That that assurance was a reasonable one for the Claimant to have sought is demonstrated by ISL's indication on 7 September 2011 that it would not oppose the continuation of the freezing order. The fact that there has been no determination after a contested hearing of the merits of the freezing application does not mean that it is not possible for me to reach the conclusion now (which I do) that the freezing order application was a measured and justified response to the stance taken by Mr Köstenbaum/ISL in August 2011. ISL must therefore pay the Claimant's costs of it.

[8] Mr Davern put in three schedules itemising his claim for the costs of the freezing relief. Mr Clifton submits that they contain a number of unparticularised items described, for example, as 'internal discussions' or strategy discussions' and 'various emails. Five hours was spent drafting a letter of 5 August 2011 and there are claims for work done after 7 September 2011, when ISL had indicated that it would not be opposing the continuation of the order on 12 September 2011. CDP's charges down to 7 September 2011 come to some US$89,000, plus disbursements of around US$5,800, a total of some US$95,000. Mr Clifton does not suggest that these charges are, as between CDP and their client, anything but reasonable, but he submits that they are insufficiently particularised to support an order that ISL as paying party should pay the aggregate amount of them. I accept that submission. In deciding how much a paying party should pay on an *inter partes* assessment the

[2] it turned out that ISL has never had a licence to act as a trustee within the BVI, thus committing a criminal offence by having done so

Court has to fix a figure that is reasonable[3] and fair to both parties.[4] Necessarily constrained by the lack of detail in the schedules and doing the best I can on that basis, I think that a figure of US$60,000 strikes such a balance.

[9] I leave open whether ISL is entitled to be reimbursed out of the trust assets for this particular expense, but in my judgment any trust property to which the Claimant ultimately establishes a beneficial entitlement (whether as a result of a decision on the effect of the dispositions to which I have earlier referred or as a result of enforcement of the agreement of 13 October 2011 or otherwise) must be exonerated from having to satisfy any part of any such indemnity. Until 7 September 2011 this was essentially hostile litigation between the Claimant and ISL in which, for the reasons given above, the Claimant is to be taken to have succeeded. There is no reason why ISL should be indemnified out of property ultimately held to belong to the Claimant in respect of this liability.

The removal applications and their costs

[10] It is necessary to set out the effect of the dispositions (real or purported) to which I have referred above in a little more detail before approaching these questions.

[11] Initially, before the events of late 2010/early 2011, the Claimant was the primary beneficiary of Belina I and Belina II. The first Defendant then purported to appoint Gestrust as protector of both trusts. Gestrust went on to appoint Sirius as trustee of both trusts. On 15 February 2011 Gestrust and Sirius purported to remove the Claimant as primary beneficiary of Belina I and to appoint the first Defendant in his place. On 4 April 2011 Gestrust and Sirius purported to divide the assets of the Belina II trust as to 60% for the Claimant and as to the remaining 40% for the third and fourth Defendants and their children and remoter issue. The Claimant contended in the proceedings (before they were discontinued) that each of these appointments and dispositions was invalid for one reason or another.

[12] As I have already mentioned and although it is not formally in evidence, on 13 October 2011 there appears to have been a meeting at the first Defendant's London home between the first Defendant, the Claimant and two of the Claimant's sisters (the third and fourth Defendants). The handwritten

[3] CPR 65.2(1)(a)
[4] CPR 65.2(1)(b)

memorandum of what was agreed at that meeting seems to have been signed by each of those persons. The second Defendant, who had no interest in either of the trusts pursuant to the various appointments set out above, was not, apparently, present. The memorandum records an agreement for the Belina I trust to be transferred to trustees of the first Defendant's choice, 'free from any costs from [Mr Köstenbaum] or ISL' and for the Claimant and his family to relinquish all rights and claims to it. The second, third and fourth Defendants were to relinquish all claims to the Belina II trust and the first Defendant was to be given (I paraphrase) a life interest in 25% of the Belina II trust. All claims in the BVI against the Defendants (other than that against ISL) were to be withdrawn. The Claimant was to pay the costs of all parties other than ISL. There were other provisions to which I need not refer for present purposes.

[13] So far as I am aware, no appointments have been made in respect of either trust to give effect to this agreement.

[14] The position in relation to Belina I as a matter of trust law therefore seems to be that either the Claimant remains the primary beneficiary or, if the appointment of 15 February 2011 was valid, the first Defendant has replaced him in that position. In either event, the Claimant appears as a matter of contract to have renounced all claims to be considered a beneficiary of Belina I (and has purported to renounce all such claims on the part of any of his family).

[15] The position in relation to Belina II as a matter of trust law would appear to be that either the Claimant remains the primary beneficiary or, if the appointment of 4 April 2011 was valid, his entitlement has been reduced to 60%, with the remaining 40% going to the third and fourth defendants and their children and remoter issue. It appears that the third and fourth Defendants have contracted to relinquish all claims to the Belina II trust and have purported to bind the second Defendant to do the same. The parties to the 13 October 2011 Memorandum further contracted to provide the first Defendant with a 25% life interest in Belina II. Whether or not these terms are to be given effect, they would be subject, if the appointment of 4 April 2001 was valid, to the interests of the children and remoter issue of the third and fourth Defendants under that appointment.

[16] I might add that the first Defendant, after having ceased to be a party to these proceedings, has written to the Court enclosing, among other documents, what appears to be a copy letter from the second defendant to Walkers, who act for ISL, to say that she believes that the dispositions made

by the appointment of 4 April 2011 were valid and to state that, if they were not, then if she were protector under Belina II, she would like Sirius to be appointed as Trustee and the terms of the purported 4 April 2011 appointment to take effect. The purpose of these communications is indiscernible and in any event the Court cannot take them into account. I mention them for completeness.

[17] ISL is not interested in remaining as trustee of either trust and it was common ground between Mr Clifton and Mr Davern that an order of the Court was, in the present circumstances, the only method by which ISL could be removed as trustee of either settlement. It appeared that ISL had been content for the Claimant's chosen candidate TMF (BVI) Limited ('TMF', formerly known as Equity Trust BVI) to be appointed under section 42 of the Trustee Ordinance (CAP 303) in its place as trustee of the Belina II trust, but would not make a transfer of the assets of the Belina II trust voluntarily without the written consent of the first Defendant. I therefore made an order under section 42 appointing TMF as trustee of the Belina II trust, subject to its continuing consent to accept the appointment.

[18] Mr Davern asked me to appoint a new trustee of the Belina I trust in place of ISL. It appeared initially to be common ground between Mr Clifton and Mr Davern that the right course was for the Court to remove ISL and appoint Sirius in its place. I agree that it is important that ISL be replaced as a trustee of the Belina I trust as soon as possible, if only for the reason that it is not licensed to hold any such office. I declined, however, to appoint a non-BVI trust company as trustee of a trust which as things stand is governed by BVI law and is subject to the exclusive jurisdiction of the Courts of this Territory and in the absence of any alternative candidate I originally directed that the property of the Belina I trust be brought into the custody of the Court to abide its further order.

[19] It subsequently transpired that there is no machinery for the Court to take custody of securities such as bearer shares and the matter was accordingly brought back for a further hearing. At that hearing the Court was told that TMF was prepared to accept an appointment as trustee of the Belina I trust and I made that appointment accordingly.

[20] The Claimant asks for the costs of his application for the removal of ISL and the appointment (as things turned out) of TMF as trustee of both trusts. I have come to the conclusion that he is entitled to those costs, but in my judgment they should be paid out of the trust funds. It was clearly

essential that ISL was removed. I take the view that in the midst of the tangled web which I have attempted to describe above, the only sure way in which that could have been done was by order of the Court under section 42 of the Trustee Ordinance. ISL did not oppose the move. This was not hostile litigation. I have not forgotten that ISL has been acting without a licence, but the reason why it has been made so difficult for it to retire has nothing to do with that fact and everything to do with the confusion which has been generated by the underlying family dispute and the conflicting dispositions which it has engendered. In my judgment it is the family, in the shape of its trust funds, which should pay the costs of ISL's retirement and replacement, to be assessed if not agreed.

Commercial Court Judge

20 December 2011