Neutral Citation Number: [2024] EWHC 757 (Ch)

Case No: **HC-2015-001414**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS AND PROBATE (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **26 March 2024**

Before :

Mr Justice Adam Johnson

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Between :

Asturion Foundation **Claimant**

- and -

Aljawharah Bint Ibrahim Abdulaziz Alibrahim **Defendant**

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David Mumford KC and James Kinman (instructed by **Bryan Cave Leighton Paisner LLP (BCLP)**) for the **Claimant**
Rupert Reed KC Simon Atkinson (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing date: **26th March 2024**

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JUDGMENT

Mr Justice Adam Johnson **Tuesday, 26 March 2024**
(**15:48**pm)

Judgment by **MR JUSTICE ADAM JOHNSON**

1. I have to give judgment on a number of matters arising from my earlier decision in these proceedings.

Permission to Appeal

2. The first point is whether to grant permission to appeal. I have determined that I will refuse permission.
3. This was a case in which the parties, and more particularly their experts, offered views as to the effects of Liechtenstein law which were entirely polarised on the key issues in the case. Those issues were as to (1) the proper purposes of the Claimant Foundation, a Liechtenstein body, and (2) the internal competencies under Liechtenstein law of a board member of the Foundation, namely Maître Assaly. Embedded within these key issues were a large number of sub-issues on which again the experts held largely polarised positions.
4. In the end, having listened to detailed cross-examination of the experts, I came to the clear view that I preferred the evidence of the Defendant's expert, Dr Bosch. His view, which I found entirely persuasive, was that (1) the purposes of the Foundation were sufficiently pliable to permit the Founder the ability to direct dispositions of Foundation assets during his lifetime, and (2) the Foundation was structured in a manner designed to confer decision-making and procedural competence, as far as possible, on Maître Assaly, as the Founder's longstanding and trusted adviser.
5. It seems to me that this was an exercise in evaluation of the type referenced by the Privy Council in its recent decision in Perry v Lopag Trust Reg [2023] UKPC 16, [2023] 1 WLR 3494 at [14]. Moreover, it was an exercise of evaluation which depended principally, if not entirely, on consideration of the written and oral evidence of the experts and was, therefore, at that end of the spectrum of cases on the application of foreign law which is most closely akin to evaluations involving determinations of fact. Further, it was an evaluation conducted in an area of foreign law,

the Liechtenstein law of foundations, which has no parallel in English law and which is, therefore, effectively alien to English lawyers but in which Dr Bosch is a recognised and well-renowned expert. It seems to me that the Court was entirely justified in placing confidence in his expertise.

6. The Grounds of Appeal are by and large an attempt to revive many of the same points dealt with at trial and to persuade me that, on proper analysis, I should have preferred the views of Dr Walser and not those of Dr Bosch. These are almost all points which have already been expressly considered and rejected in my Judgment. Insofar as there are points which were not expressly referenced in my judgment, they did not have to be. As Lord Hodge pointed out, again at [14] of the Perry decision: "*... Not all the matters which have influenced the judge in forming a view on which evidence to prefer will always be recorded in any detail in a judgment or can be ascertained from reading a transcript of the proceedings*."
7. It is true, as Ground 1 of the Grounds of Appeal indicates, that certain English law questions arose for consideration as to the scope of the section 26 of the Land Registration Act 2002. However, those were subsidiary points, not strictly arising given my findings on Liechtenstein law, and the comments made about section 26 in my Judgment are strictly *obiter*. I therefore do not see that as providing proper justification for an appeal.
8. Bearing in mind all those points, I do not see any real prospect of my overall evaluation being overturned on appeal and see no other compelling reason why there should be an appeal.
9. Permission to appeal is therefore refused but on terms that the Claimant will have until 30 April to file an Appellant's Notice with the Court of Appeal.

Stay Pending Appeal

10. The next question is whether there should be a stay pending appeal. This question arises because the Foundation as Claimant has lodged a Notice of pending land action on the Land Register, which presently operates as an inhibition on a sale or disposition of the property at the heart of these proceedings, known as Kenstead Hall. I am satisfied that, absent any appeal, there is no good

reason for that Notice remaining in place and consider it should therefore be vacated, either under the machinery in section 4 of the Land Registration Act 2002 or by way of exercise of the Court's general jurisdiction.

11. Mr Mumford KC, though, has instructions to seek permission to appeal, as I have indicated, and so he seeks a stay. It seems to me clear that he should be entitled to one until the appeal is concluded by whatever means. I think the reason is a simple one, which is that the balance of justice and convenience between the parties requires it. One need only look at the competing alternatives. If there is no stay, but there is an appeal by the Foundation which is ultimately successful, then the position of the Foundation may be irremediably damaged in the meantime if Kenstead Hall is sold or transferred by the Princess and the proprietary interest claimed by the Foundation is, therefore, violated.

12. On the other hand, if there is a stay, but the Princess later prevails on appeal, it is difficult to see that she will have been prejudiced in the meantime. She will still have Kenstead Hall. It is true that she will not have been able to do anything with it in the meantime, but there is nothing to suggest that she either intends or wishes to. One might, therefore, equally well say that there is no need for a stay. But it seems to me that if there is any doubt, it should be resolved in favour of maintaining the *status quo*.

13. I will, therefore, make an Order for a stay with the effect that the present Notice will remain in place for the time being. If the Princess wishes in due course to persuade the Court of Appeal to vary that Order, if it grants permission to appeal, she will be at liberty to do so.

Costs

14. The next question or set of questions concerns costs. A number of points arise in connection with the costs of the proceedings. I start with some brief background.

15. This has been a very long-running action. The claim was issued, I understand, about nine years ago. The costs of the Princess, the Defendant, are considerable; expressed in round figures, they come to

about £6.6 million. The action was a claim by the Foundation, Asturion Foundation, to seek to recover title to an English property, Kenstead Hall, which was transferred to the Princess in 2011 by Maître Assaly, who at the time was a member of the board of the Foundation, as I have mentioned.

16. In the end, I determined that in effecting the transfer, Maître Assaly was acting within the purposes of the Foundation and acting within the scope of his internal competencies. I thus resolved, in favour of the Princess, what seemed to me the two primary issues in the case.

17. The Princess, though, also had a back-up case, in case she was wrong on the primary issues of purpose and as to the scope of Maître Assaly's competence and authority. She thus sought to rely on the operation of certain principles of Liechtenstein law, referenced principally in Article 187a of the Liechtenstein Civil Code, which are concerned with the representative authority of corporate officers and agents. She also sought to rely on the English law doctrine of ostensible authority.

18. Given my primary findings, these points were not relevant to the overall outcome, but I said in my judgment that if they had been relevant, I would have found in favour of the Foundation, and so any contravention of the Foundation's purpose or any lack of proper authority on the part of Maître Assaly could not have been cured by reference either to Article 187a or to the English law doctrine of ostensible authority.

19. The Foundation itself also had certain secondary and indeed tertiary claims advanced on the footing that, even if legal title to Kenstead Hall had been transferred to the Princess, it was able either to rescind the transfer of title or, if not, then advance other personal claims against the Princess in unjust enrichment and/or for damages for knowing receipt arising from the circumstances in which the transfer had taken place.

20. I held that on the facts these secondary and tertiary claims failed also, although they prompted some debate on certain legal issues relating principally to matters such as choice of law and the proper scope of section 26 of the Land Registration Act 2002, on which I preferred the submissions made by the Foundation rather than those made by the Princess' legal team.

21. Against that background, the Foundation recognises that the Princess is in effect the successful party and it is the unsuccessful party, and so the Princess should be entitled to her costs of the action. But a number of points arise for consideration nonetheless.

Deductions

22. To start with, there is a question whether there should be deductions from the Princess' otherwise recoverable costs.

23. The Foundation says that there should be certain deductions arising from the following sources: (1) the Princess' failure to agree that she had received over 1/8th of the assets of the Foundation, which then required a process of valuation, which it is said the Princess also approached in a dilatory and/or obfuscatory manner; (2) the Princess' dogged pursuit of certain points pre-trial which were then either abandoned or not pursued or came to nothing, (3) the Princess' pursuit of points on which she eventually lost at trial, perhaps principal among them the Princess' arguments that she was entitled to rely on Article 187a of the Liechtenstein Civil Code or else on the English law doctrine of ostensible authority, to validate her title to Kenstead Hall.

24. The Foundation argues that the whole of the costs of the valuation exercise referenced at (1) should be disallowed and that there should otherwise be deductions of 10% and 15% respectively from the Princess' otherwise recoverable costs to take account of issues (2) and (3).

25. The Princess' position is that she is content to agree a reduction of 10% from her recoverable costs, in effect to take account of the fact that she failed on some parts of her case, but no more than 10%.

26. On this question of deductions, I have come to the view that I largely prefer the submissions of the Princess, essentially for the following reasons.

27. The exercise is largely impressionistic but it seems to me that the high value items in the Foundation's challenge are really the points about the Princess' failure to agree she had received 1/8th of the assets of the Foundation and her misplaced reliance on Article 187a of the Liechtenstein Civil Code and on the English law doctrine of ostensible authority. The point about both these

issues, it seems to me, is that they were effectively irrelevant to the outcome given my determination on the Foundation's primary case.

28. To expand a little, the point about distributions from the Foundation was part of the Foundation's case about its purpose. Its position was that the Foundation's purpose was limited in the sense that distributions could not be made to beneficiaries in excess of their specified shares, said to be either equal shares or what were referred to as Shari'a shares. A 1/8th share would have corresponded to the Princess' Sharia share.

29. My view of the Foundation's purpose, however, was that it was not limited in this way. Instead, I was persuaded by the Princess' evidence on Liechtenstein law to the effect that the purpose was sufficiently pliable to allow the Founder to direct transfers of Foundation assets to his nominees without limitation.

30. The real nub of the Foundation's criticism is that the Princess was unreasonable in refusing to agree that she had received more than a 1/8th share, but I am not persuaded this is a valid point of criticism, because one might equally well say that it was unreasonable of the Foundation to press her to agree that she had, when that had no bearing, ultimately, on the validity of the dispositions made in her favour.

31. During submissions today, I have been taken to a certain amount of correspondence, but I am told by no means all the relevant correspondence, concerning the instruction of Jones Lang LaSalle, the single expert instructed to opine on the value of the Foundation's assets. In that regard, the Foundation has made certain criticisms of the Princess in terms of her being dilatory and unreasonable, as I have mentioned. By the same token, however, the Princess has made certain criticisms of the Foundation, in particular as regards its failure to produce relevant documents in a timely manner, which she says were important in the context of the valuation exercise and, it seems, necessary in order for her to have confidence that the exercise was being managed in a proper manner and was likely to produce an accurate result that she could rely on.

32. I do not think it necessary or appropriate to try and form a value judgment about matters such as this, and indeed I think it would be dangerous to try and do so, given that I have been shown only snapshots of the relevant correspondence in the time available. It seems to me we are now at the stage where one needs to stand back from the inevitable disagreements, procedural or otherwise, which took place during the course of the proceedings, and look at matters in the round.

33. Indeed, this is really what Mr Mumford KC encouraged me to do, because his point was that there was a discrete valuation issue which the Princess had eventually conceded and which she could and should have conceded much earlier. In other words, the Foundation was entitled to say to the Princess, "*You refused to concede this discrete point and you should therefore bear the costs of addressing it*." That is one way of looking at things. But it rather depends on one's perspective, and it seems to me, with respect, that Mr Mumford KC's perspective on this point was perhaps not wide enough. The valuation exercise, as I have said, was in support of the Foundation's case on its purpose and it seems to me that the Princess is equally well able to say to the Foundation, "*You were wrong on the purpose argument and so you must bear all the costs incurred in addressing it, including the costs of the joint valuation expert, whose evidence in the end was effectively irrelevant to the outcome I have obtained*."

34. Likewise, I am not persuaded that I should make any allowance for the Princess' attempts to rely on Article 187a of the Liechtenstein Civil Code and on the English law doctrine of ostensible authority, given that these were effectively fallback points. The fact that the Princess lost on them does not affect the conclusion that overall she was the successful party and the Foundation the unsuccessful party. It very often happens in complex and hard-fought litigation, with many points in play, that the parties win and lose on individual issues, but what is most important is the overall outcome, and the fact that a party has not prevailed on particular arguments along the way should not prevent the Court taking a broad view and reaching a conclusion on costs which properly reflects the overall balance of success between the parties. This is particularly so, it seems to me, as regards a lack of

success on points which arise only on a party's secondary case, if it has meanwhile been successful on its primary case and has thus secured a victory overall.

35. In light of those conclusions, which it seems to me apply with equal force to many of the other points of detail referenced by the Foundation in its skeleton argument, I am not persuaded that there should be a deduction from the Princess' costs of the scale the Foundation contends for.

36. In light of the Princess' own concession, however, it is appropriate to make some allowance. She contended for 10% but, on reflection, I think the figure should be slightly higher, in particular to take account of the Foundation's success on certain points which were pushed rather aggressively by the Princess but which then were later abandoned or dismissed. I have in mind in particular the attacks made in the pre-trial phase on the independence of Dr Walser, the attempt in cross-examination to undermine the independence and credibility of Dr Rabanser, and the approach to the evidence of Dr Al-Rouwaished, which I rejected in favour of the Foundation's case that certain aspects of Maître Assaly's behaviour were properly explicable on the basis of a misunderstanding and not by reference to other factors.

37. Overall, and taking account of such matters, I propose to make a deduction of 15% from the Princess' otherwise overall recoverable costs.

Payment on Account

38. The next question is whether there should be a payment on account. The Princess seeks such a payment and says it should be in an amount corresponding to 50% of her recoverable costs. This is not resisted. There will therefore be a payment on account in the amount of 50% of the costs I have determined to be recoverable. I need to leave it to the parties to calculate and agree the precise figures.

Interest on Costs

39. The next point is interest on costs. This topic raises two sub-issues, namely whether there should be an Order under CPR rule 44.2(6)(g) for pre-judgment interest, and relatedly whether there should be

an Order pursuant to CPR rule 40.8(1)(b) postponing the payment of judgment debt interest until three months from the date of the Court's Order today.

40. As to the first of these points, the Princess seeks interest on the costs expended by her since the dates of payment of the relevant invoices rendered by her solicitors. She makes the point that the litigation has been running for a long time, some nine years, and that she has been out of pocket therefore for a considerable period. She says she is entitled to a payment reflecting the time value of money. This has been calculated by her cost draftsman at £362,478.87, using an interest rate of 2% above the Bank of England base rate from time to time, which is said to represent a reasonable approximation of her likely costs of borrowing: see, for example, the Commercial Court practice in cases such as Richards v Speechly Bircham LLP [2022] EWHC 1512 (Comm) at [38]-[39].

41. On the second point, i.e. suspension of payment of judgment debt interest, the Foundation's submission is essentially that it should not be penalised by having to pay statutory judgment debt interest at a rate of 8% per annum until it has had a fair opportunity to decide what sums it accepts should be payable, and it has not yet been able to do so given that it has not yet received a detailed bill of costs and needs more time. The Foundation refers to the logic of that position as expressed in the judgment of Mr Leggatt J (as he then was) in Involnert Management Ltd v Aprilgarage Limited [2015] 2 CLC 405.

42. In summary, I see merit in both points. As to pre-judgment interest, the matter is one for the Court's discretion. The factors in the mix are straightforward. The Princess has been out of pocket in respect of her costs for a substantial period of time. It seems to me unfair for her not to be compensated accordingly and I therefore agree that interest should be awarded and that an appropriate measure is the likely cost of borrowing over time. I propose to make an award of pre-judgment interest, therefore, at 2% above base rate from time to time.

43. I would make two further points in this regard. The first is that Mr Mumford KC, in argument, challenged the 2% figure, but I note the reference to the general Commercial Court practice in cases

such as Richards, and I also note that in Marathon Asset Management v Seddon and Others [2017] EWHC 479 (Comm) cases, Leggatt J again, at [17], referred to a 2% uplift as common in the then current environment of low interest rates. That has been the environment, as Mr Reed KC has pointed out, during much of the period the present litigation is concerned with. So, in summary, I think that a 2% uplift is justified.

44. The second point, though, is that I accept Mr Mumford KC's submission that interest should not run during the period between September 2017 and January 2020, when the proceedings were effectively in a state of suspense pending determination of a strike-out application made by the Princess, which was eventually unsuccessful.

45. As to post judgment interest, I agree that this is the sort of case where some real issues of proportionality and reasonableness are likely to arise on assessment and in which, therefore, it is appropriate for the paying party to be accorded some further time to consider its position in light of the information yet to be supplied to it. It seems to me that the sums involved are sufficiently large and the complexity such as to justify that conclusion. I therefore think it appropriate to make an Order which suspends the accrual of judgment debt interest, at least for a further period of three months, as Mr Justice Trower did in Galapagos Bidco v Kebekus and Ors [2023] EWHC 2348 (Ch). If further time turns out to be necessary beyond three months, then a further application will need to be made.

46. Taking the two matters, pre and post-judgment interest, together, in summary the Order I propose to make is as follows. The Foundation should be liable for pre-judgment interest on all sums expended by the Princess in respect of the recoverable costs I have allowed, i.e. 85% of her claimed overall costs, save for the period between September 2017 and January 2020. Judgment debt interest will accrue from today on the amount now ordered to be paid by way of interim payment. No judgment debt interest will accrue on the remaining disputed amount for a period of three months, but interest

at the pre-judgment rate will continue in the meantime. There may not, in practice, be much difference between the two given current interest rates, but so be it.

Conclusion

47. That concludes this Judgment. I will need the parties to assist in agreeing and finalising a form of Order to reflect the determinations I have made.