In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 142

BETWEEN:

(1) DAVID DANGLER MOIR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)
(2) RONALD BROWN MOIR, JR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)

Plaintiffs/Respondents

-and-

(1) MARK WALDRON ANDREW
(2) MARSHA LYNN ANDREW

Defendants/Applicants

RULING

Date of Hearing: **19 February 2025**
Date of Ruling: **13 March 2025**

<u>Appearances</u>: **Paul Harshaw, Canterbury Law Limited, for Plaintiffs**
Philip Perinchief, PJP Consultants, for Defendants

RULING of Mussenden CJ

Introduction

1. This matter came before me by the Plaintiffs' three summonses as follows:

a. Summons dated 28 September 2022 – an application seeking an order for the time limited for filing a Bill of Costs to be extended from 25 August 2022 until 8 September 2022 and that the costs of the application be provided for (the "**Time Summons Application**"). They relied on the Affidavit of Julica Shannon-Leigh Harvey which was sworn on 6 September 2022 ("**Harvey1**").

b. Summons dated 4 November 2022 – an application for an order that the judgment made on 30 October 2022 be amended by adding immediately before the full-stop the words "*and pay the costs of this action, to be taxed on the standard basis if not agreed*" and that there be no order as to costs of or occasioned by the application (the "**Judgment Amendment Application**"). They relied on the Third Affidavit of David Moir which was sworn on 1 November 2022 and accompanying exhibit ("**Moir3**").

c. Summons dated 16 June 2023 – an application for a declaration that by the Defendants putting their relationship with each of Saul Dismont and/or Marshall Diel & Myers Limited, Marc Daniels and/or Marc Geoffrey Limited and Allan Doughty and/or MJM Limited in issue by the first-named Defendant's affidavit sworn on 29 May 2023 they have waived their confidentiality and legal professional privilege in relation to each of Saul Dismont and/or Marshall Diel & Myers Limited, Marc Daniels and/or Marc Geoffrey Limited and Allan Doughty and/or MJM Limited in this action from 18 February 2022 (the "**Waiver Application**").

2. The Defendants opposed the Time Summons Application and the Judgment Amendment Application.

3. In relation to the Waiver Application, the Defendants agreed to the application of waiver of legal professional privilege in respect of Marc Daniels and/or Marc Geoffrey Limited and Allan Doughty and/or MJM Limited. However, they opposed the application in respect of Saul Dismont and/or Marshall Diel & Myers Limited.

4. I will deal with each application in turn.

Background

5. In a Ruling dated 18 February 2022 (the "**Ruling**") I set out the background to the substantive case. It will be useful to repeat some of that background here for context for the present applications.

6. The Plaintiffs are US citizens and resident of Massachusetts. They are the co-executors and duly appointed personal representatives of the estate of their late mother, Tia Dangler Moir

(**Tia**). A US citizen, Tia passed away in Bermuda on 18 October 2018 aged 89 having been a resident and homeowner on the island for over 40 years.

7. The First Defendant/Applicant Mark Andrew is Tia's step-son. He is the offspring of the late Bermudian David Andrew, Tia's second husband. Mark Andrew is a Bermudian.

8. The Second Defendant/Applicant Marsha Andrew is Mark Andrew's wife. Marsha Andrew is a US citizen and a Bermuda status holder.

9. David Andrew died in March 2012. From late 2012 until Tia's death, the Defendants acted (with the consent and agreement of the Plaintiffs) as Tia's full-time care givers and were remunerated by Tia and the Moir family for their services. They lived with Tia in her substantial shore-side Bermuda home, Commonland Point House, which is set on a plot of over 1.8 acres on the north side of Harrington Sound (**Tia's House**).

10. Tia's Last Will and Testament dated 28 June 2012 ("**Tia's Will**") *inter alia* bequeathed all of her tangible personal property to the Plaintiffs. As her co-executors and personal representatives, the Plaintiffs are empowered to "*divide and distribute* [Tia's] *tangible personal property by any means they consider fair and practicable…*"[1].

11. Without notice to the Plaintiffs or any other member of the Moir family, in August 2014 Tia conveyed the remainder interest in Tia's House to Mark Andrew for $1 while retaining a life interest in the property for herself. The transaction was not revealed to the Plaintiffs until several months later. In Case No. 405 of 2019, the Plaintiffs are seeking to have the conveyance set aside, and Tia's House transferred back to Tia's estate, on the grounds that the Defendants procured the conveyance by exerting undue influence over Tia (the "**Conveyance Case**").

12. Between May and July 2019, the First Plaintiff David Moir came to Bermuda in his role as co-executor and personal representative, and in accordance with Tia's Will, to inspect, inventory, pack and ship to the United States all of Tia's tangible personal property located in Bermuda. Subsequent to those duties, disputes have arisen about the personal property (chattels).

13. In accordance with their duties as co-executors and personal representatives of Tia's estate, the Plaintiffs filed and served a Generally Endorsed Writ of Summons (the "**Writ**") dated 10 June 2020 seeking *inter alia* a declaration that the Defendants have wrongfully converted certain chattels belonging to Tia's estate.

[1] See clause 6.2 of Tia's Will

14. On 29 July 2020 the Defendants entered an appearance in response to the action.

15. On 25 August 2020 the Plaintiffs' Statement of Claim (the "**SOC**") was served on the Defendants' counsel.

16. On 30 October 2020, the Defendants having failed to file a Defence within 14 days after the service of the SOC, the Plaintiffs applied for and obtained a Default Judgment. The Default Judgment was obtained more than 8 (eight) weeks after the Defence was due.

17. On 18 November 2020, almost 3 (three) weeks later, the Defendants filed a Summons seeking to set aside the Default Judgment.

18. In the Ruling dated 18 February 2022, I refused the application to set aside the Default Judgment.

19. On 22 February 2022, Canterbury Law Limited replaced Carey Olsen Bermuda as counsel for the Plaintiffs.

20. On 23 February 2023, PJP Consultants replaced Marshall Diel & Myers Limited as counsel for the Defendants.

<u>The Times Summons Application</u>

<u>Plaintiffs' Submissions</u>

21. Mr. Harshaw submitted that Harvey1 set out that on 18 February 2022 the Court delivered its Ruling dismissing the application to set aside judgment, and made an order *nisi* that the Plaintiffs be awarded their costs unless either party applied to be heard on costs. As neither party applied to be heard, then on 25 February 2022 the order for costs became absolute. In the middle of those two events, on 22 February 2022, Canterbury Law Limited replaced Carey Olsen as attorneys for the Plaintiffs in this case and in other related cases between the same parties, including consideration of a 7-day trial that was set down for 4 – 12 April 2022 for the Conveyance Case. Thus, it had taken some time for Canterbury Law Limited to come to grips with all aspects in all actions between the parties. Harvey1 also stated that she was not aware of any prejudice that could accrue to the Defendants as a result of a 12-business day delay in filing the Plaintiffs' Bill of Costs. She noted that the Defendants have filed further evidence, namely the Second Affidavit of Mark Andrew, but they gave no

evidence of any prejudice accruing by the Plaintiffs being granted an extension of time in which to file their Bill of Costs.

22. Mr. Harshaw cited Order 62, rule 29(1) of the Rules of the Supreme Court which requires a Bill of Costs to be filed within 6 months of the conclusion of the cause or matter. He also referred to Order 3, rule 5(1) which gives the Court broad discretion to extend the time for the doing of any act where the time for so doing is limited by any judgment, order or rule of Court. Mr. Harshaw relied on the case of *Schafer v Blyth* [1920] 3 K.B. 140 at 143 where Lush J stated "*The object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice.*" He submitted that although parties are expected to follow the rules, they ought not to be punished by the Court in applying an over-strict approach to compliance with the rules, especially in light of a reasonable explanation for the delay and where there is no prejudice to the party opposite. Mr Harshaw argued that the extension should be granted as the Court had already granted costs to the Plaintiffs; there was a good reason for the delay in that new counsel had been appointed; and there was no prejudice to the Defendants.

Defendants' Submissions

23. Mr. Perinchief submitted that by 25 August 2022, counsel at Canterbury Law should have been well up to speed in respect of the files in this matter and the related matters, noting that nearly seven months was a long time to get up to speed on the matters. However, it appeared that counsel were sitting on their hands. Mr. Perinchief submitted that Ms. Harvey had not provided a reasonable explanation. He submitted that if the Court granted an extension of time to file the Bill of Costs then the Defendants would be prejudiced and at a severe disadvantage, particularly so in the absence of the facility of a 'security for costs' order against the foreign Plaintiffs who can, and appear to, run an expensive tab purely at will without regard to costs.

24. Mr. Perinchief took issue with paragraph 81 of the Ruling where I said in essence that unless either party filed a Form 31TC within 7 days to be heard on costs, costs were granted to the Plaintiffs on a standard basis. Mr. Perinchief's view was that paragraph 81 was unclear and that as no party had filed a Form 31TC then no costs order was actually made.

Analysis

25. In my view, I should grant the Time Summons Application for several reasons. First, the Plaintiffs were granted their costs in paragraph 81 of the Ruling. In the ordinary circumstances justice would be served by the Plaintiffs proceeding with their costs application by filing the Bill of Costs. At this stage, I reject Mr. Perinchief's argument that

paragraph 81 is unclear and that as no party filed to be heard on costs then there was no costs order. To my mind, the intent and purpose of paragraph 81 is clear.

26. Second, I do accept that that there was a change in counsel for the Plaintiffs, not only for the present matter, but for other matters between the same parties, which I accept as a reasonable explanation, took some time for counsel to get up to speed. To my mind, that is a reasonable explanation for a delay. If there was no change in counsel, then counsel would be expected to file the Bill of Costs within time. Further, the delay of just a short period of time, namely 12 business days, shows that once Canterbury Law realised that the Bill of Costs should be filed, they did so with some promptitude.

27. Third, I accept that there is no prejudice to the Defendants other than the already established fact that they have costs awarded against them. I am persuaded by Mr. Harshaw that the Defendants have had various opportunities to file documents in this case since the award of costs but at no time did they file any evidence to state that they were prejudiced by the application to extend time.

28. Fourth, I have considered the case of *Schafer v Blythe* and I take the view that I should exercise my discretion to extend the time for filing the Bill of Costs in order to avoid an injustice of a successful party on costs being denied the opportunity to pursue those costs. In light of the above, I am satisfied that I should grant the Time Summons Application in order to extend the time for the Plaintiffs to file the Bill of Costs.

29. In respect of the Time Summons Application, I make no order as to costs.

<u>The Judgment Amendment Application</u>

30. The application is for an order that the judgment made on 30 October 2022 be amended by adding immediately before the full-stop the words "*and pay the costs of this action, to be taxed on the standard basis if not agreed*".

31. Order 20, rule 11 states as follows:

> *"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar."*

32. Both counsel agreed that the order in question was an interlocutory order.

Plaintiffs' Submissions

33. Mr. Harshaw submitted that on the evidence, the first named Plaintiff stated that for reasons unknown to him, his previous attorney did not include costs in the judgment, even though costs were claimed in the Writ of Summons. He argued that Order 20, rule 11 of the Rules of the Supreme Court allowed for clerical mistakes in the judgments or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the Registrar.

34. Mr. Harshaw also referred to the commentary and cases in the 1999 Supreme Court Practice (White Book) at 20/11/2 where in the case of *Re H. (Infants) (No. 2)* [1970] 1 W.L.R. 69; [1970] 1 ALL E.R. 287, CA where the order of the Court of Appeal was amended by adding what was accidentally omitted, that costs of the appeal be the respondent's in any event. He also referred to the White Book at 20/11/7 where the commentary stated "*Other Cases of Rectification – As has been stated, the Court had no power under any application in the action to alter or vary a judgment after it has been entered, or an order after it is drawn up, except so far as is necessary to correct errors in expressing the intention of the Court.*" [emphasis added] Mr. Harshaw submitted that the word "except" was significant in that it allowed for the application of the slip rule.

Defendants' Submissions

35. Mr. Perinchief argued that the application was not suitable for remedy by the slip rule as it was a substantial change or amendment to the judgment, and as such, should be appealed. Further, Mr. Perinchief submitted that the Court should be made aware of the reasons as to why previous counsel did not apply for costs, suggesting that the answers could substantially weaken the Plaintiffs' arguments and position in the application. He suggested that previous counsel should provide a relevant explanation. He relied on *Kelsey and Others v Doune* [1911] CA which touched on the application of the rule in interlocutory matters and the case of *Lewis and Another v Daily Telegraph and Another (No. 2)* [1964] 1 All E.R. 705 which at 710 stated that "*Interlocutory orders stand in the same position as final orders, and cannot be altered save by means of an appeal ... save in certain cases expressly provided for ...*".

36. Mr. Perinchief also relied on the case of *The Bank of Bermuda Limited v Junos and Jones* [2010] SC (Bda) 59 Civ (11 October 2010) where in a footnote to paragraph 9, ground CJ stated "*However, even if I were wrong on that, and it was an interlocutory order, I could no more have interfered with it than I could with a final one in the absence of some "fresh material not before the Court when the original interlocutory order was made*".

Analysis

37. In my view, I should grant the application to amend the judgment by way of use of the slip rule as set out in Order 20, rule 11. First, it is not in dispute that the costs were claimed in the Writ of Summons. I accept the evidence of Mr. Moir that when his counsel applied for judgment in default of defence, for reasons unknown they did not apply for costs; thus he was now applying for such costs. To my mind, the Writ of Summons claimed costs and it seems clear to me that in the application for judgment – especially default judgment - there must have been a clerical error or accidental omission to exclude costs rather than any kind of strategic or tactical omission.

38. Second, on the basis of the omission being a clerical error or accidental, I am satisfied that it can be amended by use of Order 20, rule 11. I disagree with Mr. Perinchief that the application is not covered by the slip rule and that the amendment has to be addressed by way of an appeal. I also disagree with Mr. Perinchief that the amendment was a substantial change or amendment to the judgment. To my mind, I do not see the amendment in that light, rather the amendment is clearly an accidental omission from the judgment in default.

39. In light of the above reasons, I am satisfied that I should grant the Judgment Amendment Application and I make no order as to costs for the same.

The Waiver Application

40. The application is for a declaration that by the Defendants putting their relationship with previous lawyers in issue by Mark Andrew's second affidavit, they have waived their confidentiality and legal professional privilege in relation to each counsel since the Ruling of 18 February 2022.

41. During the submissions in respect of this application, Mr. Perinchief submitted that the Defendants have no objection to the application for a declaration in respect of Mr. Daniels and/or Marc Geoffrey Limited and Mr. Doughty and/or MJM Limited as the relevant issues with them revolved around delay. In respect of Marc Daniels, Mr. Perinchief submitted that there is unlikely to be any documentary evidence as the engagement was only a consultation.

Plaintiffs' Submissions

42. Mr. Harshaw submitted that the starting point in the application was the Defendants' Summons dated 8 June 2023 which sought: (i) an extension of time for leave to appeal the Ruling of the Court dated 18 February 2022 which followed the hearing held 6 December

2021 (the "**Leave to Appeal Time Summons**"); and (ii) a stay of execution of the Ruling. The Ruling was in respect of the Defendants' application to set aside default judgment 30 October 2020.

43. Mr. Harshaw submitted that the Plaintiffs do not seek a declaration in relation to events that occurred before the Ruling as what occurred before was not relevant to the issue of delay in seeking leave to appeal.

44. Mr. Harshaw submitted that in support of the Leave to Appeal Time Summons, Mark Andrew filed a Second Affidavit 29 May 2023 in which he made a number of statements:

   a. That his former counsel Mr. Dismont did not represent him in a timely and competent manner or at the standard required for and by a prudent and careful barrister and attorney of his years of call and experience in such matters. Thus, it was necessary to know what were the instructions given by the Defendants to Mr. Dismont.

   b. That he made several efforts to retain Mr. Daniels, including having an initial consultation and then some exchanges of correspondence, between the period of March 2022 and January 2023, but it did not amount to actual representation.

   c. That in December 2022, at Mr. Daniels' suggestion, he tried to retain Mr. Doughty, who soon informed him that the firm MJM Limited could not represent him, but did not explain why.

   d. That in October 2022, he made an initial contact with Mr. Perinchief, but continued efforts to retain other counsel, eventually retaining Mr. Perinchief in February 2023.

45. Mr. Harshaw submitted that the Plaintiffs had the right to test Mark Andrew's assertions about the counsel, but those counsel were not allowed to correspond with him due to issues of legal professional privilege. Thus, a declaration would allow the counsel to assist him. Mr. Harshaw relied on the case of *Thyssen-Bornemisza v Thyssen-Bornemisza* [1998] Bda LR 11 to submit that there is a principle of law in Bermuda that "*a party who puts a confidential or privileged relationship in issue is taken to have waived any privilege that he might have arising from the relationship.*"

46. Mr. Harshaw submitted that in the circumstances, the legal professional privilege had been waived by Mark Andrew, noting that Mark Andrew could withdraw his affidavit but that would leave him no basis to support his application for an extension of time. Alternatively, the Court could grant a stay of the Leave to Appeal Time Summons until Mark Andrew made his decision to agree to a waiver or until Mr. Harshaw had the opportunity to speak with counsel, in particular Mr. Dismont.

Defendants' Submissions

47. Mr. Perinchief submitted that in respect of Mr. Dismont, the Default Judgment of the Registrar and the Ruling spoke for themselves. Thus, the Defendants objected to the application for a declaration in respect of Mr. Dismont as all issues in respect of him and the Registrar were reflected in the Ruling. Further, Mr. Perinchief submitted that nothing could be gained in respect of the issues in the Leave to Appeal Time Summons, noting that the Waiver Application in respect of Mr. Dismont was an unnecessary inquiry into confidential communication between the Defendants and their then counsel Mr. Dismont and Marshall Diel & Myers Limited.

The Law

48. In *Thyssen-Bornemisza v Thyssen-Bornemisza* [1998] Bda LR 11 an issue was whether the first appellant, the Baron, had waived the legal professional privilege between him and his advisers and that he could not lawfully exclude the defendants from communicating with those advisers. Ground J held that the defendants were not entitled to a declaration or injunction relating to the obtaining of evidence from the Baron's lawyers. The defendants appealed against the refusal of access to the Baron's advisers.

49. Huggins JA stated as follows:

> *[page 249/internal page 3]*
> *"The substance of the allegations in the actions is that, the Baron having asked his son to draw up the Continuity Trust to comply with the Baron's expressed intentions and wishes, in the event it did not so comply. The son contends inter alia that the Baron received independent legal advice before he executed the trust document and that he relied upon that advice rather than upon any wrongdoing which might be proved against the son. At the centre of the argument in relation to the waiver of the legal professional privilege is the alleged unfairness of the Baron's being allowed to bring such an action and yet, by relying upon his right to the privilege, to seek to prevent the Court from hearing evidence, from those who alone knew about it, as to the nature of the legal advice given to him by his independent legal advisers.*
>
> *The reasoning of Ground, J. was this:*
>
> > *'I have …. come to the conclusion that there is a principle in English law that a party who puts a confidential or privileged relationship in issue is taken to have waived any privilege that he might have arising from the relationship. I do not think that this is based upon some vague notion of fairness, nor does it involve any balancing of public policy, or the exercise of a dubious and dangerous discretion. It is rather an example of the Court protecting its own process, by declining to*

adjudicate an issue directly concerning a party's relationship with his lawyer, without a frank disclosure of all that passed between them on the matter. I do not think that this is to be limited or circumscribed in some artificial way, by restricting it to actions between the persons owed and owing the duty of confidence, and can see no reason in principle for doing that.

The waiver arises from the invitation to the Court, by the party possessing the right to enforce confidentiality, to adjudicate on the matters to which the privilege relates. I put it that way because there is no compulsion upon the Baron to litigate this issue, and he can preserve his confidence intact by choosing not to do so. But, if he chooses to seek a remedy from this Court, then it can only be upon the basis that by doing so he has elected to waive his privilege to the extent necessary for a proper trial of the issue.

I consider that that principle is directly relevant to this case, and I find that, by bringing his action to set aside the Trust upon the grounds of the First Defendant's presumed undue influence, and by asserting the continuation of that influence until 1995 the Plaintiff has waived his legal professional privilege in each of the categories of document numbered 1 to 7 in the Schedule to the Defendants' Summonses.'

[page 251/ internal page 5]
"... I apprehended that there was no dispute between the parties as to the nature of the privilege as discussed in the House of Lords in Reg. v Derby Magistrates' Court ex parte B. 1996 A.C. 487. Where the relationship of client and legal adviser existed, the privilege existed as a matter of law and the court was not required to balance the interests of one party against those of the other: the privilege would be enforced even though that had the result of excluding evidence which might show that a person charged with murder was not guilty of the crime. It was a basic right of confidentiality which the law conferred as being necessary for the proper administration of justice.
...
Equally it was common ground that, like any other privilege, legal professional privilege could be waived by the client. The issue was when and to what extent it might be waived by implication. ..."

50. Huggins JA also referred to a case relied on by Ground J, namely *Oceanic Finance Corporation Ltd v Norton Rose* (transcript 26 March 1997) in which Moore-Bick J cited the judgment of Leggatt LJ in *Muller v Linsley & Mortimer* (transcript 30 March 1994) where at page 7 he concluded:

[page 255/internal page 9]

'In my judgment the principle underlying all these decisions is that if a plaintiff himself invites the Court to examine the relationship which gives rise to the privilege it cannot at the same time insist on withholding from disclosure documents which are relevant to that relationship since it would be unfair for them to be allowed to do so and thereby present a partial picture to the Court. As Colman, J. put it in Nederlandse Reassuruntie Groep Holding NV v Bacon & Woodrow,

> *".... the foundation of waiver is not merely that the assertion of privilege leads to the inaccessibility of evidence relevant to a defence. It is the inconsistency of the plaintiff's on the one hand opening the professional relationship to the inspection of the court and on the other hand seeking to enforce confidentiality so as to exclude communications to which the professional relationship between the same parties has given rise."*

In my judgment these authorities show that where a party himself puts the confidential relationship between himself and his lawyer in issue he will waive privilege in respect of documents passing between them which are relevant to the issues in the proceeding. He may put that relationship in issue either by bringing proceedings directly against his lawyer, or by raising an issue to which his conduct within that relationship is so directly relevant that it would be unfair to allow him to maintain privilege in documents created under it.'

51. Huggins JA commented on those extracts as follows:

[page 256/internal page 10]

"Mr Crystal submitted that the judges in these cases upon which Ground, J. relied all misconceived what Lillicrap had decided. I was not so persuaded. The vital question in the present case was whether the Judge was justified in extending the underlying principle to cover a case where it was said that, as a matter of pleading, the relationship between the First Plaintiff and his advisers was put in issue by the Defendants. In other words was it the Plaintiffs or the Defendants who 'put the relationship in issue'? As Ground, J. said:

> *'[the defendants'] argument is that what matters is whether, by commencing proceedings to set the transaction aside for undue influence, the Baron necessarily accepts that the question of the legal advice he received will have to be gone into by the Court in order to adjudicate that issue.'*

It was clear that Ground, J. accepted that argument and that his answer was that it was the Plaintiffs who put the legal advice in issue, for he said 'there is no compulsion upon the Baron to litigate this issue, and he can preserve his confidence intact by choosing not to do so.' It could only have been on that basis that he stated the equitable principle on which he based his decision as widely as he subsequently did."

52. Huggins JA found as follows:

[page 259/internal page 13]

In my judgment the Defendants' argument should prevail. It would be unconscionable for the Plaintiff to rely upon the presumption and then to set up the privilege to prevent the Baron's legal advisers from revealing whether they had explained to him the effects of the trust document which he had been invited to execute.

53. In relation to a stay of proceedings, Huggins JA stated as follows:

[page 259/internal page 13]

"The appeals of the Defendants relating to access to the legal advisers can be dealt with quite shortly. The Baron had written to some or all of those advisers, asserted his legal professional privilege and informed them that he expected them to continue to respect their duty of confidentiality. By their Summons the Defendants sought declarations and injunctions so that the advisers would now be made aware that they could safely communicate with the Defendants' solicitors if they were willing to do so. Ground, J. was understandably anxious lest any order he made might prove futile, because, where advice had been given abroad, any waiver of privilege would be governed by foreign law. He was not prepared to consider granting any other form of relief.

The Defendants submitted that in the circumstances of this case, where the Baron had already warned his advisers that he regarded them as still bound to observe confidentiality, some relief ought to be granted to reinforce any judgment given in favour of the Defendants in the discovery appeals. I thought that was right. However, I foresaw possible difficulty in foreign jurisdictions if we made declarations or injunctions in terms of the summonses. I therefore proposed that we should make an Order staying the proceedings unless the Baron notified his advisers that he waived his privilege of confidentiality. ... "

<u>Analysis</u>

54. In my view, I should grant the Waiver Application in respect of Mr. Dismont for several reasons. First, I am satisfied that Mark Andrew has clearly raised the issues about the competency and timeliness of Mr. Dismont's representation of the Defendants in his affidavit, albeit most of it was before the date of the Ruling, a period for which Mr. Harshaw does not seek waiver. However, there is some evidence by Mark Andrew in the affidavit after the date of the Ruling in relation to the filing of an appeal. In applying the principles set out in *Thyssen-Bornemisza v Thyssen-Bornemisza*, to my mind, the Defendants have waived their confidentiality and legal professional privilege by opening the issue of their instructions to and representation by Mr. Dismont.

55. Second, in my view, it is fair in all the circumstances for the Plaintiffs to be able to test the instructions of the Defendants to Mr. Dismont in relation to an appeal after the Ruling. On the contrary, it would not be fair to allow the Defendants to rely on Mark Andrew's statements about the competency and timeliness of Mr. Dismont without the Plaintiffs having the opportunity to test the evidence. Thus, I reject the submissions of Mr. Perinchief that the Defendants were seeking an unnecessary inquiry into confidential communications between the Defendants and Mr. Dismont and/or Marshall Diel & Myers.

56. Third, in light of the reasons stated above, I am satisfied that I should grant the Waiver Application in respect of Mr. Dismont for the time period after the date of the Ruling.

57. Fourth, there is an alternative open to Mark Andrew not to rely on his affidavit where he makes the statements about Mr. Dismont's representation. However, I agree with Mr. Harshaw that that course of action would likely undermine the basis of the Leave to Appeal Time Summons. To that point, the Court is invited to grant a stay of the Leave to Appeal Time Summons until such time that counsel for the Plaintiffs have had the opportunity to speak to Mr. Dismont and/or Marshall Diel & Myers. I am satisfied that I should grant such a stay, as to allow the Leave to Appeal Time Summons to continue without having the benefit of a waiver would be unfair in all the circumstances.

58. In respect of the Waiver Application, unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiffs against the Defendants on a standard basis, to be taxed by the Registrar if not agreed.

Conclusion

59. For the reasons above, I make the following orders:
    a. I grant the Time Summons Application for the Plaintiffs to file the Bill of Costs to be extended from 25 August 2022 until 8 September 2022. I make no order as to costs for the same.
    b. I grant the Judgment Amendment Application and order that the judgment made on 30 October 2022 be amended by adding immediately before the full-stop the words "*and pay the costs of this action, to be taxed on the standard basis if not agreed*". I make no order as to costs for the same.
    c. I grant the Waiver Application in respect of Mr. Dismont and/or Marshall Diel & Myers for the period of time after the Ruling. I have granted costs of the Waiver Application as it pertains to Mr. Dismont to the Plaintiffs as set out above.

60. ***Postscript****: During the course of finalizing this Ruling, I became aware that:*

   a. *The Defendants have filed a summons in relation to the Ruling, a stay of execution and the Waiver Application.*
   b. *The Plaintiffs have filed a summons in relation to information they have received that the Defendants may have withdrawn their agreement to the Waiver Application in respect of Mr. Daniels and/or Marc Geoffrey Limited and Mr. Doughty and or MJM Limited.*
   c. *Both Summonses are returnable for Chambers on Thursday, 13 March 2025.*

Dated this 13th day of March 2025

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HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE