

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 31 of 2020**

**B E T W E E N**

**ASHLEY DAWSON-DAMER**

**Intended Appellant**

**AND**

**GRAMPIAN TRUST COMPANY LIMITED**

**Intended Respondent**

**BEFORE:**           **The Honourable Madam Justice Crane-Scott, JA  
The Honourable Mr. Justice Jones, JA  
The Honourable Mr. Justice Evans, JA**

**APPEARANCES:**   **Mr. Richard Wilson, QC with Mr. John Minns, Counsel for the  
Intended Appellant**

**Mr. Eason Rajah, QC with Mr. Sean Moree and Mrs. Vanessa Smith,  
Counsel for the Intended Respondent**

**DATES:**           **15 June 2020; 1 October 2020**

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*Civil appeal – Application for leave to appeal - Discovery of documents – Agency - Principal / agent relationship - Whether the documents requested are in the possession or control of the intended respondent –Whether the documents requested were held by a third party as agent on behalf of the principal (the intended respondent) or whether the documents requested were held between professional men in their own right - Whether the requested documents are relevant - Rules of the Supreme Court Order 24 Rule 8*

The intended respondent (Grampian) is the sole trustee of the Glenfinnan Settlement (the Settlement) dated 30 June 1992. The intended appellant is one of the beneficiaries of the Settlement. In 2006 and 2009 Grampian transferred 98% of the value of the Settlement to other trusts of which the intended appellant was not a beneficiary. As a result, the intended appellant commenced proceedings seeking orders setting aside or declaring void those decisions by Grampian to transfer the value of the Settlement to other trusts of which she is not a beneficiary.

During discovery Grampian provided a list of documents which the intended appellant contends is incomplete. Consequently, the intended appellant sought discovery of specific documents. The judge below found that the documents sought were in the possession of the Family Advisers, a third party, and not in the possession, custody or power of Grampian. On that basis the learned judge refused to order discovery of the documents requested by the intended appellant.

Consequently, the intended appellant sought, but was denied, leave to appeal and she, therefore, applied to this Court for permission to appeal. The intended respondent filed a Respondent's Notice requesting the ruling of the judge be affirmed on the basis that the documents requested are not relevant to the proceedings.

*Held:* Application for permission to appeal refused. Costs to the intended respondent, to be taxed if not agreed.

The issues to be decided are whether the requested documents which are in the possession of the Family Advisers are in the control of Grampian and whether those documents are relevant to the issues in dispute.

Regarding the first issue, the intended appellant argues that the documents are in the possession of the Family Advisers as agents of Grampian. However, the judge found as a fact that the relationship between the Family Advisers and Grampian was that of professional men and not agent-principal therefore Grampian had no legally enforceable right to get the documents from them. As such, the judge was entitled to find that there is no onus on Grampian to disclose the requested documents.

On the second issue, the Rules of the Supreme Court Order 24 rule 8 requires the trial judge to consider whether discovery is necessary. In his ruling the trial judge stated that if a document in Grampian's possession was relevant it would have to be disclosed to the intended appellant. The judge was entitled to take the view he did on the issue of relevance.

This intended appeal has no prospect of success.

*Chantrey Martin (a firm) v Martin* [1953] 2 QB 286 applied  
*Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 distinguished

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## J U D G M E N T

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**Judgment delivered by the Honourable Mr. Justice Jones, JA:**

### **Introduction**

1. Ashley Dawson-Damer ("Ashley"), is one of the living discretionary beneficiaries of the Glenfinnan Settlement and the widow of John Dawson-Damer ("John") who died in an accident on 24 June 2000. Ashley and John had adopted two children before John's death. Grampian Trust Company Limited ("Grampian"), is the sole trustee of the Glenfinnan Settlement dated 30 June 1992.

2. In proceedings before Winder J, (“the judge”) in the Supreme Court Nassau, The Bahamas, Ashley sought orders setting aside (or declaring void) decisions made in 2006 and 2009 by Grampian by which around 98% of the value of the Glenfinnan Settlement, of which she was a beneficiary, was transferred to other trusts of which she was not a beneficiary.
3. During discovery Grampian provided a list of documents on 7 March 2019 which Ashley contends is incomplete. On 26 June 2019 Ashley applied by summons for an interlocutory order asking Grampian to provide specific discovery of documents referred to in the pleadings before the Supreme Court. The judge heard the application and ordered that the documents in the possession of Messrs. Morrison and Burns “the Family Advisers” are not in the possession, custody, or power of Grampian. On that basis, he refused to order specific discovery of the documents referred to in the pleadings against Grampian. An application by Ashley before the judge for leave to appeal was refused. Ashley now applies to this Court for permission to appeal against the ruling and orders made by the judge. Grampian, for their part, filed a Respondent’s Notice in the event that this Court grants Ashley’s application for leave to appeal. The Notice requests that the ruling of the judge be affirmed essentially on the basis that the documents which are the subject of the disclosure application are not relevant to the proceedings.

## **Background Facts**

4. The action before the judge in the Supreme Court involves the Glenfinnan Settlement. It is a discretionary trust governed by the laws of The Bahamas. It came into existence after a restructuring of various trusts in The Bahamas, Australia and Hong Kong for the benefit of the descendants of the late Viscount Carlow. The settlor of the trust was Spey Limited (“Spey”). The Glenfinnan Settlement is one of four settlements made on the same date by Spey, the other three being called the Islay Settlement, the Annan Settlement and the Willards Settlement (all four being called “the Spey Settlements”). Grampian, as Trustee, employed the services of the Family Advisers.
5. Grampian’s only assets are now 2% of the issued shares in a Bermudian holding company called Glenfinnan Trading Company Limited (“GTCL”) and a receivable due from GTCL. The remaining 98% of the shares in GTCL are now held by the trustees of separate settlements to whom the shares were appointed by the 2006 and 2009 appointments. GTCL owns shares in various investment companies and trading companies.
6. Under the Glenfinnan Settlement there are currently nineteen living objects of the trustee’s discretionary powers of appointment. The group consists of the descendants of the late Lord Carlow, and their spouses. Lord Carlow left two sons: George (“George”); and John. George has 4 children, 3 daughters-in-law and 11 grandchildren. The group of beneficiaries inclusive of George’s descendants and their spouses will not close until 2072, by which time there are likely to be many more members of the group. Ashley is a beneficiary of other settlements,

including the Willards Settlement made by Spey, in which George and his descendants have no interest. In late 2002 Grampian ceased to be trustee of the Willards Settlement. The essence of Ashley's complaint in the substantive matter before the judge is that in 2006 and 2009 Grampian's directors used Grampian's powers of appointment in favour of George's descendants, and excluded her.

## Issues

7. The issues in this appeal are:

- a) First, whether documents in the possession of the Family Advisers are in the control of Grampian; and,
- b) Second, whether the documents in the possession of the Family Advisers are relevant to one or more of the issues in dispute in these proceedings.

### **(a) Are the documents in possession of the Family Advisers in the control of Grampian?**

8. Ashley, in her application before the judge, sought, by summons, specific discovery for unredacted copies of the following documents in the possession of the Family Advisors:

- “a) Full copies of the Advice and Opinions of Robert Walker QC (as he then was) which were given to the Plaintiff or her late husband by the First Defendant, its affiliates or agents;**
- b) Complete copies of the instructions to Robert Walker QC on the basis of which such advice or Opinions were prepared;**
- c) All documents on which Robert Walker QC based his advice or Opinions;**
- d) All documents mentioned or referred to in any of the pleadings in this matter (insofar as they have not already been listed and produced);**

**e) Such of the documents itemized in Part 3 of the First Defendant's list which have not been produced to the Plaintiff, namely:**

- i. An undated document described as "Particulars and Steps relating to Glenfinnan 2009 Resettlement",**
- ii. A letter from John Duff to Michael Hamilton dated 28 September 1999;**
- iii. A Letter from Michael Stanford-Tuck to John Duff re Willards dated 26 March 2002;**
- iv. A letter from Michael Stanford-Tuck to Peter Higgs re Willards Trust dated 19 April 2002;**
- v. A letter from Michael Stanford-Tuck to Tony Carroll re Willards Trust dated 25 April 2002;**
- vi. A letter from Michael Stanford-Tuck to John Duff re Willards dated 25 April 2002;**
- vii. A letter from Michael Stanford-Tuck to Peter Higgs re Willards Trust dated 26 April 2002;**
- viii. A letter from Michael Stanford-Tuck to Tony Carroll re Willards Trust dated 2 May 2002;**
- ix. A letter from Michael Stanford-Tuck to John Duff re Willards dated 2 May 2002**
- x. Attendance note of meeting at Carmelite dated 10 May 2002;**
- xi. Attendance note of meeting at Bride House re reorganization dated 27 May 2002;**
- xii. A letter from Michael Stanford-Tuck to John Duff re Willards dated 12 June 2002;**

**xiii. A letter from Michael Stanford-Tuck to Sir Geoffrey Johnston and Peter Higgs re Willards dated 14 June 2002;**

**xiv. A letter from Michael Stanford-Tuck to Sir Geoffrey Johnston re Willards Trust dated 17 June 2002;**

**xv. Attendance note of telephone calls dated 18 June 2002**

**f) The documents cross-referenced in the documents produced to the Plaintiff but apparently not listed or produced to the Plaintiff;**

**g) The full copies of all incomplete documents produced by the First Defendant.”**

9. The judge, defined the issue before him in this way:

**“[7.] Resolution of this issue, as to the disclosure of the Morrison and Burns documents, rest upon a proper consideration of the role of the family advisor. The Court has to determine whether the advisers are the agents of Grampian in the true sense, in which case these papers remain in the control of Grampian. The role of Family Advisers is not provided for in the Trust Deeds. It is accepted that they act for and on behalf of a trust structure, which the Glenfinnan Settlement is a part...”**

10. The judge then considered the absence of a written contract between the Family Advisors and Grampian and the evidence of Surinder Deal who said:

**“[7.] ...The primary role of the family advisers has been to act as a channel of communication between the Trustees in The Bahamas, Arndilly or Grampian, and (i) The beneficiaries in various jurisdiction (sic) around the world in particular Australia and the United Kingdom...”**

11. The judge made a finding of fact that the relationship between the Family Advisers and Grampian was that of professional men and not agent-employee. On that basis, he decided that Grampian had no legally enforceable right to get the documents from them.
12. Counsel for Ashley contends that the judge was wrong to come to that conclusion. They argue the Morrison/Burns documents are in possession of the Family Advisers as agents of Grampian. Consequently, they argue that Grampian, as principal, has an enforceable right to inspect and take copies of those documents. This argument, they say is supported by the evidence of Surinder Deal. She defined the role of the Family Advisers as channels of information between itself, the beneficiaries, and other professional advisers. From this, they contend that the Family Advisers did not provide advice and cannot have had the relationship as agent for Grampian.
13. Counsel for Ashley, in support of their argument, referred us to a decision of the English Court of Appeal in **Fairstar Heavy Transport NV v Adkins** [2013] EWCA Civ 886. In **Fairstar**, a company was held to have the right to inspect and take copies of emails on the computer of the PA of its former CEO relating to the company's affairs. The CEO had resisted disclosure on the grounds that the company's claim was in substance a claim to be the owner of the emails, but there was no property in the emails (being 'information' and not property), such that the claim was misconceived. The court rejected that analysis, and with it rejected any notion that the right of a principal to disclosure by his agent depends on his proving a proprietary right to documents in the agent's possession. The court took the view the company was entitled to inspect and take copies of the emails because those emails related to the company's affairs, and as the company's agent, the CEO had a duty (which survived termination of the relationship) to provide inspection.
14. Mummery LJ at para [46] had this to say:

**"[46] ...The reference to a 'proprietary right' was a distraction from the centrality of the agency relationship and its legal incidents. No competing claims of third parties are involved. Fairstar's claim is against Mr Adkins. The assertion of a right to inspect and copy the content of the e-mails on his computer relating to its business affairs arises from the legal incidents of an agency relationship that survive its termination."**

15. Mummery LJ continued at paragraphs [52] - [53]; [56]:

**"[52] [T]heir former relationship had been that of principal and agent..."**

**[53] [A]s a general rule, it is a legal incident of that relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal.**

...

**[56] ...Quite apart from the existence or non-existence of property in content, Mr Adkins was under a duty, as a former agent of Fairstar, to allow Fairstar to inspect e-mails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship."**

- 16.** However, we do not accept that **Fairstar** is relevant to these proceedings. First, it did not concern an application under Rules of the Supreme Court (RSC) O. 24 r. 1(1) for discovery. Second, it did not apply to the applicant's legal right to obtain the working papers from his retained professional advisers. In holding that Grampian had no legally enforceable right to the documents in the possession of the Family Advisers. Winder J said at para 8 of his judgment:

**"[8.] I accept the state of the law as recited by the learned authors of Hollander on Documentary Evidence (13th ed.). At paragraph 8.07 it states:**

**'The obligation under the RSC was to list documents which were or had been in a party's possession custody or control. Thus, the obligation did not attach until such documents came within the possession custody or power of a party. The courts had no power to require a party to bring documents into his possession custody or power. Possession meant the right to possession, so documents in the hands of an agent were in possession of the principal.'**

**In clarifying this position relative to agents, Hollander stated:**

**‘But this is not the case where the agent holds the documents not for the principal but in his own right, such as working papers.’**

**Hollander continued:**

**‘Custody meant physical possession. The important word was "power". This was held to mean a presently enforceable legal right to obtain the document from the holder without the need to obtain the consent of anyone else. In the leading case, *Lonrho v Shell Petroleum* [1980] 1 WLR 627, the claimant sought disclosure of the documents of the foreign subsidiaries of Shell and BP. They argued that the documents were in the power of the parent, because the parent could if necessary obtain possession by winding up the subsidiary. The House of Lords held that this did not constitute a presently enforceable legal right, and the application for disclosure failed.’”**

17. In **Chantrey Martin (a firm) v Martin** [1953] 2 QB 286 a firm of chartered accountants, claimed damages from the defendant, an employee, for breach of his contract of service. On discovery, the plaintiffs objected to producing working papers and schedules, draft accounts and the final accounts relating to the audit of the company’s books over several years. The plaintiffs objected on the grounds that the documents belonged to the company and were in their possession as accountants. The court held that the relationship between the plaintiffs and the company was of a professional man and client and not agent and principal.
18. We accept that the passages referred to by the judge in **Hollander on Documentary Evidence (13th ed.)** represents the law in The Bahamas. Additionally, it cannot, in our view, be said that the findings of fact made by the judge from the affirmation of Surinder Deal concerning the role of the Family Advisers were unreasonable to the extent that this Court should interfere. Accordingly, we accept that the judge was entitled to come to the conclusion that that the documents requested by Ashley are not in the “power” of Grampian with the result that there is no onus on Grampian under RSC O.24 r.1(1) to disclose the documents requested.

**(b) Are the unredacted documents in the possession of the Family Advisers relevant to any of the issues in dispute in these proceedings?**

19. Counsel for Ashley contends the redacted Morrison/Burns Documents include records that are relevant to issues raised in Ashley’s case. They argue that as the identities of the parties sending and receiving the documents cannot be ascertained due to the redactions, it cannot be ascertained whether or not the decisions made by the Family Advisers were conveyed to Grampian. Second, they argue that the contents of the documents is evidence that the Family Advisers had a negative view of Ashley and that would affect their advice to Grampian relating to appointments.
20. Under RSC Order 24 r. 8 the trial judge is required to consider whether discovery is necessary at that stage of the proceedings. RSC Order 24 r. 8 provides that:

**“On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”**

21. The trial judge in his ruling was alive to the dispute in the trial and the relevant issues concerning the appointments relating to the Glenfinnan Settlement trust funds in 2006 and 2009. In his ruling at paragraph 11 he said:

**“[11.] In any event, if the Family Advisers have provided information in a document or e-mail to Grampian, then the document will be in Grampian[’s] possession, and if it is relevant, then it will have to be disclosed to Ashley.”**

22. The trial judge was entitled to take the view that he did on the issue of relevance of the unredacted Morrison Burns documents at that stage of the proceedings. From this we hold that Ashley’s application for leave to appeal based on the relevance of the unredacted Morrison Burns documents serves no useful purpose at this time. Having regard to our conclusion on this issue we do not consider it necessary to go on to examine the issues raised in the Respondent’s Notice filed on 22 May 2020 by Grampian.

## **Conclusion**

23. In our judgment, Ashley’s intended appeal on the judge’s ruling on her application for disclosure of the unredacted Morrison Burns documents has no reasonable prospect of success. For all these reasons, we refuse Ashley’s request for permission to appeal the judge’s refusal to order specific disclosure with costs to Grampian to be taxed if not agreed.

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**The Honourable Mr. Justice Jones, JA**

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**The Honourable Madam Justice Crane-Scott, JA**

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**The Honourable Mr. Justice Evans, JA**