



Civil Appeal No. 9 of 2024

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER 2023: No. 115**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 16/04/2025

Before:

**JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
JUSTICE OF APPEAL RT HON SIR GARY HICKINBOTTOM**

Between:

DAVID WILLIAM COX

Appellant

- and -

(1) ROSANNA COX

**(in her personal capacity and as an Executor and Trustee of the Last Will & Testament
of William Milner Cox dated 19 July 2020)**

(2) AMANDA JEAN SKINNER

**(in her capacity as Executor and Trustee of the Last Will & Testament of William
Milner Cox dated 19 July 2020)**

(3) DAVID GEORGE GOODWIN

**(in his capacity as Executor and Trustee of the Last Will & Testament of William
Milner Cox dated 19 July 2020) Respondents**

Respondents

Appearances:

Mr David Kessaram of Cox Hallett and Wilkinson for the Appellant

Mr Jai Pachai of Wakefield Quin Limited for the Respondent

Decided on the Papers

Date of Judgment: 16 April 2025

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Issue based costs order

JUDGMENT ON COSTS

HARGUN JA:

1. On 14 March 2025 the Court heard an appeal from the Judgment of Alexandra Wheatley AJ (“**the Judge**”) on a preliminary issue, namely the standing of David William Cox (“**the Appellant**”) to bring his action in the Supreme Court and the jurisdiction of the Supreme Court to grant the relief he is seeking. By Judgment dated 28 May 2024, the Judge dismissed the Appellant’s claim against Rosanna Cox (“**the First Respondent**”), in her personal capacity and as an executor and trustee of the last Will of William Milner Cox dated 19 July 2020 (“**Mr Cox**” or “**the Will**”) on the grounds that (i) the claim pleaded by the Appellant in the Statement of Claim was a personal proprietary claim (as opposed to a derivative claim) which could not be pursued by him as he had no proprietary interest in the relevant property; and (ii) in any event the Appellant could not pursue a derivative action in his capacity as a beneficiary under the Will as there were no special circumstances which could justify the Appellant commencing a derivative action on behalf of the estate. The Judge further held that the Supreme Court did not have jurisdiction to hear this action.
2. By Judgment dated 21 March 2025 (“**the Judgment**”), the Court allowed the appeal and set aside the order of the Supreme Court dismissing the Appellant’s claim. The Court confirmed that special circumstances existed entitling the Appellant to pursue a derivative action on behalf of the estate. The Court also gave leave to the Appellant to amend the Writ so as to comply with RSC O.6, r. 3 and other amendments in the body of the Statement of Claim for the purposes of making it clear that the claim pursued by

the Appellant is a derivative claim on behalf of the estate.

3. In relation to the issue of costs the Court ordered that unless either party applies by letter to the Registrar within 14 days of the date of delivery of the Judgment to be heard on the papers in relation to costs, the Appellant shall be awarded his costs of and occasioned by the trial of the preliminary issue in the Court below on the standard basis to be taxed if not agreed; and his costs of this appeal on the standard basis to be taxed if not agreed.
4. By letter dated 3 April 2025 the First Respondent has made this application in relation to the issue of costs contending that the Appellant should pay some or all of the First Respondent's costs, or alternatively, that the Appellant should be deprived of a significant portion of his costs or that there should be no order for costs in the circumstances of this case, those in the Supreme Court and before this Court.
5. The First Respondent contends that the justice and circumstances of this case require the Court to take into account that the First Respondent succeeded in relation to the pleading requirement of O.6, r.3 requiring the Appellant to make it clear that his action was a derivative action on behalf of the deceased's estate. The First Respondent argues that had that been made clear at the outset "*there would have been no necessity for the Respondent to pursue her application any further [and] in the circumstances, it is unjust for the Respondent to be penalized by a costs order for deficiencies which the Court has accepted in relation to the Appellant's original action*".
6. The Judgment of Gloster JA in *Global Distressed Alpha I Capital Limited v Herman and Eddlestone* [2024] CA (Bda) 26 Civ makes clear at paragraph 21 that in relation to applications where an unsuccessful party is submitting that it should not pay all the costs of the hearing at first instance in the Supreme Court and/or all the costs of an appeal hearing in this Court, the proper approach is to apply the *Elgindata* principles in their entirety. In *In re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207, Nourse LJ set out the relevant principles to be applied as follows:

"In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognised or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2(4), 3(3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these: (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost

of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well-established practice.

Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in this case."

7. Applying these principles I have concluded that in the circumstances of this case there is no sufficient basis for departing from the general rule that the costs follow the event and that the Appellant shall be awarded his costs of and occasioned by the trial of the preliminary issue in the Court below on the standard basis to be taxed if not agreed; and his costs of this appeal on the standard basis to be taxed if not agreed. In coming to this conclusion, I have taken into account the facts and circumstances set out below.
8. First, it is clear that the Appellant is the successful party in this appeal and the proposed order applies the general principle that costs follow the event.
9. Second, in the Judgment the Court has held that it is necessary in this case for the Appellant to endorse the Writ with a statement that he is "*suing on behalf of the estate of William Milner Cox deceased*". However, the Judgment also makes it clear that any failure to endorse the Writ with such a statement does not render the Writ a nullity and that any misdescription in the title can always be cured by amendment in the same way as a misnomer. Furthermore, the Court held that it was satisfied that the Writ in substance does plead a derivative claim on behalf of the estate.
10. Third, as noted at paragraph 5 above, the First Respondent submits that had it been made clear at the outset that at the Appellant was pursuing a derivative action "*there would have been no necessity for the Respondent to pursue her application any further*". I am unable to accept this submission made on behalf of the First Respondent as it is demonstrably contrary to her conduct in these proceedings. In this connection it is to be noted that paragraph 9 of the Appellant's written submissions dated 29 January 2024 and filed before the Supreme Court hearing on the preliminary issue expressly stated; "***This action is brought on behalf of the Estate. It is a derivative action ... Such an action is permitted to be brought because there are special circumstances by reason of which the action cannot or will not be brought by the person entitled to bring it, i.e., in this case, the Executors.***" However, despite this clear statement by the Appellant as

to the nature of the claim being pursued in the Writ, the First Respondent insisted on proceeding with the trial of the preliminary issue before the Supreme Court contending that (a) the Writ and Statement of Claim do not plead that the Plaintiff brings this action in a representative capacity on behalf of the estate of the deceased; and (b) the Plaintiff's claim in this action is for a declaration that he is "*entitled*" to the chattels in question and this can only be construed as a personal claim by him to the property in question and not on behalf of the Executors (paragraphs 3 and 10 of the First Respondent's written submissions in the Supreme Court).

11. Fourth, it was submitted on behalf of the Appellant to the Judge below that the Writ can simply be amended to comply with the requirements of O.6, r.3. In response the First Respondent submitted to the Judge below that even if the Court accepted that this is a derivative action pursued by the Appellant there were no special circumstances in this case which would entitle the Appellant to pursue a derivative action. The Judge accepted the First Respondent's submission that even if the Appellant were allowed to amend the Writ to include the wording that confirms the action is being taken in his representative capacity on behalf of the estate, this would not cure the issue of his standing to pursue a derivative action on behalf of the estate.
12. Fifth, the First Respondent has continued to pursue the same points before this Court. In the written submissions dated 27 February 2025, the First Respondent contends that "*the Appellant has failed to properly plead a derivative action such that the claim made in his Statement of Claim on its proper construction, as found by the trial judge, is a personal proprietary claim against the chattels in question, which the Appellant is not entitled to bring and which the Court has no jurisdiction to entertain*". Furthermore, the First Respondent complains that "*Nowhere in the Statement of Claim is any case for special or exceptional circumstances asserted particularized... For the purposes of this appeal, the Respondent considers it unnecessary to again respond to the reasons put forward by the Appellant in his submissions as to special or exceptional circumstances, which are in any event dealt with in the Respondent's submissions in the Supreme Court*".
13. In my judgment whilst the Appellant failed to comply with the strict terms of O.6, r.3 in that he failed to expressly state in the Writ the representative capacity in which he was suing, it should have been reasonably clear to the First Respondent that this was a derivative action being pursued on behalf of the estate of Mr Cox. This was expressly stated in clear terms in the Appellant's written submissions dated 29 January 2024 to the Court below. Furthermore, the Appellant offered to the Court below to amend the Writ to comply with the pleading requirements of O.6, r.3. In all the circumstances I am satisfied that the appropriate order as to costs in these proceedings is the standard order that costs should follow the event. I am satisfied that there is no sufficient basis for departing from the standard order in the circumstances of this case. Accordingly, the Appellant shall be awarded his costs of and occasioned by the trial of the

preliminary issue in the Court below on the standard basis to be taxed if not agreed; and his costs of this appeal on the standard basis to be taxed if not agreed.

HICKINBOTTOM JA:

14. I agree.

KAWALEY JA:

15. I also, agree.