IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 61 OF 2010-AJEF

The Hon. Mr. Justice Angus Foster
In Chambers
26th October 2012

BETWEEN:

RENOVA RESOURCES PRIVATE EQUITY LIMITED
(A company incorporated in the Bahamas suing as shareholder of the Second Defendant, Pallinghurst (Cayman) General Partner LP (GP) Limited)

Plaintiff

AND

(1) BRIAN PATRICK GILBERTSON
(2) PALLINGHURST (CAYMAN) GENERAL PARTNER LP (GP) LIMITED
(3) PALLINGHURST (CAYMAN) GENERAL PARTNER LP
(4) PALLINGHURST RESOURCES MANAGEMENT LP
(5) AUTUMN HOLDINGS ASSET INC.

Defendants

(By Original Action)

AND BETWEEN:

(1) BRIAN PATRICK GILBERTSON
(2) AUTUMN HOLDINGS ASSET INC

Plaintiffs to Counterclaim

AND

(1) VIKTOR VEKSELBERG
(2) VLADIMIR VIKTOROVICH KUZNETSOV
(3) RENOVA HOLDING LIMITED
(4) RENOVA RESOURCES PRIVATE EQUITY LIMITED

Defendants to Counterclaim

(By Counterclaim)

Appearances: Mr. Richard Millett, QC with Mr. James Eldridge of Maples and Calder for the Plaintiff and the Defendants to Counterclaim

Mr. Michael Bloch, QC with Mr. David Butler of Appleby for the First and Fifth Defendants and the Plaintiffs to Counterclaim

RULING (5)

1. This ruling relates to certain applications made consequent upon the judgment in this matter dated 15 August 2012. The applications concern, firstly, the order which should be made in light of the judgment and, secondly, what order should be made in respect of the costs of the proceedings.

2. **The Order**

2.1. There are two principal issues concerning the order which should be made in light of the judgment. The first is whether, having regard to the terms of the judgment, the shares in Fabergé Limited which Autumn holds on constructive trust and for which it is required to account are all shares held by Autumn in the company or whether the order should be restricted to the 25 shares originally gratuitously issued to Autumn in January 2007. The second principal issue is whether or not Autumn should be ordered to account for the interest on the loans which it made to PEL in January 2007 as provided in the judgment, and if so, whether interest should be paid on that sum with effect from 3rd January 2007, as also provided for in the judgment.

2.2. The shares to be accounted for

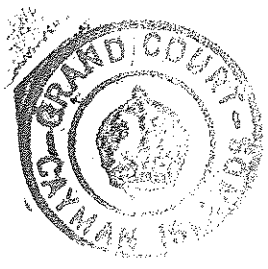
The Renova Parties contend that the judgment at paragraph 20.2 makes it clear that all of the shares in Fabergé Limited held by Autumn, including shares which it has purchased since January 2007, are to be accounted for, since the paragraph states that: *"In the circumstances Autumn must account for the shares it now holds in Fabergé Limited..."* The Renova Parties contend that the words used are clear and cannot reasonably mean that the order to account is be restricted to only the 25 shares originally issued to Autumn in January 2007, as the Gilbertson Parties contend. The Renova Parties also submit that it is not now open to the Court to change its conclusions in this respect, since the jurisdiction to do so after publication of a final judgment is an extraordinary one to be exercised only in the most exceptional circumstances: see *Re Barrell Enterprises* [1972] 2 ALL ER 631.

2.3. The Gilbertson Parties submit that it is clear that, when the judgment is read as a whole, the conclusion at paragraph 20.2 does indeed relate only to the 25 shares issued to Autumn in 2007 and that the paragraph must be read in that way. They also submit that even if the language is not clear it is at this stage still open to the

Court in its discretion to clarify it in order to give effect to the Court's clear intention: see *Smith v Smith* [2004-2005] CILR 225.

2.4. In my opinion it is clearly in the interests of justice that the final order of the court should reflect the decision which it intended to make and the court has a wide discretion to ensure that is so. In the instant case I consider that it is clear from the judgment as a whole that the court was considering, and only considering, the position in relation to the 25 shares in PEL, which it has found were gratuitously procured to be issued to Autumn by Mr. Gilbertson on or with effect from 3rd January 2007. The Court was not considering and did not consider any further or other shares in that company which were subsequently purchased by Autumn. Paragraphs 6.5 and 17.1 of the judgment summarizing the Plaintiff's claim make that clear, as do other paragraphs of the judgment, such as paragraphs 17.3 and 19.30. The reference to Autumn's shareholding in paragraph 17.7 clearly relates to the new PEL shares which it received gratuitously in January 2007 as does the reference to Autumn's shareholding in Fabergé Limited in paragraph 17.20 and I confirm that that was my intention.

2.5. I therefore do not accept the Renova Parties' interpretation of the judgment in this respect. Paragraph 20.2 must be read in context and if that is done it seems to me that what I intended is clear. However, the judgment should say clearly what I meant. If it is the case that paragraph 20.2 erroneously does not say clearly enough what I intended it should be clarified so as to avoid any doubt. I have accordingly added short clarifications to paragraphs 17.17, 17.20 and 20.2 of the judgment and re-issued the judgment with those clarifications. I should emphasize that this does not represent any change in my opinion or conclusion in the judgment but is simply intended to clarify what I always intended, for the avoidance of any doubt.



2.6. The interest on the loans

In the judgment I concluded that Autumn should also account for the interest it received on the loans it made to PEL in January 2007. The Gilbertson Parties contend that I should not have considered that claim by the Renova Parties and that anyway my conclusion that the interest should be accounted for by Autumn is wrong. They say my conclusion in that respect should now be reversed and not included in the order. The Renova Parties disagree. They support my conclusion in that respect and argue that if the Gilbertson Parties consider that I was wrong and wish to pursue that contention, they must appeal to the Court of Appeal.

2.7. This is clearly an issue of a different nature from that relating to the shares to be accounted for as referred to above. It is not a dispute about the meaning or intention of the judgment. The Gilbertson Parties are contending that the judgment is simply wrong in this respect. It seems to me that whether I was right or wrong in my conclusions in the judgment in relation to any particular claim (or counterclaim) is indeed a matter for the Court of Appeal. It is clear that the parties hold forcefully opposing views on the issue (as no doubt on other conclusions in the judgment) and in my view it is for the Court of Appeal to determine whether I am right or wrong, not for me to have the matter re-litigated before me.

2.8. The Gilbertson Parties relied on *Smith v Smith* (supra) in which the judge at first instance apparently changed his mind on a particular matter after issuing his judgment (but before any order was made or perfected) and issued a second judgment expressing a different conclusion. The Court of Appeal held that he was entitled to do so and the appeal on the merits proceeded in relation to the order made on the second judgment. However, it does not seem to me to follow that just because one party considers the judge is wrong in his conclusion in his judgment, the judge is bound to allow the issue concerned to be litigated before him all over again. I may be wrong in my conclusion on the matter as the

Gilbertson Parties contend but the Renova Parties contend that I am right. The Parties had every opportunity to make their respective cases on this issue at the lengthy trial of this case some six months ago and it has not been raised by the Gilbertson Parties until very recently. If they consider that I am wrong their remedy is to appeal.

2.9. The Gilbertson Parties also contend that even if Autumn is required to account for the interest on the loans, it should not be required to pay interest on that sum from 3rd January 2007 as I have concluded in the judgment. They say that interest should run from 27 September 2007, being the date when it was actually paid to Autumn, and they now put forward various reasons for that. They did not do so at the trial. The Renova Parties contend that 3rd January 2007 is indeed the correct date from which such interest should run and they too put forward various reasons for that. I take the view that, as I have in relation to my conclusion that interest on the loans should be accounted for, if the Gilbertson Parties contend that my conclusion with regard to the date from which interest is payable is wrong, their remedy is to appeal.

3. **Costs**

3.1. At the end of the judgment of 15th August 2012 I said that if counsel were unable to agree costs I would hear their submissions on costs as soon as practical. In the event counsel were unable to agree costs and accordingly the question of costs has now come before me.

3.2. The Renova Parties contend that the appropriate order is for the Gilbertson Parties to pay the costs of the action on the standard basis and the costs of the Counterclaim on the indemnity basis. The Gilbertson Parties contend that they should be awarded their costs of the action. They accept that the Renova Parties should have their costs of the Counterclaim but on the standard basis, not on the indemnity basis.

3.3. The rules relating to costs are contained in GCR O.62. The rules are not the same as either the current or the former equivalent rules in England, although there are some similarities to the former English RSC: see *Sadik v Investcorp Bank BSC* (unreported, 3rd July 2012 per Jones J). The overriding object of GCR O.62 as set out in r.4(2) is *"that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting the proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court"*. It is also relevant to note that r.4(5) provides that *"if the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceeding, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs"*.

3.4. Accordingly the objective of O.62 is that the successful party should recover its reasonable costs or, to put it as in r.4(5), costs should follow the event. However, both rules contemplate that the Court may order otherwise and that must mean that it may do so in the exercise of the generally accepted discretion which it has in relation to costs having regard to the circumstances of the particular case.

3.5. The obvious first question therefore in seeking to apply the general objective is to determine which party was the successful one or, as put as in r.4(5) to determine the event which costs should follow. The Renova Parties contend that they succeeded overall and were successful on *"the main issue"*. They say that in the end of the day there was a finding of serious wrong-doing by Mr. Gilbertson and a significant award on liability against Autumn. They contend that the overriding objective should be followed and that they are the successful parties and should accordingly be awarded the costs of the proceedings. They relied on *National Trust for the Cayman Island v Planning Appeals Tribunal* [2002] CILR N.24 and *Banks v Arch* [2004-05] CILR N.40. The Renova Parties submit that the onus is on the Gilbertson Parties to show why the Court should depart from the usual order.

3.6. The Gilbertson parties argue that the Renova Parties did not succeed in obtaining any relief against Mr. Gilbertson and that they effectively lost the principal part of the action. They refer to *Texaco Ltd v Arco Technology Inc* (unreported – The Times, 13th October 1989). The Gilbertson Parties also argue that the relief obtained against Autumn is, in the circumstances, nominal and that the Plaintiff has in effect lost the whole action. In the alternative they rely upon GCR O.62 r.4(5) and submit that in the particular circumstances of this case the Court is entitled to depart from the usual rule in its discretion and award costs as it sees fit. As a final alternative they propose that a fair outcome would be for the parties to each bear their own costs.

3.7. The Renova Parties and the Gilbertson parties each submitted detailed skeleton arguments which I have considered and taken into account. They also supplemented these in oral submissions which I have also taken into account.

3.8. I have been the judge assigned to and have dealt with the entirety of these proceedings since they were commenced over four years ago in May 2008, culminating in a four week trial in April and May this year. During the course of the proceedings there have been several hotly contested and significant interlocutory hearings, which have resulted in four substantial written rulings and an ex tempore written ruling. A significant issue has been the Renova Parties' discovery, to which I refer below. The issues argued by both parties at the trial departed in several respects from their respective pleadings.

3.9. There is in my view in this case no one obvious event for costs to follow; there has been no one clearly successful party overall. Each party has had victories and defeats on various claims and issues. The Plaintiff has succeeded in establishing Mr. Gilbertson's breach of fiduciary duty but has failed in establishing any consequential loss, notwithstanding the very substantial claim in respect of equitable compensation which it made. If the reasoning of Phillips J. (as he then was) in the *Texaco* case (supra) is adopted, the Plaintiff therefore lost the case. The Plaintiff also abandoned its claim against Mr. Gilbertson to account himself

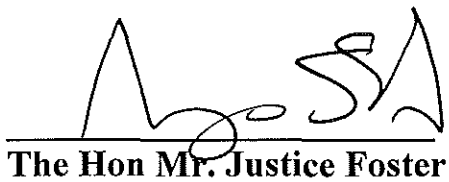
for the profit made by Autumn. Although the Plaintiff has established liability against Autumn to account for the 25 gratuitously issued shares, it seems to me that the net gain to the Plaintiff as a result can fairly be said to be minimal in the context of what was claimed. I also consider that, although legally separate, it is somewhat artificial for these proposes in these proceedings to distinguish between Mr. Gilbertson and Autumn in light of my acceptance in the judgment of the Plaintiff's claim that Mr. Gilbertson was the directing mind and will of Autumn. Of course, the Gilbertson Parties' own counterclaims were either withdrawn or have been dismissed, although in the end of the day the counterclaims accounted for a very limited part of the trial and earlier in the proceedings I declined to strike them out. I see the counterclaims as part of the ebb and flow of each parties' various successes and defeats.

3.10. In all the circumstances, I am of the view that there has been no clearly overall wholly successful party. I consider that this is a case in which the overiding objective is either not applicable at all or that it should be departed from and some other order made in light of the circumstances of the case.

3.11. Notwithstanding that discovery did not ultimately feature significantly at the trial, I consider that I should at least have some regard in considering the overall costs of the proceedings, to the Renova Parties' failure to comply with their discovery obligations. I expressly found that to be blameworthy and culpable, although in the end of the day I did not consider that it precluded the possibility of a fair trial. Nonetheless, it seems to me that, in exercising my discretion in relation to the costs of the proceedings, blameworthy and culpable conduct of one of the parties in relation to a very important part of the proceedings is at least a factor which I am entitled to take into account, at least to some extent, in reaching my overall decision.

3.12. In my view it would not be fair or appropriate to award the costs of the whole proceedings to either party. On the other hand an issue by issue allocation of costs would, in my opinion, be very difficult to apply in practice in this case and would be likely to result in interminable argument and debate, which would not be desirable. In any event the costs payable by each party on an issue by issue basis would, in this case, probably largely cancel each other out. In all the circumstances, I consider that the fairest approach in light of the conduct of these proceedings over the past four years and their eventual outcome after trial is that each party should bear their own costs of the proceeding, and I so order. That is, of course, subject to all orders for costs in favour of one or other party which have already been made and which shall stand and be complied with.

Dated 5th November 2012



The Hon Mr. Justice Foster
Judge of the Grand Court