



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. G 154 OF 2001**

**BETWEEN:**

**AX**

**(Suing by his Guardian ad Litem Tabitha Philander)**

**Plaintiff**

**-and-**

- (1) A**
- (2) B**
- (3) C**

**Defendants**

**Appearances:**

Mr Robert Lindley and Mr Wesley O'Brien, Conyers Dill & Pearman,  
for the Guardian ad litem

Mr James Chapman, counsel for a noticed party (asserting the right to  
represent the Plaintiff)

Mr James Kennedy and Mr Rupert Wheeler, KSG Attorneys for a  
noticed party

**Before:** The Hon. Justice Kawaley

**Heard:** On the papers

**Date of Decision:** 29 August 2023

**Draft Reasons****Circulated:** 4 September 2023**Reasons Delivered:** 13 September 2023**INDEX**

*Discharge of Guardian ad litem-approval of accounts-jurisdiction-whether all costs reasonably incurred- Grand Court Rules Order 62 rule 14, Order 80 rules 22(2), 25(4)*

**REASONS FOR DECISION****Background**

1. On 27 June 2023, I granted the Guardian's application to be discharged and replaced by a professional trustee and refused the Plaintiff's counsel's application for an adjournment. The discharge was to take effect when this Court had approved the Guardian's Accounts. I had made a similar Discharge Order on 23 October 2019, and approved an earlier set of accounts, but this order was frustrated because the proposed professional trustee proved not to be a viable appointee.

2. Paragraph 4 of the Amended (as of 7 August 2023) Discharge Order provides as follows:

*"4. Tabitha Philander is to file her final accounts in relation to the Award for the Court's approval within one month from the date of the Order. All fees and expenses of Tabitha Philander are approved and to be paid from the Award on the indemnity basis:*

*(a) subject to the approval of the said accounts by the Court; and*

*(b) without prejudice to any future determination by this Court in any pending or future proceedings against the Guardian that she is not entitled to be indemnified out of Award for the costs of defending such proceedings*

3. By an Ex Parte Summons dated 27 July 2023 on notice to Chapmans, which asserted authority to act for the Plaintiff, the Guardian applied for the following primary relief:

*230913- AX (Suing by His Guardian ad Litem Tabitha Philander) v A, B and C- G 154 of 2001  
Reasons for Decision*

*“1. The accounts and proposed remuneration of Tabitha Philander, as set out in and exhibited to the Sixth Affidavit of Tabitha Philander, be approved by the Court in furtherance of the Court’s order discharging Tabitha Philander as Guardian ad Litem and interim receiver for the Plaintiff.”*

4. On 28 July 2023 I gave directions for any opposition to this application to be filed by 11 August 2023. Chapmans sought a short extension of time on that date. The Guardian’s counsel filed its Submissions on 14 August 2023 and Chapmans filed its Objection on or about the same date. Shortly thereafter, I conducted a preliminary review of the application and formed the provisional view that the ‘root and branch’ opposition to any costs being allowed was clearly misconceived but that some quantum reduction was likely required. I was on leave during the period 18-28 August 2023. On 28 August 2023 at around 1.30pm, the Guardian’s attorneys invited the Court to deal with the application on the papers. On 29 August 2023 I decided to deal with the application on the papers and the following determination was communicated to counsel by email at 11.31am:

*“For reasons that will be provided later, the Judge passes the accounts as filed save that the Guardian’s claim for remuneration in the amount of \$180,000 is approved in the reduced amount of \$150,000.”*

5. These are the reasons for that decision.<sup>1</sup>

#### **Legal findings: jurisdiction to approve the Guardian’s accounts**

6. GCR Order 80 rule 25 provides:

*“(4) An order for the discharge of a receiver shall take effect from the date upon which the receiver’s final accounts are passed by the Court.”*

7. The Guardian sought approval (for the second time) pursuant to that rule. It seemed counterintuitive to contend the Court had no jurisdiction to approve the Guardian’s accounts in light of that express

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<sup>1</sup> The formal Order was sealed on 8 September 2023.

power conferred by this Court's Rules. I accordingly felt that it was appropriate to reject the jurisdictional challenge which was raised somewhat summarily. This Court's resources have over the last three years manifestly been wasted on an array of applications directly or indirectly related to the Guardianship which ought never to have been made, all purportedly made on the Plaintiff's behalf by Chapmans.

8. The Objection raised two discernible jurisdictional challenges:
  - (a) the present proceedings terminated with the Final Judgment being entered on 30 November 2018; alternatively
  - (b) the costs must be taxed under GCR Order 62 rule 14.
9. I had already summarily decided the first point against Chapmans for the reasons set out in paragraph 29 of my Judgment in *AX-v-Philander*, G91/2022, Judgment dated 20 July 2023 (unreported). The Objection acknowledged this fact.
10. The Guardian's Submissions also referenced another rule which was confirmatory of the Court's power to approve a guardian's fees, independently of the taxation process. GCR Order 80 rule 22 provides:

*“(2) Where a receiver is appointed for a patient, the Court may allow the receiver remuneration for his services at such amount or at such rate as the Court considers reasonable and proper and any remuneration so allowed shall constitute a debt due to the receiver from the patient and his estate.”*

11. The Objection advanced the following bare submission:

*“18. If the 2001 proceedings still continue then the costs of TPL must be taxed therein under Order 62 rule 14.”*

12. GCR Order 62 rule 14 provides as follows:

***“Costs payable to a trustee, personal representative or official liquidator out of any fund (O.62, r.14)***

*14. (1) Unless the Court otherwise orders, every taxation of a trustee's, personal representative's or official liquidator's costs where —*

*(a) that person is or has been a party to any proceedings in that capacity; and*

*(b) that person is entitled to be paid that person's costs out of any fund, shall be on the indemnity basis.*

*(2) On a taxation to which this rule applies, costs shall be taxed on the indemnity basis but shall be presumed to have been unreasonably incurred if they were incurred contrary to the duty of the trustee or personal representative or official liquidator as such.”*

13. This rule merely articulates the basis of taxation for the categories of costs to which it applies. It does not mandate when taxation should occur. It is clear from GCR Order 62 rule 1(2), that Order 62 is intended to regulate how the costs jurisdiction primarily governed by section 24 of the Judicature Act is applied. The starting point of any analysis as to when taxation is required must be the provisions in the primary legislation under which the Court's powers to deal with matters relating to costs are conferred. This provision states, so far as is material for present purposes:

*“24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in-*

*(a) the Court of Appeal; and*

*(c) the Grand Court,*

*shall be in the discretion of the relevant court.*

*(2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers.*

*(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.” [Emphasis added]*

14. The Court has a statutory discretion to make costs orders, subject to any applicable rules. This discretion includes the discretion to decide whether or not costs should be taxed, but any costs order must comply with any applicable rules. GCR Order 80 rules 22 and 25 (4) expressly empower the Court to “approve” a receiver’s remuneration and to “pass” a receiver’s account, without mandating taxation. This does not exclude the power to order taxation of a receiver’s remuneration and expenses in a special case where the Court considers that taxation should for good reason be required.
15. Accordingly, these provisions in GCR Order 80 made it clear beyond sensible argument that this Court possessed express statutory power to approve the Guardian’s accounts rather than directing that those costs and expenses should be taxed.

### **Findings: discretion to approve the Guardian’s costs**

#### **The Objection**

16. The Objection advanced two main broad-brush grounds upon which the Court was invited to decline to approve the Guardian’s costs:
  - (a) the Plaintiff does not consent to his Damages Award being diminished through a summary approval process;
  - (b) the Guardian’s costs after 2017 ought not to be approved because she failed (without obtaining the Court’s prior sanction) to pay the Award into Court or invest it from the outset.

17. There was nothing in the first ground. It essentially amounted to an expression of dissent about the content of the existing procedural regime. That regime explicitly, by analogy with the position of a liquidator's remuneration, allows the Court by way a standard approach to adopt a summary approach to approving the costs of an officer of the Court. It also expressly provides that the costs should be payable out of the "estate" of the patient. This limb of the Objection was rejected on this summary basis.
18. The second limb of the attack on the merits of the costs being approved at all had more potential validity to it. This was the general complaint, which Mr Chapman had articulated orally with great conviction at previous hearings that the Award ought to have been paid into Court or invested as soon as it was obtained. Had the Guardian wished to do what she did, she should have prospectively sought Court approval. This was essentially the un-particularised commercial argument that, with the benefit of hindsight, the Award would have diminished less than it did had it been invested over the last 5 years.
19. I rejected this argument in its widest ambit for one main reason. The Guardian, initially Clerk of the Court and thereafter former Clerk of the Court was not appointed to make investment judgment. She was explicitly appointed on a temporary basis until a trustee qualified to make investment decisions could be appointed on a long-term basis. The period from 2017 until 2019, when the first Discharge Order was ineffectively granted, was not unduly long. Thereafter, the landscape changed and could fairly be viewed as falling into two periods in relation which the Accounts for the period 1 April 2020-31 July 2023 could helpfully be assessed:
- (a) the period between 3 February 2020 when the last Accounts were approved and 5 August 2020 when Chapmans' filed a Notice of Change of Attorney purporting to attempt to come on the record in behalf of the Plaintiff (a Notice which was struck-out on 4 September 2020 by Ramsay-Hale J (as she then was));
  - (b) the period after 5 August 2020 when the process of appointing a professional trustee may broadly be said to have been obstructed by Chapmans, purportedly acting on the Plaintiff's behalf. Chapmans filed a Summons dated 2 September 2020 (which was effectively disposed of by the 4 September 2020 strike-out Order) seeking to have Mr Chapman himself appointed as interim next friend or guardian in place of Ms Philander.

20. Prior to Chapmans entering the stage, the period was too short to justify investment, albeit that the period appears to correspond with the time when the non-viability of the proposed trustee was revealed. Of the approximately 3.5 year accounting period, for approximately 3 years the Guardian has been to a material extent bogged down in a legal version of trench warfare instigated by Chapmans purportedly on behalf of the Plaintiff. The 4 September 2020 Order not only struck-out the Notice of Change of Attorney, it also directed that Chapmans should be provided “*all files and papers in the Cause ...so that the Plaintiff can receive independent legal advice*” (paragraph 2). At this stage the Plaintiff’s father (represented by Brooks & Brooks until the filing of a Notice of Change of Attorney dated 13 July 2021 confirming the appointment of Chapmans) was party as an Intervenor, and the Guardian’s attorneys clearly regarded the Order as requiring disclosure to the Intervenor.
21. According to the Guardian’s Affidavit herein dated 3 September 2021, in response to a Summons seeking to enforce paragraph 2 of the 4 September 2020 Order, this Order had been complied with by 7 October 2020. She also deposed that in November 2020 Mr Chapman indicated that he was seeking medical evidence with a view to establishing that the Plaintiff was no longer a patient. The 2021 and 2022 litigation commenced by Chapmans has been described in the Reasons for Decision dated 7 July 2023 at paragraphs 6 and 8.
22. There was accordingly no proper basis on which Chapmans, assuming the firm to have been validly instructed by the Plaintiff, could challenge the principle of the Guardian being remunerated during a period when it was actively impeding the Guardian’s attempts to transfer the Award to a professional trustee in implementation of the Judgment obtained in the Plaintiff’s favour. The very need for payment into Court, as a result of the protracted nature of the Guardian’s tenure from August 2020 until July 31 2023, is quite obviously to a material extent attributable to the obstructive tactics pursued purportedly on the Plaintiff’s behalf. With the benefit of hindsight, the Guardian and/or the Court ought to have anticipated that successfully overcoming the Chapmans litigation ‘blitz’ in Churchillian fashion might take as long as 3 years, and that it would be prudent for the Award to be paid into Court to earn more favourable interest. However, the failure to invest the Award during this period cannot possibly be viewed as the type of wilful misconduct or gross negligence which would justify depriving an officer holder of the entirety of their costs.

23. Accordingly the contention that the Guardian's remuneration throughout the accounting period should be completely refused because of a failure to invest the Award was clearly unmeritorious.

**Merits of application for the approval of costs in quantum terms**

24. It was noteworthy that the Objection did not seek to advance any particularised complaints about the specifics of the Accounts. Approval was sought for:

- (a) the Accounts generally, from 1 November 2019 (following on from the Accounts previously approved covering miscellaneous expenses, distributions to the Plaintiff and KSG legal fees to 19 October 2022);
- (b) Conyers' very modest legal fees of less than US\$25,000 in connection with the discharge application including the appointment of the trustee;
- (c) the Guardian's fees of \$180,000 for 40 months at 20 hours per month at US\$225 per hour;
- (d) minor disbursements of less than US\$500.00.

25. Having decided that the approval jurisdiction was broadly analogous to the Court's jurisdiction to approve a liquidator's fees, it seemed clear that the Court must carry out a broad evaluation of whether the sums claimed were reasonable taking into account the fact that the Plaintiff's sole independent representative (Chapmans) had only launched an overly broad critique of the Accounts application. The general approach to liquidators' remuneration applications before the modern regime was created was described by this court in *Re Liberty Capital Limited, Integrity Limited, Holdings Limited and Waterford Insurance Limited* [2002 CILR 606] (Smellie, C.J., Sanderson, J. and Henderson, Ag. J.): as follows:

*"51 Kellock, Ag. J., in his decision in In re Tait Intl. Ltd. (6), referred to the criteria set out by Sanderson, J. in In re High Risk Opportunities HUB Fund Ltd. (4). In further support, he then stated:*

*'The remuneration of the provisional liquidator is the subject-matter of 7(3) Halsbury's Laws of England, 4th ed., para. 2256, at 1591. The relevant statement is as follows:*

*‘The remuneration of the provisional liquidator other than the official receiver, must be fixed by the court from time to time on his application. In fixing his remuneration, the court must take into account:*

*(1) the time properly given by him (as provisional liquidator) and his staff in attending to the company’s affairs;*

*(2) the complexity (or otherwise) of the case;*

*(3) any respects in which, in connection with the company’s affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;*

*(4) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and*

*(5) the value and nature of the property with which he has to deal.” [Emphasis added]*

26. The Accounts did not include any claim costs relating to G91/2022 where I expressed the provisional view that wasted costs orders should be made against the various lawyers involved in my Judgment dated 20 July 2023. The lawyers creditably agreed in late August that there should be no order as the costs of that action and that no claim would be made against the Award either. That was a significant saving for the Plaintiff’s Fund, which to my mind justified the Court in not carrying out any further examination of the other legal costs incurred in this matter which were merely set out as line items in the Accounts. Nonetheless, the Court was obliged to look critically at the question of whether (a) all time claimed by the Guardian been properly expended and (b) how effective had the Guardian been in carrying out the duties to which the remuneration approval application related. After all, her Statement of Work asserted that she “*offered a wealth of insight needed to effectively interact with all stakeholders, and give instructions*”.

27. The 23 October 2019 approval application assumed that the time spent on creating a structure for the appointment of a new trustee had been entirely productive and effective. In fact it was not. While it is unclear precisely how much time was spent by the Guardian in the first six months of the current Accounts period, it appears likely that it became apparent during this period that the

proposed trustee was not a viable appointee. That meant that the work subsequently done in connection with obtaining the second Discharge Order was duplicative of costs approved in relation to the first Discharge Order. The nature of the property (the Award) over which she was given stewardship in extremely burdensome and difficult circumstances required the Court to scrutinise with particular care the reasonableness of the remuneration claim.

28. In my judgment it was appropriate without carrying out an uncommercial but legally ‘perfect’ inquiry through supplemental written or oral submissions for the Court to make a summary appraisal of how much should be deducted from the total remuneration claimed to take into account the fact that a certain proportion of the fees claimed had clearly not been “properly” incurred. I determined that a deduction of just over 15% (\$30,000) was appropriate to apply to the Guardian’s remuneration claim. This roughly corresponded to just over six months of billed time (using the 20 hours per month tariff) and was also in the same ball-park as the duplicative legal fees incurred in relation to obtaining the second Discharge Order.
29. These findings in no way dilute the depth of the Court’s gratitude to a former Clerk for taking on what turned out to be as challenging a guardianship assignment as is ever likely to come before this Court.

### Summary

30. For the above reasons, on 28 August 2023, I approved the Guardian’s Accounts on the terms set out in the Order of that date. For reasons which are hopefully obvious, I made no Order as to the costs of the present application and do not anticipate that any party will have the temerity to seek to be heard as to these costs.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**