IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

G 167 of 2021

Wilma Ebanks v Tabitha Philander (as Guardian ad Litem and Interim Receiver)

Representations: Mr James Chapman for Wilma Ebanks

Mr James Kennedy of KSG Attorneys for the Guardian Ad Litem and Interim Receiver

HEADNOTE

Recusal application made without proper factual basis – attorney acting in positions of conflict of interest – proliferation of litigation – concerns of the court.

REASONS FOR DECISION

BACKGROUND

1. This action, which has now generated three further actions, has had an already long history before the Courts. It is now poised alarmingly to spiral into costly and uncontrolled litigation.

2. In the first (or original) action, Cause G154 of 2001, Daric Ebanks acting by his Guardian Ad Litem and Interim Receiver Ms Tabitha Philander, ("Ms Philander") recovered a very significant award of damages by judgments[1] in respect of personal injuries he unfortunately suffered, the result of negligence on the part of the defendant state agencies represented by the Attorney General.

3. In the present action, Cause 167 of 2021, Ms Wilma Ebanks, Daric's mother, acting by Mr Chapman, claims against Ms Philander, the amount of KYD 42,118.85 (plus interest). This is said to be the remaining amount due to her (of an initial award of KYD 102,964.65) for her care and expenses undertaken on Daric's behalf and which had been ordered in her favour by Justice Swift as part of the damages awarded to Daric and which Ms Philander has held in trust as his Interim Receiver.

4. In Cause G167 of 2021, Donovan Ebanks, Daric's father, also acting by Mr Chapman, seeks by summons to intevene in Cause G154, to obtain orders appointing him as Daric's Guardian ad Litem and receiver, in place of Ms Philander.

[1] Delivered by Justice Malcom Swift on 29 July 2016 and 9 July 2017, perfected by order of Justice Richard Williams on 9 June 2017.

5. In Cause G175 of 2021, Donovan Ebanks, again acting by Mr Chapman, has filed an application by ex parte summons, seeking leave to serve a writ outside the jurisdiction upon Ms Philander as intended defendant, seeking an account and compensation on behalf of Daric, for alleged breaches of fiduciary duties.

6. The foreging is concerningly how matters have developed in respect of Daric's affairs, following on his injuries sustained in April 1998, when a 12 year old child.

7. On the day of the incident, Daric attended Seven Mile Public Beach to watch the recreation of a traditional launch of an old time Caymanian boat. As the boat was being pulled into the sea, a metal schakle broke lose, flew through the air and struck Daric on his forehead, knocking him into the sea. Daric was rendered unconscious. He was a taken to George Town Hospital and then transported by air ambulance to Baptist Hospital, in Miami, Florida, where he was taken under the care of Dr Arcenio Chacom. A CT scan revealed a right frontal haemorrhage, contusion and multiple fractures and facial lacerations. Daric's Glasgow Coma Scale was initially 13 but it deteriorated to 8 within 24 hours of admission. He required emergency neurosurgery during which was performed a frontal craniotomy with frontal lobectomy (removal of part of the frontal lobe of the brain), evacuation of a haemorrhagic contusion in the frontal lobe, and reconstruction of the comminuted skull fractures with titanium mini plates. He had a left hemiparesis which fortunately resolved. A later CT scan showed blood in the brain and a midline shift to the left. Daric suffered some 15 days of post traumatic amnesia.

8. Sadly, the outcome is that Daric has suffered permanent neuropsychological impairment as reported by various assessments over the years since his injuries. Of ongoing relevance as litigation threatens to embroil him and his family and spiral out of control, psychometric reports from Dr Coello-Jemmali as long ago as in 2005, concluded that Daric was "*not capable of making proper decisions about his legal and financial affairs due to mental, cognitive and emotional sequelae of his traumatic brain injury*", and further indicating that "*Unfortunately, family members have not been very reliable in providing Daric with the protection that he needs.*"

9. In 2007, Daric underwent a further assessment by Dr Coello-Jemmali. The report records significant problems at home with both his father Donovan and mother Wilma. Donovan had

undergone a drug rehabilitation program. Daric had taken to smoking marijuana. There were complaints of domestic abuse by Wilma and her new partner. Dr Coello-Jemmali diagnosed 1) Cognitive Deficits ,2) Personality Change secondary to traumatic brain injury, and 3) Adjustment Disorder, with depression and anxious mood. She recommended that Daric continue to live in a non-stressful environment. She concluded that he " *will not be able to maintain gainful, competitive employment*" and that "*the best thing is for Daric's money to be invested in a reputable bank and he could be provided with a monthly income which he can manage*".

10. At paragraph 190 of his Judgment when considering the need for a professional trustee, Justice Swift had made these telling observations:

> "*I am quite satisfied that the plaintiff's family members are not equipped to perform the role. Nor do I think it is desirable in the best interests of the plaintiff or of hisfamily that they should assume the role. Acting as a trustee of such a fund is an onerous responsibility. The trustee of the fund must deal with the plaintiff and his needs independently and wthout being subjected to undue pressure from the plaintiff or from anyone else. The plaintiff must be protected from himself.*"

11. Current developments provide me with no better sense of assurance that Daric's interests would be duly and properly considered and respected by family members or their advisers.

12. While there are the other three related actions, the application before me now is brought in Cause G167 of 2021 by Mr Chapman, not for substantive resolution of any issue but for my recusal from that action.

13. At first, Mr Chapman's argument for my recusal was stated to be on the basis that I have shown bias against his client Wilma Ebanks or in favour of the Respondent Ms Philander, by my remark, during a case management hearing, that "*the action is one suitable for settlement*".

14. That, by itself, was a patently implausible argument because my remark could not reasonably have been taken as reflecting upon the merits of one side or the other of the action in any way. The remark was simply and clearly my assessment that the interests of all parties would be better served by them finding common ground for a settlement, rather than going to trial. Thus, a perfectly anodyne and common-place view, expressed in the exercise of usual case management

functions, in the interests of both sides and as exhorted by the Overriding Objectives of the Grand Court Rules.

15. In his oral submissions Mr Chapman has however, raised further allegations of bias on my part. His argument here is expressed as a concern that I may be disposed to be in favour of Ms Philander, for reasons explained by him in these terms (as recorded in my notes of that hearing on 24 May 2022 at Chambers Notebook, Volume 84 folio 123 - 124):

> Mr Chapman: " *Your Lordship has stated that Ms Philander has been trying to release herself [from her appointment] but that is not true.*
>
> *Your Lordship has closed his mind.*
>
> *Your Lordship has opined in 2015 that she would continue…"*
>
> *See: Queen v [Stubbs] for proposition that pre-determination or pre-judgment indicates a closed mind.*
>
> - - -
>
> *What I am asking the Court to do is to set the remainder of the summons down for trial and assign it to another judge.*
>
> *The issue is going to be when [and whether] personal liability falls upon Ms Philander, in the absence of any explanation from Ms Philander as to why Daric Ebanks was not paid in 2017…*
>
> *.. the Court's view that the matter is "eminently suitable for settlement" is an indication of bias.*
>
> *Miss Philander was allowed to stay on without security or insurance policy. If the Clerk of Court were appointed the parties would not be put through the hoops*."

Discussion

16. First, it is significant to note that my remarks about settlement were made in the context of the application before me in the instant Cause; ie: the action in which Daric's mother seeks to sue Ms Philander his Receiver, for payment of an amount which his mother claims is due to her from Daric's fund in receivership. It is therefore illogical to surmise, as Mr Chapman appeared to do,

that my remarks were meant to reflect upon the merits of any action he might be contemplating to take on Daric's behalf against his Receiver.

17. Moreover, it is just as well to record that there simply is no factual basis for Mr Chapman's assertions.

18. As regards my "*opining in 2015*": the question then came to me in my administrative capacity as Chief Justice (not in the context of any hearing) whether Ms Philander- then in her official capacity as Clerk of Court but soon to retire - could continue to act as guardian ad litem and receiver. She was already by then appointed in both capacities by Justice Quin in May 2015 and that appointment remained in place, no order to the contrary having been made. She thus was able to pursue and recover (and became in charge of) the proceeds of the claim she later successfully recovered on Daric's behalf. The question of her replacement arose in 2015 in circumstances where there was no-one else available immediately to act as guardian ad litem and receiver.

19. In the absence in this jurisdiction of an Official Receiver, Ms Philander had been appointed Guardian ad litem and Interim Receiver while Clerk of Court (in succession to at least three earlier appointees) and so her appointment was, indeed, in an official capacity. The terms of her appointment by Justice Quin's Order dated 4 May 2015 included the following:

> "2. *That Tabitha Philander, the Clerk of the Grand Court be appointed as Guardian ad Litem and receiver to the Plaintiff for the purpose of conducting this litigation and subject to the following terms of appointment:*
>
> *a) To provide instructions in the case to move forward to either settlement or trial.*
>
> *b) To assist the parties in the post settlement/judgment phase, concluding matters and dealing with the costs issues and holding and release of funds in the short term.*
>
> c) *To assist with handing over the case to any firm of occupational therapists/life care planning firm instructed by the plaintiff's Attorneys.*"

20. It is also apparent from the foregoing that Ms Philander's appointment was intended to be interim in nature, pending the appointment of a firm of professionals, to be instructed by his Attorneys and who would be able to manage the fund for Daric's long-term care and benefit.

21. The correspondence on file reveals the following:

- When the time came for Ms Philander's departure, the request was made of her successor, Mrs Allenger, to assume the role of receiver but she declined, citing the existing demands of office and her own lack of experience.
- The Solicitor General was asked but refused to undertake the role.
- The appointment of a paid professional trustee was considered but could not be effected without an order of the Court appointing such a person to replace Ms Philander.

22. The record reveals that such an order was, however, made by Justice Kawaley and as long ago as 23 October 2019. This was upon an application brought by Ms Philander, for the transfer of the assets entrusted to her to a professional trustee. By that order she was authorized to execute, as settlor, a Deed of Settlement upon trust which allowed her to transfer the funds held as interim receiver to a professional trustee appointed under the Deed of Settlement. By the same order, the Court approved and passed her final accounts presented within her application.

23. This order has not however, been implemented because of a stay application filed by Mr Chapman purportedly on Daric's behalf (discussed further below) and which has not yet been adjudicated because of failure to bring it to trial.

24. Daric Ebanks had been in need of a guardian ad litem in the first place because of his lack of capacity to prosecute his claim himself and so there was no question of relinquishing management of his affairs to him.

25. In the absence of an order replacing her, Ms Philander was therefore, obliged to continue as guardian and receiver and the argument sought to be deployed by Mr Chapman, that it was on the basis of my "*opinion*" that she was allowed to continue, is plainly misconceived. Indeed, in my view, it is a mischievous argument.

26. Mr Chapman's further assertion, that I was wrong in expressing the view that Ms Philander has been trying to release herself from her appointment, is to say the least, puzzling. This is in light, as shown above, that in October 2019 she sought and obtained from Justice Kawaley an order for relinquishment of the receivership and further, on 2 July 2021, she filed a new summons in Cause 154 of 2021 (the original action) seeking, in effect, an order enforcing the order made in October

2019. That order, it must be emphasized, expressly directed that she be discharged from her role as guardian ad litem and interim receiver, upon the passing of her final accounts by the Court which was also then granted.

27. All this followed, moreover, after a summons filed by Mr Chapman purportedly on behalf of Daric Ebanks and his father (as intervenor in the original action) on 4 September 2020, seeking an order that "*Tabitha Philander be permitted to retire… and that James Chapman be appointed in her place on an interim basis*".

28. That summons itself followed on the earlier stay summons of 24 August 2020 filed by Mr Chapman, seeking orders "(1*) to freeze all activity in the matter by any person or firm or company or whosoever acting or purporting to act on behalf of the Plaintiff… and (2) to ensure all files and papers in these Causes are delivered up to the Plaintiff of Chapmans… so that the Plaintiff can receive independent legal advice…(3) to maintain the status quo on any payments out of the Plaintiff's funds to his dependents and himself but to no other persons or company or firm without further order of the Court…*"

29. In short, Mr Chapman had thus sought to insert himself into the proceedings in a very hostile and litigious manner, purporting to act on behalf of Daric Ebanks despite being aware that this Court (per Justice Swift) had found Daric to be incapable of managing his affairs and had for that reason, declared the need for appointment of a guardian ad litem and receiver (the roles later assumed by Ms Philander) and while the order for her appointment remained valid and effective.

30. Of still further concern, a Notice of Change of Attorney sought to be filed by Mr Chapman on 4 August 2020, purported to give notice - despite the history of the matter and without any evidence that Daric Ebanks had the capacity to have instructed him to act - that he had come on the record for Daric Ebanks in replacement of KSG Attorneys-at-Law (who have been acting for Daric through his Guardian ad Litem and Receiver).

31. Unsurprisingly, on 4 September 2020, this Notice was found by Justice Ramsay-Hale to be an abuse of the process and ordered to be struck from the record of the Court. The Notice was plainly a nullity as Daric Ebanks, a person under disability, must act by a next friend or guardian ad litem

and whilst it is possible to discharge and replace a guardian or receiver, an application must be made to the Court for those purposes. No such application had been made.

32. Despite Justice Ramsay-Hale's order and despite the blatant position of conflict of interest he seeks to bring about by his own appointment over Daric's affairs, Mr Chapman filed a further summons of 27.8.21 ostensibly on behalf of Daric's father Donovan Ebanks, as Intervenor, seeking to have him replace Ms Philander as guardian and receiver. That application is as at the date of this hearing, completely unsupported by any evidence that could justify it. Given the history of judicial and expert concern about his father's suitability to act in Daric's interests and without such concerns having either been addressed or resolved, seeking to act in this way only heightens concern about Mr Chapman's appreciation for his professional responsibilities both to his clients and the Court. His conduct is therefore in my view, itself requiring of heightened scrutiny.

33. Mr Chapman's next move was to file a summons on behalf of Donovan Ebanks as Intervenor and as Amicus Curiae (without leave of the Court), seeking inter alia, that funds be paid in Trust for Daric's monthly expenses to Mr Chapman's firm.

34. On 7 September 2021 Justice Ramsay-Hale, after hearing from Mr Chapman (ostensibly on Daric's behalf but in the absence of anyone else who could be entrusted to manage funds for his daily living and care) and Mr Kennedy on behalf of Ms Philander, made an order at her invitation:

> *" 1. That CI$10,000 be paid to Chapman's Attorneys in trust to meet Daric Ebanks' immediate housing needs.*
>
> *2. That CI$6200 per month be paid to Chapman's Attorneys in Trust for Daric Ebanks as a monthly "allowance" for Daric Ebanks to meet his regular monthly living expenses until further order."*

35. Thus, Mr Chapman (or his firm) came to act as custodian of funds provided on the monthly basis for Daric's care. And so, notwithstanding her striking out of Mr Chapman's application to come on the record for Daric, the summons of 2 July 2021 filed by Ms Philander for directions for the appointment of her successor was adjourned on 7 September 2021 by Justice Ramsay Hale for mention on 12 October 2021, to give Mr Chapman an opportunity to make proposals on behalf

of Daric Ebanks as to (i) suitable new/successor arrangements, to manage the trust fund created by the award of damages made to Daric Ebanks and if necessary as to (ii) a suitable person(s) to be appointed Guardian and/or Receiver.

36. No order was made by the learned Judge on the further summons then before her –that filed by Mr Chapman on behalf of Daric's father, Donovan Ebanks, as putative Amicus Curiae or Intervenor.

37. I was informed by Mr Kennedy at the hearing of 24 May 2022, that, regrettably, no proposal of the sort directed on 7 September 2021 for a suitable successor to manage the trust fund or to be appointed Guardian and/or Receiver, has been forthcoming from Mr Chapman.

38. However, he has since applied successfully to Justice Ramsay-Hale, by summons filed on 15 October 2021, that she recuses herself from any further dealing with the matter on the basis that her earlier orders would preclude her continuing conduct of the case, thus necessitating yet another Judge becoming engaged and with the inevitable delay and expense which such developments cause.

39. The matter having come on before me on 24 May 2022, the reason for his failure to bring proposals, as gleaned from Mr Chapman's responses to my questions, is that, for want of funds, he has been unable to obtain an up-to-date psychiatric assessment of Daric Ebanks. This he asserts, is despite an order made by me on 29 October 2021 directing, among other things, that funds be provided to Chapman's Attorneys from the trust fund to pay for an examination by the psychiatrist Dr Lockhart, for an updated medical report on Daric Ebanks. This is a further troubling aspect of developments for at least two reasons – first, the implicit acceptance it reveals by Mr Chapman that such a report is required to confirm Daric's capacity to instruct before he could properly accept his instructions to act. And, secondly, despite the stated need for funds to pay for it, the record contains an application by Mr Kennedy for an order directing Mr Chapman to provide a copy of such a report on the basis that it is already paid for and so should be available.

40. In relation to the record in the instant action, Cause 167 of 2021, I note that it does contain an order made by me on that date (29 October 2021), but directing the parties to make best endeavours to identify what funds if any remain due to Wilma Claire Ebanks, pursuant to Justice

Swift's judgment. As this is the issue and Cause 167 of 2021 is the matter of which I am presently seized and in respect of which I provide these reasons, it is the formal order which I make arising from the hearing of 24 May 2022 to which I must now turn.

41. At this stage I can make no findings as to the merits of any of the other actions taken by Mr Chapman, including any purportedly taken on behalf of Daric himself despite there being in place a valid and effective order for his guardianship and receivership of his fund. Nonetheless, I am obliged here note my concerns about Mr Chapman continuing to seek to act both as Daric's receiver and attorney, as he has sought to do, while being blatantly conflicted from doing so and despite an order of this Court precluding him from coming on the record.

42. The blatant impropriety of seeking to take control of Daric's affairs while acting as his lawyer and so being able to direct the expenditure of Daric's funds for the payment of his own fees to be incurred in pursuit of a cause or causes of action which he has himself discerned, appears to have given Mr Chapman no pause whatsoever.

43. His actions suggest a very troubling lack of objectivity and good professional judgment. It is such as to lead me to conclude, as I now expressly note, that under no circumstances should Mr Chapman himself (or his firm of which he is the sole principal as far as I am aware), be allowed to take control of Daric's fund as he has sought an order to do. Mr Chapman may not seek to act as both attorney-at–law and receiver, let alone for a client whose capacity to instruct him remains in doubt.

44. I also feel compelled to add that the current state of paralysis afflicting Ms Philander's attempts to transfer Daric's fund to a professional trustee must not be allowed to continue. It is in Daric's best interests that the transfer be effected as soon as possible to another suitably qualified and experienced professional who would be able to ensure that the fund continues to be managed and applied suitably for his welfare. In the meantime, I note that Mr Chapman (or his firm) is required by order of the court to account for whatever funds he receives for Daric's monthly expenses.

45. Mr Chapman is obliged and should be required to either prosecute his stay action or else discontinue it. Failing that, those representing Ms Philander are obliged to consider making an application to the Court for its striking out.

46. As to the formal order in the instant Cause, it is, as I indicated on 24 May 2022, that the Plaintiff's application that I recuse myself from the further conduct of this Cause is dismissed, save that if the matter must go to trial it would not be taken by me. Mr Chapman's application for my recusal had no proper basis in fact and could not satisfy the well-known test laid down in ***Locabail v Bayfield*** [2000] QB 451 and ***Porter v McGill*** [2001] UKHL 67, which is whether the fair-minded and informed observer, having considered all the relevant facts, would conclude that there was a real possibility of bias.

47. To be clear, my deciding not to undertake a trial in this case (if it must go to trial) was simply to avoid any further debate or concern about the issue and in light of my likely unavailability in any event.

48. As I did then, I now reaffirm and record my advice that the remainder of this action is eminently suitable for settlement. If Daric proves able to and does provide a written statement to Ms Philander (or her successor) that his mother should be paid the amount claimed, because as she alleges, funds when paid to her in the past over the course of proceedings were used for his benefit, that I consider would be a proper basis upon which the Receiver could pay that money to her.

49. It is also regrettable that an order declared in May 2022 is only now being settled formally. This is the result, it must be noted, of differences between Mr Chapman and KSG Attorneys over the wording of the order and another reason for my now providing these written reasons.

50. In the result, I have adopted the form of wording proposed by KSG Attorneys and approved and signed the draft propounded by them.

Hon Sir Anthony Smellie
Chief Justice

7 October 2022.