

## RECOVERING COSTS FROM THE TRUST FUND: THE LIMITS OF TRUSTEE INDEMNITY



By Vonisha Rolle | August 2025

Generally, trustees are entitled to be indemnified out of the trust fund for expenses or liabilities incurred on behalf of the trust in the execution of their duties. Importantly, this right to indemnity applies provided such cost have been properly and reasonably incurred. Nonetheless, the Court ultimately retains unfettered discretion in respect of costs and can make such alternative order as it deems fit or considers just and appropriate.

In two rulings handed down by the Supreme Court of The Bahamas in April 2024 ([link](#)) and January 2025 ([link](#)) respectively (*In the Matter of an application by Deltec Bank & Trust Limited as Trustee, for advice or direction and In the Matter of a Bare Trust*), the Court considered whether a trustee should be allowed to recover, from the trust fund, their costs incurred in obtaining legal advice and bringing a Directions Application. The Court ultimately disallowed the trustees' costs.

### **Relevant Legislation**

**Section 66** of the **Trustee Act 1998** provides:

*The Court may order the costs and expenses of and incidental to any application for an order under this Act or for any order or declaration in respect of any property subject to a trust, or of and incidental to an such order or declaration, or any document executed or act performed in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made performed, or out of the income thereof, or to be borne and paid in such manner by such persons as to the Court may seem just.*

**Section 71.19** of the **Supreme Court Civil Procedure Rules 2022** provides:

*(1) Save as is provided in paragraph (2), where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be.*

*(2) Where paragraph (1) of this rule would otherwise apply but the Court is of the opinion that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, such person has in substance acted for his own benefit rather than for the benefit of the fund, the Court may make such other order as it thinks fit.*

**Section 30** of the **Supreme Court Act 1996** provides:

*(1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by who, and to what extent the costs are to be paid.*

### **Facts**

Nicostone S.A. was an International Business Company which held an account at Ansbacher (Bahamas) Limited ("**Ansbacher**") consisting of a substantial amount of cash and financial assets. In 2018 the beneficial owner of Nicostone died and in December 2020 Nicostone was placed into voluntary liquidation and a liquidator was appointed. Prior to the dissolution of Nicostone, the Liquidator instructed Ansbacher to transfer the account balance to the legal heirs of the beneficial owner of Nicostone ("**the legal heirs**") and to close the account.



Only following the dissolution, in 2022, was it discovered that Ansbacher did not transfer the funds and close the account as instructed. Ansbacher was later acquired by Deltec Bank & Trust Limited ("**Deltec**"). In July 2023, the legal heirs wrote to Deltec requesting transfer of the funds on the Nicostone account. In October 2023 Counsel for Deltec advised that they could not transfer the funds since Nicostone had been dissolved, and further, that they intended to make an application to the Supreme Court for directions. In November 2023, Counsel for the legal heirs notified Deltec of their instructions to make an application for Nicostone to be restored to the Register of International Business Companies which would alleviate the need for a Directions Application. In response Counsel for Deltec stated that they disagreed with the approach of having Nicostone restored. Counsel for the legal heirs also expressed they did not agree it was necessary for Deltec to make a Directions Application.

Counsel for the legal heirs proceeded with the application to have Nicostone restored and by Order of the Supreme Court of The Bahamas dated 6 February 2024, Nicostone was restored to the Register of International Business Companies ("**the Restoration Order**"). On 15 December 2023, Counsel for Deltec lodged an application for advice and direction pursuant to Section 77 of the Trustee Act 1998 ("**the Directions Application**"), without giving notice to the legal heirs.

On 27th February 2024, the Directions Application was heard by His Lordship the Hon. Chief Justice Sir Ian Winder ("**Winder J**") who reserved his decision. In March 2024, via written correspondence to the Court, Counsel for Deltec advised that unbeknownst to Deltec, Nicostone had been restored to the Register of International Business Companies and further expressed that while in their view the Court does not have jurisdiction to make a restoration order in the circumstances of Nicostone, Deltec had no interest in challenging the restoration order. Counsel for Deltec further stated that, as Deltec was acting as a bare trustee and acted reasonably in taking advice and moving the Directions application it was entitled to its costs incurred out of the assets of Nicostone. Counsel for Deltec asserted that given the developments which occurred it would be unnecessary for the Court to give a decision on the Directions Application but nonetheless requested that the Court make an Order (1) granting Deltec leave to withdraw its Directions Application and (2) awarding Deltec, from the assets of Nicostone, its cost of taking advice and costs incidental to the Directions Application.

## **Decision**

### ***First Ruling***

In the Court's ruling dated 3<sup>rd</sup> April 2024, Winder J held that this was not an appropriate case for leave to withdraw to be granted having regard to the stage that the application had reached and that the Directions Application ought to be dismissed as it was not an appropriate case in which to give advice or directions as the Restoration Order deemed Nicostone to have at all times continued in voluntary liquidation notwithstanding its purported dissolution. Additionally, Winder J highlighted that the Restoration Order effectively vitiated or eroded the entire basis of the Directions Application and that there was no longer a question as to whether Deltec ought to transfer Nicostone's assets to the legal heirs.

In relation to whether Deltec was entitled to its costs, the Court held at paragraph 51 that "*Deltec acted precipitately and unreasonably and therefore cannot be said to have acted "properly" after 3 November 2023*", the date on which Counsel for the legal heirs advised that they were instructed to make application to restore Nicostone and disagreed with Deltec making a Directions Application.

Further, at paragraph 52 of the ruling, Winder J stated that "*While weight must be given to the fact that Deltec acted on advice, in the absence of urgent circumstances requiring that a section 77 application be made in haste, without coordinating with the legal heirs, Deltec, as prudent putative trustee, ought to have opened communications with [Counsel for the legal heirs] to coordinate positions with the legal heirs and to keep abreast of the progress of any potential restoration applications.*"

*It ought to have been obvious in the circumstances that if the intended restoration application was brought and it succeeded, Nicostone would be restored to the Register and consequential order would be made attempt to unwind its purported dissolution. Priority ought therefore to have been afforded to the restoration application and, at a minimum, Deltec ought to have confirmed whether that application would be preceded with before moving its own application.”*

Additionally, the Court considered the duties of a bare trustee, being one which holds property for the absolute benefit and at the absolute disposal of other persons, having no beneficial interest in the property and no duties to perform in respect of its except to transfer it to the persons entitled to it. Winder J therefore determined that Deltec ought to have closely consulted with the legal heirs about the course of action to be taken in respect of Nicostone's assets and respected their wishes where practicable considering the fact that the legal heirs were absolutely entitled to the assets of Nicostone which Deltec was seeking advice and directions. The Court held that Deltec, in effect preferred its own views to those of the legal heirs, in a manner inconsistent with its role as putative bare trustee.

The Court determined that it would be unjust for the legal heirs to bear any costs incurred in connection with the Direction Application after they indicated to Deltec that they would be making application to have Nicostone restored.

### ***Second Ruling***

The Court's ruling dated 27<sup>th</sup> January 2025 considered whether Deltec was entitled to its legal costs incurred in obtaining advice and moving the Directions Application, prior to the date on which Counsel for Deltec advised that an application would be made to restore Nicostone.

In His Lordship's ruling, Winder J stated that he was not persuaded Deltec acted reasonably as trustee for the benefit of the fund and determined that Deltec did not act prudently considering there was no need to advance a Directions Application without concurrence of the liquidator or the legal heirs. The Court held that Deltec acted beyond the proper scope of its role as a trustee.

### **Conclusion**

Both Supreme Court decisions illustrate that indemnity is not automatic and may be denied where a trustee acts precipitately, unreasonably or in a manner inconsistent with their duties. In particular, where absolute beneficiaries are involved, trustees should, in the absence of urgent circumstances, act consultatively and take care not to exceed the proper scope of their role, as failure to do so may not be regarded as acting “for the benefit of the fund”. The obligation to act prudently therefore remains central to a trustee's entitlement to costs.

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