

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW C. DURHAM,

Plaintiff Below,
Appellant,

v.

GRAPETREE, LLC,

Defendant Below,
Appellee.

§

§ No. 280, 2024

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§ Court Below—Court of
§ Chancery of the State of
§ Delaware

§

§ C.A. Nos. 2019-0366
§ 2020-0175

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Submitted: January 31, 2025

Decided: March 25, 2025

Before **VALIHURA, TRAYNOR, and GRIFFITHS**, Justices.

ORDER

After consideration of the parties’ briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Andrew C. Durham, is one of five siblings.¹ Andrew and his siblings—Dee Durham, Jeffrey Durham, Davis Durham, Jr., and James Durham²—received from their father a vacation and rental property in St. Lucia known as “Les Chaudieres.” The siblings eventually formed a limited liability company, Grapetree, LLC, to hold Les Chaudieres. Under Grapetree’s operating

¹ The background described in this paragraph is drawn from this Court’s decision in *Durham v. Grapetree, LLC*, 2021 WL 274724 (Del. Jan. 26, 2021), the parties’ briefs, and the record.

² For clarity, we use first names to refer to the individuals discussed in this dispute involving family members. We intend no disrespect. Davis died while the Court of Chancery litigation was pending.

agreement,³ each of the siblings has a 20% equity interest in Grapetree. Although the siblings other than Andrew have authority as managing members, Dee and Jeffrey have taken the most active role in managing the company.

(2) The siblings have been embroiled in litigation over Grapetree for more than a decade. Since 2011, Andrew has initiated at least eight lawsuits in the Court of Chancery seeking access to books and records or alleging that Dee and Jeffrey were mismanaging Grapetree, misappropriating company funds, or otherwise engaging in improper conduct with respect to Grapetree.⁴ The two most recent of those actions underlie this appeal. In the 2019 Action, Andrew filed a complaint seeking to enforce a 2012 settlement agreement by which some of the earlier litigation had been resolved.⁵ In the 2020 Action, Andrew filed a complaint alleging that Dee and Jeffrey had denied Andrew equal use of Les Chaudieres and seeking

³ After hearing testimony in July 2021 regarding the adoption of the Fifth Amended and Restated Operating Agreement of Grapetree, LLC, the Court of Chancery determined that document is the operative operating agreement. *Durham v. Grapetree LLC*, C.A. No. 2019-0366, Docket Entry No. 94, Order Appointing Liquidating Trustee (Del. Ch. Aug. 13, 2021); *id.* Docket Entry No. 96, Order Appointing Liquidating Trustee (Del. Ch. Sept. 3, 2021); *id.* Docket Entry No. 97, Transcript of July 13, 2021 Proceeding. The foregoing documents were also filed at Docket Entry Nos. 47, 49, and 50 in *Durham v. Grapetree LLC*, C.A. No. 2020-0175. This order refers to C.A. No. 2019-0366 as the “2019 Action” and to C.A. No. 2020-0175 as the “2020 Action.”

⁴ In addition to the 2019 and 2020 Actions, see *Durham v. Grapetree LLC*, C.A. No. 6167 (Del. Ch.) (complaint filed Feb. 4, 2011); *Durham v. Grapetree LLC*, C.A. No. 7325 (Del. Ch.) (complaint filed Mar. 14, 2012); *Durham v. Grapetree LLC*, C.A. No. 9824 (Del. Ch.) (complaint filed June 25, 2014); *Durham v. Grapetree, LLC*, C.A. No. 2018-0174 (Del. Ch.) (complaint filed Mar. 12, 2018); *Durham v. Preservation Del. Inc.*, C.A. No. 2018-0686 (Del. Ch.) (complaint filed Sept. 18, 2018); *Durham v. Durham*, C.A. No. 2018-0796 (Del. Ch.) (complaint filed Nov. 2, 2018).

⁵ 2019 Action, Docket Entry No. 1 (filed May 17, 2019).

reimbursement for travel expenses that he purportedly incurred on behalf of Grapetree.⁶

(3) At a proceeding on July 13, 2021, the parties agreed that the court should appoint a liquidating trustee to manage Grapetree, potentially sell Les Chaudieres, and determine how to wind up Grapetree's affairs.⁷ The first appointee resigned before performing any services or incurring any fees or costs. The court then appointed Jason Powell, Esquire (the "Trustee") as liquidating trustee on September 3, 2021. The appointment order authorized the Trustee to "do all things necessary in the Trustee's business judgment to manage the Company in its best interest and in accordance with Delaware law."⁸ The order further provided that the Trustee's actions would be "presumed to have been made on an informed basis, in good faith, and in the honest belief that such actions taken were in the best interests of the Company" and that "[a]ll interim actions of the Trustee shall be subject to review and reversal by the Court only on a showing that the Trustee abused his discretion."⁹

⁶ 2020 Action, Docket Entry No. 1 (filed Mar. 9, 2020).

⁷ It appears that Andrew had requested the appointment of a receiver. During the July 13, 2021 proceeding, Grapetree's counsel stated that the company had been actively trying to sell Les Chaudieres, which was substantially all of the company's assets, and that the managing members were not opposed to the appointment of a receiver or liquidating trustee.

⁸ 2019 Action, Docket Entry No. 96 ¶ 4; 2020 Action, Docket Entry No. 49 ¶ 4.

⁹ 2019 Action, Docket Entry No. 96 ¶ 12; 2020 Action, Docket Entry No. 49 ¶ 12.

(4) On August 5, 2022, the Trustee filed a motion seeking court approval of a sale of Les Chaudieres to third-party buyers for \$1.4 million. No member objected, and the Court of Chancery approved the sale. The sale closed in July 2023. The Trustee received \$1,160,612.14 in proceeds from the sale on Grapetree’s behalf. The Trustee held the funds in his firm’s IOLTA account until the foreign funds cleared and he was able to set up an interest-bearing account for Grapetree at the beginning of December 2023.¹⁰

(5) Following the sale of Les Chaudieres, the Trustee, with the assistance of an accounting firm that he retained, reviewed creditor claims and the claims that Grapetree might have against the members—including Andrew’s contentions that Dee and Jeffrey misappropriated Grapetree funds—to determine how the company’s assets should be distributed. On February 28, 2024, the Trustee filed a report summarizing his conclusions as to those issues and proposing a plan for final distribution and dissolution (the “Final Report”). Notice was provided to the

¹⁰ 2019 Action, Docket Entry No. 222, Transcript of June 17, 2024 Hearing, at 14:12-16:6, 84:5-91:9, 93:20-94:12 [hereinafter, June 2024 Transcript]. The transcript of the June 17, 2024 hearing is at Docket Entry No. 128 in the 2020 Action.

An IOLTA account is an account in which a lawyer or law firm holds pooled client or third-party funds, the interest on which is remitted to the Delaware Bar Foundation for approved distributions for the purposes of improving the administration of justice, providing and enhancing the delivery of legal services to the poor, supporting law-related education, and otherwise serving the public interest. DEL. L. RULES OF PROF. COND. 1.15(g)-(j). The records of IOLTA accounts are the lawyer’s or law firm’s records and not the clients’ or third parties’ records. Durham’s claims relating to records of the Trustee’s IOLTA account and the interest on Grapetree’s funds while in that account are misplaced.

members and Grapetree's known creditors and also by publication. Members were required to submit any objections by April 12, 2024. Andrew objected to the Final Report;¹¹ the other members did not. At a hearing on June 17, 2024, the Court of Chancery addressed the objections from the bench. On June 21, 2024, the court entered a final order implementing its rulings, approving a final distribution of assets, and discharging the Liquidating Trustee upon dissolution of Grapetree. Andrew has appealed to this Court.

(6) Andrew asserts that Grapetree did not provide all the documents that he requested. Thus, he contends that the Court of Chancery should not have approved the distribution and dissolution plan, because he did not have an opportunity to investigate and present all potential claims against Dee and Jeffrey.

(7) At the June 17, 2024 hearing, the Court of Chancery addressed and rejected Andrew's argument that the Final Report should not be approved because of outstanding requests for documents. The court stated:

It's clear to me that the requests for documents, under whatever rubric they were made, are not pertinent at this point because there has been an accounting. The accounting has taken into account income that was received before the rentals were made that had to be deducted from the sale price. It's explained that that income was used for the purposes of the LLC. There has been a deduction proposed for Dee and for Jeffrey for situations where they were unable to document that sums that they claim to have expended were expended on behalf of the LLC.

I don't see what purpose any further documents would serve at this point, nor do I understand why they would be in the interest of a

¹¹ 2019 Action, Docket Entry No. 197.

member of the LLC, to the extent they were properly demanded under the analog of Section 220.¹²

(8) The 2019 and 2020 Actions were not filed as books and records actions under 6 *Del. C.* § 18-305. Andrew received many Grapetree business records over the years, although Dee and Jeffrey did not always carefully maintain the records. Indeed, in 2020, the court appointed a special master to determine whether Grapetree was in compliance with a 2019 order requiring it to provide Andrew with financial information, including banking records, from November 19, 2016, forward. The special master found numerous instances of noncompliance.

(9) After the Trustee's appointment, the Trustee continued to make records available to Andrew. He has represented that he has produced all of Grapetree's non-privileged records that are within his possession or control. Moreover, the independent Trustee, with the assistance of a professional accountant, reviewed Grapetree's records and accounts and determined, based on that review, what adjustments should be made to the members' respective distributions. For example, the Trustee found that Dee and Jeffrey made or authorized expenditures for which they could not provide documentation demonstrating that the expenditures were for Grapetree's benefit, and the Trustee therefore recommended that Dee's and Jeffrey's distributions be adjusted downward accordingly. The Trustee also examined the

¹² June 2024 Transcript, *supra* note 10, at 58:12-59:4.

cash flow as to certain rental weeks for which the buyers of Les Chaudieres were compensated at closing because they would have to honor future leases and determined that Dee and Jeffrey had not misappropriated the rent that Grapetree had received for those weeks, as Andrew had alleged. On appeal, Andrew has not demonstrated what specific documents remain outstanding and how they would undermine the Trustee's independent assessment of the merits of Grapetree's potential claims against its members. We find no reversible error as to the document-production issue.

(10) Andrew also argues that the Court of Chancery erroneously rejected his applications for “fees and costs and other requested compensation.” Andrew was not represented by counsel and therefore did not incur attorneys’ fees. He contended that by pursuing the litigation, he achieved a corporate benefit for Grapetree and that he should therefore be reimbursed for his litigation expenses and receive a special compensation award for his effort.

(11) Andrew argued that the key corporate benefit that he achieved was the elimination of certain legal fees charged to Grapetree. John G. Harris, Esquire, then of Berger Harris LLP (the “Firm”),¹³ represented Grapetree in the 2019 and 2020 Actions before the Trustee's appointment. The Firm claimed unpaid legal fees of more than \$180,000. Andrew had asserted that Grapetree should not pay those fees

¹³ Harris later left the Firm, which became Berger McDermott LLP.

because Harris was not properly retained under the company’s operating agreement, had conflicts of interest (including spending time at Les Chaudieres at a deeply discounted rate), and acted for Dee and Jeffrey’s benefit rather than for Grapetree’s benefit. The company had argued that the Firm’s fees should be shifted to Andrew. The Trustee negotiated with the Firm and reached a settlement agreement that entirely eliminated the fees. The Trustee asserted that Andrew’s efforts did not achieve that benefit but rather caused the company to incur more fees and interfered with the Trustee’s efforts to resolve the fee issue with the Firm.

(12) The Court of Chancery expressed “very deep doubts whether the litigation that was engaged in by Mr. Durham is responsible for the good result of Berger Harris waiving its claim.”¹⁴ The court further found that “[i]n any event, there is no basis under the corporate benefit doctrine to shift fees that were never incurred.”¹⁵ As for Andrew’s costs, the court determined that the vast majority of those costs were for filings that did not help the company but rather increased Grapetree’s expenditures.¹⁶ The court concluded:

I don’t think there was a net benefit. I don’t see any reason to shift fees. I don’t see any reason to incentivize the behavior that I’ve watched over the last 12 years. And so I am denying the motion for fees and costs and fee shifting or special compensation on that ground.

Even given the presumption, which I take into account, that you did seek to exclude Berger Harris from recovering its fees from the

¹⁴ June 2024 Transcript, *supra* note 10, at 81:4-7.

¹⁵ *Id.* at 81:7-9.

¹⁶ *Id.* at 81:10-15.

LLC, and the fact that that result was obtained during the litigation, notwithstanding that, I don't see any basis in equity to shift fees.¹⁷

(13) We find no abuse of discretion.¹⁸ Exercising its broad discretion as to Andrew's request for fees, costs, and special compensation, the Court of Chancery determined that Andrew did not achieve a net benefit for Grapetree. Moreover, the court also rejected the Trustee's request to shift a portion of the Trustee's fees to Andrew. The Trustee argued that Andrew's conduct increased the fees that Grapetree incurred for the Trustee's and the accountant's services and sought to shift \$15,000 of those fees from Grapetree to Andrew. In rejecting the Trustee's request, the Court of Chancery found that (i) although Andrew's communications were uncivil and excessive, the court had taken that into account in rejecting Andrew's corporate-benefit claim, and (ii) given the litigation history, the antipathy among the siblings, and the final result, it would not be equitable or productive to shift fees to Andrew.¹⁹ We find no basis to reverse the Court of Chancery's determination that Andrew and Grapetree should bear their own fees and costs and that no special compensation award was warranted.²⁰

¹⁷ *Id.* at 81:16-82:3.

¹⁸ *See Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) (stating that this Court will not reverse the Court of Chancery's decision on fee shifting "[a]bsent a clear abuse of discretion").

¹⁹ June 2024 Transcript, *supra* note 10, at 140-41.

²⁰ We similarly find no basis for reversal arising from Grapetree's—rather than Dee's—payment of the special master's fees or from the Court of Chancery's denial of Andrew's motion to join Dee as a defendant.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is AFFIRMED.

BY THE COURT:

/s/ Karen L. Valihura
Justice