IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD0206 OF 2017 (ASCJ)

IN THE MATTER OF A SETTLEMENT KNOWN AS B TRUST MADE BY DECLARATION OF TRUST DATED NOVEMBER 1, 2002 ("THE TRUST")

AND IN THE MATTER OF GCR ORDER 85, R.2 AND/OR THE TRUSTS LAW (2018 REVISION)

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
HEARING AND DECISION ON: 17TH JULY 2019.
REASONS DELIVERED ON: 20TH AUGUST, 2019

APPEARANCES: Mrs. Shân Warnock-Smith QC, instructed by Ms. Morven McMillan and Mr. Adam Huckle of Maples Group **for the Plaintiff**

Mr. Simon Taube QC, instructed by Mr. Paul Smith and Mr. Robert Lindley of Conyers Dill & Pearman, Attorneys-at-Law for the **First Defendant Trustee (Paicolex)**

Mr. Dakis Hagen QC, instructed by Mr. Marc Kish and Ms. Jennifer Fox of Ogier, Attorneys-at-Law for the **Second, Third and Fourth Defendants (JPD, RM and YP)**

Mr. Eason Rajah QC instructed by Mr. Graham Stoute of Carey Olsen, Attorneys-at-Law for the **Fifth Defendant (HB)**

Mr. Andrew De La Rosa, instructed by Mr. Carlos de Serpa Pimentel and Ms. Anya Martin of Appleby, Attorneys-at-law for the **Sixth, Seventh and Eighth Defendants (CA, BA and AA)**

Mr. John Machell QC, instructed by Mr. Charles Moore of Harneys, Attorneys-at-Law for Mr. Henry Mander, the **Ninth Defendant (HM) (as court-appointed representative of the unborn children of the Fifth Defendant)**

REASONS FOR JUDGMENT

Restructuring and distribution of trust assets - jurisdiction of court to direct Trustee – Trustee's right to apply to court for the "blessing" of its decisions to restructure and distribute – obligation of trustee to make full and frank disclosure of relevant information – whether Court should give final blessing to effect distribution before all steps in the transaction are completed and disclosed to the Court – Trustee to be indemnified if acting with the blessing of the Court – Court's approval to be binding upon all beneficiaries including minors and future unborns – duty of Court to satisfy itself that it is fully informed and that interests of minors and unborns are protected.

1. These proceedings concern the B Trust, a settlement comprising a corporate structure of holding companies which control a significant shareholding in an immensely valuable European enterprise. The proceedings were instituted by the Plaintiff AB, in her capacity as a beneficiary of the B Trust, by way of Originating Summons under Grand Court Rules ("GCR") Order 85 rule 2. AB seeks orders from the Court directing the First Defendant Trustee to give due consideration to her request for the appointment out and distribution to her of one-half in value of the assets of the B Trust.

2. The relief sought is framed in such non-compulsory terms because the Trust vests in AB and her children discretionary entitlement to income and capital in respect of a one-half proportion of the Trust fund, the other one-half proportion being held on discretionary trust for her brother HB and his children; described by the Trust Deed respectively as AB's and HB's "Said Proportions". At the expiration of the trust period, which is likely to be in 2039, each of AB's and HB's Said Proportions will vest in AB and HB respectively if still alive. Failing them, the Trust would vest secondary entitlement to income and capital in their children and failing them, an ultimate default trust to charity, at the end of the trust period in 2039.

3. What AB now seeks therefore, is an advancement by the appointment out to her of the capital of one-half of the Trust assets – that defined by the Trust as AB's "Said Proportion" but which would not otherwise occur until the end of the trust period in 2039, provided she is then still alive.

4. Although this advancement to AB would be absolute with no legal obligation on her part to benefit her three children, they all consent, being joined as parties (the 6th, 7th and 8th Defendants) and independently advised that their interests would be protected. This would be on the basis that AB is considering another arrangement by which the capital of AB's Said Proportion would be preserved for their ultimate benefit, while she would enjoy a usufruct over the income during her lifetime.

5. Given the very large value of AB's Said Proportion, her usufruct (apart from other income from other very large capital interests) would assure her more than sufficient means by which to provide for herself and her children during her lifetime.

6. The jurisdiction invoked by AB's Originating Summons is the long-standing inherent and supervisory jurisdiction of the Court as set out in Grand Court Rules ("GCR") Order 85 rules 2 in the following terms:

> "**2.** *(1)* *An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.*
>
> *(2)* *Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions –*
>
> *(a)* ....

(b) ....

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

(3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs:-

(a) ...

(b) ...

(c) ...

(d) ...

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court."

7. Accepting that AB has good reasons for making her request (to be discussed below), the Trustee acknowledges this jurisdiction of the Court to entertain AB's application, including for the making of orders for the administrative restructuring and distribution of the Trust assets. The Trustee has therefore agreed to consider AB's request and, subject to ensuring that it complies with its obligations to all beneficiaries and obtains appropriate indemnities, will implement the division of the Trust to give effect to it.

8. While there are elements of this complex restructuring which require the agreement and cooperation of third parties, it is common ground that the Trustee itself has the power under the Trust Deed to make the final distribution of the assets for these purposes. This, among other powers, is expressed in Clause 4 of the Trust Deed where,

in this regard, an appointment out of capital for the benefit of beneficiaries is allowed: *"...provided always that any such appointment shall respect and be in accordance with the Said Proportions...."*

9. Accordingly, and of crucial importance to the present matter, it is acknowledged by all that neither the Trustee nor the Court (in the context of the present proceedings) has the power to alter the beneficial entitlements under the Trust beyond the stated limit. And so, although all beneficiaries are joined in the proceedings and consent – with the minors through their guardians ad litem accepting that their interests would be protected, or in the case of the future unborns – with their interests represented in relation to the restructuring and distribution; the contingent interests of minor or unborn beneficiaries may not be deleteriously affected and may not be compromised (there being no dispute which could be the subject of a compromise): see *Chapman v Chapman* [1954] A.C. 429 and the Notes to Order 85 r 2 of the Rules of the Supreme Court 1999 Edition (the equivalent to GCR Order 85 r 2)[1].

10. What is proposed will therefore involve only the exercise of dispositive and administrative powers strictly for the equal division of the Trust assets in such manner as to ensure that beneficial proportions under AB's and HB's Said Proportions are respectively maintained albeit that AB's Said Proportion will be appointed to her absolutely and that HB's Said Proportion will be appointed on different trusts.

[1] The jurisdiction in the Court to approve of a compromise of a trust dispute on behalf of a beneficiary is now also expressly set out in section 64B of the Trust Law as amended by section 3 of the Trusts (Amendment) Law, 2019.

11. In this case, it is recognized that HB, although unmarried and without children, could yet have children who would qualify[2] as beneficiaries of HB's Said Proportion. Accordingly, distribution of the assets must be as near as possible precisely equal, to avoid any deleterious impact upon the contingent entitlements especially of any unborn children of HB.

The process of restructuring

12. There have been a number of hearings and adjournments in the proceedings to allow for what all parties recognize to be a complicated process for the restructuring of the incorporated entities of the Trust and for the proper equal division and distribution of AB's and HB's Said Proportions of the assets, all of which must be effected in order to honour AB's wishes. Significant work has been done by the Trustee and matters have progressed to the stage where there is a Memorandum of Understanding ("MOU") between the Trustee, AB, HB, and AB's adult child, CA the 6th Defendant. Although not legally binding, the MOU describes in acceptably clear terms the remaining steps to be taken and the commitment of the Trustee, AB herself and her brother HB (as the primary beneficiaries of the Trust in equal shares), to the fulfilment of AB's wishes to have her distribution from the Trust.

[2] It is accepted by the parties that, in in recognition of the Status of Children Law 2003 and the Cayman Islands Constitution Bill of Rights section 16 (non-discrimination), there is an issue as to whether such children are born in or out of wedlock. See in this regard; *Re Shiu Pak Nin* 2014 (1) CILR 173 and *Re Hand's Will Trust* [2017] Ch 449. This issue will be avoided by the Trustee using its power of amendment to stipulate in any subsequent appointment under the trust instrument that the word "children" shall bear the same meaning as it does in the B Trust when construed in accordance with the law in force in the Cayman Islands at the date of the court's final order in these proceedings. This will also be recognized by the agreement to delete the word "legitimate" from recital (B) and clauses 4.1 (iv) and 6.8.2 of the MOU, discussed immediately following.

13. As already mentioned, HM, the 9th Defendant, who has been appointed by the Court to represent the unborn children of HB, advises the Court on the appropriateness of the proposed division of assets as it might relate to them.

The Trustees' application, delay and AB's (and her children's) sense of urgency

14. There are now, however, urgent concerns about timing from AB's and her children's point of view, relating to their intended relocation to France from the United Kingdom. These concerns are in large part explained as having arisen from the possibility of legislative changes in France, changes which AB says could be imminent[3] and which could have very detrimental tax consequences if the distribution of assets and their relocation are not effected before they occur.

15. These concerns and the absence of agreement over how they are to be addressed, also set the background for the Trustee's present application by way of its summons brought within the proceedings. By its summons, issued under section 48 of the Trusts Law[4], the Trustee seeks the "blessing" of the Court for its decision to have entered into the MOU and to "*carry forward the (steps or) proposals*" agreed in the MOU.

16. As Mr. Taube QC explained, with the blessing of the Court so expressly given, it would be the intention of the Trustee to return to the Court for its final blessing of each of the distinct contractual arrangements which remain to be executed for the actual implementation of the restructuring and distribution of the Trust assets.

[3] Anticipated to occur, if at all, soon after the reconvening of the French Parliament at the end of September 2019. Advice has been obtained by AB from a prominent firm of French lawyers.
[4] To be discussed below.

17. According to Mr. Taube, what the Trustee ultimately seeks and is entitled to obtain, is an order of the Court that gives the Trustee protection by way of indemnity from suit, which the mere presence of the parties before the Court and consent of the adult beneficiaries cannot provide. The Trustee is only protected if it is shown to have made full and frank disclosure to the Court of each important step in the arrangements and it is the blessing of the Court given in those circumstances that gives the protection. A blessing of the Court which is not fully and frankly informed can be challenged by beneficiaries who would not have consented and vitiated for having been improperly obtained.

18. Speaking more specifically to the question of the binding effect of an order of the Court, Mr. Taube submitted that especially as regards those beneficiaries who cannot appear in their own right and so appear before the Court by a guardian ad litem or representative (as in the case here of the 9th Defendant as representative of the unborn children of HB), the function of the guardian or representative is to advise the Court on how a matter such as the proposed restructuring and distribution may affect their interests. The guardian or representative does not act as the agent of those whom they represent and has no power to bind them to what is proposed. It is the order of the Court approving of the proposal as a proper and fair division and distribution that binds them and so it is the Court who must take the final decision as to how their interests are to be impacted. That being so, the Court should decide only after it has full disclosure of all relevant information, regardless of whatever views may be taken by the representative, or for that matter, the Trustee or any other party. Full disclosure from the Trustee's point of view, cannot be given until after all the relevant transactional

documents will have been settled and executed and so it would only be at that stage that the Court's final blessing can properly be obtained. And frankly in this regard, it is therefore only the fully informed blessing of the Court that will ensure the Trustee of its indemnity from suit.

19. On behalf of the 9th Defendant in his representative capacity, Mr. Machell QC agreed with these submissions.

20. On behalf of AB, Mrs. Warnock-Smith QC – supported by Mr. De La Rosa on behalf of AB's children (the 6th, 7th and 8th Defendants) – objected to the Trustee's proposed two-stage process for obtaining the Court's blessing or approval. They object on the grounds of what they say will be unnecessary delay, citing their concerns as to timing, described above.

21. More particularly, Mrs. Warnock-Smith QC submits that with the MOU in place and the remaining steps to be taken already clearly defined, there is no need for the Trustee to apply again to the Court and so to delay to await the outcome of such an application before effecting the distribution. Instead, that the Trustee should now once and for all seek the Court's blessing, not only to carry forward the proposals set out in the MOU but also for authorization to make the distribution requested by AB "*on the basis set out in the MOU*".

22. Mr. De La Rosa criticized the Trustee for being overly concerned for its own indemnity rather than the interests of the beneficiaries, emphasizing the fact that he and his instructing attorneys Appleby, have carefully considered the matter and agreed the MOU "*on the footing that it is going to be carried out.*"

23. Thus explained, AB's and her children's ultimate concern is that without a deadline set for the completion of the process within the next two months or so, the apprehended legislative changes in France may have occurred without the distribution and the family's relocation to France having been effected, potentially giving rise to very detrimental tax consequences.

24. While Mr. Machell QC, on behalf of the 9th Defendant HM, agreed that there is already sufficient evidence available to the Trustee and put before the Court, this he said only warrants the Trustee's application for approval of its decision to proceed with the negotiations for the proposed restructuring and distribution, including amongst other things that additional expert valuation advice should first be obtained in order to ensure the even and proper division of assets as between AB's *and HB's Said Proportions.*

25. As Mr. Rajah QC puts the position on behalf of HB: *"HB's position is that he wants the restructuring and distribution done quickly but also properly. He is concerned that once the division is effected that there are no proprietary claims against his fund. For that reason, we support the two stage procedure proposed by the Trustee*".

26. The need for a valuation report is also a matter of importance to the members of the Protection Committee who, speaking through Mr. Hagen QC, support the position taken by the Trustee. He explains that quite independently of the Trustee, the Protection Committee has fiduciary obligations under the Trust to all the beneficiaries[5] which they will not regard as having been fulfilled until the final documents have been concluded such that an informed decision can be made to proceed and full and frank disclosure made to the Court. This they do not regard as possible until amongst other things, an

[5] As expressed in Clause 3 (a) of particular relevance here, the Trustee during the trust period may make appointments out of capital to beneficiaries only with the prior or simultaneous written consent of the Protection Committee.

independent valuation has been obtained and all transactional documents have been finalized and placed before the Court for its consideration and blessing. As Mr. Hagen QC emphasized, the members of the Protection Committee are required to give their consent on the basis of all the information relating to the steps to be taken.

27. For its part, the Trustee, as already mentioned, also wishes to have finalized all transactional documents which it regards as relevant to its consideration before deciding finally to effect the restructuring and distribution – the decision for which it would prefer to have the Court's final blessing.

28. Both the Trustee and the Protection Committee have stated their determination to return to Court in any event for its final blessing, if only in keeping with the liberty to apply which all sides accept must be granted, and granted even if the Court now accedes to AB's proposal for the Court's final blessing.

Jurisdiction

29. For the relief sought by its summons (including importantly the indemnity), the Trustee relies upon section 48 of the Trusts Law and the case authority of *Public Trustee v Cooper*[6] [2001] W.T.L.R. 901, as that case explains the circumstances under which a trustee might apply to the Court for the "blessing" of a momentous decision or transaction by the Trustee for the administration of a trust.

30. Both sources of jurisdiction – the statutory and common law – are indisputably wide enough to allow the Court to accommodate the Trustee's application.

[6] Applied in earlier judgments of this Court: see, for instance, *Al-Ibraheem v Bank of Butterfield* 2000 CILR 507 ; *Barclays Private Bank and Trust (Cayman) Limited v C, K and the Attorney General* [2014] (1) CILR 144 and most recently in *The Matter of A Trust (IKJ)* (Unreported judgment delivered on 17 January 2019).

31. Nonetheless, given the juxtaposition of the stances taken by the Trustee and the Protection Committee on the one hand, and AB and her children (as guardedly supported by HB) on the other, it will be useful to discuss the principles here, oft cited though they may be.

32. First from section 48:

> *"48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee or personal representative in the subject matter of the said application:*
>
> *Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been guilty of any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."* [Emphasis added.]

33. Of particular note to the present matter is the fact that section 48 can be invoked only by a trustee (or personal representative) who is deemed to have discharged his duty and so receives an indemnity from suit, when having acted in keeping with the opinion, advice and direction of the Court. The jurisdiction is distinct from that invoked by AB's Originating Summons, which invites the Court to assume administrative control and direct the Trustee to act, whether or not it wished to bring about the division and

distribution of the assets. But as the words in emphasis above show, this section 48 jurisdiction is also administrative in nature. While allowing for the kind of orders sought by both the Trustee and AB here (the latter by her Originating Summons), section 48 vests no power to alter beneficial entitlements[7]. And this is so even more generally as to a trustee's administrative powers and the jurisdiction of the Court to expand those powers: see *ScotiaBank v Brossard* 2015 (2) CILR 106.

34. Of further particular relevance here as to the stance taken by the Trustee, is the express requirement of section 48 (above) for full and frank disclosure.

35. *Public Trustee v Cooper* provides what may now be regarded as the classical categorization of the wide supervisory administrative jurisdiction of the Court which is codified in section 48. The categorization comes from passages from the Judgment of Hart J, citing an earlier judgment of Robert Walker J (as he then was) given in Chambers. The passages seek to distinguish between cases where, in applying to the Court for relief, trustees surrender their discretion to the Court and, those where they do not; identifying four categories:

> *"At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).*
>
> *(1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish*

[7] That power is vested in the Court only by statute, in the Cayman Islands by section 72 of the Trusts Law (as amended by the trusts (Amendment) Law 2019, section 4.

that situation from the second situation that I am coming to ... [He then gave an example].

(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.

(4) *The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court...."*

36. With *Public Trustee v Cooper* category 2 especially in mind, the Trustee's position is that it seeks from the Court at this stage, its blessing only as proposed above for its decision already taken. It does not yet seek the Court's blessing for the decision to be finally taken for the actual restructuring and distribution of the Trust Assets, nor does it surrender to the Court, the exercise of its discretionary powers in that regard.

37. It would therefore be wrong, submits Mr. Taube on behalf of the Trustee, for the Court to purport to bless a decision not yet taken by the Trustee or to direct the Trustee to effect the transactions which it has not yet finally decided to enter into and which it proposes to do only when satisfied about the exact terms of each transaction.

38. In support of AB's position, Mrs. Warnock-Smith referred to what she described as the Court's "wide supervisory jurisdiction" vested by section 48 of the Trusts Law, to authorize trustees not only in terms as they might specifically seek to be authorized but more widely, in terms which the Court might be satisfied would be in the best interests of the Trust. She submits that the Trustee already has all the information it needs to decide to enter into the transaction and has in fact already decided, in keeping with the MOU, to take the steps necessary to effect the restructuring of the assets and distribution of AB's Said Proportion. All that remains is the execution of the particular legal instruments and agreements required, the execution for which the Trustee could well now seek the Court's blessing in advance. She submitted that such a single blessing of the Trustee's decision to enter the MOU and implement its proposals is

consistent with an approach that has been adopted previously by this Court, citing *In Re A Trust*[8]. This was a matter in which Kawaley J. considered a non-legally binding "Final Distribution Proposal" presented by the trustee of a discretionary trust, the intent of which was to divide the trust assets equally between the three principal beneficiaries. The proposal, although described as "Final", required subsequent detailed implementation which would not be entirely straightforward. The proposal was opposed by one of the beneficiaries on a number of grounds. Nonetheless, Kawaley J. acceded to the trustee's application and approved the Final Distribution Proposal and authorized its subsequent implementation, with the understanding that this was merely the first part of the exercise and did so on the alternative bases that the trustee was authorized either to implement the Final Distribution Proposal as presented to the Court or alternatively on modified terms following further discussions with the principal beneficiaries to meet their particular requests (paragraph 78 of the Judgment). Kawaley J. also gave the trustee liberty to apply if difficulties were encountered in implementation.

39. It is submitted on behalf of AB and her children that the same approach is available and should be adopted by me in this case. Indeed, the Court can, and has, ordered that trustees (or those exercising similar fiduciary duties) be at liberty to enter into non-binding proposals and subsequently to seek to implement their terms, with liberty to apply where difficulties arise or if substantive changes to those terms are required.[9]

[8] Unreported: 17 January 2019, Kawaley J (above).

[9] Citing for example, where approval is granted for a liquidator to effect restructuring in terms of non-legally binding restructuring implementation agreements such as *In Scottish Re Group*, 15 February 2018, FSD Cause 127 of 2017 (RPJ) and in the case of a corporate administrator's trusteeship responsibilities: *Re Nortel Networks UK Ltd. And other companies* [2016] EWHC 2769 (Ch). There the Court assisted the administrators facing a momentous decision which went far beyond the typical decision.

40. While I accept that the section 48 jurisdiction may properly be exercised in that way, as shown in *Re A Trust* (above); the circumstances of this case are distinguishable on the simple but important basis that here the directions proposed by AB are not those which the Trustee seeks and would be in respect of decisions not yet finally taken by the Trustee. In *Re A Trust* (above) the directions given were in keeping with those sought by the trustee.

41. Here, the position taken by AB and her children as set out at paragraphs 1 and 2 of their draft propounded order, is that the Trustee should now be authorized not only to carry forward the proposals set out in the MOU but to effect the distribution requested by the Plaintiff "*on the basis*" set out in the MOU.

42. The conceptual and practical difficulty which this proposal presents for the Trustee, as I understand its position and that of the Protection Committee, is that this "*basis for distribution as set out in the MOU*" remains to be settled and that only once settled and expressed in the implementing documentation, can it be disclosed to the Court and the final blessing for the restructuring and the distribution properly obtained.

43. In order to get to that stage, there are still complex issues of restructuring (and from the Protection Committee's and 9th Defendant's point of view, valuation issues as well) to be resolved.

44. That being so, I may not regard the Trustee's request for a two-stage blessing of the process from the Court as unreasonable. Nor would I consider it appropriate to foist upon the Trustee the blessing of the Court for decisions it has not yet finally taken.

45. This must be a proper exercise of restraint in the exercise of the supervisory jurisdiction where the Trustee applies under section 48 of the Trusts Law in circumstances coming

within *Public Trustee v Cooper* Category 2. Here the Trustee has not surrendered its discretion to the Court for the exercise instead by the Court of its discretion (Category 3); nor is the Court exercising its own inherent supervisory jurisdiction as described by *GCR O. 85 R.2.*

46. The following statements of principle from *Lewin on Trusts*[10] confirm the suitability of the Trustee's approach:

> "*Application without surrendering discretion – role of the court*
>
> *27-079* *The Court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trusted estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.*
>
> *27-080* *The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed as they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though, doing so will not be the same thing as*

[10] *Lewin on Trusts*, 19th Ed., Sweet and Maxwell, [27-079] to [27-081].

prohibiting the exercise proposed). The court may also withhold approval where the trustees have demonstrated a general unfitness to act, by conduct before the taking of the decision in question.

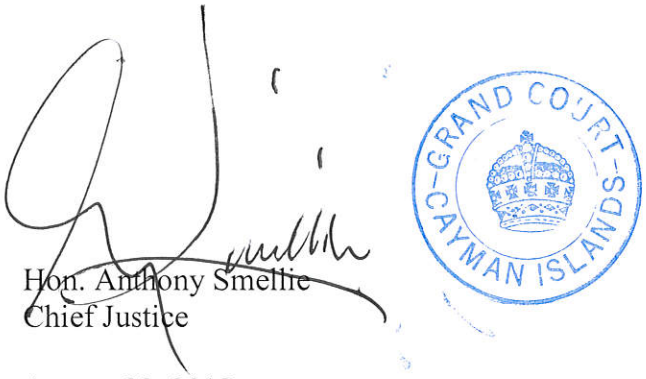
Application without surrendering discretion – role of the trustees

27-081 *Hence, as when the trustees surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise. The Trustee must also demonstrate that they have concluded how best to exercise their discretion and that they intend, subject to the approval of the court, forthwith to act on that conclusion, since they are not entitled to raise hypothetical questions."*

47. Thus, acceding to the Trustee's proposal for a two-stage blessing will also, importantly, allow the Court to become fully informed and satisfied that the restructuring and distribution will not have a detrimental impact upon the interests of the minors or unborns. It is, as Mr. Taube submitted and as I accept, the decision of the Court that binds those who cannot speak for themselves to the changes which will be effected. This is settled principle: see *Barclays Private Bank v C and others* (above) at [12] to [16] and *Re Q Trust* 2001 CILR 481.

48. I am however, very alive to the concerns identified by AB and her children that the decisions for the restructuring and distribution be taken by the Trustee and presented for the final blessing of the Court by, at latest, end of September of this year. This, with a view also to completion of restructuring and distribution by, at latest, December of this year.

49. With these concerns in mind, I directed, without objection from Mr. Taube on behalf of the Trustee or Mr. Hagen on behalf of the Protection Committee, that the matter be restored on the 20th September 2019, when the Trustee and the Protection Committee are expected to present to the Court their final decisions for the blessing of the Court as to the restructuring of the assets and the distribution of AB's Said Proportion in value.



Hon. Anthony Smellie
Chief Justice

August 20, 2019