01-10-09

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 128 OF 2009
CAUSE NO. 576 OF 2005

IN THE MATTER OF THE DECLARATION OF TRUST DATED 1 JUNE 1979 AND MADE BY MEB AND ROYWEST TRUST CORPORATION (CAYMAN) LIMITED

AND IN THE MATTER OF SECTION 63 OF THE TRUST LAW (2009 REVISION)

BETWEEN (1) MEP
(2) MPQ

PLAINTIFFS

AND (1) ROTHSCHILD TRUST CAYMAN LIMITED
(2) Mrs. L.
(3) JL
(4) ELB
(5) CBC
(6) CB (a minor)
(7) LP (a minor)

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 20TH OCTOBER 2009

APPEARANCES: Mrs. Shan Warnock Smith Q.C., instructed by Ms. Sara Collins of Conyers Dill & Pearman for the Plaintiffs

Mr. Simon Taube QC instructed by Ms. Cherry Bridges of Ritch & Conolly for the 1st defendant Trustee

Mr. Christopher McCall Q.C. instructed by Mr. Hector Robinson of Mourant for Mrs. L. the 2nd Defendant

[The third Defendant, JL, no longer participating in the proceedings having relinquished his beneficial interests]

Ms. Emily Campbell instructed by Ms. Rowena Lawrence of Turner and Roulstone for the 4th Defendant

Mr. Francis Barlow QC and Mr. Carlos Pimentel of Appleby for the 5th, 6th and 7th Defendants

RULING

1. This is an application by the Plaintiffs for orders which would empower the 1st Defendant Trustee to divide the trust fund, now held subject to the trusts of the Z Trust, into three equal shares and to appropriate one such share to each of three sub-funds respectively nominated in the names of the three daughters of Mrs. L. Mrs. L. is the sole primary beneficiary of the Z Trust as to both income and capital. The Plaintiffs are two of her three daughters who will succeed Mrs. L. as the primary beneficiaries equally as to the income of the trust when she dies.

2. The children and grandchildren of Mrs. L.'s daughters will be the remote beneficiaries as to income and capital, to benefit equally per stirpes to the end of the trust period. The remote default beneficiaries would be the descendants of the late son of Mrs. L.

3. The proposed division and partition of the trust fund into three equal sub-funds would not be intended to change and, if approved, would not change the existing beneficial entitlements under the Z Trust. Indeed, it is to be expressly provided that each of the sub-funds is to be held on the trusts of the Z Trust, with and subject to the powers and provisions of the Z Trust as modified only as to be provided in the order of the Court itself. These modifications are to be addressed

only to administrative matters relating to the composition and powers of Management Committees and to the appointment or removal of the Trustee.

4. It is, in my view, amply demonstrated for reasons now to be explained, that the proposed division and partition of the Trust would be expedient for the better and more efficacious management and administration of the Trust. In this all the adult beneficiaries are agreed.

5. Partition would be the final step in the implementation of what has been described as the "peace agreement". This is a written agreement reached between the three branches of Mrs. L's family which have been regrettably embroiled in litigation over the Trust for many years in a number of jurisdictions. Mrs. L, who is now incapacitated, was, while of full capacity, herself a party to the agreement and her guardians are firmly of the view that she would have wished to secure its implementation – an objective which can only be achieved by the separation of the interests of the discordant branches of the family. This is therefore what is proposed by way of the partition of the Trust Fund.

6. There are, moreover, certain difficulties which confront the Trustee in having to consider the divergent financial and practical needs of each branch of the family (who live in at least two different jurisdictions); involving such matters as different tax implications and different investment imperatives and which, therefore, require the Trustee to approach their needs differently, even while being bound by duty to treat each branch and each beneficiary equally. Partition would also allow the Trustee and respective Management Committees to direct

the affairs of each sub-fund in keeping with these peculiar needs and imperatives of the beneficiaries of each sub-fund.

7. It is also important to note that as the sub-funds are to be held upon the trusts of the Z Trust, the interests of the remote default remainder beneficiaries under the Z Trust, will be preserved.

8. Being satisfied about all the foregoing, the only remaining question for me is whether there is jurisdiction in the Court to empower the Trustee as proposed.

9. Reliance is placed in this regard entirely upon the provisions of section 63 of the Trusts Law 2009 Revision, which provides as follows:

> *(1) Where in the management or administration of any property vested in trustees, any sale lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may, by order, confer upon the trustees, either generally or in any particular instance, the necessary power for that purpose, on such terms, and subject to such provision and conditions, if any, as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*

(2) The Court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the Court under this section may be made by the trustee or any of them, or by any person beneficially interested under the trust."

10. A number of cases from the United Kingdom, Australia and elsewhere appear to have considered equivalent statutory provisions to those in section 63.

11. The section 63 jurisdiction is reported as having been considered and applied once before in this Court: ***HSBC International Trustee Limited v Registrar of Trusts, Earl of Dalkeith and the Attorney General 2008 CILR Note 5.*** In that case, the plaintiff trustee of an exempted trust (one registered pursuant to section 74 of the Trusts Law) applied to the Court for the variation of the terms of the trust pursuant to section 63 so as to permit the appointment of new trustees resident in the United Kingdom. The Registrar of Trust, as the official responsible for supervising and enforcing exempted trusts, proposed a qualification upon the power sought by the inclusion of certain conditions that there should always be at least one trustee resident in the Cayman Islands and that any UK-resident trustee appointed should give an undertaking, before taking office, to submit to the jurisdiction of the Cayman Courts.

12. These proposed changes were administrative in nature, intended for the better administration of the trust, including, in the case of those proposed by the Registrar, changes which would facilitate the performance of his duties without additional expense and inconvenience.

13. The Court accepted (per Foster Acting J); that it would be expedient to grant the power of appointment sought by the variation of the terms of the trust by the application of the section 63 jurisdiction. That jurisdiction was regarded as *"...empowering the Court to confer on trustees any absent but, in its opinion, expedient powers, subject to any provisions and conditions it thought fit."*

14. As I believe other decided cases show, this conclusion reached by Justice Foster (Actg); must be regarded as unexceptionable in the context of the purely administrative power of appointment of trustees then under consideration. No wider sense of the jurisdiction, such as to allow for the vesting of dispositive powers, could have been intended.

15. In the other decided cases from other jurisdictions, the Courts became concerned with defining the appropriate limits of their supervisory jurisdiction and, in some of them which will be reviewed below; with the specific limits on the jurisdiction to vary or modify beneficial entitlements while empowering trustees to act.

16. The section 63 jurisdiction is to be distinguished from the well established inherent jurisdiction of the Court. This is a jurisdiction (as it has been classically described in the case law): *"to confer upon trustees quoad items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may be fairly called an "emergency" – that is a state of affairs which has to be presently dealt with, by which it is not necessarily implied that immediate action then and*

there is required – and such that it is for the benefit of all beneficiaries that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. See ***Re Downshire Settled Estates***, (below) at page 235. The inherent jurisdiction is also recognised in ***Re Downshire*** as encompassing the power to disregard trusts for accumulation of income where beneficiaries are in immediate need of maintenance (citing ***Hanlock v Hanlock 17 Ch. D. 807***) and the power in the Court to approve, on behalf of beneficiaries who are under disability, of compromises proposed by or between persons also beneficially interested under the trust and who are *sui juris* (citing ***In re Trenchard [1902] 1 Ch. 378.***

17. Thus described, it will be noted that there are important qualifications upon the inherent power of the Court, requiring as it does circumstances in the nature of an emergency or unforeseen event, or the existence of a proposed compromise; before the Court might empower a trustee to exercise administrative powers not given by the trust instrument.

18. The section 63 jurisdiction is also to be distinguished from the other statutory jurisdiction given by section 72 of the Trusts Law; in terms which codify and expand upon the inherent jurisdiction by not only enabling orders for the exercise of what may strictly be described as administrative powers, but also generally for the exercise of dispositive powers by approving of arrangements on behalf of beneficiaries who are either not *sui juris* or competent and where it would be for the benefit of such persons to do so (and where all beneficiaries who are *sui juris*

agree). This section may be described as giving statutory recognition to the rule **in *Saunders v Vautier* *[1835-42] All. E. R. 58.***

19. Notwithstanding that all parties have agreed to the proposed partition here, I am satisfied in the particular circumstances of this case and for other reasons explained by Counsel; that neither the inherent jurisdiction nor the section 72 jurisdiction can be appropriately invoked. This is because an alteration to the beneficial trusts in the absence of express suitable trustee powers would require, for the purposes of section 72, exploring and seeking consent by, and on behalf also of the remote default beneficiaries and which would be both impractical and undesirable. And – in the case of an application under the inherent jurisdiction – because there is no "emergency" or the seeking of approval for a compromise of issues as no such issues exist.

20. It follows that either the section 63 jurisdiction can be invoked or the proposed transaction must be disallowed.

21. It does appear as Counsel have submitted, and as I accept, that from a plain reading, section 63 gives the Court power to approve of transactions involving trust property (some examples of which are given in section 63) and to confer administrative powers on trustees in cases where they have no suitable existing power; and where the Court considers that it is expedient in the interests of the administration or management of the Trust as a whole to do so.

22. In this case it is acknowledged by all parties, that the Trustee has no existing power under the Trust itself, to do what is proposed.

23. That being so, it would follow that the jurisdiction exists if what is proposed here by way of the transaction for the partition of the Trust into sub-funds; is in essence to be regarded as administrative but not dispositive in nature, as being expedient in the interests of the administration or management of the Trust.

24. Even though the transaction would expressly and directly involve the partition of the Trust Fund into three sub-funds and so fundamentally alter the structure of the Trust, I am satisfied that the predominant purpose and practicalities are essentially administrative in nature. This is primarily for the reason already mentioned – that the sub-funds will remain governed by the trusts of the Z Trust and so there are not intended to be any alterations of the respective beneficial entitlements.

25. There perhaps will, nonetheless, be some unintended, unforeseen and incidental change to the practical beneficial entitlements. This may be in the sense envisaged in ***Re Freeston's Charity*** *[1979] 1 All E.R. 51* by Goff LJ (at page 10) where he said ***"it is manifest that an interest in half the income [(of an undivided fund)] is quite different from the whole income of a divided part of that fund".***

26. Put another way, the idea is that as a single larger fund when invested could potentially yield more than the combined income of three equal sub-funds derived from it; a one-third interest in the single fund could be worth more than the full interest in any of its sub-divisions.

27. While such a potential diminution in benefit must be recognised; I accept, on the authority of the case law, that while the jurisdiction given to the Court by section 63 does not involve a power to vary or interfere with or intermeddle with the

existing beneficial trusts; there is to be recognised an acceptable exception to the extent that beneficial interests might be affected, but only incidentally affected, by the proper exercise of the powers which the section of the Law does in terms expressly confer. This – I add merely in parenthesis here – notwithstanding the contrary views expressed, but only obiter, by Goff LJ in ***Re Freston's Charity*** above (at page 60).

28. Support for the foregoing view of the section 63 jurisdiction is to be found in the leading English case on the subject (already mentioned above) that is: in ***Re Downshire Settled Estates***; ***Re Chapman's Settlement Trust*** and ***R v Blackwell's Settlement Trusts*** *[1953] Ch 218.*

29. Among other things, the Court of Appeal in that case had to consider the nature of the jurisdiction vested in the Court by section 57 of the Trustee Act, 1925 – the identical wording of which came to be adopted in section 63 of the local Trusts Law.

30. The judgment of the Court (given by Evershed MR on behalf of the majority) is worthy of extensive study. In particular on the subject of section 57 of the 1925 Act, pages 243 to 262 are compelling.

31. I will confine my citation to the following passages; first at pp 243 – 244:

> ***"We now turn to section 57 of the Trustee Act 1925. It was presumably the intention of Parliament, in enacting that section to confer new powers on the court rather than to codify or define existing powers, though it may well be that the new extended jurisdiction does in some degree overlap the old. We have***

already examined the inherent jurisdiction of the court, and we have found that the common characteristic of the orders which were made by virtue of that jurisdiction was the determination of the court never to depart from the strict letter of the trust further than the exigencies of any particular case demanded. The question now to be considered is whether, and to what extent, section 57 has empowered the court to depart from that principle."

32. From the second third of p247 to top of p248:

"It is clear, in our judgment, that the subject-matter both of "management" and of "administration" in section 57 is that property which is vested in trustees; and in our opinion, "trust property" cannot by any legitimate stretch of the language include the equitable interests which a settlor has created in that property.

...we are satisfied that the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Such is the natural scope of both expressions, and to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose upon their ordinary significance an interpretation that is both unnatural and unwarranted.

....

We have already pointed out that neither trustees nor the court itself at any time before 1925, had any general power to depart from the precise directions (provided that they were within the law) that a settlor thought proper to declare. If Parliament, in enacting section 57, had intended to confer this power on the court it is, in my view, inconceivable that it would not have done so in express terms, having regard not only to the novelty but also to the width of the jurisdiction that it was creating and it is equally incredible that it should have done so without imposing any kind of limit, other than expediency, upon the extent to which, or the manner in which the court was to exercise its powers. Not only did the legislature do neither of these things, but it did not even mention beneficial interests from the beginning of section 57 to the end or give the slightest indication that it was intending to give power to vary or interfere with such interests or intermeddle with them in any way – <u>except to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer</u>." (emphasis added)

33. And finally, in the middle of p248:

"In our judgment the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to

authorise specific dealing with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it is no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction."

34. The words in emphasis appearing as they do as a stark exception to and qualification upon the discursive reaffirmation (by Evershed MR) of the strict limits of the section 57 jurisdiction, must be regarded as being of special significance.

35. In my view, they embody an exception which the Court recognised as necessarily arising from the performance by trustees of administrative powers which are fiduciary and discretionary in nature and which – as some earlier and later cases show – could often entail in their proper exercise, an overlap between the pure management of trust assets with administrative actions taken genuinely in the interests of the trust as a whole but which could incidentally affect beneficial interests.

36. From the case law it appears, for instance, in ***Anker-Petersen v Anker-Petersen (1998) 12 Tru. L.I. 166*** – that authorisation was given for the enlargement of powers of investment and for the delegation of investment management to

investment managers (who could adopt different policies which in turn could affect beneficial entitlements) and in ***Re Harvey*** *[1941] 3 All E.R. 284,* authorisation was given for the blending of trust funds left by two different wills expressed in precisely similar terms for the foundation of a home for the poor into a single fund (thereby merging the beneficial interests). In ***Riddle v Riddle*** *(1951-1952 85 CLR 202* the Australian High Court expanded the trustees' power of investment by authorizing them to invest in stocks of companies not included by the trust instrument, and to vary and transpose such investments from time to time. A power varying the investment provisions of a settlement is an apposite example here, because depending on the circumstances, its exercise could well result in differing incidents as between the beneficiaries.

37. As already explained, such differing incidental outcomes could be the result of partition in this case where one of the necessary and desired objectives, is that the respective sub-funds be managed and invested in ways most likely to meet the peculiar and disparate needs of the different branches of family.

38. There is in ***Re Thomas*** *[1930] 1 Ch. 194,* a direct precedent for the application of the equivalent section 57 powers, as vesting jurisdiction to authorise the partition of a fund.

39. In this case, the potential alteration of or interference with beneficial interests mentioned above, would be of the kind which I would consider to be incidental to the exercise of the section 63 power.

40. When considered against the background already explained and which compelled the Trustee (or the Plaintiffs on their behalf) to seek the authorization of the

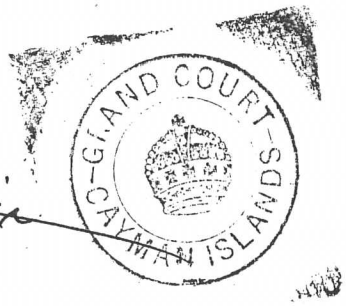
Court, I would indeed regard any potential alteration or interference with beneficial interests – should any of the sort ever actually occur as a consequence of proper fiduciary management and investment after partition – as a necessary incident of the proper management and administration of the Trust.

41. I emphasise however that here no alteration of the beneficial interests or entitlements are contemplated. What is proposed is intended only for the more efficacious management and administration of the Trust with the further potential benefit of maintaining harmony within the family. Finally, I think it is important to note that had the Trustee been given an express power to partition, it may well now be beyond debate that such a power is to be characterised as administrative and not dispositive in nature: ***Russell v IRC [1988] STC 195.*** In that case, deeds executed by trustees varying dispositions of property in the testator's estate for the purpose of avoiding capital transfer taxes by appropriating gifts to the Testator's daughters; were described by Knox J (at p203) as being "only ancillary and administrative (powers of appropriation), although their exercise can, in times of fluctuating values, have a considerable impact on beneficiaries' rights *inter se*."

42. In the circumstances of that case, he considered it legitimate to treat the power of appropriation "as an administrative appendage to the successive trusts to raise (money for the benefit of the daughters)" and as not by itself "giving rise to a separate variation of earlier dispositions".

43. Being similarly satisfied that the proposed partition here is administrative in nature, I am also satisfied that the jurisdiction exists and grant the authorization to

the Trustee to proceed as proposed and as set out in the draft form of order which has been propounded and explained by Counsel.



Hon. Anthony Smellie
Chief Justice

October 21 2009