IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: 123 of 2013 (ASCJ)

IN THE MATTER of a Settlement by deed dated 15 July 1967

AND IN THE MATTER of section 48 of the Trusts Law (2011 Revision) and/or GCR O.85 and/or the inherent jurisdiction of the Court

BETWEEN	**BARCLAYS PRIVATE BANK & TRUST (CAYMAN) LTD.**	**PLAINTIFF**
AND	**MR. C** **MR. K** **THE ATTORNEY GENERAL**	**DEFENDANTS**

IN CHAMBERS AND IN PRIVATE
BEFORE THE HON. CHIEF JUSTICE
THE 11TH AND 12TH DAY OF DECEMBER 2013

APPEARANCES: Mr. Colin McKie, Q.C. and Mr. Marc Kish of Maples and Calder for the Trustee
Ms. Rachael Reynolds of Ogier for Mr. C
Mr. Carlos de Serpa Pimentel of Appleby for Mr. K
Mr. Ian Paget-Brown QC for the Attorney General as *parens patriae* for charity.

RULING

1. The Trustee of the E Trust applies for the Court's approval in respect of the Trustee's exercise of its power to make a distribution of trust capital, in the form of shares in an underlying trust company, to O Limited, one of the named beneficiaries of the E Trust (the "Proposed Distribution").

2. The Proposed Distribution would be in the magnitude of value of $750 million and as such, a "momentous decision" in the life of the E Trust, regarded by the Trustee as justifying this application for the sanction of the Court.

3. All persons having an interest in the E Trust, as well as charity, have been notified of the application and all interests have been represented before me by way of representatives appointed by earlier order or by the Trustee and, in the case of charity, by Mr. Paget-Brown Q.C. on behalf of the Attorney General as *parens patriae* and upon whom notice of the application was also served.

4. All are agreed that the Trustee has the power as it proposes – in keeping with Clause 2.2 of the E Trust Deed – to make the Proposed Distribution.

5. I record that I am satisfied that the Trustee of this fully discretionary trust, has the power to order the Proposed Distribution and to do so by way of a payment out to O Limited as a named beneficiary of the E Trust.

6. The question was raised in the course of the hearing whether O Limited, as an entity whose objects comprise not only charitable but also philanthropic objects and purposes, can properly benefit from the Proposed Distribution while philanthropy is not itself an object of the E Trust, as those objects are identified in Clause 1.6 of the Trust Deed. In other words, the question is whether the exercise of the dispositive power vested in the Trustee to benefit O Limited would be a "fraud on the power" because an object which does not come within those identified by the Trust Deed would be benefited.

7. There is a plain answer to that question that appears from the fact that O Limited is itself named as a beneficiary of the E Trust and qualifies for the Proposed

Distribution on that basis. It was added as a beneficiary as long ago as 1984 and has included philanthropy as one of its objects ever since. It is, in my view, irrelevant that O Limited might itself in turn benefit objects which are not the same as those which might benefit directly as objects of the E Trust. Moreover, it is clear that benefiting charity is a primary objective of O Limited and so it matters not that some other philanthropic object could be benefited as well: see ***Re O Trusts***[1] where it is explained that the fact that a proposal would also benefit other objects does not alter or negate the primary purpose and motivation behind a proper exercise of a dispositive power.

8. I am satisfied that the exercise by the Trustee of the power to benefit O Limited by way of the Proposed Distribution would not be a fraud on the power vested in the Trustee in the sense that the exercise of the power would benefit someone who was not an object of the power or would be for a purpose outside the scope of the power[2].

9. That conclusion holds true as well in respect of another concern raised: which is that O Limited's constitutional documents allow its members to change O Limited's objects so as to benefit others – including individuals or non-charitable organizations – who would not now qualify for benefit under the E Trust.

10. In light of the written assurances which have been given by the directors of O Limited against that happening, I do not regard any such possibility as a

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[1] *2001 CILR 481*

[2] See again ***Re O Trusts*** (above) and ***Thomas on Powers*** (2nd Edition, Oxford University Press 2012) paras. 9-01 – 9-02 and 9-13 – 9-34 for an explanation of circumstances which might fall afoul the "Fraud on a Power" doctrine.

reasonable concern weighing against the Trustee's decision to make the Proposed Distribution.

11. As to the other relevant considerations that the Trustee must consider, I comment briefly as follows:

(1) I note that the adult beneficiaries – A, J, K, N and Ce. – have all consented to and positively support the Proposed Distribution. It is particularly to be noted that A and J may be considered not only to be beneficiaries but also to be the real economic settlors of the E Trust and that the Trust businesses have been developed over the years to a large extent due to the business acumen of A in particular. While C, as the remaining adult does not feel compelled, in his representative capacity on behalf of the minors and future unborn beneficiaries, to consent to the Proposed Distribution, he does not oppose it either. It is especially because their representative cannot aver that the Proposed Distribution would be in the interest of the minor and future unborn beneficiaries so as to bind them to the Trustee's decision that the Trustee seeks the sanction of the Court. Once sanctioned by the Court, there could be no subsequent challenge to the Trustee's exercise in good faith of the power to make the Proposed Distribution.

The consent of the adults and the sanction of the Court instead of the consent of those unable to consent have a special significance when it is recognised that the E Trust has been, from inception, a means by which the family has sought to recognise and fulfil what its adult members have come to regard as their moral obligation to make charitable donations. In

that sense, they may well, and doubtless do, regard the Proposed Distribution to O Limited as a very significant step towards the discharge of that obligation and so as being of strong moral benefit to themselves as well. See in this regard Re Clore Settlement[3] which recognizes that the discharge of a moral or social obligation could justify an advancement of capital in appropriate circumstances. That principle has been recognised before by this Court[4]. I also note in this regard, the terms of the Aide Memoire described in the Trustee's evidence which express the wishes of the adult beneficiaries to the Trustee and which put the recognition of that moral obligation and the family's intention that it be fulfilled, beyond doubt. There is no reason to think that any beneficiary, present or future, would wish to take a different view.

(2) I further note that the Proposed Distribution notwithstanding, it is firmly the Trustee's view that the assets which would remain within the E Trust, would be more than sufficient to meet the likely needs of the individual beneficiaries now and into the future, until the expiry of the E Trust.

Given that the present beneficiaries are all already well provided for; that there are other family trusts with assets of enormous value of which these individual beneficiaries are also beneficiaries and that the E Trust will still retain one-half its current value notwithstanding the Proposed

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[3] [1966] 2 All E.R. 272.

[4] Considered and applied in ***RE T Trust*** *2000* CILR 24; ***In Re P Trust*** *2001 CILR N. 18.*

Distribution; it is plain that the Trustee's assessment in this regard is very soundly based.

The only relevant consideration in this context which did not appear to have been expressly considered by the Trustee, is whether charity as a separate named beneficiary of the E Trust, would be unfairly prejudiced by the Proposed Distribution. This is in the sense that the interests of charity as an object of the E Trust into the future, has not been addressed in the explicit way in which the future interests of the individual beneficiaries have been addressed in the evidence put before me. But I have been assured by Mr. McKie Q.C. that distinct consideration was given by the Trustee to the interests of charity in that way; subsequently, further evidence to that effect was filed with the Court. This confirmed that the Trustee is not to be thought as regarding itself as absolved from considering charity as a beneficiary in the future on account of having made this very large Proposed Distribution to O Limited, or simply because charitable objects will be primarily benefitted by O Limited.

(3) I am also satisfied that the Trustee has properly considered whether to make a single lump sum distribution or to make a series of lesser distributions over a period of years and has sound reasons for opting for the former method by way of the Proposed Distribution. I accept that not only would the Proposed Distribution more effectively achieve the long-term intentions of the E Trust (as one of the family trusts) to benefit charity as envisaged by the terms of the Aide Memoire and by the terms of

the trusts themselves, the Proposed Distribution will also avoid the inconvenience of having to assess the need for periodic distributions and the inconvenience and possible expenses of making them.

12. Primarily with the foregoing considerations in mind, I am satisfied that the Trustee's application is brought properly within the supervisory jurisdiction of the Court without the need for the Trustee to surrender its discretion to the Court as to whether or not the Proposed Distribution should be made. In that regard, the application comes within the second category of ***Public Trustee v Cooper***[5] (as recognized and applied by this Court (in ***Al Ibraheem [2000] CILR 507*** and in ***Re O Trust*** (above)), and as being an application which might properly be brought by a trustee who seeks to have the sanction or "blessing" of the court, for an arrangement or transaction into which it proposes to enter.

Acting with the caution advised and for the reasons advised in those cases, I am satisfied that the court should grant its sanction to the Proposed Distribution.

13. Finally, the question of the Attorney General's costs arose for brief discussion.[6] While I was not required to rule on the matter; being told by Mr. McKie Q.C. that it would be the subject of discussion between the Attorney General and the Trustee; I expressed the view that the Attorney General's involvement through Mr. Paget-Brown Q.C. on behalf of charity was of real assistance to me in concluding that I should sanction the Trustee's decision. I have concluded that it was entirely appropriate that the Trustee sought directions and got directions to

[5][2001] WTLR 901; per Hart J. adopting dicta of Robert Walker J. (as he then was) from an earlier unreported judgment given in chambers.

[6] While Mr. Paget-Brown Q.C. indicated that he appeared for the AG as amicus curiae, I regard the service of notice of the proceedings upon the AG to have been effected in his role as Protector of Charity on behalf

notify the Attorney General of its application and that the Attorney General should have been represented.

14. And so, while I note Mr. McKie's argument that the Attorney General's costs of participation as *parens patriae* of charity may be costs that would ordinarily be borne by the public purse, my own view is that the interests of charity, like those of all the other named beneficiaries of the Trust, needed to be represented before the Court and so I can see no reason why the Trustee should object to meeting the costs of that representation any more than it would, the costs of the representation of the other beneficiaries. The Trustee is after all, trustee for charity as well and so charity is not here "orphaned" so as to require the expense of its representatives to fall upon the public purse. Nor is this hostile litigation as was the case in ***Bridge Trust et al v A.G. et al*** (above) where it was questioned whether it was appropriate to direct that the costs of representation for charity, as a party to that hostile litigation, should have been indemnified from the trust fund. But even in that case the Attorney General's and subsequently that trustee's cost of representing charity (when the Attorney General would no longer act) were ordered to be paid from the trust fund. By contrast, this is not hostile litigation and no one questions whether charity should be represented. I am firmly of the view that the Trustee should feel no less obliged to meet charity's costs here than it would and will[7], the costs of the other beneficiaries.

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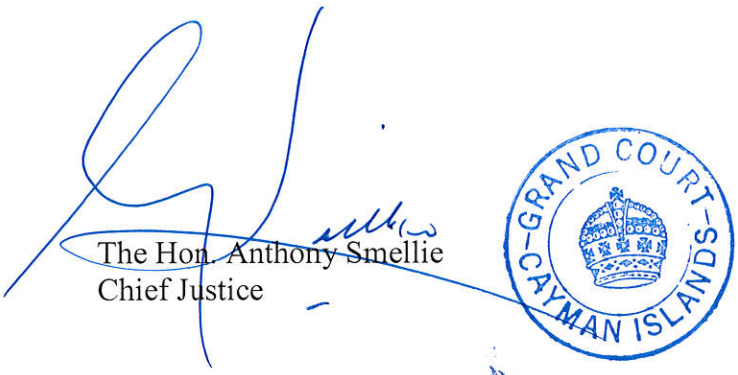
of the Crown as *parens patriae*. See the discussion of this subject in ***Bridge Trust et al v Attorney General et al 2001 CILR 132***.

[7] By virtue of the representation orders already mentioned above and made by the Court on the 16th October 2013 with the consent and upon the application of the Trustee.

15. I note finally that I have been told by Mr. McKie and am therefore pleased to record, that the Trustee has agreed to meet the Attorney General's costs of representation for charity.



The Hon. Anthony Smellie
Chief Justice

Written Reasons issued on 24th January 2014