COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/00000

IN THE MATTER of the trusts of the Deed of Settlement establishing the X Foundation Trust

AND IN THE MATTER of the Trustee Act, 1998

AND IN THE MATTER of an application by Cititrust (Bahamas) Limited as Trustee of the said trusts pursuant to Section 77(1) of the Trustee Act, 1998

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Philip Dunkley QC with him Mr. N. Leroy Smith and Mr. Jonathan Deal of Higgs & Johnson for Cititrust (Bahamas) Limited ("the Trustee")
Mr. Brian Simms QC with him Mr. Wilfred Ferguson Jr. of Lennox Paton for A Limited
Mr. Francis Tregear QC of XXIV Old Buildings, London with him Mr. Robert Adams and Mr. Edward Marshall II of Delaney Partners for S and B Limited
Mrs. Krystal Rolle QC with her Ms. Kendrea Demeritte for C Limited and D Limited

Hearing Dates: 31 May, 1 June 2021

Trusts – Trustee applied pursuant to section 77 of the Trustee Act, 1998 for directions and determination of certain questions consequent upon the possible incapacity of the settlor– Two potential occupiers of the office of Appointor based on competing sets of documents executed by the settlor - Two proceedings before foreign court by settlor's family - Current and past mental capacity of settlor who resides in foreign country in issue before foreign court - Bahamian Court not seized with mental capacity proceedings – Posture that Trustee should take in relation to the foreign proceedings - Governing Law of Trust is the law of The Bahamas – Exclusive jurisdiction clause in Trust Deed – Effect of section 7(1)(a) of the Trust (Choice of Governing Law) Act, Ch. 179 on proper forum for the determination of issue of settlor's capacity – Jurisdiction or *forum non conveniens* issue

Interim measures to secure safe administration of Trust pending outcome of foreign proceedings – Whether Trust documents should be disclosed to purported Appointor – Effect of outcome of foreign proceedings

The settlor (the "Settlor") is a very old man in his jurisdiction of residence and the settlor and the initial Appointor of the X Foundation Trust (the "Trust"). In 2003, the Settlor purportedly appointed one of his daughters ("Daughter A"), to be his Successor Appointor upon his resignation, disability or death. In 2004, the Settlor purportedly appointed his son ("the Son") to be Daughter A's Successor Appointor. In 2019, the Settlor purported to execute a series of documents ("the 2019 documents") appointing the Son as the Appointor.

In 2019, the Trustee determined that the Settlor was mentally incapacitated and had so been when he executed the 2019 documents. Accordingly, it recognised Daughter A to be the Appointor. The basis of the Trustee's conclusion on the Settlor's capacity included: (i) a medical report from the Settlor's doctor that he suffered from advanced Alzheimer's dementia, complicated by subdural haemorrhage and (ii) evidence from a representative of the Trustee that at a meeting with the Settlor, he could not remember significant information. The Son asserts that the Trustee's conclusion on the Settlor's mental capacity was rushed and therefore unreasonable. He produced medical evidence contrary to that of the Trustee.

The Son and Daughter A each commenced proceedings before the Courts of the Settlor's jurisdiction of residence (the "Foreign Court") with respect to the Settlor's mental capacity. Daughter A's proceedings (i.e. the MH Proceedings) concern the Settlor's present mental capacity and the Son's proceedings (i.e. the Historic Capacity Proceedings) concern the Settlor's mental capacity to execute the 2019 documents.

Daughter A contends that she is the Appointor since, among other things, the Settlor lacked the mental capacity to appoint the Son when he purported to do so in the summer of 2019. The Son asserts that the Settlor had, at the material times, the mental capacity, thereby rendering him (i.e. the Son) the proper Appointor. The identity of the Appointor being in sharp contention, the Trustee applied to this Court under Section 77(1) of the Trustee Act, 1998 by way of Trustee Statement for the directions of the Court pending the determination of the extant proceedings before the Foreign Court. The Trustee sought the Bahamian Court's directions on the following questions:

1. What steps, if any, should the Trustee take in relation to the MH Proceedings?

2. What steps, if any, should the Trustee take in relation to the Historic Capacity Proceedings?

3. Whether the Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated and that Daughter A is the Appointor of the Trust pending the final determination of the Settlor's capacity in the MH Proceedings?

4. Whether the Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated (and has been incapacitated at all material times) and that Daughter A is the Appointor of the Trust pending the determination or staying of the Historic Capacity Proceedings?

5. Whether the Trustee may properly refuse to disclose trust documents to the Settlor (whom the Trustee has determined to be incapacitated), Son or any of the purported representatives pending the final determination of the Settlor's capacity in the MH Proceedings?

6. Whether the Trustee may properly refuse to disclose Trust Documents to the Son or any of his representatives pending the final determination or staying of the Historic Capacity Proceedings?

7. What steps, if any, should the Trustee take upon the final determination of the Settlor's capacity in the MH Proceedings?

8. What steps, if any, should the Trustee take upon a final determination of the Historic Capacity Proceedings and whether the Trustee should administer the Trust in a manner that is consistent with the determination of the Foreign Court therein?

HELD: The Court provided the opinion, advice and/or directions as follows:

1. The Trustee shall not be required to take any steps concerning either the MH Proceedings or the Historic Capacity Proceedings before the Foreign Court (or any appeal thereof).

2. The Trustee did not rush to judgment when it declared the Settlor to be incapacitated. Such a determination appears to have been based on all the facts and surrounding circumstances available to the Trustee at that time including medical evidence which is only one aspect of the evidence, albeit, an important one. The Trustee was therefore obliged under the terms of the Trust documents to recognise Daughter A as the Appointor.

3. The Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated and that Daughter A is the Appointor of the Trust pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings.

4. The Trustee does not have to disclose any trust documents to the Settlor (whom it determined to be incapacitated), the Son or any of their purported representatives pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings. However, if the Settlor directly requests any trust documents, the Trustee should provide them.

5. Applying the principle of comity, respect for courts of friendly nations is encouraged but it would be wrong for this Court to give directions to the Trustee to the outcome of proceedings which are extant before a foreign court insofar as the Court ought not to direct the Trustee to fetter its discretion now when the Foreign Court's future decisions are unknown.

RULING

Charles J:

Introduction

[1] Pursuant to section 77(1) of the Trustee Act, 1998 ("the Act"), Cititrust (Bahamas) Limited ("the Trustee") seeks the Court's "*opinion, advice and/or directions*" in relation to certain matters to ensure the orderly and safe administration of the X Foundation Trust ("the Trust") pending the determination of two sets of proceedings before a foreign court with respect to the mental capacity of the settlor and initial Appointor of the Trust (the "Settlor").

Background

[2] The Settlor, now a very old man, is the settlor of the Trust which he established under a Deed of Settlement (as amended, the "Settlement Deed") to, among other things, fund activities and programs to improve the living standards of his countrymen and donated to it his valuable shareholding in a successful company.

[3] The Trust is a private, discretionary trust administered for the benefit of a number of "Eligible Beneficiaries" which include all of the Notice Recipients save for the Settlor's son ("the Son") in his personal capacity. The Settlor's charitable intentions are served by several companies which receive distributions from the Trust and in turn pursue charitable activities.

[4] Cititrust is the original Trustee of the Trust and has administered it as sole trustee since its inception. The Settlement Deed is expressly governed by the laws of The Bahamas and (among other things) contains an "exclusive jurisdiction" clause (at Clause 30) which is drawn up in the following terms:

> **"(1) This Settlement is made under the laws of the Commonwealth of The Bahamas and the rights of all parties and the construction and effect of each and every provision hereof shall be subject to such laws** or, if and to the extent that the laws governing this Settlement may be so varied, shall be subject to, as the case may be:-
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> (a) in the absence of any declaration described in paragraph (b) of this sub-clause (1), the laws of the place of incorporation or residence of:-
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> (i) the Emergency Trustee in the event that Clause 33 below shall apply; or
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> (ii) any successor trustee for the time being hereof appointed pursuant to Clause 21 above; or
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> (b) the law of any other state or territory in any part of the world as specified to be the law applicable to this Settlement, by virtue of any declaration made by deed by both the Appointor and the Trustee at any time or times and from time to time during the period up to the Perpetuity Date, which shall take effect from the date of such declaration or such other date or the occurrence of certain circumstances as therein specified.

> **(2) The situs of this Settlement and of all beneficial interests in the trusts hereof shall be deemed to be the same place or territory as mentioned in Clause 30(1)(b) hereof, but where Clause 30(1)(b) shall not apply, the situs of this Settlement shall and of all beneficial interests in the trusts hereof shall be deemed, subject to the provisions of Clause 21 and Clause 33 hereof, to be the Commonwealth of The Bahamas.**
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> **(3) The Courts of and situate at the place or territory being the situs of this Settlement shall have exclusive jurisdiction over all matters appertaining to this Settlement and the trusts hereby declared and of any and all matters relating thereto**." [Emphasis added]

[5] By its terms, the Settlement Deed provides for an "Appointor", who, among other things, possesses power to remove and replace any trustee of the Trust at any time and from time to time pursuant to Clause 18 of the Settlement Deed.

[6] Clause 29 of the Settlement Deed provides that certain powers throughout the Settlement Deed defined as being "*Restricted Powers*" shall not be exercised by the Trustee except after having given notice to the Appointor and then only subject to the procedure prescribed by the aforesaid Clause 29. The Restricted Powers are enumerated at paragraph 3.4 of the Third Trustee Statement and include the power to:

i. appoint an earlier Perpetuity Date than is expressly prescribed by the Settlement Deed: Clause 1(p)(iii);

ii. revocably or irrevocably appoint the income and capital of the trust fund to or for the benefit of some or all of the Eligible Beneficiaries: Clause 4;

iii. (subject to any appointments pursuant to clause 4) until the Perpetuity Date pay or apply some or all of the income of the trust fund in any year to or for the advancement, maintenance or benefit of some or all of the Eligible Beneficiaries: Clause 5(1);

iv. (subject to any payments or applications or determinations pursuant to Clause 5 or Clause 7) determine which of the Eligible Beneficiaries shall

benefit from the trust fund and income thereof on the Perpetuity Date: Clause 6;

v. pay or apply the whole or any part or parts of the trust fund to or for the advancement, maintenance or benefit of some or all of the Eligible Beneficiaries: Clause 7;

vi. (subject to Clause 5) at any time prior to the Perpetuity Date pay or transfer the whole or any part of the trust fund or the income thereof to the trustee or trustees (in their capacity as such) for the time being of any Eligible Trust: Clause 8;

vii. at any time and from time to time revoke add to or vary all or any of the trusts, terms, and conditions of the Settlement Deed or the trusts, terms, and conditions contained in any variation or alteration or condition made thereto and in like manner declare any new or other trusts terms and conditions concerning the trust fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied: Clause 24;

viii. appoint any Associated Corporation or Continuation Corporation to be from the date of such appointment or any specified subsequent date Eligible Beneficiaries for the purposes of the Settlement Deed: Clause 26;

ix. at any time and from time to time before the Perpetuity Date remove any person, corporation (including any Eligible corporation), or the trustees of any Eligible Trust (in their capacity as such trustees) or any Associated Corporation or any Continuation Corporation from the class of Eligible Beneficiaries: Clause 27; and

x. add any person, corporation, or the trustees of any Eligible Trust (in their capacity as such trustees) or any Associated Corporation or any Continuation Corporation to the Excluded Class: Clause 28.

[7] The Appointor also has other roles/functions under the Trust. Importantly, under Clause 18, the Appointor has the power to remove and appoint trustees. Indisputably, the Appointorship of the Trust is a significant role and his/her powers are wide.

[8] By a Deed of Appointment dated 6 October, 2003 (the "2003 Deed of Appointment"), the Settlor purportedly appointed one of his daughters ("Daughter A") to be the Successor Appointor of the Trust with such appointment to take effect '*upon the Settlor's resignation, disability or death*'. By a Deed of Appointment dated 1 March 2004, (the "2004 Deed of Appointment"), the Settlor purportedly appointed the Son second Successor Appointor to hold office after Daughter A.

[9] This scheme for the succession of the Appointorship stood unaltered for nearly 16 years until the Settlor purportedly executed the 2019 documents between April and July 2019 with a view to investing the Son with the rights and powers of the Appointor. It is contended by Daughter A's siblings and the Settlor's wife (the "Settlor's Wife"), that this is in keeping with the Settlor's wish that the Son would take over from him this important role to ensure that control of his philanthropic legacy should remain within the male line of the family.

[10] Daughter A disputes, among other things, that the Settlor had the mental capacity to execute the Appointor documents in 2019 and argues that she instead is the Appointor of the Trust as the Settlor's successor.

[11] On 3 July 2019, the Trustee declared the Settlor to be incapacitated and it has adhered to the 2003 Deed of Appointment ever since. The Trustee reached the conclusion that the Settlor had lost mental capacity and was unable to make any legal and important decisions after relying on:

1. a medical certificate issued by an attending physician ("Physician X") dated 3 May 2019 opining that the Settlor was suffering from "*advanced Alzheimer's dementia, complicated by subdural hemorrhage*";

2. a report from a wealth planner affiliated with the Trustee who met with the Settlor in May 2019 shortly after receiving the medical certificate and found that the Settlor could not recall the answers to basic questions; and

3. a report from the aforementioned wealth planner about a meeting that took place with Physician X in May 2019.

[12] According to the Trustee, they strove to give effect to the wishes that the Settlor expressed about what should happen to the Appointorship of the Trust upon his disability long before the doubts about the Settlor's capacity arose. Similar considerations led the Trustee to refuse requests for trust documents received from the Son in 2019.

[13] In the Son's opinion, the Trustee rushed in making a declaration that the Settlor was incapacitated when it accepted a medical certificate from Physician X (a physician practising in the Settlor's jurisdiction of residence) who is not a practitioner approved by the relevant medical authority in the Settlor's jurisdiction of residence (the "Relevant Medical Authority") as having special experience in the diagnosis and treatment of mental disorder (which is a status required by the Mental Health legislation there in order for a doctor's opinion to be relied upon by the court in respect of such matters), and had not in fact conducted a cognitive assessment with the Settlor since September 2018 (when the Settlor had suffered a subdural haemorrhage). The Son asserts that the Trustee was put on notice that multiple doctors approved by the Relevant Medical Authority had expressed a contrary opinion to that of Physician X.

[14] A dispute has arisen between (i) Daughter A on the one hand and (ii) her siblings (including the Son) and the Settlor's Wife on the other hand as to whether Daughter A (one of the Settlor's daughters) or the Son (the Settlor's only son) was appointed to succeed him as Appointor of the Trust. The dispute has led to the commencement of two sets of proceedings by the Settlor's family in the Courts of the Settlor's jurisdiction of residence (the "Foreign Court") over the Settlor's mental

capacity; one to principally determine his present mental capacity and the other to determine his mental capacity to execute the 2019 documents appointing the Son as the Appointor of the Trust.

[15] The Son (and his 'camp', if I may borrow the Foreign Court's terminology) and Daughter A have hurled vitriolic allegations at one another but this Court ought not to concern itself with their wrangle. Instead, I shall focus on the Trustee's section 77 application.

The Foreign Court Proceedings

MH Proceedings

[16] There are two extant proceedings before the Foreign Court (the "Foreign Court Proceedings"). The first was instituted by Daughter A wherein she issued an *ex parte* summons under the relevant Mental Health legislation, which is concerned with the determination of the present mental capacity of the Settlor and the appointment of a committee to manage the Settlor's affairs ("the MH Proceedings").

[17] The Son's camp was informed of the application. They opposed Daughter A's application. A Judge in the Foreign Court handed down a decision following an inter partes hearing. That decision stated that:

(i) There is a serious dispute between the family members about the mental condition of the Settlor, with Daughter A in one 'camp', and the rest of the family in the other;

(ii) The family members had indicated at the hearing that the Settlor was not mentally incapacitated, and would welcome the Judge to visit him at his residence to discuss the proceedings;

(iii) Rather than visiting himself, the Judge felt it would be more appropriate for the Official Solicitor to visit the Settlor to ascertain his views about

Daughter A's application, so as to provide an independent view to the court about the condition of the Settlor;

(iv) The Official Solicitor was therefore instructed to visit the Settlor (with a clinical psychologist with experience in handling elderly people), without the presence of any other family members, in order to ascertain the Settlor's views about the MH Proceedings and, in particular, how he might appropriately participate in the proceedings) prior to the hearing of Daughter A's application for an inquiry and appointment of a committee to manage the financial affairs of the Settlor.

[18] In the MH Proceedings, the Son unsuccessfully applied to join the Trustee as a party to those proceedings and also unsuccessfully attempted to persuade the Foreign Court to determine the validity of the 2019 Appointment Documents within those proceedings.

[19] As things currently stand, the Trustee is not a party to the MH Proceedings and alleges that it is not a privy of any of the parties. Accordingly, the Trustee correctly opined that *prima facie* it will not be bound by any determination made in the MH Proceedings on the application of Bahamian conflict of laws principles.

[20] The MH Proceedings are still ongoing.

The Historic Capacity Proceedings

[21] The Son has also instituted an action in the Foreign Court ("the Historic Capacity Proceedings"). He seeks, among other things, a declaration against Daughter A that the Settlor had the requisite mental capacity to execute the 2019 documents between April and July 2019 and that each of those documents was duly executed. In other words, a declaration that he is now the Appointor of the Trust.

[22] Daughter A has applied to stay the Historic Capacity Proceedings in favour of The Bahamas. She relies on the exclusive jurisdiction clause (Clause 30) of the

Settlement Deed in support of her application. The stay application is set for a hearing in a matter of days.

[23] Recognizing that the declaration concerning the validity of the Appointor Documents were questions properly to be determined by the Bahamian Court, approximately 3 months after Daughter A's stay application was served, the Son filed an Amended Statement of Claim which now only seeks a declaration that the Settlor had the *"requisite mental capacity to execute each of the Appointor Documents and that each of the documents was duly executed".*

[24] Mr. Tregear QC, appearing for the Son and "B Limited", one of the beneficiaries which has the Son as one of its directors, unequivocally submitted that the only question that the Foreign Court is concerned with in the Historic Capacity Proceedings is that of the Settlor's mental capacity at the relevant times in 2019. He submits that the Foreign Court will not be encroaching on the questions of the effect of the Appointor Documents or the identity of the Appointor. According to him, those are questions for the Trustee to consider once it has an answer to the question of capacity from the Foreign Court.

[25] However, Mr. Dunkley QC, appearing as Counsel for the Trustee, asserts that the institution of the Son's Historic Capacity Proceedings in the Foreign Court are somewhat unusual in the sense that the issues raised by the Son appear to be governed by Bahamian law and also (based upon the Settlement Deed's exclusive jurisdiction clause) subject to the exclusive jurisdiction of the Bahamian Courts. In addition, section 7(1)(a) of the Trust (Choice of Governing Law) Act, Ch. 179 ("TCOGLA") stipulates a conflict of law rule which applies Bahamian law to a multiplicity of questions including that of the settlor's capacity.

[26] Mr. Dunkley QC also relies on the decision of the Grand Court of the Cayman Islands in **Re O Trust** (2018) 21 ITELR 514. He submits that the case is instructive because (i) Cayman law contains similar choice of law provisions in its trusts legislation to that of The Bahamas and (ii) the Caymanian Court seemingly applied

the Cayman Island test for capacity to assess the validity of amendments executed by a South American settlor. As I understand this case, the trustee had genuine doubts about the settlor's capacity and invited the Grand Court to determine the issue. The Court held that the same test for mental capacity which applied to the making of wills applied to the exercise of any other impugned legal powers. There was no challenge to the jurisdiction of the Grand Court to hear the case. In my opinion, this case is not very helpful.

[27] The Trustee's submissions are endorsed by Mr. Simms QC, who appears for A Limited, one of the beneficiaries which has Daughter A as one of its directors. According to Mr. Simms QC, despite his Amended Statement of Claim, the Son's claim still breaches the exclusive jurisdiction clause because due execution involves considerations other than mere capacity. He next submits that questions involving formalities under Bahamian law must also be considered. In that regard, Daughter A has maintained her stay application.

[28] Mr. Tregear QC asserts that there can be no technical legal objection to the issue of capacity being determined by the Foreign Court and then followed by the Trustee. Mr. Tregear QC submits that the TCOGLA makes various provisions as to the law which governs various questions associated with trusts but is, *for good reason*, silent on the question of jurisdiction in which these questions should be determined. He next submits that it is entirely consistent with the provisions of the statute for the Foreign Court to determine the Settlor's capacity at the time when the Appointor Documents were executed and for the Bahamian Court to direct the Trustee to follow and adopt the conclusions of the Foreign Court on the question of capacity.

[29] I make some preliminary observations, cognizant of the fact that this issue will be properly ventilated before the Foreign Court when the stay application is heard. The governing law of the Settlement Deed is the law of the Commonwealth of The Bahamas (Clause 30). In addition, section 7(1)(a) of TCOGLA is clear that the issue of capacity of the settlor is governed by Bahamian law. In those

circumstances, the Bahamian court would have jurisdiction – perhaps not exclusive – to hear the issue on the capacity of the settlor if it were asked to do so. It seems obvious that the Foreign Court has *in personam* jurisdiction over the Settlor because he resides there.

[30] In his submissions, Mr. Tregear QC identified a litany of reasons why the Foreign Court may be better placed to hear the issue of capacity.

[31] That said, Counsel for the Trustee and Daughter A see this question as plainly matters "*appertaining to"* and *"relating to"* the Trust and governed by the Laws of The Bahamas.

[32] Whether the issue on the capacity of the Settlor may be one of a forum rather than jurisdiction is not before me and my views are merely preliminary. However, even if the Son is successful in the Historic Capacity Proceedings, he will still have to apply to this Court because decisions of the Foreign Court are not binding on the Trustee who has not even submitted to the jurisdiction of that court.

[33] As I stated, I shall concentrate on the 8 specific questions which the Trustee seeks the Court's "*opinion, advice and/or direction*" under section 77 of the Trustee Act ("the Act").

The law

Section 77 Procedure

[34] I gratefully adopt the Trustee's submissions on the law with some modifications where appropriate. Section 77 of the Act enables a trustee to apply to the Court "*upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property…*".

[35] Section 77 must be read conjunctively with section 78. Together, they provide:

> ***"Trustee may apply to Court for advice or direction.***

> **77. (1) A trustee or personal representative may without commencing an action apply upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate.**
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> **(2) Such application shall be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.**
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> **(3) A trustee or personal representative acting upon the opinion, advice or direction given by the Judge 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.**
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> **(4) Subsection (3) shall not extend to indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction if he is guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.**
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> **(5) The costs of such application shall be in the discretion of the Judge.**
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> ***Application for advice or direction to be signed by counsel and attorney.***
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> **78. Where any trustee or personal representative applies for the opinion, advice or direction of a Judge under section 77, the written statement shall be signed by a counsel and attorney and the Judge may require the applicant to attend him by his counsel and attorney either in Chambers or in Court where he deems it necessary to have the assistance of a counsel and attorney."**

[36] The purpose of the section 77 procedure is to provide trustees and personal representatives with an efficient and cost-effective means of obtaining the opinion, advice or direction of a Judge in Chambers on any question regarding the management or administration of the trust property or the assets of the testator or intestate, for the protection of the trust or estate and the applicant.

[37] The section 77 procedure gives effect to the general supervisory jurisdiction of the court over the administration of trusts and is modelled upon the procedure for obtaining the "opinion, advice or direction" of a judge on isolated questions relating

to the administration of trusts that was introduced in England and Wales by Lord St. Leonard's Law of Property Amendment Act 1859, 22 & 23 Vict, c 35 but later superseded by Rules of Court.

[38] The section 77 procedure cannot be invoked unless some question respecting the management or administration of the trust property or the assets of any testator or intestate arises. Even where the Section 77 procedure is properly invoked, the court has a discretion whether to give its opinion, advice or direction and as to what opinion, advice or direction it gives**.**

[39] **In exercising its jurisdiction to give directions on a trustee's application, the court is essentially engaged solely in determining what ought to be done in the best interests of the beneficiaries and not in determining the rights of adversarial parties** [Emphasis added]. The fact that the directions sought by the trustee are opposed must not be allowed to obscure this.

[40] In the Privy Council case of **Marley v Mutual Security Merchant Bank & Trust Co Ltd** [1991] 3 All ER 198, Lord Oliver said at p. 201:

> **"In the first place, there has always to be borne in mind the position and duties of a trustee who applies to the court for directions. A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised. It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course**

is either to dismiss the application or adjourn it until full and proper information is provided.

Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation; but it is essential that the primary purpose of the application—indeed, its only legitimate purpose—be not lost sight of in academic discussion regarding the discharge of burdens of proof. Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the court is, of course, inevitably concerned to see whether these objections are or are not well founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interests of the beneficiaries and whether the court has before it all the material appropriate to enable it to give those directions."(Emphasis added)

[41] It is critical to bear in mind that by invoking the section 77 procedure, the Trustee has invoked a summary, non-adversarial facility for the provision of private advice to the Trustee as to how it should proceed for its protection and the trust estate. In this case, the Court is not being asked or required by the Trustee to make a final determination on any matter.

[42] In **Re Macedonian Orthodox Community Church St Petka Inc (No 3)** [2006] NSWSC 1247, Palmer J considered a *Beddoe* application brought under section 63 of the New South Wales Trustee Act, 1925 and opined at [69]:

"…an interim costs order in a judicial advice application cannot create an issue estoppel or res judicata in other proceedings. There is no "issue" or "res" between the parties in a judicial advice application in the sense in which those terms are understood in adversarial proceedings. A judicial advice application is an application by a trustee to the Court for private advice and is founded upon facts stated to the Court by the trustee, untested by adversarial procedure, and assumed by the Court to be true only for the purpose of the application. If other persons are given notice of the application under s 63(8) of the Trustee Act so that they become bound by the advice or order of the Court in accordance with s 63(11), they are bound only to the extent that the trustee is protected from claims by them if the trustee has followed the judicial advice and if the facts stated to the Court by the trustee in obtaining the advice are accurate.

> **There is no finding by the Court in a judicial advice application that the facts stated by the trustee are accurate. No person bound by the advice is prevented from litigating as to the accuracy of those facts in other proceedings. If the facts found in other proceedings are not as stated by the trustee to the Court in the judicial advice application, the trustee is not protected by the Court's advice: see the general discussion by Needham J in *Harrison v Mills* [1976] 1 NSWLR 42, at 45–46."** [Emphasis added]

[43] In **Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand and Another** (2008) 249 ALR 250, a decision of the High Court of Australia, Gummow ACJ and Kirby, Hayne, Heydon and Kiefel JJ identified a number of helpful general propositions in relation to section 63 of the New South Wales Trustee Act, 1925 in their discussion of it at [54] to [76], including that: (i) the procedure pursuant to section 63 and its equivalents is summary in character ([61]); (ii) the provisions of section 63 operate as an exception to the court's ordinary function of deciding disputes between competing litigants as they afford a facility of giving "private advice" and the function of the advice is to give personal protection to the trustee ([64]); and (iii) section 63(2) precludes any trustee, who acts in accordance with the private advice, from being held liable for breach of trust in the event that in conventional proceedings it is later held that the legal position does not correspond with the advice given, so long as the proviso to section 63(2) is satisfied ([65]). In addressing a criticism of the first instance judge for giving advice on the basis of assumed facts, they stated at [77] to [81]:

> **"[77] In judgment No 3, Palmer J assumed the correctness of, and repeated, what he had found in judgment No 1 and judgment No 2: that if the association were not permitted to fund its defence on the issue isolated by Palmer J out of trust assets, it would not be able to defend the proceedings. The plaintiffs attacked this aspect of the trial judge's reasoning in three ways.**
>
> **[78] *Lack of factual basis?* The first criticism of Palmer J's reasoning was that it 'rested on factual assertions (as to the [Association's] means and its ability to retain the services of its lawyers) that were themselves in dispute. For this reason alone, it was unsuitable to be taken into account in a judicial advice application where the relevant facts could not be properly explored or tested'.**

> **[79] It is very common in judicial advice applications for the court to be invited to give advice on the basis of facts, whether proved by affidavit as contemplated by s 63(4) or alleged in a "written statement" or "other material" as contemplated by s 63(3), which are contested and controversial. As Palmer J said, a "judicial advice application … is founded upon facts stated to the court by the trustee, untested by adversarial procedure, and assumed by the court to be true" — although "only for the purpose of the application".**
>
> **[80] Palmer J understood that if the challenge made by the plaintiffs were to be fully ventilated, "it would doubtless engender yet another protracted and expensive piece of litigation as a spin-off to the Main Proceedings". Palmer J was right not to permit that to happen. Section 63(2) affords a safeguard against the mischief complained of by the plaintiffs: the trustee loses the protection which the "opinion advice or direction" would otherwise have given if, in obtaining it, the trustee has been "guilty of any fraud or wilful concealment or misrepresentation".**
>
> **[81] The plaintiffs cited no authority for this aspect of their submission. It finds no support in the language of the Act and is erroneous in principle."** [Emphasis added]

Reasons for the Section 77 application

[44] The Trustee has found itself for the last 2 years in the invidious position of having to administer the Trust in circumstances where the Settlor's capacity and the identity of the Appointor are hotly contested issues in the Foreign Court. Faced with extant foreign proceedings and there being no other option reasonably available to the Trustee to resolve the disputes over the Settlor's capacity without recourse to the Court which law governs the administration of the Trust, the Trustee has applied for what are essentially interim directions while it awaits the outcomes of the Foreign Court Proceedings. The Trustee maintains that, although it has elected to await the outcome of the Foreign Court Proceedings in the absence of directions to do otherwise, this should not be treated as an admission by the Trustee that the Bahamian Court is not the most appropriate forum for a final and binding determination of the matters sought to be litigated in the Foreign Court particularly the Historic Capacity Proceedings.

Questions posed by the Trustee

[45] The Trustee has asked the following 8 questions in relation to the Trust:

1. What steps, if any, should the Trustee take in relation to the MH Proceedings?

2. What steps, if any, should the Trustee take in relation to the Historic Capacity Proceedings?

3. Whether the Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated and that Daughter A is the Appointor of the Trust pending the final determination of the Settlor's capacity in the MH Proceedings?

4. Whether the Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated (and has been incapacitated at all material times) and that Daughter A is the Appointor of the Trust pending the determination or staying of the Historic Capacity Proceedings?

5. Whether the Trustee may properly refuse to disclose trust documents to the Settlor (whom the Trustee has determined to be incapacitated) the Son or any of the purported representatives pending the final determination of the Settlor's capacity in the MH Proceedings?

6. Whether the Trustee may properly refuse to disclose Trust Documents to the Son or any of his representatives pending the final determination or staying of the Historic Capacity Proceedings?

7. What steps, if any, should the Trustee take upon the final determination of the Settlor's capacity in the MH Proceedings?

8. What steps, if any, should the Trustee take upon a final determination of the Historic Capacity Proceedings and whether the Trustee should administer the Trust in a manner that is consistent with the determination of the Foreign Court therein?

[46] These 8 questions could be subsumed into the following 4 issues:

1. What steps, if any, should the Trustee take in relation to the Foreign Court Proceedings?

2. What interim measures should be put in place pending the outcome of the Foreign Court Proceedings to secure the safe administration of the Trust?

3. Whether Trust documents should be disclosed to the Son and/or the Settlor pending the outcome of the Foreign Court Proceedings?

4. How should the Trustee treat the final outcome of the Foreign Court Proceedings?

Issue 1: What steps, if any, should the Trustee take in relation to the Foreign Court Proceedings?

[47] This question can be answered shortly. All parties agree that the Trustee should take no steps in relation to the Foreign Court Proceedings.

Issue 2: Interim measures to secure the safe administration of the Trust pending the outcome of the Foreign Court Proceedings

[48] A Limited (i.e. Daughter A), the Son and C Limited and D Limited have different views on the course of action that the Trustee should take pending the final determination of the Settlor's capacity in the MH Proceedings and the Historic Capacity Proceedings.

[49] A Limited asserts that the Trustee should continue to treat the Daughter A as the Appointor of the Trust pending the final determination of the Settlor's capacity in the MH Proceedings. Mr. Simms QC submits that the Trustee's decision to declare the Settlor to be incapacitated and to appoint Daughter A as Appointor on 30 July 2019 was as a result of a careful decision-making process. He next submits that once the Trustee began to harbour concerns about the Settlor's mental capacity in May 2019, it was legally obliged to carry out further investigations and consider whether to deem him to be incapacitated with respect to the administration of the Trust.

[50] Mr. Simms QC asserts that the Trustee exercised care and diligence in arriving at the decision that the Settlor was incapacitated based particularly on:

a. the Settlor's long standing doctor, i.e. Physician X, who had given a formal opinion that the Settlor was unable to make decisions relating to any legal issues, to important personal decisions, to issues relating to his property/banking/finance or to his own personal daily care.

b. The Trustee's representative had met with the Settlor in May 2019 and found that the Settlor "*was in good mood and looked normal but when asked certain questions about himself, his family and the Trust [he] seemed to be unable to recall or remember these".* These questions included some basic questions as to the number of children he had and whether he could remember setting up the Trust.

c. The Trustee's representative met with Physician X in June 2019 to understand and confirm his medical opinion directly.

d. The Trustee has repeatedly requested the Son to allow their representatives to meet with the Settlor either in-person or via video-conference. Their requests have never been accepted.

[51] Mr. Simms QC further asserts that having decided that the Settlor was incapacitated, the Trustee was obliged under the terms of the Trust documents to appoint Daughter A as Appointor. Says Mr. Simms QC, there is no credible reason to doubt the integrity or lawfulness of the Trustee's actions and no reason for this Court to interfere with them.

[52] Firstly, Mr. Simms QC submits that the suggestion by the Son and his camp that the Son and Daughter A should be treated equally as "potential Appointors" of the Trust pending the outcome of the Foreign Court Proceedings ("the Co-appointorship Proposal") is without any proper legal basis and would be extremely

detrimental to the proper functioning of the Trust. According to him, there is no evidence that the Settlor ever intended Daughter A and the Son to jointly discharge the role of Appointor and he never signed any supplemental Trust document enacting such a proposal. However, he in fact specified a clear order of succession for the role of Appointor, with Daughter A first in line and the Son second. Mr. Simms QC made the observation that the Settlor is not represented in these proceedings and so cannot consent to a change of his plans as settlor.

[53] Secondly, says Mr. Simms QC, the Co-appointorship Proposal would undermine the Settlor's decision to entrust the Trustee with the responsibility of determining when he was mentally incapacitated. Unless a court determines that the Trustee has acted unreasonably, there is no basis to interfere with the Trustee's judgment. Mr. Simms QC further asserts that, at present, there is no legal action to have the Son made Appointor in Daughter A's place and by the Son's own admission, the Historic Capacity Proceedings are not intended to determine whether he should be made Appointor by virtue of the Appointor Documents. Accordingly, says Mr. Simms QC, the Co-appointorship Proposal is fundamentally flawed.

[54] Thirdly, if treated as a Co-Appointor, the Son would likely have to be provided with confidential information regarding the Trust and, doing so, would be irreversible. If it later becomes apparent that the Son is not the Appointor, there is no way to undo or mitigate the damage that has been done.

[55] Fourthly, says Mr. Simms QC, the Son's behaviour has caused Daughter A's relationship with him to become extremely strained. Daughter A is fearful that he will make unmeritorious and fabricated accusations and that he would frequently cause unnecessary disagreement in relation to the running of the Trust. In that vein, precious court time and legal costs out of the trust for charitable purposes would be wasted which would ultimately prevent the proper functioning of the Trust. Having a Co-appointorship Proposal would be damaging to the Trust.

[56] With respect to the Historic Capacity Proceedings, Daughter A has made an application to stay those proceedings. Mr. Simms QC submits, that especially whilst this application is ongoing (which will be heard on 3 November 2021), there is no basis or need for the Trustee to take any steps.

[57] Mrs. Rolle QC appearing as Counsel for C Limited and D Limited, is of the view that the Trustee should be neutral pending the final determination of both proceedings in the Foreign Court and await their respective outcomes. In the interim, the Trustee should give notice of its intention to exercise its Restricted Powers to both Daughter A and the Son.

[58] Mr. Tregear QC submits that the Trustee should give notice under Clause 29 of the Settlement Deed to both the Son and Daughter A before it exercises any of the Restricted Powers until the true identity of the Appointor is resolved.

[59] As the Trustee acknowledges, the present ambiguity concerning the identity of the Appointor has left the Trustee in a position in which it is unable to safely make distributions and carry out the Settlor's philanthropic ends. If notice is not given to the true Appointor prior to the exercise of any of the Restricted Powers, the exercise will be invalid. The sooner this issue could be resolved, the better.

[60] All parties accept that there is a real dispute between the two camps which needs to be sorted out expeditiously. That said, I am being called upon to give certain directions to the Trustee. In doing so, I am duty bound to look at the evidence presented to this Court and to make certain preliminary findings bearing in mind that the witnesses/affiants, lay as well as experts, have not been cross-examined.

[61] The Son alleges that in the summer of 2019 when the Settlor was 95 years of age, he made a series of documents which have the effect of invalidating the 2003 Deed of Appointment as well as the 2004 Deed of Appointment. The effect of those prior Deeds is that, upon the Settlor's 'resignation, disability or death', Daughter A would

be the Appointor and the Son the Successor Appointor. The Son has now reserved his right to challenge the 2003 and 2004 Deeds of Appointment. That is his right.

[62] The Son will present his evidence and so will Daughter A. The Son has documentary evidence including (i) a video taken by the Settlor's Wife on 31 May 2019 when the Settlor was interacting with his optician whilst having his eyes examined; (ii) a video taken on 15 June 2019 at a restaurant showing the Settlor explaining his views about recent legislative amendments ; (iii) a video taken on 29 May 2019 in the office of one of the Settlor's other daughters, in which the Settlor explained the work and mission of the Trust; (iv) a video taken on 19 June 2019 of a conversation between the Settlor and the Settlor's Wife about his succession plan for the Trust; (v) a video taken on 20 August 2019 of the Settlor and a person who has known the Settlor for over 30 years, in which the Settlor explains that he wishes for the Son to succeed him in relation to the Trust. Overall, should the Historic Capacity Proceedings proceed and the evidence is presented to the Foreign Court, that court will have a clearer picture than this Court.

[63] However, in order to determine the issues which confront me now, I make some preliminary findings.

[64] Prima facie, it seems somewhat puzzling that a man of the Settlor's astuteness, who was then capable, as alleged by the Son, and who may still be capable (to be determined in the MH Proceedings), would make such a drastic change without contacting the Trustee, with whom he has had dealings for about 3 decades. Then, there is the allegation by the Son's camp that it was/is the Settlor's wish that the Son would take over from him in order that his philanthropic legacy should remain within the male line of the family. This is also unusual since, in 2003/2004, when the Settlor was not allegedly incapacitated, he did not think of this. The Son was an adult at that time. Why would he wait until 2019 to come to his senses that his son should continue his legacy? Another allegation is that Physician X is not a practitioner approved by the Relevant Medical Authority and may not meet the threshold requirement under the Mental Health legislation required by the Foreign

Court. This may be true but it is an inescapable fact that Physician X was the Settlor's physician for about 6 years and he last saw and examined him in 2018 when he suffered a subdural haemorrhage. Undoubtedly, medical evidence will be critical when the extant Foreign Court Proceedings (particularly the Historic Capacity Proceedings) take place but it may not be dispositive of the issues. The Foreign Court no doubt, would consider the totality of the evidence. I shall say no more as I do not wish to encroach on an issue which is not before me.

[65] As I see it, I do not believe that the Trustee rushed to judgment when it declared the Settlor to be incapacitated. Such a determination appears to have been based on all the facts and surrounding circumstances available to the Trustee at that time including medical evidence which is only one aspect of the evidence, albeit, an important one. The Trustee was therefore obliged under the terms of the Trust documents to recognise Daughter A as Appointor. That situation ought not to be disrupted. Daughter A will continue to act as the Appointor until any contrary determination is made.

Issue 3: Disclosure of trust documents

[66] A Limited suggests that (i) trust documents should not be disclosed to the Settlor because he is incapacitated (and therefore the requests purportedly made by the Settlor have in fact been made by others for their own reasons) and (ii) trust documents should not be disclosed to the Son because the Settlor was clear that he did not want trust documents to be disclosed to family members (and the Trustee should maintain confidentiality).

[67] A Limited next submits that, as regards the Son, Daughter A, in her Second Affidavit, averred that the Settlor, whilst still well, had always made clear that he did not want Trust documents to be disclosed to family members. The Son has no legal right to access the trust documents and so his request is subject to the Trustee's discretion. According to Mr. Simms QC, it is trite law that trustees should give "*great weight"* to the settlor's wishes and are bound to take them into account. There is no reason for the Court to compel the Trustee to violate the Settlor's long-

standing wishes for confidentiality. Further, the Son has not provided any cogent explanation as to why he requires copies of trust documents.

[68] C Limited/D Limited are of the view that the Trustee should treat the Son and Daughter A equally and disclose the same documents to both of them pending the determination of the Settlor's capacity in the MH Proceedings and pending the determination or staying of the Historic Capacity Proceedings. The Trustee should also disclose trust documents to the Settlor if he requests them.

[69] The Trustee initially refused to disclose trust documents to the Settlor and the Son for reasons similar to those advanced by A Limited. However, Mr. Dunkley QC says that the Trustee will abide with whatever direction the Court may give.

[70] The Son appears to take a more neutral stance on the issue of disclosure to him in advance of his status of Appointor being confirmed. He does, however, consider that if the Court adopts the approach in respect of the interim arrangements to be put in place by the Trustee pending the determination of the true identity of the Appointor, then he and Daughter A ought to be treated equally.

[71] In my opinion, the Trustee has taken the correct posture not to disclose trust documents to the Settlor unless he directly makes the request. Otherwise, they may fall into the wrong hands. The Trustee ought not to disclose any trust documents to the Son until the Appointorship issue is resolved.

Issue 4: How should the Trustee treat the final outcome of the Foreign Court Proceedings?

[72] With respect to both proceedings, A Limited considers that it is premature for the Court to set out what should happen following a decision which is unknown. According to A Limited, the Trustee should reapply to this Court if it still requires guidance once the proceedings have been completed. According to Mr. Simms QC, it would be premature and indeed counter-productive for the Court to try to anticipate what may happen and set out guidelines for such eventuality.

[73] Mrs. Rolle QC opines that the MH Proceedings are not relevant to the issue which will eventually confront this Court and therefore the Trustee should await the outcome of the Historic Capacity Proceedings and until such determination, the Trustee should give notice of its intention to exercise its Restricted Powers.

[74] Mr. Tregear QC argues that, if Daughter A's application to stay the Historic Capacity Proceedings is unsuccessful, the Foreign Court will proceed to determine the question of whether the Settlor had the requisite mental capacity at the time the Appointor Documents were executed in the summer of 2019. Mr. Tregear QC submits that the exercise will require a thorough analysis of contemporaneous documentary evidence and the evidence of lay and expert witnesses. He submits that the Foreign Court will be well placed to hear the relevant lay and expert witness testimony but a Bahamian court would not be nearly as well placed as the Foreign Court to assess the question of capacity given the quantity of important evidence that is not in English and the location of all of the relevant witnesses.

[75] Mr. Tregear QC asserts that the approach that the Son invites the Court to take in its directions to the Trustee is that, upon the determination of the Historic Capacity Proceedings, the Trustee should follow the conclusions of the Foreign Court on the question of the Settlor's capacity and then apply those conclusions to the further questions of the effect of the Appointor Documents and the identity of the Appointor with the assistance of the Bahamian Court if necessary.

[76] Mr. Tregear QC next asserts that this course is, evidently, consistent with the Trustee's own view (as expressed in its letter of 31 July 2019) that the Foreign Court is "*eminently well-placed*" to determine questions of capacity – and if appropriate measures are put in place in the interim to protect the position of the Trust pending the determination of the Foreign Court, it is entirely right and proper that the Trustee should await the determination of the Foreign Court on the question of the Settlor's historic capacity and then follow that determination.

[77] That said, the Trustee has taken what I consider to be a rather conservative approach and has kept its distance from the Historic Capacity Proceedings. The Trustee has made submissions on the potential ramifications of submitting to the jurisdiction of the Foreign Court and/or whether it would be appropriate for it to do so because under Bahamian conflict of laws principles, submission to the courts of a foreign jurisdiction will render an ensuing judgment binding upon the defendant subject to a limited number of defences, with the result that the judgment can be recognized domestically without a thorough consideration of its merits.

[78] Mr. Dunkley QC contends that, in the trusts context, courts in jurisdictions with comparable conflicts of laws principles have admonished trustees against submitting to the jurisdiction of foreign courts too readily. For example, in **In the Matter of the H Trust** (2006) 9 ITELR 133, the Royal Court of Jersey (against the backdrop of a trustee seeking directions in relation to foreign divorce proceedings) stated at [16]:

> **"The significant factor from the point of view of whether the trustee should submit to the jurisdiction of the overseas court is that it will remain a matter of discretion for the Court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits."**

[79] Mr. Dunkley QC also refers to the case of **In the Matter of the B Trust, RBS Coutts (Cayman) Limited v W and Others** [2010] (2) CILR 348. It was held that it would commonly be appropriate for a trustee to follow guidance from a foreign court even if it had not submitted to its jurisdiction but the trustee would not be bound to follow the guidance since the foreign court would not have the jurisdiction to direct a particular exercise of such a trustee's power. If the trustee was of the opinion that following the foreign court's guidance would be unduly prejudicial to the beneficiaries' interests, it would be appropriate for it to decline to do so.

[80] Finding the submissions of the Trustee and Daughter A to be more compelling, in my opinion, it would be wrong for this Court to give directions to the Trustee on matters which are extant before a foreign court. In a matter of days, Daughter A's

application to stay the Historic Capacity Proceedings will be heard by the Foreign Court. It has been brought to my attention that the Son has made an application for an adjournment of Daughter A's stay application. The sooner these proceedings are resolved, the better.

[81] I also agree with the Trustee and Daughter A that this issue of what steps, if any, the Trustee should take upon the final determination of the MH Proceedings and the Historic Capacity Proceedings is premature at this time. When the time is ripe, the Trustee can reapply for guidance of the Court (which governs this Trust) if it still requires such guidance. To my mind, it matters not that on 31 July 2019, the Trustee wrote that the Foreign Court is "*eminently well-placed*" to determine questions of capacity. Respect for courts of friendly nations is encouraged but this Court ought not to direct the Trustee to fetter its discretion now when the decisions are unknown.

Costs

[82] In paragraphs 34 and 35 of an Affidavit lodged by one of Daughter A's and the Son's siblings, on behalf of C Limited it is stated:

> **"34. Finally, I note that in paragraphs 3.25(6) and (7), the Trustee seeks the following orders:**
>
> **[…]**
>
> **34.2 an order that the Trustee be relieved and excused wholly from any liability and be fully indemnified pursuant to Sections 77(3) and 98 of the Trustee Act and against all and any costs legal fees and expenses arising out of, and incidental to, the subject matter of this application out of the assets of the Trust.**
>
> **35. As I mentioned above, I and all of our family members (except [Daughter A]) are upset by the hasty and ill-thought-out process in which the Trustee declared [the Settlor] incapacitated on 3 July 2019. Since both orders involve consideration of whether the steps taken by the Trustee prior to the making of the Directions Application were fair and reasonable, I believe it is more appropriate for such orders to be determined at the conclusion of the Directions Application and not before."**

[83] According to Mr. Dunkley QC, it is unclear precisely what was intended by the above-recited paragraphs. To the extent that what is suggested is that this Court might refuse to the Trustee its indemnities under section 77(3) and section 98 of the Trustee Act the affiant has laboured under a misapprehension. There is no jurisdiction in the court to refuse indemnities which accrue to the trustee automatically by statute upon an order being made under section 77.

[84] Mr. Dunkley QC submits that, to the extent that it is suggested that this Court might deny the Trustee its costs, the Trustee accepts that this Court has jurisdiction to deny a trustee the costs of its application in certain circumstances and, indeed, section 77(3) of the Trustee Act provides "*The costs of such application shall be in the discretion of the Judge*".

[85] However, says Mr. Dunkley QC, it is difficult to see how the Trustee could properly be deprived of its costs on a proper application of the law. The normal entitlement of a trustee in applications such as these is to be indemnified as to its costs. In **Ann Maxine Patton v Alvarez Jimenez de Pass & Others** [2020] BHS J. No. 22, this Court at [32] referred to the famous guidance given by Kekewich J in **Re Buckton** [1907] 2 Ch. 406 at page 414 where the learned judge stated:

> **"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. <u>But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may</u>**

> **appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned."**[Emphasis added]

[86] Mr. Dunkley QC submits that there is no good reason why the Trustee should not be indemnified for its costs; it has at all times acted in good faith (and for the benefit of the Trust rather than for its own personal benefit). I agree that the Trustee ought to be paid its costs. In addition, the Trustee shall raise and pay from the trust fund the parties' costs of the Application, to be taxed on the indemnity basis if not agreed.

Conclusion

[87] The Order of this Court is set out below:

IT IS HEREBY DIRECTED and ORDERED that:

1. The Trustee shall not be required to take any steps concerning either the Historic Capacity Proceedings or the MH Proceedings before the Foreign Court (or any appeal thereof).

2. The Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated and that Daughter A is the Appointor of the Trust pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings.

3. The Trustee does not have to disclose any trust documents to the Settlor (whom it determined to be incapacitated), the Son or any of their purported representatives pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings. However, if the Settlor directly requests any trust documents, the Trustee should provide them.

4. The Trustee is entitled to its costs on an indemnity basis and shall also raise and pay from the trust fund the costs of the other parties, to be taxed on the indemnity basis if not agreed.

5. The Trustee and any Notice Recipient to these proceedings shall have liberty to apply.

Dated this 29th day of October 2021

Indra H. Charles
Justice