IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 82 OF 2105 (ASCJ)

IN THE MATTER OF A DECLARATION OF TRUST DATED 23 OCTOBER 1973
AND
IN THE MATTER OF SECTION 63 OF THE TRUSTS LAW (2011) REVISION

BETWEEN	**SCOTIABANK & TRUST (CAYMAN) LTD**	**PLAINTIFF**
AND	**CORA LOUISE SMITH BROSSARD and others**	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 29TH DAY OF SEPTEMBER 2015 AND 8TH OCTOBER 2015

APPEARANCES: Mrs. Shan Warnock-Smith, Q.C. instructed by Ms. Shelley White of Walkers for the Plaintiff

Mr. James Austin-Smith of Campbells for the Defendants

Application by Trustee under Section 63 of the Trusts Law (2011 Revision) for powers to alter the administrative arrangements of the Trust by creating subdivisions of the Trust Fund – no such power given in Trust Deed – circumstances under which it would be appropriate to grant such powers.

REASONS FOR DECISION

1. The Plaintiff brings this application in its capacity as the Trustee of a trust settled under the Laws of the Cayman Islands on 23 October 1973 by the late Warren W. Smith ("the Trust") who died in 1983. He was a citizen of Venezuela and was domiciled there at the time of his death.

2. The application is made under section 63 of the Trusts Law (2011 Revision) and its purpose in the absence of such a power in the Trust Deed, is to seek a power which will enable the Trustee, if it thinks fit in due course, to partition the capital of the trust

fund into sub-funds for the benefit of the various branches of the Settlor's family who are the beneficiaries of the Trust.

3. If the Trustee were granted such a power, I am told that it would enable the Trustee to administer each sub-fund of the Trust in the specific interests of each branch of the family whose needs and circumstances are diverse, as will be further explained below.

4. The Trustee and the Defendants parties (who are beneficiaries of the Trust) all support the application. It is important to note at the outset that they do not seek to change any of the beneficial interests arising under the Trust, nor would the conferring or exercise of the power have that effect, save so far as would be incidental to the intended purpose of better and more targeted administration of the Trust fund.

5. Accordingly, the application is properly brought under section 63 rather than by way of an application for variation of trusts under section 72 of the Trusts Law (2011 Revision).

6. The relevant provision is in sub-section 63(1):

> *"63. (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."*

7. It will be immediately clear from sub-section 63(1) that the powers to be vested by the Court upon any application brought under it can only be administrative and not dispositive in nature. No jurisdiction is here given to the Court to grant powers to

make any allocation to beneficial interests arising under the Trust, save only as already mentioned, so far as would be necessarily incidental to the exercise of the administrative power: "*the jurisdiction exists if what is proposed...is in essence to be regarded as administrative and not dispositive in nature, as being expedient in the interests of the administration or management of the trust*".

8. This is now well-settled principle in the case law, as explained by this Court in *In Re Z Trust* 2009 CILR 593 – a decision from which the passage quoted above is taken and which has since been approved and applied by the English Courts in the application of the equivalent provisions of section 57 of the Trustee Act 1925. See *Southgate and Southgate v Sutton et al*[1] and *In re English American Insurance Co. Ltd.*[2]

9. To the extent that what is proposed by the Trustee here by way of sub-division of the Trust fund would not be dispositive but only administrative in nature, it follows that subject to the proposed division being, in the particular words of subsection 63(1) "*in the opinion of the Court expedient*", I would have jurisdiction to confer upon the Trustee *"either generally or in any particular instance, the necessary power for that purpose*...."

10. I am informed however, that the Trustee is not yet at the stage of exercising the required power to sub-divide. Rather, the situation is as follows.

The terms of the Trusts and the circumstances of the beneficiaries

11. In summary and in effect, the terms of the Trust require the net income of the trust fund to be distributed on the stirpital basis between the four extant branches of the family, headed respectively by the four children of the Settlor. Of those children, two

[1] [2011] EWCA Civ. 637 (per Mummery LJ on behalf of the Court of Appeal).
[2] In Cause No. HC 13C02801 of 2013 in the High Court of Justice, written Judgment delivered per Deputy Judge Clive Freedman QC on 9th October 2013.

are deceased. Of the remaining children one, the First Defendant, has no issue and after her death the distribution will be between three branches only. As the family tree shows, those three families are now very numerous, running to several generations.

12. As to capital, the Trust requires 50% of the capital of the trust fund to be distributed on the death of the second to die of the Settlor's surviving children, both of whom are in their 90s.

13. On the happening of that event, half the capital will be distributed stirpitally between the members of the three extant families. The remaining half of the trust fund will be distributed similarly 21 years less one day after the death of the last to die of the Settlor's issue who were living at the creation of the Trust in 1973.

14. While many members of the family live in the United States of America, a number live in Venezuela and in the United Kingdom and it is already apparent to the Trustee, that subject to the entitlements to income and capital as described above, different tax planning and investment management arrangements will have to be put in place to respond to the different personal, geographical and fiscal circumstances of the beneficiaries.

15. Those being the circumstances of the beneficiaries and the requirements of the Trust with which the Trustee must contend, it was explained to me that the power now sought to be vested in the Trustee, is not sought with a view to immediate implementation.

16. Rather, the Trustee wishes to have the power vested now in order that, at the appropriate time and circumstances, the sub-division of the trust fund can be effected.

17. Thus, at present, there is no specific transaction by way of division of the fund in contemplation. What is sought is the power generally to be able to do so as and when the need arises.

18. This proposition of the Trustee gave rise to an issue which I thought should be addressed and so directed at the hearing of the application on 29th September. The issue, as I perceived it, is the ability of the Court on a section 63 application to grant additional administrative powers to a trustee where there is as yet no specific proposal before the Court as to the way in which the powers are planned to be exercised. It then seemed to me incongruous that the Court should be asked to vest a power, the exercise of which should not be allowed to affect beneficial entitlements, without knowing the specifics of the transaction over which the power is to be exercised. In the present case, I was immediately satisfied having heard the Trustee's concerns as explained above, that the transaction in question (i.e. the proposed partition of the Trust fund into sub-funds), was expedient. The concern was whether I was prepared to grant a general power to partition the fund in circumstances where the Trustee has not yet worked out how or when it would be exercised. I am informed from the evidence submitted by the Trustee, that that will take further discussion with the beneficiaries and the provision of all relevant financial, tax and other advice. The Trustee explains that the proposal here is designed to pave the way for such discussions and the taking of advice to proceed.

19. At the hearing on 29th September I invited Counsel to submit a note dealing with the issue, as I had perceived it to have arisen and as described above. I have since received that note which helpfully informs these brief reasons for decision.

20. It is submitted by Mrs. Warnock-Smith QC that, given the diverse circumstances and interests of the different branches of the family, I should accept that in principle it is

now "expedient", in the sense of sub-section 63(1), that the Trustee should be vested with the power in order that it might divide the Fund as and when it determines that it should do so. She further submitted that it is open to the Court to grant a power in circumstances such as these and referred anecdotally to frequent practice to that effect in England and Wales under its equivalent of section 63, section 57 of the Trustee Act 1925. On applications under that section, I was told that it had become commonplace to seek a raft of new administrative powers in order to modernize a trust which was short on administrative powers, even where there was no particular proposal to exercise them. Modernization and flexibility of administration were themselves considered expedient and the English Courts had not objected that to confer those powers was beyond the scope of the section. An extreme example given is that of a general power for trustees to confer additional powers on themselves if they think it is expedient (perhaps qualified by the need to take expert advice before doing so) in terms largely identical to those of section 57 itself, so that it would not be necessary to go back to court if unexpected circumstances arose. According to the note provided by Mrs. Warnock-Smith, herself a Leading Counsel in the trust field, only once had she faced a refusal to grant such a power on an objection from the Court that that might be regarded as ousting the jurisdiction of the Court.

21. So far as reported authority is concerned, I was referred additionally to the decision of Paul Baker Q.C., sitting as a Deputy Judge of the High Court of England and Wales, in the case of *Anker-Petersen v Anker-Petersen* 1998 12 Tru. LJ 166. In that case the Judge was asked to confer new powers on the trustees to invest as if they were beneficial owners (in place of a restrictive investment provision), to delegate the exercise of their investment power to an investment manager, to hold investments in the names of nominees and to borrow money for any purpose. The general context

was that the will trusts in question had become outdated since 1956 when the trusts had come into effect so that it had become difficult to invest in a way which was beneficial to the beneficiaries and additionally, since the "Big Bang" in the City of London in 1986 which affected the way in which investments were handled by investment managers. There was no proposal before the Court to invest in a particular way, to delegate to a specific investment adviser or hold property in the names of specific nominees, still less any particular proposal to borrow money. The expediency test imposed by section 57 (as by sub-section 63(1) here) was satisfied by the clear advantage to the trust as a whole of putting the trustees in the position of being able to take advantage of the best opportunities for the beneficiaries as they arose.

22. The learned Judge felt able to approve the proposals "*without hesitation*". They were supported by the beneficiaries and opinions of counsel were before the court on behalf of the minor beneficiaries and, separately for the Trustees, analyzing the proposals and recommending them. He went on to make useful observations about the availability of the section 57 jurisdiction in such circumstances. Of particular relevance here are the passages of the judgment on page 171 in which, at the top of the page, he reviews two earlier authorities in which doubt was expressed whether the section could be used to enlarge a power of investment generally rather than to authorize a particular investment[3]. He observed that those doubts have not troubled other judges and in particular Danckwerts J (in Re *Brassey's Settlement* [1995] 1 WLR 192 at 196 and in *Re Shipwrecked Fisherman and Mariners' Royal Benevolent* Society [1959] Ch. 220) and the Vice-Chancellor of the County Palatine, Judge Blackett-Ord in *Mason v Farebrother* [1983] 2 All ER 1078. Reviewing the history

[3] *Re Coates Trust* [1959] 1 WLR 375 at 378 (per Harman J. as he then was) and *Re Byng's Will Trusts* [1959] 1 WLR 379 at 381 (per Vaisey J.).

of the section as a widening of the inherent emergency jurisdiction of the court, he concluded that there was "*no need to adopt a restrictive construction of the section.*"

23. Citing *In Re New* [1901] 2 Ch 534, he further observed that in that long-standing decision(which had articulated the inherent jurisdiction and preceded the introduction of the section 57 jurisdiction) Romer LJ on behalf of the Court of Appeal, had been at pains not to define the extent of the inherent jurisdiction. Rather, he had declared as follows:

> *"It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at Chambers. Of course, the jurisdiction is one to be exercised with great caution, and the court will take great care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by the trustees and beneficiaries merely because it appears to be beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character"*

24. No doubt with those cautionary words in mind and against that historical background of the jurisdiction, Judge Paul Baker QC declared that the manifest object of section 57 was to enlarge the inherent administrative jurisdiction of the Court which had hitherto been confined to cases of emergency. And that the section does this by authorizing the court to confer a power on the trustees "*either generally or in any particular instance*" to effect a wide range of transactions, including investment. The Court is empowered to authorize transactions which were, in its opinion, "*expedient*" although (as Romer LJ had also advised in *In Re New* (at p545)) "*the jurisdiction is one to be exercised with great caution, and the court will take great care not to strain its powers.*"

25. *Anker-Petersen* itself has been regularly relied upon subsequently as authority for the availability of enlarged investment powers and powers to delegate investment management under section 57: see para. 23 of my own Ruling in *In Re Z Trusts, MEP v Rothschild* 2009 (above). More generally however, I became satisfied that *Anker-Petersen* and the cases on which the Judge therein relied, are useful authority for the proposition which I now accept, that the Court does not need a highly specific transaction to consider in order to be satisfied that it is expedient to confer new general powers on trustees.

26. The order sought is accordingly granted, with the practical condition imposed in affirmation of the true ambit of the jurisdiction – that no exercise of the power shall result in any change to beneficial entitlements, save such as might be purely incidental to the exercise of the power – see again: *In re Z Trust, MEP v Rothschild* (above).

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

October 8, 2015