6.12.2000

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 459 0F 1996

BETWEEN: ISABELLE AL-IBRAHEEM PLAINTIFF

AND: (1) BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LIMITED and OTHERS DEFENDANTS

GRAND COURT CAYMAN ISLANDS

DEC 15 2000 LEGAL DEPARTMENT CAYMAN ISLANDS

Appearances:
Mr. Lawrence Cohen QC instructed by Boxalls for the plaintiff
(Mr. William Helfretch of Boxalls present as a witness)
Mr. Kenneth Farrow of Quin & Hampson for the trustee
Mr. Jules Sher QC. with Mr. Anthony Arthur for Maples & Calders

Before: Hon. Chief Justice Anthony Smellie

REASONS FOR DECISION

Notice to Maples & Calders pursuant to Myers v Elman [H.L. (E)] 1940 A.C. 282

These proceedings were instituted by the plaintiff in September 1996 seeking the administration by the Court of the Corduroy trust which had been settled by her father. She relied among others upon the ground that her father had become incapacitated and was incapacitated at the time he purported to effect the second amendment to the trust in

July 1996. The trustees had been administering the trust on the basis of the validity of the second amendment.

On 27th April 2000 a Notice was issued to Maples & Calders ("M&C") on the Court's own motion, to show cause why they should not be ordered to pay the whole or some part of the costs of these proceedings on the grounds that they have been guilty of misconduct within the meaning of Myers v Elman.

M&C later applied for discharge of the Notice (which had been issued ex parte) on a full inter partes hearing on 17th – 21st August 2000 when it was determined that the Notice should stand. See written reasons delivered on 8th August 2000.

During the course of proceedings over the last two days, I heard M&C's explanations offered by their counsel Mr. Sher, and had regard to the evidence they filed in the proceedings in response to the Notice.

This was not, however, upon the full contested hearing of the Notice, as it had been brought to my attention shortly after the commencement that the parties, including M&C, wished to enter into compromise negotiations with a view to settling all possible claims between them, including any claims for wasted costs. The Myers v Elman `jurisdiction being primarily compensatory in objective, I allowed the negotiations to proceed upon the understanding that M&C's explanation would be forthcoming in any event.

That explanation was given by way of the responses mentioned above.

I indicated last evening in giving my initial view of the explanations offered by Mr. Sher, that I was prepared to accept those explanations as to the three main issues identified in the Notice to M&C and then directed the discharge of the Notice.

Given the public interest in the outcome of any proceedings of this kind, I thought I should issue these formal reasons in elucidation of that decision.

1. As to the letter of 12th September 1996 in which it was wrongly stated by M&C that "the trustee had seen no evidence of incapacity", I can now accept that inaccurate though that statement was, there was so intention to mislead. As was more fully explained in the reasons delivered on 8th August 2000 the issue whether the grantor had capacity to take decisions in respect of the complex affairs of the trust, was the central issue in the case. Quite apart from the fact that the circumstances suggest no motive in M&C for seeking to mislead, it is now apparent from all the evidence in the case that the authors of the letter of 12.9.96 (it seems more than one attorney at M&C) were genuinely at the time of writing, focused upon the issue of the grantor's capacity as at the time of the second amendment only. Though in hindsight that was too narrow a view to be taken of the issue of the grantor's capacity it was, I accept, the issue which they intended to address in the impugned sentence in the letter. It was the unfortunate but I accept, unintended result, that the sentence carried the ambiguity that the trustee had seen no evidence of incapacity whatsoever.

   It is now asserted that Mr Timms (the partner from M&C having conduct of this litigation on behalf of the trustee) sought to set the record straight on this issue on at least one occasion before the Court in February 1997. The record shows that he interjected during the course of submissions then to say that he wished to explain that the statement in the letter of 12th September related only to the time of the second

Amendment. This carefully phrased statement did not convey to the court or the parties the true position.

The somewhat abstruse message which that explanation might have conveyed; viz: that the trustee had indeed seen evidence of incapacity at other times, was, it is now apparent, not appreciated by anyone at the time. Certainly not by the Court. While it seems this was the message which Mr. Timms sought to convey in his interjection to the court, it is to be regretted that the implicit admission that the trustee had indeed seen evidence of incapacity at other times was not made clear.

2. There was an ongoing failure throughout the proceedings to disclose the positive evidence of incapacity which M&C were aware the trustee had in its records. This was evidence which we now know was referenced in a draft affidavit prepared by Mr. Timms for Mr. Forster (an officer of the trustee) intended to be filed in the proceedings. In this regard I conclude I can now also accept the explanations for the failure to file that affidavit.

In particular, I can now accept that Mr. Timms would have genuinely perceived a dilemma over not obtaining the grantor's consent to the disclosure of the personal medical information the draft affidavit contained. This I accept having regard to the circumstances which developed. In particular the fact of the grantor then being apparently capable of instructing Hunter & Hunter to act on his behalf in these proceedings and the latter's insistence that he was competent to give them instructions.

I accept that in those circumstances, there would have been a genuine question in Mr. Timm's mind over the nature of his disclosure obligations and, moreover, concerns about the effect the disclosure of the affidavit at that time would have had upon the litigation which threatened to embroil and consume the trust fund.

I must observe however, that in the same way the issues over the trust company Prudence Inc (the alleged unauthorised extractions by Mrs. Shellie Blume from its account with Wells Fargo Bank) were discussed on behalf of the trustee by Mr. Timms with the Court in private; so too could the draft affidavit have been discussed and directions sought from the Court. I accept nonetheless that it was within the bounds of the reasonable exercise of professional judgement for Mr. Timms not to have disclosed the affidavit at the earlier stages in the proceedings as it was a matter of professional judgement whether the trustee should seek the directions of the court or continue to exercise its own discretion while the grantor appeared to have capacity. This does not, however, amount to the Court's *approval* of the approach taken.

In prefacing his explanations Mr. Sher urged me not to examine M&C's, and in particular Mr. Timms' conduct, against the background of the knowledge now available with the benefit of hindsight.

Nonetheless, it is apparent from all the formation now available, on the preponderance of the evidence, that the grantor was medically regarded as incompetent to manage his affairs from as early as sometime in 1992.

The first Amendment to his trust was purportedly effected by him in 1993 and the 2nd Amendment (by which the contingent beneficial entitlements were radically changed) in July 1996.

I must note that it is the case, however, that not all the medical evidence of his condition was available to trustee by the time of the preparation of Mr. Forster's draft affidavit.

The evidence then available indicated in favour of as well against capacity. It is also now apparent that rightly or wrongly, on advice from M&C, the trustee also had in mind that if the 2nd amendment had been executed by the grantor during "a lucid interval," it should be regarded as valid.

The evidence also indicates that at different times over the period of the three years leading up to the 2nd amendment, the grantor had expressed in apparently firm and clear terms to different persons, his intention to effect it.

By reference to that background and to a recent decision of the English High Court - (The Public Trustee and Another v Paul Cooper and Others HC-99-04500; 20.12.99 per Justice Hart) -. Mr. Sher urged me to accept that it was within the bounds of proper professional judgement for M&C to advise that the trustee had no positive obligation at any material stage of the proceedings to disclose the information in its possession in respect of the grantor's capacity. This is the draft affidavit which came not to be disclosed.

He submitted that as the proceedings were not proceedings in which the trustee had surrendered its discretion to the Court, but were instead hostile proceedings instituted by the plaintiff; the trustee was entitled to await the appropriate time for giving discovery and that that time had not yet come in the proceedings. It was therefore within the trustee's discretion on the advice of M&C, not to disclose the information which they had to the Court without the grantor's consent, a discretion they exercised

being mindful in particular of the escalation in the litigation which would likely result from disclosure. Mr. Sher further submitted that in participating throughout in these proceedings and in seeking and obtaining the several directions which they obtained from the Court; the trustees did not surrender their discretion to the Court but instead merely sought and obtained the blessing of the Court in the exercise of their discretion.

Mr. Sher relied upon the following passage from the judgement of Justice Hart in Public Trustee v Cooper (supra), citing an earlier judgement of Mr. Justice Robert Walker given in Chambers. The passages seek to distinguish between cases where the trustees surrender their discretion to the Court and where they do not:

"On the particular point made by Mr. Herbert, I had advantage of having available to me a judgement of Robert Walker J. (as he then was) given in Chambers in 1995. Since it was given in Chambers, it is inappropriate for me to say more about it, save that it concerned the question whether the court in authorising trustees to pursue litigation was necessarily exercising its own discretion or was simply protecting the trustees in an exercising of their own. The relevant passage in the judgement is in the following terms:

> "At the risk of covering a lot of familiar grounds and stating the obvious, it seems to me that, when the Court has adjudicated on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and they are no doubt numerous variations of those as well).
>
> (1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instruments or a statute or both. The practice

of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to … [He then gave an example].

(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.

Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

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

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

Mr. Sher submitted that this case should be regarded from the trustees' point of view as coming within Justice Walker's category two.

If so, then the advice given by M&C as the trustees' advisors, not to disclose the evidence in Mr. Forster's draft affidavit, far from being regarded as misconduct, should be regarded as well within the bounds of professional judgement.

If they are wrong about this said Mr. Sher, then there was an error of professional judgement without an intention to mislead and for which M&C apologise.

These proceedings were brought by the plaintiff, who is one of the grantor's daughters, not as hostile proceedings against the trust or trustee, but seeking the Court's administration of the trust. Her and her three sisters' beneficial entitlements under the trust had been altered by the recent 2nd amendment and the woman, Luz Maria Schaffer, whom her father had recently married under what she feared to have been the yoke of undue influence, had been substituted as the sole remainder beneficiary.

With the passing of the grantor before the matter could be tried, the issue of his capacity at the relevant times was not to be determined. Nonetheless, as events have transpired, the concerns of the plaintiff as the basis for her institution of these proceedings have been justified.

The medical evidence now reveals degrees of incapacity of the grantor going as far back as 1992.

Quite apart from that, the second amendment has now been found to have been invalid for want of the requisite notarisation.

The approach taken by this Court throughout - that the proceedings be regarded as administration proceedings and not hostile proceedings - remains the appropriate way of characterising the early stages of the proceedings. See for instance written ruling delivered on 4th March 1997.

It was in that light that all sides agreed that the plaintiff was entitled to her costs of the proceedings from the trust fund on the indemnity basis: the proceedings were to be regarded as having been brought for the protection of the trust. See earlier ruling as to costs, now reported at 2000 CILR 88.

It must be acknowledged, however, that the proceedings were never free of hostilities. The plaintiff had raised allegations of undue influence, (directed against Mrs. Luz Schaffer Djjedah) and collusion and fraud (as against Mr. Michael Chatsky the lawyer who drafted the second amendment and Mr. Robert Blume, the trust protector). By the ruling of 4th March 1997, the plaintiff was directed to particularise those allegations in points of claim in order that those affected could properly respond.

It is to be noted for present purposes, that those allegations were never directed as against the trustee for whom M&C acted, although it must realistically be recognised that there was potential contingent liability facing them if the grantor proved to have been incapacitated at the re ant times. If so, he would have been unable to give valid receipt for distributions purportedly made by the trustee for his benefit from the trust fund. Happily, no such claim was actually raised against the trustee in these proceedings, but the potential remained throughout.

Against all that background, I think I must fairly recognise that M&C in advising the trustee at the different stages of these difficult and complex proceedings - which I conclude did not fall squarely into any of Justice Robert Walker's four categories mentioned above - could have reasonably apprehended doubt about the nature of the trustee's discovery obligations. This is not as to whether there was the obligation to

disclose which I find existed and was indeed contemplated and intended to be fulfilled (hence the preparation of the draft affidavit); but as to the timing for so doing.

That having been said it would be inappropriate to let the matter rest there.

Mr. Cohen properly brought to my attention the dictum of Lord Oliver in his opinion delivered on behalf of the Privy Council in Marley v Mutual Society Bank [1991] 3 All E.R. 198 at 201 d - h.

> "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 discretion 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 - - -, 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 to 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 supplied).

It was sought to be explained by Justice Robert Walker in his elucidation of the categories of trust proceedings (outlined above as taken from Justice Hart's judgment in

The Public Trustee v Cooper) that by use of the words in emphasis above, Lord Oliver in Marley was not to be taken as abolishing the distinct class of cases in his category two - cases in which trustees seek the Court's blessing for the exercise of their own discretion but without actually surrendering that discretion to the Court.

I am quite prepared to accept that such a distinct class of cases is to be recognised. That does not, however, establish to my mind any justification for a proposition that the obligations of the trustee - even in such a case - to make full and frank disclosure by giving the Court all information relevant to the exercise of the Court's discretion in giving its blessing to the trustee's proposed conduct, is in any way diminished.

It appears to be upon the misconception of such a proposition that Mr. Timms proceeded on behalf of the trustee in the failure to disclose to the Court all the relevant medical and other evidence of incapacity which the trustee had. That failure in the context of this case was just as misguided, in my view, as were the "academic discussions as to the discharge of burdens of proof" in the Marley case.

I need say no more about the matter, having heard the explanation on behalf of M&C, than that I accept their apology to the Court for what I also accept was an error of professional judgment.

3. As to the Notarisation issue I must still observe that this, perhaps most of all, caused me concern in the end.

I am afraid that notwithstanding the very able and helpful submissions of Mr. Sher in reliance in particular upon the authority of McPhail v Doulton [1971] (H.L.(E) A.C. 424 - I am unable to accept that the entirely appropriate course, as he suggested, was for the

trustee to be advised by M&C to seek to remedy the defect in notarisation without reference first to the Court.

As I observed to Mr. Sher yesterday and as he acknowledged in reply, that course of action proceeded on the assumption that the grantor had had the capacity to execute the second amendment.

Even if I were to accept as M&C assert, that the attempt at notarisation could do no harm - as the basis upon which M&C gave the advice to proceed with it - I cannot accept that it was right to do so knowing that the very assumption on which they were proceeding was the issue over which the action had been joined before the Court for some 3 ½ years by then. The defect in notarisation came to light in March 1999, the action had been instituted by the plaintiff in September 1996.

I hold that the matter should have been brought to the attention of the Court to see whether the Court would agree that the proposed course was appropriate. The Court would no doubt have weighed in the balance the argument that no harm would be done. I can say that the Court would have been reluctant to so conclude given that the result would be to prefer certain beneficial interests over others.

That having been said, what I can now accept is that M&C were themselves quite concerned about the propriety of the proposed course and took the precaution of obtaining independent advice from eminent Queen's Counsel. It appears from the Attendance Note of the advice given by Queen's Counsel (Exhibited to their Mr. Appleyard's affidavit) that M&C were advised that the second Amendment could be validated, albeit not retrospectively, by having the attestations notarised. This was the

basis upon which M&C proceeded to assist in the attempt at notarisation in March 1999 of the deed executed in July 1996. In the event, the attempt proved wholly unsuccessful after full arguments about it before this Court. See 1999 CILR 436 per Murphy J. Notwithstanding that decision of this Court which has not been appealed, Mr. Sher now seeks to explain the advice given and the actions taken by M&C, by reference to the trustee's perceived obligation to give effect to the grantor's true intentions as they were known to the trustee. Support for that proposition was sought from the following dictum of Lord Wilberforce in McPhail v Doulton supra at 456G - 457A:

> "-- I agree with my noble and learned friend Lord Upjohn in In re Gulbenkian's Settlements that although the trustees may, and normally will be, under a fiduciary duty to consider whether or in what way they should exercise their power, the Court will not normally compel its exercise. It will intervene if the trustees exceed their powers, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it, the court will: I respectfully adopt as to this the statement in Lord Upjohn's opinion (p.525). I would venture to amplify this by saying that the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions".

That is the basis for the proposition that the trustee was in effect being advised by M&C, after advice from Queen's Counsel, to carry out the grantor's true intentions. But we see already established how dangerous was the assumption as to what that true intention was.

It became all the more dangerous an assumption upon which to act because of the further assumption that despite having been before the Court for years by then, the trustee had not submitted its discretion in that regard to the Court and so was entirely free to act without recourse to the Court.

Nothing in the authorities cited serve to my mind as support for that proposition. Lord Wilberforce in McPhail v Doulton appears, on the contrary, to have had in mind the Court acting according to what it thinks is in the manner best calculated to give effect to the settlor's intention. In all the circumstances of the case, it is certainly now at least arguable whether the Court would have directed the trustee to attempt to remedy the defect in notarisation. I can say with equanimity that that would have been very unlikely. That unavoidable doubt as to the propriety of the attempt at notarisation by itself demanded that the trustee should have been advised to refer to the Court before taking the action which was taken.

I have no basis, however, for concluding otherwise than that in advising the trustee as they did, M&C fell into error.

I conclude that, on the balance of probabilities, the advice they gave the trustee was motivated by the exercise of their professional judgment. Again, it is regrettable that there will inevitably linger questions whether their actions could have been motivated by self-interest being fully aware of the implications for themselves and the trustee of the second amendment not being valid. This is certainly another reason why the matter should have been referred to the Court.

Though I do not agree with their exercise of professional judgment, I am satisfied that it falls short of evidence of misconduct in the sense of Myers v Elman which could be

appropriately visited with an order for wasted costs. I also accept that there would also have been a genuine issue over causation; ie: whether, as an enquiry would have been inevitable over what to do about the defect in notarisation, the enquiry which did take place before Murphy J involved costs which could have been avoided.

For all the foregoing reasons, I accepted the explanations given by M&C and directed the discharge of the Notice.

Notice to the Trustee to show cause whether their costs should be disallowed for payment from the Trust fund

A notice in terms very similar to that issued to M&C was also issued to the trustee on 27 April 2000. As events transpired upon the outcome of the compromise negotiations between the parties, it became unnecessary to call upon the trustee to show cause. Had the matter proceeded to trial, it was indicated that the trustee would have pleaded, in part, its reliance upon the advice given from time to time before and throughout the proceedings by M&C. I do not think I should let the occasion pass without commenting upon the importance of the trustee's position in this regard.

Whether the trustee could properly have relied upon such a plea is at best doubtful having regard to the venerable dictum of Bowen LJ in In Re Beddoe Downes v Cotton [1893] 1 Ch 547 at 562:

"The principle of law to be applied appears unmistakably clear. A trustee can only be indemnified out of the pockets of his cestui que trust against costs, charges, and expenses properly incurred for the benefit of the trust - a proposition in which the word "properly" means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere bona fides is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong - headed and perverse. Costs, charges and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person at fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee himself might recover over his own cestuis que trust costs which his own solicitor has unreasonably and perversely incurred merely because he had acted as his solicitor told him".

Ultimately, there was to be no challenge before me by Mr. Farrow to that statement of principles. His skeleton arguments also outlined other intended arguments on behalf of the trustee. In any event, having regard to the release of M&C on the discharge of the notice against them, it became entirely moot what the outcome of the trustee's notice would have been. The issues in it are now to be overtaken by the Compromise

6.12.2000

Agreement reached as between the trustee, M&C and the plaintiff, with the blessings of this Court and by which significant sums are to be recouped for the benefit of the trust fund by reference among other things to the costs of the action.

This is entirely appropriate because the trustee's notice was issued by the Court upon the application of the plaintiff seeking the disallowance of the trustees' costs from the trust fund.

Having regard to all those circumstances including the Compromise Agreement of which I approve, I also directed the discharge of the notice issued against the trustee to show cause.

I also approved the draft order which was propounded on behalf of the parties on the trustee notice including as it provides for the resignation of the trustee and for the appointment of the plaintiff Isabelle Al-Ibraheem, as successor trustee.

As Mr. Cohen submitted, I was satisfied not only as to her suitability having regard to the admirably principled manner of her conduct throughout the proceedings, but also that she is, for all practical purposes, the only obvious person available to pursue the claims which the trust has or might have in damages against certain other parties.

Anthony Smellie
Chief Justice
Dated this 6th day of December 2000.

GRAND COURT
CAYMAN ISLANDS