



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2  
3 CAUSE NO: 258 OF 1998

4  
5 IN THE MATTER of Section 45 of the Trusts Law (Revised)

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7  
8 AND IN THE MATTER of GCR Order 85, rule 8

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10  
11 AND IN THE MATTER of the Cotorro Trust originally constituted by a Trust  
12 Agreement dated the 1st day of June 1979 between Maria Ernestina Bacardi y Gaillard  
13 and Roy West Trust Corporation (Cayman) Limited, now named Coutts(Cayman)  
14 Limited.

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17  
18 Direction

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20 This is an application by the Trustee for the written directions of the Court upon a  
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22 question relating to the management and administration of the Trust.

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24 The application is made pursuant to GCR Order 85 Rule 8 and is supported by the  
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26 written submissions of the Trustee's lawyers and by an affidavit of an officer of the  
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28 Trustee.

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30 The question is whether orders already made - that the costs of all but one party to the  
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32 action be paid out of the assets of the Trust on an indemnity basis - should be satisfied out  
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34 of income or capital.

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36 I regard this manner of application by way of GCR Order 85 Rule 8 as appropriate  
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38 primarily for the reason that what is sought is essentially clarification of the orders for  
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40 costs already made.

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42 The Trustee, on advice, has taken the view that the payments are appropriately to be made  
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44 out of capital. In keeping with the mechanism presented by the Trust Deed the Trustee  
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1 has put the matter to the Management Committee which has full responsibility for the  
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3 Special Companies the shares in which constitute the capital of the Trust. Some of those  
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5 shares would have to be sold in order to satisfy the orders for costs if to be paid from  
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7 capital. The Management Committee has unanimously agreed with the Trustees views.  
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9 This application is nonetheless a prudent one given the substantial costs billed as having  
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11 been generated by this very complex litigation - some USD 2.2 million as at September  
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13 23rd, 1997 - and because members of the Management Committee may have been placed  
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15 arguably in a position of conflict of interest in having to decide the question posed by the  
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17 Trustee. The Trustee is also concerned not to proceed without the directions of the Court  
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19 given the obvious importance attached by the Grantor to preserving intact the shares of  
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21 the Special Companies.  
22  
23 This intention of the Grantor is manifest from Article Ninth (F) of the Trust Deed which  
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25 requires the unanimity of the Management Committee in regard to any sale, alienation,  
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27 pledge, assignment or other encumbrance of the shares of the Special Companies.  
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29 The case law is clear that unless otherwise directed by the instrument creating the  
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31 trust, costs and expenses incurred by way of legal proceedings or otherwise for the benefit  
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33 of the estate as a whole should be met from capital. Such proceedings or expenses  
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35 relate exclusively to the tenant for life entitled to income or in some other manner  
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37 exclusively to income then they may well be directed to be paid from income. See  
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39 Underhill & Hayton, Law of Trusts and Trustees 15 Ed. Article 53 (d) at page 535;  
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41 Halbury's Laws 4th Ed. Vol. 48 para 637 and Carver v. Duncan [1985] 2 ALL E.R. 645.  
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43 Here the proceedings involved the determination of questions of the validity of certain  
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45 amendments to the Trust deed which enabled the distributions of capital and of the

1  
2 subsequent distributions of capital pursuant to those amendments to the beneficiary  
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4 who was, prior to the amendments and distributions, the income beneficiary for life.

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6 For reasons already expressed, this court has held that those proceedings were for the  
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8 benefit of the estate as a whole and that the costs of the parties (except the third  
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10 defendant) should be met from the assets of the Trust. See written rulings given on 17th  
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12 January 1977 (as to the costs of the 5th defendant); on 2nd June 1977 (as to the costs of  
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14 1st, 2nd, 6th and 7th defendants) and order of 29th June 1995 (as to the costs of the  
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16 Guardian ad litem of the 4th defendant ).

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18 Apart from opposition to the costs of the 5th defendant there was no dispute that those  
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20 orders for costs were properly to be made. And on account of the economies of effort as  
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22 between those representing the 4th and 5th defendants on the arguments as to the validity;  
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24 the award of the 5th defendant's costs could in no sense be regarded as a superfluous  
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26 award. Whether at the end of the day the actual quanta of costs are justified, will be  
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28 a matter for the Trustee to ensure.

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30 In response to the question now submitted to me for directions, I am satisfied that the  
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32 proper view to be taken of the matter is that the ordinary rule cited above and which  
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34 requires payment from capital, should apply.

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36 For present purposes it is important to note that the question of validity was one of  
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38 construction. All beneficiaries had an interest in having it properly resolved as serious  
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40 and troubling challenges to validity had been raised.

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42 Had the challengers been successful the corpus of the Trust would have been redoubled  
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44 as a result of requiring the recovery of the capital earlier paid out.  
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1 In the result they were unsuccessful, and it would now be wholly unjust that the income  
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3 beneficiary should be required to meet the entire costs of the challenge which would be  
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5 the effect of a directive that the costs be met from the income of the Trust to which she  
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7 is entitled.

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9 Moreover, by directing payment from capital, the resultant diminution of capital will be  
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11 borne not only by the other beneficiaries (contingent income and capital beneficiaries)  
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13 but by the present income beneficiary as well, whose income which is yielded from  
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15 capital will diminish in proportion to the amount of capital to be sold to meet the costs  
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17 of the action. Thus the burden will be shared by all the beneficiaries according to their  
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19 respective interests in the Trust.

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21 It was never the intention of the Court that these costs be met from income. This is  
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23 reflected in the earlier orders that the costs of all the parties mentioned, including  
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25 the income beneficiary herself, were to be paid out of the assets of the Trust. In  
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27 relation to her, such an order would be meaningless if intended to be met from the income  
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29 to which she is entitled.

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31 For all the foregoing reasons I direct, in accepting the written submissions made on  
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33 behalf of the Trustee, that the orders for costs under discussion be met from the capital  
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35 assets of the Trust.

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41 Anthony Smellie  
42 JUDGE OF THE GRAND COURT



43  
44 Dated this 5th day of May 1998.  
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