Seen f A.

13.9.96 CIRCULATE

4/11

Seen - Stam
Secs Cmte 13/11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE # 153 OF 1995

IN CHAMBERS

IN THE MATTER OF the Cotorro Trust, originally constituted by a Trust Agreement dated the 1st of June, 199979 between Maria Ernestina Bacardi y Gaillard as Grantor and Coutts & Co (Cayman) Limited (then known as Roywest Trust Corporation (Cayman) Limited, now named Coutts &Co. (Cayman) Limited.

AND IN THE MATTER of the Trusts Law (Revised)

BETWEEN **COUTTS & CO (CAYMAN) LIMITED**
PLAINTIFF

AND (1) **JERRY M. LINDZON** **FIRST DEFENDANT**

(2) **ELENA GOMEZ DEL CAMPO DE LINDZON**
SECOND DEFENDANT

(3) **ELENA LAURA PESSINO DE BALMASEDA**
THIRD DEFENDANT

(4) **CESAR JAIME DE BALMASEDA**
FOURTH DEFENDANT
(A MINOR, BY HIS GUARDIAN AD LITEM GEORGE GIGLIOLI, ON HIS OWN BEHALF AND ON BEHALF OF ALL MINOR AND REMOTER BENEFICIARIES OF THE COTORRO TRUST)

(5) **SANTIAGO CASAS** **FIFTH DEFENDANT**

Mr. Graham Ritchie of Charles Adams Ritchie and Duckworth for the Plaintiff
Mr. Neil Timms of Maples and Calder for the first and second defendants
Mr.. Huw Moses of Hunter and Hunter for the third Defendant
Mr. George Giglioli as Guardian ad Litem
Mr. William Helfretch for the 5th defendant

SMELLIE J **REASONS**

These are fuller reasons for a ruling given on 18th June 1996 refusing the application of the third defendant to revoke the appointment of Mr. Giglioli as Guardian ad litem of the named minor fourth defendant and to replace him with a relative of the minor.

This matter first came before the Court in April 1995 upon the plaintiff/Trustee's originating summons by which the Trustee sought directions, inter alia, as to how to proceed to investigate or otherwise deal with certain allegations made by or on behalf of the third defendant.

In raising those allegations the third defendant purported to do so, not only on her own behalf as a contingent income beneficiary of the Trust, but also on behalf of the minor, who is her son and a contingent capital beneficiary of the Trust.

As outlined in the Originating Summons the allegations are that:

(i) the Trust was not validly created

(ii) there has been a breach of fiduciary duty on the part of the Management Committee of the Trust (or one or more members of that Committee) or on the part of the Trustee in relation to amendments to the Trust Agreement;

(iii) there has been a breach of duty on the part of the Management Committee of the Trust (or one or more members of that Committee) or on the part of the Trustee in relation to distribution of capital from the Trust.

Since the commencement of these proceedings, the Trustee's concerns as to the first allegation have been addressed, if not entirely resolved, by means of a formal Deed of Acknowledgement in which the third defendant and her husband acknowledged to the Trustee, among other things, that the Trust was valid as originally constituted and that the transfer, to the Trust by the Grantor - (the second defendant's mother and the third defendant's grand-mother) - of approximately one-half of the Grantor's "Bacardi interests" (i.e: the Trust assets) was also validly and effectively executed.

The acknowledgments were required of Mr. De Balmaseda also, notwithstanding that he is not a party to the action, because it appeared from the evidence that he had a guiding, if not controlling hand, in the raising of the allegations by his wife, the third defendant.

The remaining allegations ((ii) and (iii) above) are yet to be fully particularised but are now cited in an affidavit filed by the third defendant in these proceedings.

Underlying them is the central issue whether certain amendments to the Trust Deed including amendments by which the capital was invaded and distributed to the second defendant - (the income beneficiary for life under the Trust as originally constituted) - were validly made.

Those issues have come to be referred to as the "construction issues" as they involve, among other matters, the construction of the original Trust Deed and of the amendments as to whether they properly enabled the capital distributions.

These are very important issues to the Trustee and all beneficiaries because it is said that approximately 50% of the capital, to a value of more than $100m, has been distributed pursuant to the amendments.

It will appear from that background that this is yet another of those unfortunate cases where disputes develop within families over Trust assets which result in deep and bitter divisions and with different sides encamped against each other.

Here that regrettable circumstance is exacerbated by the fact that the first defendant, the husband of the second defendant, was, at the material time, a member of the management committee said to have advised or authorised the amendment which permitted the distribution of capital to her.

The apparent acrimony notwithstanding, it remains the obligation of the Trustee and a primary concern of the Court, to protect the assets for the benefit of all beneficiaries and to that end to attempt to contain the litigation which threatens so readily to escalate into a partisan and expensive full-blown writ action.

All the counsel before me, albeit with varying degrees of scepticism, have recognised that imperative.

Hence the Trustee's summons has come to be referred to as "the construction application" and is being treated with as a basis for resolving the dispute without the need for contested partisan litigation.

If indeed this action is to proceed as one only for the construction of the Deed, of the amendments and for consequential directions to the Trustee, the issues will involve only matters of law.

It is against that background that the issue of who should be appointed Guardian ad litem of the named minor fourth defendant (to represent also the interests of the other minor and remoter beneficiaries) came to be considered.

The principles stated in the notes to Order 80 of the Rules of the Supreme Court which provide guidance to the application of the local Grand Court Rule Order 80, state that it is advisable to appoint a person who is "a relation, connection or friend of the family and not a mere volunteer" - see notes to Order 80 Rule 3/1 at page 1359 of the 1995 Edition.

Those characteristics of a guardian ad litem are important for the obvious reason that the personal circumstances of the infant may need to be considered by the guardian in his conduct of the action or may need to be canvassed before the Court in order to enable a

proper dispensation in favour of the minor. See for example Foster v Cautley (1853) 10 Hare App.1127.

The minors involved, the named fourth defendant and his cousin, Francisco Bergaz y Pessino, have no immediate entitlement either to income or capital. Nothing about their personal circumstances will likely be relevant to the issues. They and the remoter beneficiaries are or will be contingent capital beneficiaries.

Thus the proceedings before the Court will not require the Guardian ad litem to be someone with familial or other close connection to the minors.

The minor and remoter beneficiaries are joined as parties on the direction of the Court because it is in their interest and that of the Trust generally that they and the other parties ultimately be bound by the outcome of these proceedings.

That could not be effectively achieved without a representation order in respect of the class and without the class being joined in through a guardian ad litem - see RSC Order 80 r 2 and the notes thereto at 80/2/9 and Grand Court Rules Order 80 r 2.

Moreover, matters of more immediate importance dictated that the usual practice of appointing a person with a close familial or other connection should not be followed, in the case of the named fourth defendant who represents the class.

Neither of his parents (the third defendant and her husband Mr. DeBal maseda) was appointed in June 1995 . Instead, Mr. Giglioli was then appointed. This was inspite of their objections. Then it was clear to the Court from the evidence (albeit ex parte) that so strong were the emotions driving their criticisms of the Committee (in particular the first defendant who was a member) and the Trustee, that neither parent could be relied upon impartially or objectively to guide and advise the actions to be taken on behalf of their minor son, Cesar, in the proceedings.

I have had no reason to conclude otherwise since then.

To meet the concerns of the Court in this regard, by paragraph 4 (a) of her present summons, the third defendant proposed, not that her husband or herself be appointed her son's Guardian in substitution for Mr. Giglioli, but that instead her step-daughter, Almudena Balmaseda, be appointed on the basis that Almudena is a suitable person having the requisite familial connection to young Cesar.

Apart from being, at only 23 years of age, herself relatively young and certainly inexperienced in the affairs of family disputes of this nature, I was not satisfied that Almudena could be expected to be any more objective in the dispute than her father, whose influence over her must be presumed.

A further proposal, arising on the 5th defendant's summons was also refused. It was that he, as an adult who was also a contingent capital beneficiary, the cousin of young Francisco and half-brother of young Cesar, should be appointed and should represent the class.

The 5th defendant, being also the son of the third defendant, it was reasonable to assume will owe affinity to, if not actually encamped in the dispute with, her side of the family.

Recognising if not accepting that all those realities were to be weighed by the Court in deciding whether to appoint any family member who had volunteered, the main thrust of Mr. Moses' submissions for the revocation of Mr. Giglioli's appointment was rather more technical.

Citing Order 80 r 2.3 which mandates that a guardian ad litem must act through an attorney, he submitted that it would be a contradiction in terms and wrong in principle, that the guardian should himself be the attorney of record.

There is some force in that submission but in the end I concluded that it overlooked a number of important factors which appertained in this case and in many other like cases arising in this jurisdiction.

In the absence of a suitable family member or other close connection, the Guardian had to be someone, a stranger, upon whom the Court could rely impartially objectively and independently to perform the functions.

Moreover, the Guardian must be someone present in and amenable to the jurisdiction of the Court, for the purposes of the rules already mentioned.

Notwithstanding the many reasons why a reputable attorney, as an officer of the Court, would be a suitable appointee to meet those requirements, my attention was drawn to the Australian case of Loorham v Loorham The Australian Weekly Notes May 5th 1948: for the reasons cited in it why an attorney should never be appointed to act as guardian and as attorney at the same time, whether or not the suit is undefended.

In that case Justice Bonney decided in the Matrimonial Causes Jurisdiction - but also, as noted in his brief judgment; after discussion with the Chief Judge in the Equity Division - that:

> "There are four good reasons why a solicitor should not be appointed to the dual positions of guardian and solicitor for a minor:
>
> (1) a guardian cannot appear in person [(i.d. Order 80/2/3)], and a solicitor cannot retain himself,
>
> (2) the guardian should be in a position to change his solicitor,
>
> (3) he should be in a position to question his solicitor's bill of costs, and

(4) he should not be in a position where his interest might possibly conflict with his duty."

Those are obviously good factors, in the usual case, which would advise against an appointment to the dual positions.

But when each is considered in the context of the present and cases like it, there are to my mind more compelling reasons for not treating those factors as mandatory.

As to the first factor: in the present case there was no question of Mr. Giglioli as guardian choosing to appoint himself as attorney.

He was appointed to both positions by order of the Court after it had become clear that a guardian had to be appointed to see to the interests of the minor and remoter beneficiaries. For the reasons already explained, including the nature of the dispute, there appeared no justification for the further costs which would be attendant upon an alternative course:- for example, the appointment of a local professional guardian, such as an accountant, who would then be obliged by Order 80 r 2/3 to instruct a local attorney to appear for him.

As to the second factor, that a guardian should be in a position to change his attorney - that too needs to be examined in context. To do so one must ask the question - what reason could likely arise for a guardian wishing to do so?

Implicit in the reasons why the appointment of a stranger as the Guardian is manifestly necessary and appropriate in this case, is the further consideration that the factors which may properly influence the role of the Guardian are not such as would give rise to the dynamics affecting the relationship between a typical guardian and his attorney in the ordinary case.

So long as the dispute, as it affects the minors and the unborn, involves purely questions of construction and of law, there would likely be no reasonable basis for disagreement as between a separate guardian and an attorney (had that been the nature of the appointment here), which would affect their relationship.

There is always the possibility of course that a separate guardian might simply not like his attorney's advice on the strictly legal issues. But that is not to be a relevant factor in this case either so as to preclude a dual appointment, for the reason that Mr. Giglioli is not to be acting on his own advice on the more important issues.

Because Mr. Giglioli's role requires an impartial and independent assessment of legal issues, he need not consult with the family in the way an ordinary guardian would to determine what steps to take in the action for the better protection of the interests of those whom he represents.

He has taken, and will continue by the direction of the Court, to take the specialist advice of Senior Counsel and to act on that advice.

Given the nature of the legal issues, any guardian, even one separately appointed and acting through a local attorney, would be well advised to take Senior Counsel's opinion.

Apart from the immediate saving of costs from the dual appointment of an attorney as guardian, is the other obvious benefit that an attorney is best placed to assimilate and to decide how to act on senior counsel's advice. That is the particularly important function to be exercised by the Guardian in this case.

The third factor of the principle cited in Loorham v Loorham is that the guardian should be in a position to question his attorney's bill of costs.Again, although an obvious and important factor in the ordinary guardian/attorney relationship, this did not arise as a factor to preclude the dual appointment here.

Here the joinder of young Cesar and the appointment of his Guardian to represent his and the interests of his class, was upon the order of the Court for the reasons already cited.

The costs involved in that representation are, as a matter of obvious and agreed principle, to be met from the Trust fund.

In that respect the Guardian's costs are to be scrutinised and agreed by the Trustee and failing agreement, to be taxed pursuant to the applicable Rules of Court.

The fourth aspect of the principles cited in Loorham v Loorham is that the guardian's interest should not appear to conflict with his duties.

When considered in the context of the present case, this issue subsumes the issue of the independence and impartiality of the Guardian - that addressed under the second aspect of the Loorham v Loorham principle above. It is therefore to be examined against the background of the rather limited contextual legal scope of the Guardian's responsibilities in this case.

Nonetheless, the importance of ensuring that the Guardian's own interests do not conflict with his duties must not be understated. And had there been a scenario presented in which such a conflict could arise in the context of Mr. Giglioli's appointment, I would have considered it wrong in principle.

I could not, however, anticipate such a situation.

Apart from being required to obtain the independent advice of senior counsel, Mr. Giglioli is regarded as possessing the necessary experience and competence to enable the proper fulfilment of his duties. His integrity and appreciation for the ethical principles involved are in no way questioned. He has in the past fulfilled the obligations of similar appointments in the dual capacity in at least two very notable cases in this jurisdiction. Albeit without the benefit of a full discussion of the present principles and without

objection from any party ,his appointments were then regarded as suitable by the Court: see Lemos v Coutts & Co 1992 - 1993 C.I.L.R.5 and In Re Ojjeh Trust 1991-3 C.I.L.R. 348. Thus, there was to be no imputation raised that Mr. Giglioli might in some way be inclined to exercise his functions as Guardian in such a manner as to enhance his profits as attorney.

The Court, while being astute to recognise that a less than well informed bystander might so apprehend, is not to be overly influenced by that consideration if all the objective factors would deny it and if it is clearly in the better overall interests of the Trust that there be a dual appointment.

For the reasons already cited, in particular the fact that Mr. Giglioli, an officer of the Court, is appointed to act on the advice of independent senior counsel and under the supervision and direction of the court - the mere apprehension, however spurious, that a conflict might arise was insufficient in this case to preclude his appointment.

Dual appointments are not unprecedented in other jurisdictions.

We see from Duffy v O'Connor (1868) 1 Ch. Chan. Rep. 393 (Upper Canada) - that the Canadian Provincial Court was disposed to assign to an absent infant defendant one of the solicitors of the court to act both as guardian ad litem and as legal representative in the suit. That was in a case where the interest of the absent infant, in estate property

which was to be sold to pay a legacy which had been charged upon it, needed to be represented.

In Hoskins v Harty (1876) VI Chy Chan Rep 200 (Upper Canada) - a similar approach was adopted on appeal where a Mr. O'Reilly, the Queen's Counsel representing the mother (and who was also her relative) was appointed as guardian ad litem for her children. Vice Chancellor Proudfoot noted that "both mother and children are equally interested in resisting redemption - (of the mortgage over the property which they had jointly inherited upon the death of the father) - and there is no conflict of interest between them. I think it unnecessary to increase the costs of the suit by having separate solicitors for the mother and the children. I therefore allow the appeal and appoint Mr. O'Reilly."

It is implicit from the Vice Chancellor's reasons that his appointment of Mr. O'Reilly was in the dual role of guardian ad litem and as solicitor.

In England the Official Solicitor to the Supreme Court is often appointed as guardian ad litem in a number of different types of proceedings. Examples appear in the R.S.C Order 80 at the notes to Rule - 80/1/2 and 80/1/5. In the Family Division it appears from Rule 4.11 of the Family Proceedings Rules and Practice Directions (U.K) that the Official Solicitor will be appointed when the case contains "... a substantial foreign element or where there are special or exceptional points of law ..."

Such appointments can be acceptable only because the independence integrity and competence of the Official Solicitor as guardian ad litem are implicit.

Accordingly such appointments would neither be regarded as offending against the principles recognised in Loorham v Loorham nor against the separation of roles contemplated by Order 80 Rule 2/3.

In this jurisdiction which depends so greatly on its offshore financial industry, although the public resources do not provide for the office of Official Solicitor to the Court, nonetheless, as already noted, a growing number of cases involve the element of foreign infant defendants who must be represented by guardians ad litem who are themselves amenable to the jurisdiction of the Court and to its process.

In cases such as this, where the circumstances do not preclude the appointment of an attorney as guardian, it is therefore also to be regarded as being in the public interest that the Court should be able to appoint a suitable local attorney to act.

For all the foregoing reasons, I did not consider the rule in Order 80/2/3 - that a guardian ad litem must act by an attorney - as implicitly mandating separate appointments and as preventing the appointment of an attorney to act both as guardian and as attorney.

Thus, Mr. Giglioli's original appointment remained, subject to the following proviso which in terms reflect the foregoing reasoning:

"Paragraphs (iii), (iv) and (iva) of the directions given on 29th June 1995 remain subject to the following proviso:

> That Mr. Giglioli will continue to act in these proceedings, as he does now, only on the advice of Senior Counsel and shall appear upon the hearing of the substantive proceedings herein through Counsel, that is: up to the hearing of the substantive application for the construction of the validity of the amendments to the Trust Deed when that is held. He may continue to appear in his own right as an attorney (and as Guardian ad litem in any further interlocutory proceedings unless otherwise advised or unless he considers it appropriate that Counsel should appear on his behalf."

A. Smellie Q.C.
Judge of the Grand Court.

13th September 1996.